

2015

# The Overlooked Benefits of the Blackstone Principle

John Bronsteen

*Loyola University Chicago, School of Law, jbronst@luc.edu*

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Criminal Law Commons](#)

---

## Recommended Citation

Bronsteen, John The Overlooked Benefits of the Blackstone Principle, with Masur, Jonathan S. 128 Harv. L. Rev. F. 289 (2015).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

---

---

## THE OVERLOOKED BENEFITS OF THE BLACKSTONE PRINCIPLE

*John Bronsteen\** & *Jonathan S. Masur\*\**

There are two ways to read Daniel Epps's fascinating and provocative article, *The Consequences of Error in Criminal Justice*.<sup>1</sup> One way is this: the article shows that the Blackstone principle — the principle that more effort should be made to avoid false convictions than false acquittals — may well produce many consequences that are often overlooked. Some of those overlooked consequences are positive, others are negative, and it is unclear whether those overlooked consequences make the principle more or less desirable on the whole than it was previously thought to be.<sup>2</sup> We agree with those points, and in making them Epps contributes significantly to the literature on criminal justice.

The other way to read Epps's article is this: the article claims that the Blackstone principle may well have bad overall consequences, or at least that the principle has worse consequences (especially for innocent criminal defendants) than it is typically assumed to have. We do not think those conclusions follow from the principle's overlooked effects that Epps identifies. So in our view, the best way to read his article is the first way: Epps shows that the Blackstone principle has more complicated effects than people realize, and those effects may be positive, negative, or neutral on the whole.

Because Epps focuses almost exclusively on the negative features of the overlooked effects, we focus on their positive features. First, we discuss the crime reduction and other benefits that could result from the effects Epps identifies. Second, we explain how social science evidence on prison and well-being reveals unappreciated benefits of the Blackstone principle. Epps is right that the Blackstone principle should be viewed from a dynamic perspective. But that perspective may serve to reveal the principle's unnoticed strengths, even more than its weaknesses.

---

\* Professor of Law, Loyola University Chicago School of Law.

\*\* John P. Wilson Professor of Law and David and Celia Hilliard Research Scholar, University of Chicago Law School.

<sup>1</sup> 128 HARV. L. REV. 1065 (2015).

<sup>2</sup> Indeed, the answer may depend at least in part on what one's previous view of the principle was. The principle has many defenders but also, as Epps notes, some staunch critics. *E.g., id.* at 1089–92.

## I. POSITIVE DYNAMIC EFFECTS

The main argument against the Blackstone principle is that it increases crime.<sup>3</sup> That is, if procedural safeguards make it harder to convict those accused of crimes, then there will be less deterrence and incapacitation and therefore more law-breaking. One of Epps's main points is that this increase in crime harms not only potential victims but also criminal defendants — the very people the Blackstone principle is supposed to help.<sup>4</sup> This occurs, according to Epps, in large part because society responds to increased crime by broadening criminal statutes, reducing other procedural protections, and, most importantly, increasing the length of prison sentences.<sup>5</sup>

If Epps is right about all of this, however, then the broader criminal statutes, reduced procedural protections, and longer prison sentences of the Blackstonian world themselves reduce crime via deterrence and (perhaps especially) incapacitation relative to the alternatives in the non-Blackstonian world. So if the picture Epps paints is right, then the Blackstonian world is one in which any would-be criminal will be harder to convict in some ways but easier to convict in other ways, and will face a longer sentence if convicted. Whether that arrangement is better or worse than the one in a non-Blackstonian world — in terms of crime reduction or otherwise — is utterly uncertain. On the one hand, one might argue that certainty of punishment deters crime more than does severity of punishment, and that criminals are more likely to be convicted and punished in the non-Blackstonian world (though that is far from certain).<sup>6</sup> On the other hand, one might argue that keeping would-be recidivists locked up for long periods of time without having to release them, catch them again, and convict them again each time, gives the Blackstonian world an advantage. It is not clear which system, Blackstonian or non-Blackstonian, is preferable.

In addition, a major benefit of the Blackstone principle is that some potential innocent defendants are not even charged in a world with the principle but would be charged and acquitted in a world without it.<sup>7</sup> Being charged and acquitted is typically *much* worse for someone than not being charged at all. The decision to charge imposes substantial burdens on the accused, burdens that do not entirely dissipate even if the individual is eventually acquitted.<sup>8</sup> Epps disagrees,

---

<sup>3</sup> See, e.g., *id.*

<sup>4</sup> See *id.* at 1099–1102.

<sup>5</sup> See *id.* at 1102–06.

<sup>6</sup> E.g., *id.* at 1095.

<sup>7</sup> *Id.* at 1111, 1114 n.239.

<sup>8</sup> See Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1301–14 (2000).

dismissing the concern with only this sentence: “But the costs to such innocents are likely not large, because in a non-Blackstonian system an arrest without a conviction would carry less stigma than it would in our world.”<sup>9</sup> This rejoinder is surprising, however, because Epps himself acknowledges the potential weakness of his claim about changes in stigma: “[S]ome of the principle’s dynamic costs may be fairly marginal. For example, the additional stigma that acquitted innocent defendants suffer may be real but small in any given case.”<sup>10</sup> If Epps is right that there would not be much difference between the stigma of being charged but acquitted in a Blackstonian and non-Blackstonian world, it undercuts his claim that the benefit of avoiding a charge in a non-Blackstonian world is “likely not large.”<sup>11</sup>

On the other hand, if the stigma of an arrest — as well as that of a conviction<sup>12</sup> — turns out to be much smaller in a world without the Blackstone principle, then the Blackstone principle creates an overlooked deterrent benefit by increasing the stigmatic harm that would-be criminals face if they are caught. This factor belongs in Epps’s calculus of costs and benefits because it is Epps himself who argues that the factor exists.<sup>13</sup> Once these additional benefits are added to the accounting, the idea of moving to a non-Blackstonian world becomes less appealing. Indeed, it is possible that a dynamic analysis of the type Epps suggests would provide even stronger justification for the Blackstone principle than scholars have previously supposed.

## II. HEDONICS AND PRISON

We can try to obtain some purchase on the competing dynamic effects of the Blackstone principle by looking to the literature on hedonic psychology. Analysis of the hedonic effects of prison suggests that the Blackstone principle may be helping innocent defendants far more than it harms them. One of Epps’s central points is that there is a tradeoff between the length of prison sentences and the likelihood of conviction. Epps argues that if we were to do away with the Blackstone principle, higher conviction rates would enable shorter prison sentences for individuals who were convicted.<sup>14</sup> This would provide a benefit to innocent defendants who would be convicted in either world, counterbalancing (at least to some degree) the fact that a higher percentage of innocents would be convicted in a non-Blackstonian world. We do not know whether sentences would actu-

---

<sup>9</sup> Epps, *supra* note 1, at 1114 n.239.

<sup>10</sup> *Id.* at 1122.

<sup>11</sup> *Id.* at 1114 n.239.

<sup>12</sup> *E.g., id.* at 1099–1102.

<sup>13</sup> *See id.*

<sup>14</sup> *Id.* at 1112.

ally be reduced, but let us suppose that Epps is correct. The question then becomes: How much will innocent defendants benefit from shorter prison sentences in a non-Blackstonian world? Will this benefit be substantial, or will it be dwarfed by the increased risk of wrongful convictions in the first place?

It is impossible to know how many more innocent defendants will be wrongfully convicted in a non-Blackstonian world, so we cannot compute that side of the balance sheet. But research from hedonic psychology sheds considerable light on the issue of how much wrongfully convicted defendants will benefit from shorter prison sentences. As we have explored in depth elsewhere, the difference between the respective harm of long and short prison sentences is far smaller than most people assume<sup>15</sup> — scholars, judges, legislators, and citizens included. There are two reasons for this. First, people adapt to many aspects of life in prison.<sup>16</sup> They form social networks, develop coping mechanisms, and generally become accustomed to life behind bars. The tenth year that someone spends in prison is not nearly as bad for that person as the first. Second, *having been in prison* causes people to suffer a wide variety of negative effects that persist even after they are released.<sup>17</sup> Ex-prisoners have trouble preserving or reestablishing family and social relationships; they have difficulty finding work; and they are often afflicted with serious chronic diseases.<sup>18</sup> Surprisingly, these effects are almost equally pronounced whether the individual spent one year in prison or ten (or twenty).<sup>19</sup> These types of harms are also very difficult to adapt to, and they exert a consistently negative force on former inmates' lives years after they have been released.<sup>20</sup>

This means that even if Epps were right to suggest that a wrongly convicted defendant might face a twenty-year sentence in a Blackstonian world and a ten-year sentence in a non-Blackstonian world, the practical difference between the two sentences would be much smaller than one might imagine. The last ten years in prison are not as bad as the first ten years, and even after a prisoner is released

---

<sup>15</sup> John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009).

<sup>16</sup> See *id.* at 1046–49.

<sup>17</sup> *Id.* at 1049.

<sup>18</sup> See *id.* at 1049–52.

<sup>19</sup> *Id.* at 1050. It is possible that the negative effects of prison on relationships and employment might be ameliorated somewhat if, as Epps postulates, eliminating the Blackstone principle mitigated the stigma associated with prison. However, we suspect that reduced stigma — if in fact it materializes — will have a small impact on these harms. The reason is that they are not caused entirely (or necessarily even predominantly) by stigma. Rather, prison is maladaptive to regular life: the coping strategies that allow prisoners to survive in prison make it harder for them to function on the outside. This, in turn, makes interpersonal relationships and employment more difficult to maintain after release.

<sup>20</sup> *Id.* at 1049–55.

(earlier, in the non-Blackstonian world), the years after release are not as good as one might expect.<sup>21</sup> To be sure, it is very likely worse to serve a longer sentence than a shorter one. But the *amount* by which it is worse is smaller than almost everyone assumes. And that amount is dwarfed by the benefit (to an innocent person) of never having been incarcerated in the first place. Accordingly, if the Blackstone principle decreases the chance that an innocent defendant will go to prison by (for instance) twenty-five percent, but increases by a proportionate amount the sentence that such a defendant will serve if convicted, then that accounting cuts *dramatically* in favor of the Blackstone principle.<sup>22</sup> The sentence reductions in a non-Blackstonian world would have to be enormous and wholly disproportionate to the increased rate of conviction for innocent defendants to benefit.<sup>23</sup>

### III. CONCLUSION

Epps has written a deeply interesting, provocative, and novel article on a topic that many might have felt was well settled. His article is thus a valuable contribution. In this Response, we've endeavored to demonstrate that by focusing almost exclusively on the unexplored negative effects of the Blackstone principle, Epps overlooks the positive effects of the very same phenomena he believes cause the Blackstone principle's negative effects. Of course, it remains impossible to know whether the Blackstone principle's benefits exceed its costs, in large degree because the magnitudes of these competing effects are impossible to determine. Where data do exist, however — in the form of hedonic psychology studies of prison and its effects — those data cut strongly in favor of the Blackstone principle and against any legal change that would send a higher percentage of innocent defendants to prison. In the end, it is not clear whether Epps's dynamic analysis, even if correct, would render the Blackstone principle more or less desirable than it was previously thought to be.

---

<sup>21</sup> *Id.*

<sup>22</sup> Indeed, one could argue on this ground that the Blackstone principle should be strengthened and that the status quo does not do enough to protect innocent defendants from wrongful convictions.

<sup>23</sup> The hedonics literature would not necessarily support the Blackstone principle if Epps were right that the principle increases the number (while reducing the rate) of false convictions due to increasing crime. Epps, *supra* note 1, at 1112–13. But as we explained in Part I of this Response, it is utterly uncertain whether the Blackstone principle results in more crime even if Epps is right about the dynamic effects that flow from the principle.

---

---

## FOREIGN RELATIONS LAW AND THE PURPORTED SHIFT AWAY FROM “EXCEPTIONALISM”

Curtis A. Bradley\*

The field of “foreign relations law” encompasses a variety of constitutional, statutory, and common law rules and doctrines that regulate how the United States interacts with the rest of the world.<sup>1</sup> In their article on *The Normalization of Foreign Relations Law*, Professors Ganesh Sitaraman and Ingrid Wuerth contend that there has been a revolution in U.S. foreign relations law during the past twenty-five years.<sup>2</sup> In particular, they claim that there has been a shift away from treating foreign relations law issues as “exceptional” toward treating them as “normal” — that is, “as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles.”<sup>3</sup> The authors further contend that this trend of normalization is likely to continue, and that such a development should be welcomed and encouraged.<sup>4</sup>

*Normalization* makes a number of important contributions. It usefully seeks to develop a more rigorous definition of the idea of “foreign relations exceptionalism.” It ties together various Supreme Court decisions since the end of the Cold War that might otherwise have seemed unconnected. Perhaps most notably, its critique of treating a general category of “foreign relations law” as legally distinct from a general category of “domestic law” is powerful and likely to have lasting significance. Despite these virtues, the article has some conceptual and methodological limitations. In particular, its definition of foreign relations exceptionalism is underinclusive in certain respects and overinclusive in others; its descriptive account is too exclusively focused on the Supreme Court and is not entirely persuasive even on its own terms; and its lack of an underlying theory weakens its empirical, predictive, and normative claims.

---

\* William Van Alstyne Professor, Duke Law School. For their helpful comments and suggestions, I would like to thank Kathy Bradley, Jean Galbraith, Jack Goldsmith, Larry Helfer, Eric Posner, Neil Siegel, and Paul Stephan.

<sup>1</sup> See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* (5th ed. 2014).

<sup>2</sup> See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

<sup>3</sup> *Id.* at 1901.

<sup>4</sup> *Id.* at 1904.

### I. CONTINUING UNCERTAINTIES ABOUT "EXCEPTIONALISM"

At the heart of *Normalization* is a descriptive claim about the rise and fall of something called "foreign relations exceptionalism." The authors graciously credit me with coining the term, and they accurately note that I did not attempt to define the concept with much specificity.<sup>5</sup> Instead, I simply described it as "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers,"<sup>6</sup> and I argued that scholars often seemed opportunistic in their embrace or rejection of the concept.<sup>7</sup>

Sitaraman and Wuerth seek to define foreign relations exceptionalism somewhat differently, and with more precision. In particular, they propose to limit the concept so that it covers only differences in the treatment of domestic and foreign relations law that are based on "distinctive functional, doctrinal, or methodological analysis," and not "differences that emerge from standard analysis, such as constitutional text and original history."<sup>8</sup> In making this distinction, the authors seek to avoid having to consider and evaluate the extent to which the Constitution itself accords exceptional treatment to foreign relations law. Under their approach, if "standard" constitutional interpretation leads a court to conclude (for example) that the President has broad foreign relations powers, or that there should be differential treatment of statutes and treaties, "[t]his is not exceptionalism."<sup>9</sup>

While Sitaraman and Wuerth's effort to refine the concept of exceptionalism is commendable, the distinction they attempt to draw does not seem tenable. As an initial matter, their definition of exceptionalism is underinclusive because assumptions about functional and other differences between domestic and foreign relations — assumptions that the authors label as exceptionalist reasoning — pervasively affect "standard constitutional interpretation."<sup>10</sup> This phenomenon is especially evident in structural constitutional reasoning, which is one of the standard "modalities" of constitutional interpretation.<sup>11</sup>

<sup>5</sup> See *id.* at 1906.

<sup>6</sup> Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999).

<sup>7</sup> See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 557–61 (1999).

<sup>8</sup> Sitaraman & Wuerth, *supra* note 2, at 1907.

<sup>9</sup> *Id.* at 1908; see also *id.* (referring to "generally applicable analysis"); *id.* at 1969 (referring to "standard constitutional interpretation"); *id.* at 1975 (referring to "generally applicable constitutional analysis").

<sup>10</sup> *Id.* at 1969.

<sup>11</sup> See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–17 (1991). At times, Sitaraman and Wuerth appear to be assuming that "standard constitutional interpretation" is

To take one of many examples, when the Supreme Court stated in *United States v. Belmont*<sup>12</sup> that “the external powers of the United States are to be exercised without regard to state laws or policies,”<sup>13</sup> it was expressing a view about constitutional text, history, and structure, but its view about these materials was colored by a sharp conceptual distinction between domestic and foreign relations. Similar observations can be made about the constitutional reasoning in other canonical foreign relations law decisions, such as *Missouri v. Holland*<sup>14</sup> and *United States v. Curtiss-Wright Export Corp.*<sup>15</sup> Tellingly, Sitaraman and Wuerth themselves frequently label examples of structural constitutional reasoning as exceptionalist.<sup>16</sup>

Sitaraman and Wuerth recognize this potential objection to their proposed definition of foreign relations exceptionalism, but they contend that broadening the concept to include differential treatment that is the result of standard constitutional analysis “proves too much” because it would cause the concept to “lose[] much of its usefulness.”<sup>17</sup> It is not clear, however, why this is so: if nothing else, pointing out that the Constitution is being interpreted in foreign relations cases in ways that do not track how it is being interpreted in potentially analogous domestic cases may place a burden of justification on those arguing for such differential interpretation, especially if, as many scholars have argued in recent years, the dividing line between domestic and foreign relations has become blurred.<sup>18</sup> In any event, by excluding from their focus the question of whether the Constitution should be interpreted as treating foreign relations law exceptionally, Sitaraman and Wuerth are artificially excluding many of the core issues in the field.

In a different sense, however, the authors’ proposed definition of exceptionalism is overinclusive, at least in the way that the authors apply it. A court’s treatment of an issue of foreign relations law is not “exceptional” as compared with its treatment of domestic law unless the issue is comparable to the domestic law issue. But it is not clear that this is true for some of the authors’ examples of exceptionalism.

---

limited to textualist and originalist reasoning. See, e.g., Sitaraman & Wuerth, *supra* note 2, at 1907–08. If so, it is not clear why they are making that assumption. In any event, it is likely that textualist and originalist reasoning is affected by other modalities of constitutional interpretation. See generally Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2015).

<sup>12</sup> 301 U.S. 324 (1937).

<sup>13</sup> *Id.* at 331.

<sup>14</sup> 252 U.S. 416 (1920).

<sup>15</sup> 299 U.S. 304 (1936).

<sup>16</sup> See, e.g., Sitaraman & Wuerth, *supra* note 2, at 1915 (discussing *Curtiss-Wright*); *id.* at 1915–16 (discussing *Belmont*); *id.* at 1916–17 (discussing *Missouri v. Holland*).

<sup>17</sup> *Id.* at 1910.

<sup>18</sup> That was, in fact, the thrust of my critique of exceptionalism in the 1990s. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998).

For instance, the authors argue that deference to executive branch treaty interpretations should be subject to the precise requirements and limitations of the *Chevron* framework governing deference to agency interpretations of statutes.<sup>19</sup> If the treaty context is not fully analogous to the statutory context, however, it would not necessarily be “exceptional” to apply a different deference regime to the treaty context. In fact, the treaty context is *not* analogous in certain ways, such as in how the relevant text is developed (through executive branch–managed negotiation with other countries) and in the implications of adopting a particular interpretation (which, for treaties, inherently involve international reciprocity considerations).<sup>20</sup> Similarly, the authors suggest that it is exceptionalist to give more weight to historical practice in constitutional interpretation in the foreign relations area than in the domestic area.<sup>21</sup> But part of the typical doctrinal test for crediting such “historical gloss” concerns whether Congress has acquiesced in the practice.<sup>22</sup> If it turns out that Congress has acquiesced more in unilateral executive action in the foreign affairs area than in the domestic area — a possibility that the authors do not explore — one should see gloss having a more prominent role there, and that would not be exceptionalist.

Sitaraman and Wuerth contend that, regardless of whether one agrees with their empirical and normative claims, their definition of foreign relations exceptionalism “is an independent contribution.”<sup>23</sup> It turns out, however, that they are more successful in highlighting the conceptual uncertainties than in resolving them, and these continuing uncertainties make it more difficult to evaluate their other claims.

## II. LIMITS OF THE DESCRIPTIVE ACCOUNT OF “NORMALIZATION”

The descriptive claim in *Normalization* is that there has been a shift during the past twenty-five years toward “normalizing” foreign relations law — that is, toward treating it like ordinary domestic law. The authors describe this shift as occurring in three waves: in the immediate aftermath of the end of the Cold War, during the post–

---

<sup>19</sup> See Sitaraman & Wuerth, *supra* note 2, at 1968–70.

<sup>20</sup> See Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 157–60. It is therefore artificial to make a sharp distinction, as the authors do, between “a constitutional basis” for deference and the view “that the government offers expertise and accountability that the courts do not, making deference appropriate.” Sitaraman & Wuerth, *supra* note 2, at 1969.

<sup>21</sup> See Sitaraman & Wuerth, *supra* note 2, at 1909.

<sup>22</sup> See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 432 (2012).

<sup>23</sup> Sitaraman & Wuerth, *supra* note 2, at 1902.

September 11 War on Terror, and during the Roberts Court.<sup>24</sup> The methodology employed by the authors to support this claim is an examination of Supreme Court decisions from the past quarter-century. These decisions, the authors maintain, “form an unmistakable pattern of normalization across the most important debates in foreign relations law over the last century.”<sup>25</sup>

This Supreme Court–focused methodology is questionable, since most of foreign relations law is developed, interpreted, and applied outside the Supreme Court. One may see much less “normalization” during the period in question by looking at the lower courts or political branch practice. The political question doctrine, for example, has had a more vibrant life in the lower courts during the relevant period than in the Supreme Court, especially in cases touching on foreign relations.<sup>26</sup> And, contrary to the views expressed in *Normalization*<sup>27</sup> and separately by one of its authors,<sup>28</sup> the lower courts have generally accorded significant — and, indeed, often dispositive — deference to the executive branch with respect to whether to accord immunity to foreign officials.<sup>29</sup>

Even on its own terms, however, the picture presented in *Normalization* is less clear than the authors suggest. For example, the authors describe the period following the September 11 attacks as witnessing a surprising and expedited turn to normalization in the judicial treatment of foreign relations law, as evidenced most notably by the Supreme Court’s willingness to exercise judicial review over the executive detention and trial of alleged terrorists.<sup>30</sup> But this is a highly contestable account of the Court’s decisions. While the Court did insist on the availability of judicial review over detainees held at the Guantanamo Bay Naval Base and required the President to obtain more specific statutory authority for military trials of the detainees, the Court otherwise left intact the executive branch’s “War on Terror” regime. In *Hamdi v. Rumsfeld*,<sup>31</sup> for example, the Court accepted the

---

<sup>24</sup> *Id.* at 1919–35.

<sup>25</sup> *Id.* at 1935.

<sup>26</sup> See BRADLEY & GOLDSMITH, *supra* note 1, at 68–69 (providing examples).

<sup>27</sup> Sitaraman & Wuerth, *supra* note 2, at 1974–75.

<sup>28</sup> See Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915 (2011).

<sup>29</sup> See CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 263–64 & n.185 (2d ed. 2015) (collecting cases). The Supreme Court could be seen as having invited this deference when it noted in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), that courts had deferred to executive branch suggestions of foreign official immunity prior to Congress’s enactment of the Foreign Sovereign Immunities Act, *see id.* at 2285, and that the Supreme Court had “been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity,” *id.* at 2291.

<sup>30</sup> See Sitaraman & Wuerth, *supra* note 2, at 1902–03.

<sup>31</sup> 542 U.S. 507 (2004).

foundational premise of the Bush Administration’s approach, namely that the United States was in a “war” and that the authority conveyed by Congress in its post–September 11 authorization of force should be construed to encompass the “incident[s] of waging war.”<sup>32</sup> Moreover, since *Boumediene v. Bush*,<sup>33</sup> the Court has left the determination of the President’s detention authority to common law development in the D.C. federal courts, which have employed a broad and deferential approach to executive detention authority.<sup>34</sup> The result is that the executive branch has been able to hold hundreds of individuals for years, mostly without trial, despite the fact that many of them are not formal members of any enemy armed forces. Instead of seeing this period as one of “normalization,” one might describe it as one of the more exceptional periods in the history of American law.<sup>35</sup>

The picture with respect to foreign relations federalism since the end of the Cold War is also not as clear as the authors suggest. Indeed, two of the most significant federalism decisions in the period — *Crosby v. National Foreign Trade Council*,<sup>36</sup> and *American Insurance Ass’n v. Garamendi*<sup>37</sup> — are notable for how exceptionalist they were in their willingness to infer preemption of state law. Sitaraman and Wuerth emphasize the Court’s more recent decision in *Chamber of Commerce v. Whiting*,<sup>38</sup> which held that an Arizona law relating to the licensing of state businesses that employ unauthorized aliens was not preempted by federal immigration law.<sup>39</sup> But the more significant immigration decision in this period was *Arizona v. United States*,<sup>40</sup> in which the Court held that a number of widely publicized Arizona measures relating to unauthorized aliens were preempted.<sup>41</sup> Moreover, in reaching this conclusion, the Court invoked the exceptionalist decision *Curtiss-Wright* in support of what it described as the government’s “inherent power as sovereign to control and conduct relations

---

<sup>32</sup> See *id.* at 519 (plurality opinion). For extended consideration of these incidents of war, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005). The *Hamdi* plurality also endorsed minimal due process standards that were sensitive to the foreign relations context. See 542 U.S. at 531–35 (plurality opinion).

<sup>33</sup> 553 U.S. 723 (2008).

<sup>34</sup> See, e.g., *Al-Bihani v. Obama*, 590 U.S. 866, 874–75 (D.C. Cir. 2010).

<sup>35</sup> The Supreme Court and the lower federal courts have also largely abstained from reviewing U.S. government conduct in the War on Terror that takes place in foreign locations other than Guantanamo. See, e.g., *Munaf v. Geren*, 553 U.S. 674 (2008) (U.S. transfer of custody in Iraq); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (U.S. detentions in Afghanistan).

<sup>36</sup> 530 U.S. 363 (2000).

<sup>37</sup> 539 U.S. 396 (2003).

<sup>38</sup> 131 S. Ct. 1968 (2011).

<sup>39</sup> *Id.* at 1973.

<sup>40</sup> 132 S. Ct. 2492 (2012).

<sup>41</sup> *Id.* at 2510.

with foreign nations.”<sup>42</sup> While it is true that in *Bond v. United States*<sup>43</sup> the Court applied a domestic federalism presumption to treaty-implementing legislation,<sup>44</sup> it is also true that the Court resisted the temptation in that case to revisit what is often regarded as an exceptionalist decision, *Missouri v. Holland*.<sup>45</sup>

The authors are on somewhat stronger ground in suggesting that there has been reduced deference to the executive branch during this post-Cold War period. But even here the picture is mixed. While the Court gave surprisingly little deference to the Bush Administration’s interpretation of Common Article 3 of the Geneva Conventions in *Hamdan v. Rumsfeld*,<sup>46</sup> it subsequently accorded “great weight” to the Bush Administration’s interpretation of the Vienna Convention on Consular Relations in *Sanchez-Llamas v. Oregon*,<sup>47</sup> and of the U.N. Charter in *Medellín v. Texas*.<sup>48</sup> The Court again reaffirmed the propriety of this sort of strong treaty deference in *Abbott v. Abbott*<sup>49</sup> in the face of the dissent’s critique of it.<sup>50</sup> Moreover, contrary to the suggestion in *Normalization*,<sup>51</sup> the Court’s disallowance in *Medellín* of executive branch preemption to enforce a non-self-executing treaty does not represent a dramatic blow to executive power. As the Court emphasized, the executive action there was unprecedented.<sup>52</sup> What was more noteworthy in *Medellín* was the Court’s articulation of a broad “non-self-execution” approach to treaties that distinguishes them from the enforcement of federal statutes,<sup>53</sup> an approach that many observers have criticized as unduly exceptional.<sup>54</sup>

It is probably easiest to agree with the authors that the Court has had a narrower view of nonjusticiability limitations in recent years, with the Court’s refusal to apply the political question doctrine in

---

<sup>42</sup> *Id.* at 2498.

<sup>43</sup> 134 S. Ct. 2077 (2014).

<sup>44</sup> *See id.* at 2088–90.

<sup>45</sup> *See id.* at 2087; *see also* Sitaraman & Wuerth, *supra* note 2, at 1917 (noting that *Holland* “seemed to rest both on textual and exceptionalist grounds”); *id.* at 1928 n.173 (observing that *Holland* was “arguably” an exceptionalist decision).

<sup>46</sup> 548 U.S. 557 (2006).

<sup>47</sup> 548 U.S. 331 (2006).

<sup>48</sup> 552 U.S. 491 (2008).

<sup>49</sup> 130 S. Ct. 1983 (2010).

<sup>50</sup> *See id.* at 1993; *id.* at 2006–09 (Stevens, J., dissenting).

<sup>51</sup> Sitaraman & Wuerth, *supra* note 2, at 1930.

<sup>52</sup> *See Medellín*, 552 U.S. at 532.

<sup>53</sup> *See id.* at 508–11.

<sup>54</sup> *See, e.g.*, John T. Parry, Response, *Rewriting the Roberts Court’s Law of Treaties*, 88 TEX. L. REV. SEE ALSO 65, 74 (2010) (“*Medellín* creates a different structure for treaties [than for statutes.]”); Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT’L L. 563, 563 (2008) (“*Medellín v. Texas* is the first case in which the Supreme Court has denied a treaty-based claim solely on the ground that the treaty relied upon was non-self-executing.” (footnote omitted)).

*Zivotofsky v. Clinton*<sup>55</sup> being a prime example. (Indeed, it is hard to imagine *Normalization* being written if *Zivotofsky* had come out the other way.) It is worth noting, however, that the Supreme Court rarely applied the political question doctrine even before the purported period of normalization, and it famously declined to do so in *INS v. Chadha*<sup>56</sup> in 1983.<sup>57</sup> *Zivotofsky*, moreover, presented a relatively unusual situation in which the executive branch was asserting authority to disregard a clear statutory provision,<sup>58</sup> something not presented in earlier, "exceptionalist" foreign relations law decisions in which the Court had invoked justiciability limitations, such as *Goldwater v. Carter*.<sup>59</sup> The picture is also mixed with respect to other justiciability doctrines, and signs of "normalization" may partly be a function of the particular cases that make up a relatively small set. In *Clapper v. Amnesty International USA*,<sup>60</sup> for example, the Court applied a restrictive approach to standing in a case seeking to challenge the government's electronic surveillance activities, noting that "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs."<sup>61</sup>

I should emphasize that I am not claiming that all or even most of the Supreme Court's decisions in this period prove exceptionalism rather than normalization. My claim is simply that these decisions do not offer clear support for the supposedly revolutionary shift postulated in *Normalization*.

### III. AN OBSERVATION IN SEARCH OF A THEORY

The authors describe a purported normalization of foreign relations law, but they do not offer a theory about why it has happened. They make clear that they "do not seek here to explain *why* normalization is taking place,"<sup>62</sup> something that they say will be "left to another day."<sup>63</sup> In a paragraph in the introduction, the authors do note that they "have a number of hypotheses: the perception of reduced risk of

---

<sup>55</sup> 132 S. Ct. 1421 (2012).

<sup>56</sup> 462 U.S. 919 (1983).

<sup>57</sup> See *id.* at 940-43.

<sup>58</sup> See *Zivotofsky*, 132 S. Ct. at 1424.

<sup>59</sup> See 444 U.S. 996 (1979) (mem.).

<sup>60</sup> 133 S. Ct. 1138 (2013).

<sup>61</sup> *Id.* at 1147. The Supreme Court's reinvigoration in this period of the presumption against extraterritorial application of federal statutes could also be described as reflecting exceptionalist reasoning. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (expressing concern about the "danger of unwarranted judicial interference in the conduct of foreign policy").

<sup>62</sup> Sitaraman & Wuerth, *supra* note 2, at 1905.

<sup>63</sup> *Id.* at 1906.

negative foreign affairs consequences after the Cold War, scholarly attacks on exceptionalist doctrine, the rise of the conservative legal movement, the Bush Administration's overreaching legal arguments coupled with shocking uses of executive power, and the widespread acceptance of *Chevron*.<sup>64</sup> But they do not return to these hypotheses.

While no article should be expected to do everything, the lack of an explanatory theory presents particular problems for *Normalization*, both in its historical account of the rise and fall of foreign relations exceptionalism, and in its predictive and normative claims about future directions of the law. Consider first the authors' account of the rise of foreign relations exceptionalism. Without a theory about why the courts embraced exceptionalism, the authors end up portraying it as chiefly an implementation of the vision of Justice Sutherland, who authored two of the early "exceptionalist" decisions after having developed a strong conceptual distinction between domestic and foreign affairs in his writings before joining the Supreme Court. The authors label this the "Sutherland revolution."<sup>65</sup> But this label does not tell us why the other Justices went along with Justice Sutherland's views, and why subsequent courts — over many decades — would have continued to express the same exceptionalist attitudes.<sup>66</sup> Without a sense of the answer to those questions, it is difficult to evaluate the normative attractiveness of the exceptionalist period or the consequences of abandoning it. This difficulty is compounded by the fact that Sitaraman and Wuerth generally avoid taking a position on whether the exceptionalist decisions were correctly decided.

The lack of a theoretical framework also makes it more difficult to evaluate the authors' empirical claim that there has been a revolutionary shift in foreign relations law away from exceptionalism. As discussed above, the empirical case is uncertain even on its own terms. In evaluating the evidence offered in *Normalization*, it would be useful to have a sense of whether some underlying dynamic has changed. If there has not been such a change, the pattern described in *Normalization* may simply be (at most) the function of the particular cases that produced a relatively small number of Supreme Court opinions with a high degree of variance. If some dynamic has changed, one might expect that there would still be some cases that would be paradigmatic foreign relations cases, and that these cases might continue to be treated exceptionally even if others are not. For reasons discussed above,

---

<sup>64</sup> *Id.* at 1905–06.

<sup>65</sup> *Id.* at 1911.

<sup>66</sup> Nor does it tell us why there were exceptionalist decisions and reasoning long before Justice Sutherland's opinions. See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

this sort of variegated pattern may be a more accurate empirical picture than what is portrayed in *Normalization*. Again, having a theory about what is purportedly occurring would make it easier to evaluate the evidence.

For similar reasons, the lack of a theory is problematic for the authors' prediction of future judicial decisionmaking. The authors "suspect and predict" that the "stirrings of normalization" "are likely to be expanded to other areas of foreign relations law."<sup>67</sup> But this prediction assumes some new underlying dynamic that will continue to exert a force on judicial decisionmaking. There are a variety of possible explanations for the purported shift to normalization, however, that would not involve such a dynamic. For example, if the shift to normalization was initiated because of a sense immediately after the end of the Cold War that foreign relations had become less dangerous and consequential, it is not clear why the shift should be expected to continue after the emergence of new threats, such as global terrorism and heightened geopolitical struggles with countries like Russia and China. On the other hand, if part of what is going on is that a majority of the Supreme Court has become more "formalist" in its approach to constitutional and statutory interpretation,<sup>68</sup> the trend may hold only so long as the composition of the Court remains the same, and it may produce normalization only when exceptionalism happens to conflict with formalism, which will not be true in all cases. (To take one example, the formalist Justices were the ones who staked out (in dissent) the exceptionalist position in *Boumediene*.<sup>69</sup>) Alternatively, a political science account of judicial decisionmaking might suggest that the current Supreme Court's willingness to restrain presidential authority is related to political ideology, including the fact that President Obama is a Democrat and a majority of the Supreme Court consists of Republican appointees. If so, the Court's approach might change depending on the next presidential election.

Finally, the lack of an underlying theory weakens the authors' normative claim that there should be additional "normalization" of foreign relations law and that "courts and scholars should embrace the normalization trend."<sup>70</sup> The authors view themselves, in contrast with other scholars, as making an "across-the-board normative assault on exceptionalism."<sup>71</sup> But without an account of why some areas of for-

---

<sup>67</sup> Sitaraman & Wuerth, *supra* note 2, at 1905.

<sup>68</sup> See, e.g., Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015).

<sup>69</sup> *Boumediene v. Bush*, 553 U.S. 723, 826 (2008) (Roberts, C.J., dissenting); *id.* at 827 (Scalia, J., dissenting).

<sup>70</sup> Sitaraman & Wuerth, *supra* note 2, at 1905.

<sup>71</sup> *Id.* at 1920.

eign relations law have become normalized, it is difficult to know whether it would be desirable for additional areas to follow the same pattern. Merely identifying a purported trend in the case law does not itself establish a normative case for extending that trend. Again, if the phenomenon of normalization is a function of particular cases that have been decided by the Supreme Court in a particular period, it would not necessarily follow that we would see — or that we would want to see — the emergence of a uniform approach.

#### CONCLUSION

Whether or not one agrees with the authors' claims, *Normalization* makes important observations about the direction of U.S. foreign relations law, at least as that law is interpreted and applied by the Supreme Court. It also provides a useful counterpoint to the tendency among some scholars to generalize about the differences between domestic law and foreign relations law. Ultimately, however, the reader is left uncertain about what constitutes foreign relations exceptionalism, whether there has been a genuine shift away from it, why such a shift might have occurred, and whether it is normatively attractive.