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Formalism and Distrust: Foreign Affairs Law in the Roberts Court

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Abstract

When it comes to foreign relations, the Roberts Court has trust issues. As far as the Court is concerned, everyone—the President, Congress, the lower courts, plaintiffs—has played hard and fast with the rules, taking advantage of the Court's functionalist approaches to foreign affairs issues. This seems to be the message of the Roberts Court foreign affairs law jurisprudence.

The Roberts Court has been active in foreign affairs law, deciding cases on the detention and trial of enemy combatants, foreign sovereign immunity, the domestic effect of treaties, the extraterritorial reach of federal statutes, the preemption of state laws, and the scope of the political question doctrine, among others. Looking back at those decisions, this Article notes and explores a stark and surprising trend. Across a string of decisions, from Hamdan v. Rumsfeld *through* Medellín v. Texas*,* Morrison v. National Australia Bank Ltd.*,* Zivotofsky ex rel. Zivotofsky v. Clinton*,* Kiobel v. Royal Dutch Petroleum Co.*, and* Bond v. United States*, the Court has jettisoned its traditional foreign affairs functionalism in favor of formalism.*

The shift, as the Article explains, is not merely rhetorical or stylistic. Embedded within these opinions is a deep distrust of the executive branch, Congress, and the courts. And embraced by a surprising number of Justices across different wings of the Court, this formalism of distrust has brought about constraints on the discretion of the federal government that are deeper and more powerful than have been seen in some time. Foreign affairs formalism, with all of its implications, is the new reality—one that must be understood and watched.

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INTRODUCTION

The Solicitor General was having a rough time. Arguing on behalf of the federal government and defending Carol Anne Bond's conviction under the Chemical Weapons Convention Implementation Act[1] for the attempted poisoning of her neighbor, U.S. Solicitor General Donald Verrilli entreated the Justices of the Supreme Court to tread lightly in construing the scope of the Act and the treaty it implemented. The language of the Chemical Weapons Convention was the topic of ongoing "very sensitive negotiations"[2] with Syria and Iran, and a Supreme Court decision construing its language narrowly could "undermine the ability of our negotiators into—to make treaties in

1 Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229 (2012).

2 Transcript of Oral Argument at 39, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158).

the future,"[3] Verrilli explained. The common reaction from the Justices was skepticism. "[I]s that what you're telling me, that if I write the opinion that I think the law requires me to write, that I somehow am hurting the national security interests of the United States?,"[4] asked Justice Breyer. Justice Alito had already posed the question to Bond's lawyer: "[I]s there any possibility that there is any other country in the world that has the slightest interest in how the United States or any of its subdivisions deals with the particular situation that's involved in this case?"[5] This skepticism extended to the Chief Justice as well: "Now, usually, when we have a case that implicates significant and serious bilateral concerns, we get a lot of briefs and all that from our—our treaty partners. Is—is there any concern that's been expressed in any concrete way by them about whether Mrs. Bond is prosecuted?,"[6] Chief Justice Roberts asked.

The scene from the oral argument in *Bond v. United States*[7] might have surprised many of those watching and commenting on the nomination of John Roberts to be Chief Justice eight years earlier. Prior to his confirmation hearing, many expressed concern that he might be too deferential to Executive power and to calls for Executive discretion, particularly on issues of foreign affairs and national security.[8] Based on his time working in the Department of Justice and as associate White House Counsel, as well as specific memoranda he wrote, commentators pegged Roberts as a "real executive power guy,"[9] "a government attorney,"[10] and someone who "probably will sympathize

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3 *Id.* at 42.

4 *Id.* at 41.

5 *Id.* at 17.

6 *Id.* at 46.

7 Bond v. United States, 134 S. Ct. 2077 (2014).

8 *See, e.g.*, Robyn E. Blumner, *Roberts' Rules Put U.S. at Risk*, ST. PETERSBURG TIMES, July 24, 2005, at 4P ("This case is instructive on Roberts' deference toward executive power. Roberts appears willing to keep the courts out of Bush's hair while he unilaterally alters the rules on the civilized treatment of prisoners that the world has adopted and we have embraced for more than 50 years."); Peter M. Shane & Reed Hundt, *Protective of the Presidency*, WASH. POST, Sept. 11, 2005, at B7 (opining that "there is every reason to suspect that as chief justice, Roberts could well move the Supreme Court in a much more conservative direction on an all-important but easily overlooked set of issues: constitutional checks and balances as applied to the president"); Henry Weinstein, *Debating the Power of the Presidency*, L.A. TIMES, Aug. 14, 2005, at A20 (observing that "many legal experts on the left and the right . . . believe that executive power could be the area in which a Justice Roberts would have the biggest impact").

9 *Talk of the Nation: What the Documents Say About John Roberts*, NPR (July 28, 2005, 12:00 AM), http://www.npr.org/templates/transcript/transcript.php?storyId=4775271 (interview with Jeffrey Rosen).

10 *Fox Special Report with Brit Hume: Discussion of Judge Roberts as Nominee*, FOX

with presidential claims of authority."[11] They noted a "thread [in his work] favoring executive power."[12] Given a perception that the Court was already too deferential to the executive branch on foreign affairs and national security, senators were urged to pay particular attention to Roberts's views on these issues during the confirmation hearings.[13]

When the hearings arrived, so too did these questions.[14] But the future Chief Justice succeeded in defusing them by invoking the example of Justice Robert Jackson, who, Roberts reminded the senators,

> was a strong advocate for Executive power when he was FDR's attorney general, one of the strongest, and yet he could issue a decision like the *Youngstown* decision, not only concluding that President Truman lacked the authority, even in times of war, to seize the steel mills, but also setting forth the framework about how to analyze these decisions in a way that is particularly sensitive to the role of Congress, as well.[15]

As explained at another point during the hearings, Justice Jackson was "someone whose job it was to promote and defend an expansive view of Executive powers as Attorney General, which he did very effectively, and then when he went on the Court . . . he took an entirely different view of a lot of issues."[16] For some senators, the example of Justice Jackson was enough to allay concerns.[17] But only time would

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NEWS (July 22, 2005) [hereinafter *Fox Special Report*], *available at* 2005 WLNR 11523971 (discussion with Jeff Birnbaum).

11 Weinstein, *supra* note 8; *see also id.* (quoting Pepperdine University law professor Douglas W. Kmiec, who observed that "[i]nsofar as he served in the White House, you have an inclination by preparation to be sensitive to things that encroach on presidential authority").

12 *Fox Special Report*, *supra* note 10 (discussion with Fred Barnes).

13 *See, e.g.*, Editorial, *A Judicious Choice*, L.A. TIMES, July 20, 2005, at B12 ("It is entirely appropriate for the Senate to probe a nominee's judicial philosophy . . . . Senators will have to ascertain just how much further Roberts would defer to the executive in pursuing the war on terrorism."); Craig Gilbert & Katherine M. Skiba, *Kohl, Feingold Preparing Probing Questions, Respectfully, for Roberts*, MILWAUKEE J. SENTINEL, Sept. 11, 2005, at 6A.

14 *See, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 43–46 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of Sen. Durbin, Member, S. Comm. on the Judiciary); *id.* at 240, 279–80, 350; Linda Greenhouse, *By Invoking a Former Justice, the Nominee Says Much but Gives Away Little*, N.Y. TIMES, Sept. 14, 2005, at A24 (discussing questions from Sens. Leahy and Feingold); Carol Rosenberg, *Detainee Issues Await New Court*, MIAMI HERALD, Sept. 18, 2005, at 9A (discussing question from Sen. Graham).

15 *Roberts Confirmation Hearing*, *supra* note 14, at 280 (statement of John Roberts, Nominee for Chief Justice of the United States).

16 *Id.* at 153.

17 *See, e.g.*, Senator Patrick Leahy, Statement on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States (Sept. 22, 2005), *available at* http://www.judiciary.senate.gov/imo/media/doc/leahy_statement_09_22_05.pdf ("I expect Judge Roberts to act in the tradition of Justice Jackson . . . . When he joins the Supreme Court he can no

tell how deferential Chief Justice Roberts and the Roberts Court would actually be.

In the nearly ten years that have passed since Chief Justice Roberts's confirmation hearings, the Roberts Court has been active in foreign affairs law, deciding cases on the detention and trial of enemy combatants, foreign sovereign immunity, the domestic effect of treaties, the extraterritorial reach of federal statutes, the preemption of state laws in the field of foreign affairs, and the scope of the political question doctrine, among others. It is time to look back and assess the Roberts Court's legacy within foreign affairs law.

The result is stark and surprising. Looking at the string of foreign affairs-related cases decided by the Roberts Court, an as-yet undernoticed trend becomes apparent. Nominee Roberts's invocation of Justice Jackson turns out to have been only partially right. Neither the Chief Justice nor the Court more broadly has been particularly deferential to the President. On the contrary, as this Article will explain, the Court has exhibited a deep distrust not only of the executive branch, but also of Congress and the lower federal courts in the realm of foreign affairs.

Even more surprising is how the Court has gotten there. Functionalist interpretative approaches have long dominated foreign affairs law. Although they have more often than not been used to support judicial deference to the political branches on these issues, they have also provided limits on that deference, as Justice Jackson's famously functionalist approach in *Youngstown Sheet & Tube Co. v. Sawyer*[18] demonstrates.[19] But in a string of decisions, from *Hamdan v. Rumsfeld*[20] through *Medellín v. Texas*,[21] *Morrison v. National Australia Bank Ltd.*,[22] *Zivotofsky ex rel. Zivotofsky v. Clinton*,[23] *Kiobel v. Royal Dutch Petroleum Co.*,[24] and most recently, *Bond*, the Roberts Court has jettisoned its traditional functionalism in favor of formal-

longer simply defer to presidential authority."). *But see* Jesse J. Holland, *Roberts Picks Up a Big Nod from Democrat Leahy*, STAR-LEDGER, Sept. 22, 2005, at 3 (noting that Sen. Jon Corzine "said Roberts has 'sidestepped central questions about the fundamental rights and constitutional protections Americans hold dear,'" including "'a woman's right to choose, civil rights, the rights of consumers, federalism, the scope of executive power, and government's ability to help those Americans who need it most'").

18 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

19 *See infra* Part II.

20 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

21 Medellín v. Texas, 552 U.S. 491 (2008).

22 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

23 Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

24 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

ism. And with this shift in rhetoric have come constraints on the discretion of the federal government that are deeper and more powerful than have been seen in some time.

This as-yet-unrecognized shift[25] to formalism is notable for at least three reasons. First, it marks a significant break with the functionalism that dominated the Court's approach to foreign affairs law over much of the twentieth century[26] and that rose to particular prominence towards the end of the Rehnquist, or perhaps better-characterized, "Souter Court."[27] Some close observers have noticed a more general trend towards formalism in the rhetoric of the Roberts Court.[28] Even if foreign affairs cases have only been part of this broader trend, the shift in approach to *these* cases is worth noting.

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25 Observers have noted the apparent formalism of one or another of the Roberts Court cases, but not the broader trend. *See generally* Ingrid Wuerth, Medellín*: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1 (2009) (noting the formalism of *Medellín*); Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson's* Youngstown *Taxonomy by* Hamdan *and* Medellín, 58 AM. U. L. REV. 665 (2009); Peter Spiro, *Does* Medellín *Revive Barclays Bank?*, OPINIO JURIS (Jan. 16, 2009, 4:36 PM), http://opiniojuris.org/2009/01/16/does-medellin-revive-barclays-bank/. In fact, it remains common to criticize the Court for its functionalism, in its various forms. *See, e.g.*, David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1041–44 (2014).

This though may be starting to change. In a new article citing this one, Ganesh Sitaraman and Ingrid Wuerth argue not only that the Court has been normalizing foreign relations law but also that the Court is right to do so, developing a sophisticated and formidable account of how ordinary constitutional, statutory, and administrative law principles might better make sense of and improve foreign relations law doctrine. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. (forthcoming 2015). Normalization may not be completely coextensive with a shift towards formalism, but the two are very closely connected, as this Article explains.

26 *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1424–29 (1999); Stephen I. Vladeck, *Foreign Affairs Originalism in* Youngstown*'s Shadow*, 53 ST. LOUIS U. L.J. 29, 31 (2008).

27 *See infra* Part II.A.

28 *See, e.g.*, Michael P. Allen, *The Roberts Court and How to Say What the Law Is*, 40 STETSON L. REV. 671, 694 (2011) (describing the new formalism as one that emphasizes rules, relies on the understanding of the Framers, and issues broad interpretive rulings without necessarily overruling prior decisions); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 16, 35 (2013) (noting the formalism of *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010)); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1615–25 (2012) (discussing the new formalism of the Roberts Court); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1774 (2012) (describing the formalistic, unitary executive theory of presidential control); *see also* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1360–63 (2012) (arguing that the Court in *Free Enterprise Fund* mixed formalist language with prior functionalist analyses). Cases cited for this trend include *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), *Stern v. Marshall*, 131 S. Ct. 2594 (2011), *Free Enter. Fund*, 561 U.S. 477, *New Process*

Across wide swathes of American law, the formalist-functionalist divide has long served as a battlefield over which members of the Court have fought, with one side or the other gaining or losing strength at any given time.[29] Few such battles, though, have been fought over foreign affairs law. Feeding off a perception that foreign affairs issues are somehow different from other constitutional or statutory ones, functionalism has long been the dominant approach to foreign affairs and national security cases.[30] Dealing with foreign states requires a special level of discretion, flexibility, and speed—the conventional story goes—and, as such, the political branches need more room in fulfilling their constitutional obligations. This preference for functionalist interpretations has, in turn, created a self-fulfilling prophecy, emphasizing the differences between foreign affairs issues and domestic ones, for which formalist approaches have and could more often be embraced. It is almost a cliché in American constitutional law that foreign affairs are simply different,[31] that courts are

Steel, L.P. v. NLRB, 560 U.S. 674 (2010), *United States v. Stevens*, 559 U.S. 460 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Medellín v. Texas*, 552 U.S. 491 (2008). Commentators have observed that the formalist rhetoric of these decisions has been aimed primarily at Congress, favoring Executive power over legislative intrusions. *See* Krotoszynski, *supra*, at 1617–19; Meazell, *supra*, at 1774–75. By contrast, this Article argues that the Roberts Court's formalism has been aimed as much at constraining the President as it has at Congress. *See infra* Part II.B.

29 *See* Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 17 (1998) (describing trends in formalist and functionalist decisions); Krotoszynski, *supra* note 28, at 1605–07 (contrasting the predominantly formalist approach of the Burger and Roberts Courts with the functionalist decisions of the Rehnquist Court); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (noting that "[t]he Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues . . . and a functional approach"); *see also* Lee A. Deneen, Note, *Defeating a Wolf Clad as a Wolf: Formalism and Functionalism in Separation-of-Powers Suits Against the Consumer Financial Protection Bureau*, 48 GA. L. REV. 579, 583 (2014) (describing formalist-functionalist divide in separation of powers Court decisions).

30 *See* Vladeck, *supra* note 26, at 30–31 (describing *Youngstown*'s functionalist approach); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 5–9 (1993) (describing and criticizing the power of functionalist accounts of Executive power over foreign affairs).

31 *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936) ("That there are differences between [foreign and domestic affairs], and that these differences are fundamental, may not be doubted."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 5–6 (1972) ("Because the constitutional allocations of power to conduct foreign affairs are different from those for domestic matters, issues between the President and Congress in foreign affairs are not the same 'separation-of-powers' controversies that have roiled the governance of domestic affairs."); Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1984 (1993) (reviewing THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992)) (discussing "pervasive judicial

warier to scrutinize—and more likely to defer to—the decisions of Congress and the President than in domestic affairs, that the constitutional strictures that might otherwise constrain political branch actions are loosened,[32] and that the federalism concerns that might otherwise limit the political branches largely disappear.[33]

Any shift away from these conventional wisdoms towards more formalist approaches would be worthy of note. A trend as stark as the one described in this Article is an upheaval that must be described and understood.

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sense that foreign affairs are 'different'"); David A. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229, 325 (1988) ("Foreign affairs in general, and national security matters in particular, are traditionally accorded special treatment in American courts."); *id.* at 325 n.605 ("Foreign policy matters are generically different from other constitutional litigation."); *see also* Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 319 (2011) ("Kennedy's *Boumediene* compromise is likely normatively rooted in the perception that foreign affairs is different from the domestic order, and that the Constitution should thus be interpreted differently and more flexibly in the foreign policy arena.").

32 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward . . . it should have no such indulgence."); Mingtai Fire & Marine Ins. Co. v. United Parcel Serv., 177 F.3d 1142, 1144 (9th Cir. 1999) ("It is axiomatic that 'the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] that the propriety of the exercise of that power is not open to judicial review.'" (alterations in original) (quoting United States v. Pink, 315 U.S. 203, 222–23 (1942))); *see also* Republic of Austria v. Altmann, 541 U.S. 677, 678, 696 (2004) (describing foreign sovereign immunity as a "sui generis" context with regard to retroactivity); Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (finding the question whether the President or Congress controls treaty termination to be a nonjusticiable political dispute); United States v. U.S. Dist. Court, 407 U.S. 297, 321–22 (1972) ("express[ing] no opinion" as to whether the Fourth Amendment warrant requirement would apply "with respect to activities of foreign powers or their agents"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) ("It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*."); HENKIN, *supra* note 31, at 6 ("Even the modest role played by the courts in foreign affairs is different, asserting different judicial authority, maintaining different relations with the political branches, monitoring different limitations on the States.").

33 Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference."); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *see also Chae Chan Ping*, 130 U.S. at 604 ("While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation . . . .").

Second, while the shift to formalism on other issues seems to have come from the conservative wing of the Roberts Court (and opposed by its more liberal wing),[34] the shift in foreign affairs law seems to reflect an imperfectly overlapping agreement across the various wings of the Court. Foreign affairs decisions authored by both the Court's more liberal and conservative justices have embraced formalist rhetoric.[35] Even disagreements with the majority opinions are often couched not in functionalist terms but in alternative formalist ones.[36]

Third, and most importantly, the shift seems to reflect a change in Court philosophy. As will be discussed in the next Part, formalism and functionalism are best seen as rhetorical devices or moves that frame and justify a decision rather than doctrinal rules that dictate specific answers. As such, formalist rhetoric can serve various purposes. Some commentators have suggested that a shift to formalism could loosen judicial control over foreign affairs doctrine and return control to the political branches.[37] Alternatively, a shift to formalism could be merely political, reflecting the momentary ascendance of certain views in the judiciary and the political branches. Formalism provides a useful, if not necessarily principled, justification for an otherwise political decision. Some might be tempted to interpret the Roberts Court's formalism that way, as nothing more than a conservative Court's response to a Democratic President and, at times, Democratic Congress. Undoubtedly, ideological differences have played a role.[38]

But this trend seems considerably more robust, extending back into the prior Republican presidency and garnering support from ideologically opposed Justices. And, as this Article will explain, reading the opinions reveals broader principles at work. Binding these formalist opinions together is a deep distrust of other government actors and a concomitant desire to constrain their discretion. This formalism is not a product of judicial humility or restraint; this formalism

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34 *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy forming the majority); District of Columbia v. Heller, 554 U.S. 570 (2008) (same); *see also* Stern v. Marshall, 131 S. Ct. 2594 (2011) (same, with Justice Scalia concurring).

35 *Compare* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (majority opinion delivered by Justice Stevens), *with* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (majority opinion delivered by Justice Scalia).

36 *See infra* notes 332–33, 363–64.

37 *See generally* Goldsmith, *supra* note 26.

38 *See* Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 948 (2008) (asserting that "this is the most conservative Court since the mid-1930s").

is about a Court retaking control. Where the Court earlier used functionalism to give the political branches, and in particular the Executive, greater room to maneuver in a globalizing world, the Court now seems determined to rein them in. This seems to be the common message of Justice Stevens's opinion in *Hamdan*, formalistically rejecting the Executive's power to establish military commissions,[39] and Chief Justice Roberts's opinion in *Medellín*, formalistically rejecting the Executive's ability to preempt state criminal laws that violate American international obligations.[40] In an era of globalization in which the United States exerts its regulatory authority around the world and in which domestic affairs are increasingly of international concern, unconstrained Executive discretion seems to the Court a dangerous proposition. If state criminal procedure[41] and random lovers' quarrels[42] can be plausibly described as having foreign affairs implications, and foreign-based banks,[43] oil companies,[44] terrorists, and insurgents[45] can be subjected to the full force of federal regulation, the mere mention of the term "foreign affairs" or "national security" cannot be enough to release the government or its policies from judicial scrutiny.[46] To do otherwise would be to place enormous trust in the executive branch, Congress, and the lower federal courts. And the Roberts Court's message is that that trust simply is not there.

Part I begins by explaining the formalist-functionalist divide in constitutional law and how it has traditionally manifested itself with regard to foreign affairs. Part II looks more closely at the foreign affairs jurisprudence of the "Souter Court," contrasting the functionalism of decisions like *American Insurance Ass'n v. Garamendi*,[47] *Crosby v. National Foreign Trade Council*,[48] *Sosa v. Alvarez-Machain*,[49] *Republic of Austria v. Altmann*,[50] *Hamdi v. Rumsfeld*,[51] *F.*

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39 *Hamdan*, 548 U.S. at 635.

40 Medellín v. Texas, 552 U.S. 491, 529–32 (2008).

41 *See id.* at 529–30 (rejecting argument that President can rely on foreign affairs powers to enforce a non-self-executing international treaty to preempt a state law of criminal procedure).

42 *See* Bond v. United States, 134 S. Ct. 2077, 2091–92 (2014) (refusing to "transform the [chemical weapons] statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults").

43 *See infra* Part II.B.3 (discussing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)).

44 *See infra* Part II.B.4 (discussing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)).

45 *See infra* Part II.B.1 (discussing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

46 *See supra* notes 2–6 and accompanying text.

47 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

48 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

49 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

Hoffman-La Roche Ltd v. Empagran S.A.,[52] and others, with the formalism of the Roberts Court decisions in *Hamdan*, *Medellín*, *Morrison*, *Mohamad v. Palestinian Authority*,[53] *Zivotofsky*, and *Kiobel*. Along the way, it explores the judicial philosophy animating these contrasting approaches. Part II also explores the key dividing line within the current Court: how much to constrain the courts themselves (particularly, the lower federal courts). Whereas a fragile consensus seems to have emerged that the political branches need to be fenced in with more formal checks on their power, the Court seems divided over (and perhaps a bit unsure) whether the federal courts need similar rules. It is this line that seems to divide the majority from the dissenting and concurring justices in *Morrison*, *Kiobel*, and *Boumediene v. Bush*,[54] and that is likely to continue to divide the Court in future cases.

Part III considers some implications of the current formalist trend. For one thing, the resilience of this trend suggests the type of foreign affairs cases that may pique the Court's interest over the next few terms. The Justices' evident skepticism regarding the government's pleas for foreign affairs deference during the *Bond* oral argument, and later evidenced in their opinions in *BG Group PLC v. Republic of Argentina*[55] and *Republic of Argentina v. NML Capital, Ltd.*,[56] is far from surprising. That sense of distrust has been brewing for some time and can be expected to continue. Nor is it surprising that the Court will decide *Zivotofsky ex rel. Zivotofsky v. Kerry* ("*Zivotofsky II*")[57] this Term. The case for the first time confronts the scope of the presidential recognition power, a highly functionalist power long invoked to grant the President nearly unreviewable authority over questions of U.S. foreign policy.[58] Cases revisiting the

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50 Republic of Austria v. Altmann, 541 U.S. 677 (2004).

51 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

52 F. Hoffman-La Roche Ltd v. Empagran S.A., 542 U.S. 155 (2004).

53 Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

54 Boumediene v. Bush, 553 U.S. 723 (2008).

55 BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198, 1208 (2014) ("We do not accept the Solicitor General's view as applied to the treaty before us."); *see also infra* Part III.A.

56 Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250, 2258 (2014) (noting that "Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court," but concluding that "[t]hese apprehensions are better directed to [Congress]"); *see also infra* note 450 and accompanying text.

57 Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State (*Zivotofsky II*), 725 F.3d 197 (D.C. Cir. 2013), *cert. granted sub nom.* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 134 S. Ct. 1873 (2014).

58 *See infra* Part III.A.

broadly interpreted Foreign Commerce Clause or the scope of the *Charming Betsy*[59] presumption might garner similar interest.[60]

But not all future questions will provide easy platforms for renewed formalism and reinvigorated checks. A second possible implication of the Court's new (new)[61] formalism is that cases that cannot easily be resolved with formal tools will not be resolved at all. A renewed commitment to formalism may also mean stricter pleading[62] or standing[63] standards or a sort of backdoor functionalism through the denial of certiorari in thorny foreign affairs cases.[64]

What all of this suggests is that Court-watchers, commentators, and critics will need to shift their focus. Critiques of the Court's excessive functionalism in foreign affairs remain common.[65] But the trend identified here suggests that that horse may already be dead. Instead of watching to make sure the Court is not being too functionalist or too deferential, Court-watchers may be well-advised to look out for the opposite, aware of the potential for excessive formalism and the possibility of an imperial Court.

I. Formalism and Functionalism in U.S. Foreign Affairs Law

A. As Interpretative Frames

The choice between formal and functional tools is one of the great, enduring divides in U.S. constitutional and statutory interpretation. Should the Constitution and statutes be interpreted strictly, to guarantee that all act within established rules and roles, or broadly, with an eye towards achieving the government's or Constitution's goals? On the one hand, the federal government "is acknowledged by all[ ] to be one of enumerated powers."[66] Moreover, we are taught

59 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

60 For an example of a more formalist and more conservative approach that a court could take to the doctrine, see Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (declining to invoke the *Charming Betsy* doctrine where the language of the statute is "plain"), as well as the discussion *infra* Part III.

61 *See generally* Wuerth, *supra* note 25. In 1999, Jack Goldsmith suggested that the Court might be embracing a "New Formalism" in foreign affairs law. *See* Goldsmith, *supra* note 26, at 1. To the extent he was correct, this latest trend would have to be the *new* new formalism.

62 *See infra* note 455 and accompanying text.

63 *See infra* note 456 and accompanying text.

64 *See infra* notes 459–61 and the accompanying discussion of post-*Boumediene* detainee cases.

65 *See* Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 Ariz. St. L.J. 87, 96 (2009); Moore, *supra* note 25, at 955–56; Vladeck, *supra* note 26, at 31.

66 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

that within the federal government "[t]he Constitution sought to divide the delegated powers . . . into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility."[67] On the other hand, we are taught "never [to] forget that it is a *constitution* we are expounding,"[68] and that the goal of the Constitution is to create "a workable government."[69]

As William Eskridge has explained, the tension between these two visions, one formalist and the other functionalist, can take a number of forms in judicial opinions. One manifestation is the choice between rules and standards. "Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism, at least as an antipode, might be associated with standards or balancing tests that seek to provide public actors with greater flexibility."[70] A different manifestation is in the forms of reasoning we might use to answer hard questions. "Formalism might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together. Functionalism might be understood as induction from constitutional policy and practice, with practice typically being examined over time."[71] Finally, a third manifestation might be with regard to goals. "Formalism might be understood as giving priority to rule of law values such as transparency, predictability, and continuity in law. Functionalism, in turn, might be understood as emphasizing pragmatic values like adaptability, efficacy, and justice in law."[72] Formalism is essentially backward-looking, tethering interpretations to existing doctrines, prior precedents, and original text. Functionalism looks to the present and future, asking what rule will lead to the best results (understood, of course, within the general constitutional design).

A different way of putting it, quite apparent in the foreign affairs context, might be that formal approaches emphasize constraint and functional approaches emphasize empowerment. Formalist techniques are often accompanied by sober appeals to the importance of keeping all constitutional actors within their designated roles. Func-

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67 INS v. Chadha, 462 U.S. 919, 951 (1983).

68 *McCulloch*, 17 U.S. (4 Wheat.) at 407.

69 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

70 William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998).

71 *Id.*

72 *Id.* at 22.

tional techniques are invoked along with rhetoric of exigency, efficiency, and effectiveness.[73] This is quite apparent in the two opinions that often stand as archetypes of formalism and functionalism, which are, respectively, Chief Justice Burger's majority opinion in *INS v. Chadha*[74] and Justice Jackson's concurrence in *Youngstown*.[75]

In the first case, *Chadha*, the Court was faced with a challenge to the one-house veto. Under the Immigration and Nationality Act,[76] the Attorney General was delegated the discretion to suspend deportation of certain deportable individuals for whom deportation would result in "extremely unusual hardship."[77] This decision was subject to a legislative veto by either house of Congress.[78] Justice White, in dissent, appealed to functionalism, describing the legislative veto as "a central means by which Congress secures the accountability of executive and independent agencies,"[79] noting its long pedigree,[80] and worrying about the consequences of overriding it.[81] Moreover, Justice White explained that nothing in the Constitution specifically forbade it.[82] The majority took a different view. In a paean to formalism, Chief Justice Burger, writing for the majority, explained that the Constitution established a clear process and order for lawmaking that included both bicameralism and presentment. The political branches could not simply agree to rearrange it, regardless of how "efficient,

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73 *Cf.* Theodore J. Lowi, *Afterword: Presidential Power and the Ideological Struggle Over Its Interpretation*, *in* THE CONSTITUTION AND THE AMERICAN PRESIDENCY 227, 238–39 (Martin L. Fausold & Alan Shank eds., 1991) (contrasting a "Fast Track" of American politics characterized by "secrecy, unilateral action, energy, commitment, decisiveness, where time is always of the essence," with a "Slow Track" or "a Separation of Powers Track, permitted by a longer time horizon, and desirable wherever time permits, yet highly unpredictable, uncontrollable, public, full of leaky holes, and dominated not merely by the legislature but by a large and pluralistic process fueled by greed, otherwise called the pursuit of happiness").

74 INS v. Chadha, 462 U.S. 919 (1983).

75 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J. concurring).

76 Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

77 *Id.* § 244(a)(1)–(c)(2), 66 Stat. at 214–17 (current version at 8 U.S.C. § 1229(b)(1)(D) (2012)).

78 *Id.* § 244(b)–(c), 66 Stat. at 216.

79 *Chadha*, 462 U.S. at 967–68 (White, J., dissenting).

80 *Id.* at 968 ("[O]ver the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern . . . ." (footnote omitted)).

81 *See id.* at 973 ("Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory.").

82 *Id.* at 977.

convenient, and useful in facilitating functions of government"[83] it might be. Quite the contrary, the Constitution "impose[s] burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."[84] Formalism enforces restraint.

Functionalism, in contrast, is at the heart of Justice Jackson's influential concurrence in *Youngstown*, now often read as the central opinion in that case.[85] Recognizing that the Constitution "must be understood as an eighteenth-century sketch of a government hoped for, not as a blueprint of the Government that is,"[86] the opinion eschews formal categories, declaring that "[t]he actual art of governing under our Constitution does not, and cannot, conform to judicial definitions of the power of any of its branches based on isolated clauses, or even single Articles torn from context."[87] Instead, Justice Jackson explains, assessing President Truman's Korean War-era attempt to seize the nation's steel mills required an understanding of the fluctuating relationship between Congress and the President. Justice Jackson suggests that any Executive action can be judged based on where it falls within a "grouping of [three] practical situations."[88] In the first, "the President acts pursuant to an express or implied authorization of Congress."[89] In such cases, the President's "authority is at its maximum,"[90] and a challenge to his actions will only succeed if the federal government "as an undivided whole lacks the power."[91] In the second, the President acts against a backdrop of congressional silence.[92] In such cases, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law."[93] Finally, in a third category of

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83 *Id.* at 944 (majority opinion).

84 *Id.* at 959.

85 *See, e.g.*, Louis Fisher, *Foreword* to MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER, at xii (Duke Univ. Press 1994) (1971) ("The part of *Youngstown* that has had the greatest impact on contemporary constitutional analysis is Justice Jackson's concurring opinion.").

86 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

87 *Id.* at 635.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 636–37.

92 *See id.* at 637.

93 *Id.*

cases, the President acts against the explicit or implicit will of Congress.[94] There, the President's "power is at its lowest ebb."[95] President Truman's actions, Justice Jackson found, fell into the third category.[96] But the opinion goes further, surveying how the powers of the presidency have grown beyond anything the Framers could have imagined.[97] Giving in to the President's claims of necessity seemed neither warranted nor wise.[98] Even as the President lost, the argument was one about effective government, not about textual constraint.

As *Chadha* and *Youngstown* suggest, applying formalist or functionalist tests will have different results, depending on the specific question presented and the area of law.[99] Many observers have noted that in the foreign affairs context, functionalism favors the executive branch.[100] Observers often point to decisions like *United States v. Curtiss-Wright Export Corp.*,[101] *Dames & Moore v. Regan*,[102] or *Garamendi*, which invoke the unique functions of the President as "sole organ of the federal government in the field of international relations"[103] to justify expansive Executive power. In a sense, this should not be surprising. When a President's actions are challenged, it is likely to be on the basis of either a contrary congressional act or constitutional provision. Given the comparatively few explicit powers

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94 *See id.*

95 *Id.*

96 *See id.* at 640.

97 *See id.* ("Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism.").

98 *Id.* at 652.

99 For example, in the administrative law context, functionalist approaches are sometimes said to favor the sharing of power between Congress and the President, rather than one branch or the other. *See* Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting) (criticizing the majority's "distressingly formalistic view" barring efficient government action). The disagreement between Justices Burger and White in *Chadha* exemplifies this well. *See* INS v. Chadha, 462 U.S. 919, 967–68 (1983) (White, J., dissenting).

100 *See, e.g.*, Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 109 (2002) ("[T]hose invoking [functionalist] language generally do so to suggest that the 'flexible' approach warrants upholding the challenged action."); Knowles, *supra* note 65, at 96 ("[P]roponents of executive branch dominance have triumphed in the courts and in practice, a victory driven largely by functional considerations."); *see also* Monaghan, *supra* note 30, at 8–9 (describing, yet criticizing, how functionalist logic has been used to support broad Executive authority).

101 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

102 Dames & Moore v. Regan, 453 U.S. 654 (1981).

103 *Curtiss-Wright*, 299 U.S. at 320.

granted to the President in the Constitution,[104] it may take a functionalist account, rather than a formalist one, to find in favor of the Executive.

Yet, even if this is unsurprising, it is also only partly true. For one thing, applying a functional analysis need not result in victory for the President, as Jackson's concurrence in *Youngstown* proves. But it also focuses too much on the congressional-executive separation of powers questions to the exclusion of others.[105] Foreign affairs law involves a wide range of other issues, including the political question doctrine, treaty interpretation, the preemption of state laws, foreign sovereign immunity, the act of state doctrine, the extraterritoriality of statutes, and others. Most of these foreign affairs issues do not pit the President against Congress, at least not usually or explicitly, and it is harder to say that applying a functionalist approach in these cases consistently favors one branch over another.

Some functionalist foreign affairs decisions will still favor executive over congressional authority. Functional accounts of the President's role in negotiating treaties and managing American foreign policy support amorphous doctrines of deference towards the executive branch in treaty interpretation.[106] Similarly, looser versions of the political question doctrine that ask functional questions about whether a particular case might embarrass the other branches or undermine the government's ability to speak with one voice in foreign affairs tend to insulate the President's acts from greater scrutiny.[107]

But other issues and doctrines may be harder to categorize as exclusively advancing Executive authority. Preemption, for example, usually pits the federal government against the states. A more formalist analysis might mean a narrower reading of a congressional statute or Executive policy. This, in turn, will make the Court less likely to find a conflict with state laws and less likely to preempt. A functionalist reading, on the other hand, might look more broadly to the federal

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104 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("[I]t is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office.").

105 *See* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 817–18, 820 (2011); *see also* Knowles, *supra* note 65, at 92, 94–99; Vladeck, *supra* note 26, at 37–38.

106 *See* Pearlstein, *supra* note 105, at 792–801; *see also* Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 36–37, 41–44 (2005).

107 *See* Corrie v. Caterpillar, Inc., 503 F.3d 974, 980–84 (9th Cir. 2007); *see also* Bancoult v. McNamara, 445 F.3d 427, 431–33, 437–38 (D.C. Cir. 2006); Schneider v. Kissinger, 412 F.3d 190, 193–98 (D.C. Cir. 2005).

statute's or policy's goals, reading into it not only what it explicitly does, but also all the decisions about what it does not. Such a broad reading is more likely to suggest either a conflict between the state and federal government or that the federal government has sought to occupy the field. The result of such functionalism is thus likely to be a victory for the Congress *and* the President together against the States.[108]

Things get even more complicated when the powers of Congress and the Executive are not squarely at issue. Oftentimes, for example, the question revolves around the rights of individual litigants to sue. When can individuals sue foreign states or their instrumentalities? When can individuals sue regarding acts taken by foreign states within their own territory? When can individuals use federal law to gain redress for conduct occurring somewhere else, whether a securities violation, a price-fixing scheme, employment discrimination, copyright infringement, or human rights violations? These cases are not always easy to categorize as matters of political branch authority. Certainly in some cases the executive branch is the defendant, as in, for example, detainee cases.[109] Sometimes, the constitutionality of Congress's actions may actually be the target of the suit, as they were in *Boumediene*.[110] But in many of these cases, the role of the political branches may be much more attenuated.

That does not mean that one could not also look at these cases in separation of powers terms. One way to look at the plaintiffs' relative rights to sue would be in terms of congressional delegation: to what

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108 Even if functionalist decisions like *Garamendi*, *United States v. Pink*, and *United States v. Belmont* suggest that the President alone may be able to preempt state laws, they say nothing about what would have happened had Congress been affirmatively opposed. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–25 (2003); United States v. Pink, 315 U.S. 203, 227–30 (1942); United States v. Belmont, 301 U.S. 324, 327–28, 330–32 (1937). Thus, the better reading of the whole group is that, in general, functionalism favors the federal government as a whole over the states. *See, e.g.*, *Belmont*, 301 U.S. at 331 ("Plainly, the external powers of the United States are to be exercised without regard to state laws or policies.").

109 *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 558 (2006). This will also be the case, for example, with *Bivens* actions. *See* Ashcroft v. Iqbal, 556 U.S. 662, 668 (2009); Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009). More tangentially, the Executive may be implicated in cases against private defendants that somehow challenge government actions. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1072, 1075 (9th Cir. 2010) (challenging the United States's invocation of the state secret doctrine in a suit against a U.S. corporation that allegedly provided "flight planning and logistical support services" to transport individuals who were ultimately detained and tortured). Functionalist analysis may favor the Executive here, as it does in the context of the state secrets privilege. *See, e.g.*, *id.* at 1078–82, 1086–87, 1089–90.

110 Boumediene v. Bush, 553 U.S. 723, 732–33 (2008) (challenging Congress's ability to deny Guantanamo detainees access to habeas corpus).

extent should Congress be able to delegate (even provisionally) the scope and meaning of legislation to private litigants and courts? Arguably, Justice Scalia's formalist rejection in *Morrison*[111] of the Second Circuit's test for extraterritorial application of U.S. securities laws, a test developed through decades of litigation and long-acquiesced to by Congress (as noted by the plaintiffs),[112] was a denunciation of that form of silent, subcontracted congressional legislation. The same might be said of Chief Justice Roberts's opinion in *Kiobel*.[113] Overall, however, the formalism-functionalism divide in these cases does not seem to really be about the political branches. Formalism and functionalism might line up as defendant-friendly or plaintiff-friendly, respectively, as the majorities and dissent in *Sosa*, *Kiobel*, and *Morrison* might suggest. But they need not.[114] Perhaps the better interpretation is that functional approaches favor the federal judiciary, rather than plaintiffs, Congress, or the President, giving lower federal court judges discretion in how to balance foreign affairs concerns in each case.[115]

This point is illustrated well by the Court's decisions regarding the act of state doctrine. It is very hard to categorize either seemingly functionalist or seemingly formalist opinions as pro- or anti-executive

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111 *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."); *infra* Part II.B.3.

112 *Morrison*, 561 U.S. at 278 (Stevens, J., concurring) ("The Second Circuit refined its test over several decades and dozens of cases, with the tacit approval of Congress and the Commission and with the general assent of its sister Circuits. That history is a reason we should give additional weight to the Second Circuit's 'judge-made' doctrine, not a reason to denigrate it.").

113 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (applying the presumption against extraterritorial application to the Alien Tort Statute and holding that the ATS does not apply to conduct occurring abroad because there is no explicit indication to the contrary within the statute's text).

114 Justice Scalia's more formalist version of the act of state doctrine in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, 493 U.S. 400, 405–09 (1990), is a good example. There, formalism narrows the doctrine such that it applies to fewer cases. *Id.* at 409–10. The result of that formalism is that more plaintiffs rather than fewer are able to seek relief.

It should also be noted that formalism and functionalism are not always pitted against each other. In some cases, the two sides may represent warring formalist approaches or warring functionalist approaches. *See infra* Part II.A.4 (discussing *Republic of Austria v. Altmann*, 541 U.S. 677 (2004)). Justice Stevens, for the majority, applies a functionalist analysis of the Foreign Sovereign Immunity Act to deny the applicability of the antiretroactivity norm, in turn allowing the plaintiff to sue under current rules. *Altmann*, 541 U.S. at 696. In dissent, Justice Kennedy finds that the antiretroactivity principle does apply, but in the process creates a different sort of functionalist rule, in which the Court might defer to the Executive's opinion on sovereign immunity as it would have back in the 1940s. *Id.* at 734 (Kennedy, J., dissenting).

115 This dovetails well with Jack Goldsmith's suggestion. *See* Goldsmith, *supra* note 26, at 1396 (arguing that the "foreign relations effects test rests on questionable assumptions about the nature of foreign relations law and the proper role of federal courts"); *see also infra* notes 123–27 and accompanying text.

authority. The Court in *Banco Nacional de Cuba v. Sabbatino*[116] famously found the authority behind the act of state doctrine not in the Constitution, international law, or statute, but in separation of powers principles with "constitutional underpinnings."[117] Functional considerations, including guarding against judicial interference in executive branch foreign policy, supported the doctrine.[118] And yet, the Court took pains to ignore the executive branch's specific views on the legality of Cuban expropriations[119] and specifically rejected a "reverse *Bernstein*" test that would have them apply the doctrine only when asked to by the Executive.[120] On the flipside, Justice Scalia invoked a more formalist version of the act of state doctrine in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*[121] based on clear rules about when it would apply.[122] Here too the Executive's view of what should happen in the particular case was ignored.[123] What really seems to distinguish the functionalism of *Sabbatino* from the formalism of *Environmental Tectonics* is not the deference to the Executive, but the amount of room left for lower federal courts to decide the contours of the act of state doctrine.

As a summary, we might thus say that foreign affairs functionalism seems to generally favor the President against Congress, both political branches against the states, and the federal judiciary against everything else.[124]

B. As Strategy and Rhetoric

All of this suggests moving beyond the blunt formalist-functionalist divide in assessing Supreme Court opinions related to foreign af-

116 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

117 *Id.* at 423.

118 *Id.* at 430–33.

119 *Id.* at 432 ("The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law.").

120 *Id.* at 436 ("[A] reversal of the *Bernstein* principle would work serious inroads on the maximum effectiveness of United States diplomacy."). This is not to say that the resulting opinion and doctrine do not in some sense favor the Executive, but rather that whether it does or does not is a complicated question on which different observers might disagree.

121 W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400 (1990).

122 *Id.* at 405–06.

123 A similar account might be told regarding *Zschernig v. Miller*, 389 U.S. 429 (1968). *See infra* note 152 and accompanying text.

124 One might question the value of looking at all of these doctrinal areas together. The Court though has long treated them as a category, justifying its functionalism in all of them with the same concerns—the delicateness of foreign affairs, the unusual need for one voice, and the relative expertise of the federal government.

fairs. Far more telling than the overall trend towards formalism is how the Court makes decisions about what is part of that trend and what is not. Which doctrines and contexts does the Court look at functionally or formally? Who does the Court's functionalism or formalism favor? Is functionalism or formalism used primarily in contexts where functionalism might favor the executive branch? If so, this might suggest a particular view of the Court, good or bad, with regard to Executive power. Is functionalism used instead across the board with regard to a wide range of different issues and contexts? Does it always favor the Executive, or even the political branches? The same questions can be asked of a Court's use of formalist techniques. In what cases does it appear to carry weight? Who does the Court's formalism seem to constrain: the Executive, Congress, the courts, or individual plaintiffs?

One possibility is that the Court's use of functionalism is actually a means of empowering itself. In an earlier important article, Jack Goldsmith, looking primarily at the Court's opinions in cases involving doctrines of political question, act of state, and dormant foreign affairs preemption, argued that the Court had over a period of time adopted a functionalist "foreign relations effects" test that left federal judges to decide whether a particular case was good or bad for American foreign policy.[125] In that article, he also identified a potential new trend back to formalism, which he welcomed as a way to return foreign policy effects questions back to the political branches.[126] The opposite, though, may also be true. While formalism might favor the political branches, as Goldsmith suggested, it may also empower the courts (or at the very least the Supreme Court). This is arguably the case with the Roberts Court, as the next Part will explain.[127]

The point is that depending on exactly how functionalism and formalism are arrayed, different stories can be told about the Court's goals and philosophy. In other words, the nuance matters.

It is also important to recognize that while particular decisions are often labeled "functionalist" or "formalist," the reality is that the lines between the two approaches can be quite fuzzy.[128] Formalism and functionalism are constructs; few opinions fit perfectly into either.

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125 Goldsmith, *supra* note 26, at 1417.

126 *Id.* at 1424.

127 *See infra* Part II.B.6.

128 *See* Eskridge, Jr., *supra* note 70, at 24 (stating that "constitutional reasoning pervasively, and often unconsciously, melds formalist and functionalist justifications); *see also* Pearlstein, *supra* note 105, at 844–46.

Many opinions will invoke both in support of their result,[129] and observers might reasonably disagree about how a particular opinion should be categorized.[130] Take *Munaf v. Geren*,[131] for example. In that case, a unanimous Court held that the habeas statute applied to two American citizens held by U.S. forces operating as part of a multinational coalition in Iraq.[132] In one sense, the decision sounds quite formalistic, focusing on the habeas statute's plain language, which applies to anyone held "in custody" of the United States.[133] In another sense, the opinion might be read as a functionalist one, rejecting the U.S. government's formalist argument that the two men were held not by the United States, but by Multinational Forces-Iraq, a U.N.-sanctioned coalition.[134] Functionally, the Court held, the two men were under the complete control of the United States, regardless of the label under which the United States was operating.[135] This is even before getting into the opinion's second half, which declares habeas "governed by equitable principles,"[136] denies the relief requested, and suggests broad deference to the Executive in transfer decisions.[137] Or take the Court's recent decision in *Kiobel*.[138] As will be discussed more below, the application of a presumption against extraterritoriality to claims under the Alien Tort Statute ("ATS")[139] seems like a formalist move, applying a bright-line rule of statutory interpretation rather than a more searching analysis of what Congress might have

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129 *See* Eskridge, Jr., *supra* note 70, at 24 (listing examples). A good example from the foreign affairs canon is *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Often cited for its highly functional support for Executive discretion in foreign affairs, Justice Sutherland's opinion also invokes formal sources like history and text in support of his position. *Id.* at 316–19. Similarly, Hamilton's Pacificus writings during the Neutrality crisis invoke both functional accounts of the President's primacy in diplomatic affairs *and* formal accounts of the Vesting Clause of Article II of the Constitution. ALEXANDER HAMILTON, PACIFICUS NO. 1 (1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 36–40 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

130 Even that opus of functionalism, Jackson's *Youngstown* concurrence, *see supra* text accompanying notes 86–98, plays some formalist notes: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . . ." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

131 Munaf v. Geren, 553 U.S. 674 (2008).

132 *See id.* at 678–80.

133 *Id.* at 686.

134 *Id.* at 685–86.

135 *Id.* at 686–88.

136 *Id.* at 693 (internal quotation marks omitted).

137 *Id.* at 702.

138 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

139 Alien Tort Statute, 28 U.S.C. § 1350 (2012).

intended or might now want. That said, application of the presumption in this case invites a range of functionalist analyses about when and whether a particular claim touches or concerns the territory of the United States in a significant enough way to overcome it.[140]

This brings us to an important point: instead of trying to characterize a decision as formalist or functionalist, we might better talk of formalist or functionalist rhetoric.[141] It is common for commentators to talk about formalism and functionalism as if they were interpretative *rules*, often arguing for one or the other because it will more often than not lead to a particular desired or desirable set of outcomes.[142]

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140 Not to mention the Court's admittedly unusual, *see Kiobel*, 133 S. Ct. at 1664–69, application of the presumption against extraterritoriality to particular claims rather than to the regulatory scope of the statute, a transposition that seems inspired by the Court's functionalist concerns about how the Alien Tort Statute works. *See infra* Part II.B.4. It should also be noted that formalist rhetoric and technique may also be a smokescreen for functionalist thinking. *See infra* notes 329–32 and accompanying text.

141 As will be explained, understanding formalism and functionalism as rhetoric can help explain how the Roberts Court's decisions can be formalist yet favor the courts. *See infra* Part II.B. Although invoking the language and technique of formalism, many of the Roberts Court decisions adopt "rules" whose content or application remains obscure or novel. *See, e.g.*, Wuerth, *supra* note 25, at 1–3 (explaining that though the *Medellín* opinion "reads in places like a breath of formalist fresh air," upon closer examination it creates a lack of clarity and generates tensions with formalism). Criticism that the Court's formalist tests are obscure or novel is common. *See, e.g.*, David J. Bederman, Medellín*'s New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 530 (2008) (arguing "the *Medellín* decision signifies a substantial break with previous disputations between members of the Supreme Court as to the proper modalities of treaty interpretation, and fashions a new paradigm for treaty construction with respect to three essential matters"); Anthony J. Colangelo, Kiobel*: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65, 65–66 (2013) (criticizing the Court's novel use of the presumption against extraterritoriality); David L. Sloss, *Executing* Foster v. Neilson*: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 186–87 (2012) (describing *Medellín* as "inscrutable," "analytically incoherent," and reliant on a "fictitious" basis); Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After* Morrison*: Correcting the Supreme Court's "Transactional Test*,*"* 52 VA. J. INT'L L. 405, 410 (2012) (explaining that "the transactional test adopted by the majority is profoundly ambiguous and might cause uncertainties in its application"). The result is that much like the functionalist "foreign effects test" that Goldsmith identifies, *see supra* note 26, at 1417, these "rules" leave lower courts a great deal of discretion to shape their contours.

142 *See, e.g.*, Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 154–56 [hereinafter Ku & Yoo, *Beyond Formalism*] (using functional arguments to propose a system in which "courts would continue to adjudicate [customary international law (CIL)] cases, while at the same time allowing a functionally superior executive branch to oversee and unify the interpretation of CIL when necessary"); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 180, 199 (2006) (arguing the Supreme Court should have deferred to executive interpretation in *Hamdan* for functional reasons as the "federal judiciary suffers significant disadvantages" in resolving issues in foreign affairs); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41

But as explained above and described below, neither formalism nor functionalism dictates outcomes in particular cases. Cases are simply too complex, with too many elements that could be seen through a formalist or functionalist lens.

Instead, formalism and functionalism should more properly be seen as rhetorical moves that can be used to justify a particular decision and set a particular tone or mood. As such, in analyzing the formalism or functionalism of particular opinions, it is language and rhetoric on which we should be focusing: when does the Court invoke the binds of formal categories, clear language, or formal rules, and when does it break free of them, citing the obvious needs of a functioning government? It is the use of such competing rhetorics that most clearly distinguishes the opinions of the Souter and Roberts Courts discussed in the next section.

Suggesting that formalism and functionalism are primarily rhetorical is not to suggest that the categories are unimportant. On the contrary, rhetoric can have real force, framing arguments between the Justices and serving as part of a broader attempt to justify the Court's opinions to its various audiences, the political branches, lower courts, and the public. An effective shift in rhetoric can change the terms of debates between members of the Court and others, even if it does not dictate outcomes. Depending on the prevailing mood, Justices may want (or need) to justify opinions as either sufficiently constraining or sufficiently aware of practical realities. When functionalism is dominant and the mood favors deferring to the political branches, a decision constraining the Executive may need to sound in functionalism and signal an awareness of real world complexities. Justice O'Connor's functionalist opinion in *Hamdi* denying the President a "blank check"[143] on matters of national security might be an example.[144] If, as argued in the next Part, formalism now dominates and gives voice to a mood of distrust and constraint, we might expect Justices to cautiously suggest limits even when they uphold the general discretion of other actors. It should not be surprising that Justice Breyer was searching for a limiting reading of the Chemical Weapons Convention Implementation Act in the *Bond* oral argument,[145] nor

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CONN. L. REV. 1549, 1553 (2009) (arguing against the new functionalists' "scattershot approach" in separation of powers disputes).

143 Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

144 *See infra* Part II.A.6.

145 Transcript of Oral Argument at 40, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158). *See supra* notes 2–6 and accompanying text.

that the more liberal concurring Justices in *Kiobel* suggested new constraints on the Alien Tort Statute even as they argued against the more formalist shackles on human rights litigation that the majority put in place.[146]

II. There and Back Again: The "Souter" and Roberts Courts

The attraction of either formalist or functionalist approaches to foreign affairs cases has waxed and waned over the course of American history.[147] At some point in the twentieth century, though, functionalism gained the upper hand. One might look to *Curtiss-Wright*, which found formalist domestic doctrines on nondelegation inapplicable to foreign affairs, as the start of this shift.[148] That 1936 opinion laid out the key functionalist justifications for greater political branch, and particularly Executive, discretion in foreign affairs that would be cited by later functionalist opinions, including the unique need for secrecy, the President's better knowledge of "conditions which prevail in foreign countries,"[149] and the President's access to information and agents.[150] Or one might date the birth of foreign affairs functionalism to 1952 and Justice Jackson's influential *Youngstown* concurrence.[151] Still others might find the trend's origin in the mid-1960s in cases like *Sabbatino* and *Zschernig v. Miller*,[152] which justified application of the act of state doctrine and the preemption of state law (in the absence of a specific federal act or treaty) in functionalist terms.[153]

This trend towards functionalism put foreign affairs law increasingly outside the mainstream of American law. The political question doctrine, now rarely applied in other areas of law, is regularly, and

146 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1670–71 (2013) (Breyer, J. concurring).

147 *See* International Law in the U.S. Supreme Court: Continuity and Change 2 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (mapping shifts in foreign affairs jurisprudence over time).

148 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

149 *Id.* at 320

150 *Id.*

151 *See supra* notes 85–98 and accompanying text; *see also* Vladeck *supra* note 26, at 30–31 (describing *Youngstown* as the origin of the Court's movement towards functionalism).

152 Zschernig v. Miller, 389 U.S. 429 (1968).

153 *Zschernig*, 389 U.S. at 440–41; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423–25 (1964); *see also* Goldsmith, *supra* note , at 1401–09. Goldsmith identifies this as the beginning of the trend towards functionalism, adding *Baker v. Carr*, 369 U.S. 186 (1962), and its functionalist account of the political question doctrine to the mix. For Goldsmith, the functionalist story is one rooted in Cold War sensitivities about the potential peril associated with judicial involvement in foreign policy.

very loosely,[154] used to shield foreign affairs from judicial scrutiny.[155] Courts normally apply a presumption against preemption of state law, but when foreign affairs are concerned, that presumption slips away or may even be reversed.[156] Deference will more quickly be granted to the Executive in treaty interpretation than in the interpretation of ordinary statutes, where stricter canons of interpretation will be applied. Presumptions against federal common law may not apply to foreign affairs.[157] Canons of statutory antiretroactivity will be loosened when foreign affairs are at issue.[158]

Whatever the origin, the trend towards foreign affairs functionalism was established enough by the late 1990s that a series of more formalist decisions by the Supreme Court seemed sufficiently extraordinary to some observers to augur a new trend. Observers pointed to *Environmental Tectonics*,[159] adopting a rule-based approach to the act of state doctrine, *Barclays Bank PLC v. Franchise Tax Board*,[160] rejecting preemption of a California tax with foreign relations implications, *EEOC v. Arabian American Oil Co.*,[161] applying a presumption against extraterritoriality to Title VII of the Civil Rights Act of 1964,[162] and possibly *Japan Whaling Ass'n v. American Cetacean Society*,[163] refusing to abstain from the case on political question grounds, as a potential "new formalism" in foreign affairs law.[164]

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154 *See infra* Part II.B.7.

155 *See* Goldsmith, *supra* note , at 1403.

156 *See* Arizona v. United States, 132 S. Ct. 2492, 2501–02 (2012) (finding an Arizona statute granting itself "independent authority to prosecute federal registration violations" was preempted by a federal law governing alien registration); Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941) ("[I]t is of importance that [Pennsylvania's] legislation is in a field which affects international relations, the one aspect of our government . . . most generally conceded imperatively to demand broad national authority."); *see also* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 188.

157 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (identifying "international disputes implicating . . . our relations with foreign nations" as appropriate for federal common law); *Sabbatino*, 376 U.S. at 427.

158 *See* Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004).

159 W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400 (1990).

160 Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994).

161 EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

162 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

163 Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986); *see also* Goldsmith, *supra* note , at 1427–28 (expressing uncertainty about whether the case was part of a formalist shift).

164 *See* Goldsmith, *supra* note , at 1427–28; *see also* Spiro, *supra* note 25 ("*Barclays Bank v. Franchise Tax Board* (1994) was a case that some of us (those who started teaching in the mid

If that formalism was a trend, it was not meant to last.[165] By the early to mid-2000s, functionalism was back, arguably stronger than ever. At the center of this robust functionalism was Justice Souter. Although he did not author all of the functionalist opinions during this period, his opinions announced the Court's functionalism in the strongest terms and epitomize the functionalism that prevailed. Three key Justice Souter-authored decisions set the general tone: *Crosby*, *Garamendi*, and *Sosa*.

A. The Functionalist "Souter Court"

1. Crosby v. National Foreign Trade Council

In *Crosby*, the Court considered a Massachusetts law that sought to ban state entities from contracting with those doing business with the military regime then running Burma.[166] In a Justice Souter-authored majority opinion, the Court invalidated the law, finding it preempted by the similar sanctions adopted by Congress a few months later.[167] From a formal standpoint, there might have seemed little reason to preempt the Massachusetts law. The Congressional legislation said nothing about state sanctions,[168] both seemed inspired by the same goal,[169] and there was no direct conflict between the laws' requirements.[170] Nonetheless, the Court found that the Massachusetts law stood as an "obstacle" to the federal one.[171] Justice Souter specifically avoided stating a formal rule—either a presumption for or against preemption.[172] Instead, the key to his decision was his belief that Congress, in enacting its legislation, had made very intentional and careful decisions about the scope and type of sanctions that would be wise.[173] Functionally, the fact that the Massachusetts act banned transactions not banned by Congress "undermine[d] the Congres-

90s) saw as a breakthrough case on foreign relations federalism, a sharp turn from *Zschernig* and the 'one voice' line of foreign commerce clause cases.").

165 Ironically though, it is plausible that Goldsmith's influential article recognizing the earlier shift did have legs, planting some of the seeds for the current shift. *See generally* Goldsmith, *supra* note .

166 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

167 *Id.* at 388.

168 *See id.* at 376 n.10.

169 *See id.* at 379.

170 *Id.*

171 *Id.* at 385.

172 *Id.* at 374 n.8 (2000) ("We leave for another day a consideration in this context of a presumption against preemption.").

173 *Id.* at 377–78 ("Congress's calibrated Burma policy is a deliberate effort to 'steer a middle path.'").

sional calibration of force."[174] Moreover, the congressional act required the President to develop a "comprehensive, multilateral strategy"[175] to achieve democracy and human rights in Burma, and it granted the President discretion to suspend the sanctions under certain circumstances.[176] Massachusetts's sanctions, which the President could not waive, limited the President's diplomatic tools.[177] As Justice Souter explained, "[i]t is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[178]

2. American Insurance Ass'n v. Garamendi

Garamendi, just three years later, took the functionalist case for foreign affairs preemption even further. In that case, the Court was forced to consider a California law that required "any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945."[179] Unlike *Crosby*, however, there was no federal law that might preempt it. Instead, the issue was whether an Executive agreement between President Clinton and German Chancellor Gerhard Schroeder, creating a compensation fund for individuals whose insurance policies had been confiscated or denied as a result of Nazi policies, preempted the California law.[180] In the agreement, the United States agreed to encourage use of the fund's settlement procedures as the "exclusive forum" for Holocaust-related claims against German companies.[181] Justice Souter, again writing for the majority, found that the California law had been preempted because it "interfer[ed] with the National Government's conduct of foreign relations."[182] "California [sought] to use an iron fist where the President has consistently chosen kid gloves,"[183] Justice Souter explained. Again, functionalist justifications seemed to carry the day:

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174 *Id.* at 380.

175 *Id.*

176 *See id.* at 376 n.10.

177 *See id.* at 367, 381–82.

178 *Id.* at 381.

179 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401 (2003).

180 *See id.* at 405–10.

181 *Id.* at 406.

182 *Id.* at 401.

183 *Id.* at 427.

> There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.[184]

3. Sosa v. Alvarez-Machain

In contrast with *Garamendi*, Sosa's functionalism comes in a different context and takes a different form. In *Sosa*, the Supreme Court was faced with the scope and meaning of the Alien Tort Statute.[185] A key question for the Court was whether the statute was merely jurisdictional or whether it granted courts the authority to recognize causes of action for law of nations violations.[186] Rejecting either *rule*, Justice Souter set out a middle ground: the statute is jurisdictional, but was enacted against a background assumption that courts would hear claims regarding the few law of nations violations then recognized at common law.[187] This led Justice Souter to a functionalist *standard* for whether a particular cause of action can today be recognized under the statute: "any claim based on the present-day law of nations" must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[188] Functionalist concerns support this "restrained conception of the [federal courts'] discretion . . . in considering a new cause of action."[189] Understandings of the common law and the role of courts had changed since the ATS was enacted in 1789,[190] and Congress had neither granted the courts a mandate to recognize new causes of action under international law nor explicitly created private rights of action.[191] More broadly, "the

184 *Id.* at 413 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964)).

185 28 U.S.C. § 1350 (2012) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

186 Sosa v. Alvarez-Machain, 542 U.S. 692, 713–14 (2004).

187 *See id.* at 714–15 (discussing the "narrow set of violations . . . that was probably on minds of the men who drafted with ATS").

188 *Id.* at 725. Those eighteenth-century paradigms were "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724.

189 *Id.* at 725.

190 *Id.* at 729–30 ("[P]ost-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.").

191 *Id.* at 718.

potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[192] But for Justice Souter, the functional considerations do not end there.[193] For example, a requirement that plaintiffs exhaust their remedies in other countries' courts before using the ATS might be appropriate in certain cases.[194] There may also be some room for "case-specific deference to the political branches" where they express a view on a particular case.[195]

The functionalism of these decisions was not lost on those Justices dissenting or concurring in *Garamendi* and *Sosa*.[196] "As I see it," Justice Ginsburg wrote in dissent in *Garamendi*, "courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds."[197] "The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument."[198] And in his concurrence in *Sosa*, Justice Scalia excoriated the majority for its "Never Say Never Jurisprudence,"[199] its "discretion-based framework,"[200] and its invitation to "ambitious lower courts"[201] to embark on an "illegitimate lawmaking endeavor,"[202] as well as for ignoring a range of formal rules designed to limit judicial lawmaking in the absence of congressional authorization.[203]

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192 *Id.* at 727. Notably, Justice Scalia saw the same factors as reasons for a formal approach, one that would require Congress to act before courts recognized any cause of action based on international law. *Id.* at 747 (Scalia, J., concurring).

193 *See id.* at 733 n.21 (majority opinion) ("This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law . . . .").

194 *Id.*

195 *Id.*

196 There was no dissent in *Crosby*. Justices Scalia and Thomas did add a concurrence taking issue with majority's use of legislative history (itself, arguably a form of functionalism) to inform its understanding of Congress's purpose. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388–91 (2000) (Scalia, J., concurring).

197 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 443 (2003) (Ginsburg, J., dissenting).

198 *Id.* at 442.

199 *Sosa*, 542 U.S. at 750 (Scalia, J., concurring).

200 *Id.* at 746.

201 *Id.* at 750.

202 *Id.*

203 *Id.* at 739–47. It is hard to overstate Justice Scalia's alarm that the majority has loosened the Constitution's restraints on the Court. He describes the path as "perilous." *Id.* at 749. "The Framers would . . . be appalled." *Id.* at 750. "[U]nelected federal judges," he writes, are "usurping . . . lawmaking power" from the people's representatives. *Id.*

But those three cases are not alone. The foreign affairs functionalism obvious in the three cases was pervasive during this period, reaching its height in the 2003 Term. Functionalist approaches seemed ascendant in every foreign affairs-related case before the Court. Aside from *Sosa*, *Altmann*, *Empagran*, *Hamdi*, and *Rasul v. Bush*[204] each show varying shades of functionalism.[205]

4. Republic of Austria v. Altmann

In *Altmann*, Justice Stevens, writing for the majority, held that the presumption against retroactivity did not apply to the Foreign Sovereign Immunities Act ("FSIA").[206] Even though there was no exception to immunity for "property taken in violation of international law"[207] prior to the FSIA's enactment in 1976, Maria Altmann could nonetheless use it to sue the Austrian Gallery for the alleged theft of her family's artwork in the 1940s.[208] As Justice Stevens explained, an antiretroactivity presumption protects those who may have relied on the prior legal rule[209]:

> But the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* "protection from the inconvenience of suit as a gesture of comity."[210]

Justice Breyer's concurrence (joined by Justice Souter) put an exclamation point on the majority's functionalist reasoning, ridiculing the idea that "the expropriations carried out by the Nazi or Communist regimes" were influenced "by knowledge of, or speculation about, the likely future shape of America's law of foreign sovereign immunity" as approaching "the realm of fantasy."[211]

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204 Rasul v. Bush, 542 U.S. 466 (2004).

205 One could even add in here a case like *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). In that case, the Court understood the terms "interested person" and "foreign tribunal" functionally, based on a careful assessment of how complaints to the European Commission work and how Congress would have hoped they would be categorized. *Id.* at 256–59.

206 Republic of Austria v. Altmann, 541 U.S. 677, 699–700 (2004); *see* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602–1611 (2012).

207 28 U.S.C. § 1605(a)(3).

208 *Altmann*, 541 U.S. at 700.

209 *Id.* at 678.

210 *Id.* at 696 (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003)).

211 *Id.* at 711 (Breyer, J., concurring).

5. F. Hoffmann-La Roche Ltd v. Empagran S.A.

Faced with the scope of the Foreign Trade Antitrust Improvements Act ("FTAIA"),[212] Justice Breyer framed the question before the Court: "Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*"[213] "We can find no good answer to the question,"[214] he answered. In some ways, the result looks quite similar to that achieved by the application of the much more formal presumption against extraterritoriality later applied by the Roberts Court in *Morrison* and *Kiobel*.[215] But the logic and rhetoric is highly functionalist. Seemingly moved by the many amicus briefs submitted by offended foreign states,[216] the decision invokes "principles of prescriptive comity."[217] As the Court explained, "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."[218] The functionalism of this analysis is highlighted by Justice Scalia's concurrence, which argues for the result on the sole basis of the presumption against extraterritoriality, a more formal path to the same place.[219]

6. Hamdi v. Rumsfeld

In *Hamdi*, Justice O'Connor, writing for a plurality of the Court, found Congress's Authorization for Use of Military Force ("AUMF")[220] sufficient authority for the President to hold an American citizen captured in Afghanistan as an enemy combatant.[221] Although the AUMF did not specifically mention detention, and another

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212 Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2012).

213 F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 166 (2004).

214 *Id.*

215 *See infra* Parts II.B.3–4.

216 *Empagran*, 542 U.S. at 167–68 (citing briefs of the governments of Canada, Germany, and Japan).

217 *Id.* at 169.

218 *Id.*; *cf.* William S. Dodge, *Loose Canons: International Law and Statutory Interpretation in the Twenty-First Century*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 147, at 547, 548–49 (describing a Breyer-Ginsburg approach to resolving cross-boundary regulatory conflicts that focuses on the functionalist-sounding "legitimate sovereign interests").

219 *Empagran*, 542 U.S. at 176 (Scalia, J., concurring).

220 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

221 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

prior statute, the Non-Detention Act,[222] required Congressional authorization for the detention of American citizens, Congress *did* authorize the use of "all necessary and appropriate force."[223] As "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incidents of war,"[224] functionally Congress must have intended to activate those powers in enacting the AUMF. Notably, Justice O'Connor avoided multiple formal rules that could have decided the case in different ways. She avoided the Bush Administration's formal argument that the Constitution's designation of the President as Commander-in-Chief gave the President this power exclusively and on his own.[225] She also rejected both Justices Scalia and Stevens's position that only treason could be used to try or detain American citizens without suspension of the writ of habeas corpus[226] and Justices Souter and Ginsburg's position that only a clear statement by Congress could authorize detention under or supersede the Non-Detention Act.[227]

That authorization to detain, however, was "not a blank check for the President when it comes to the rights of the Nation's citizens."[228] Detainees are due some process to challenge their designation and detention.[229] How much process, O'Connor explained, will require balancing functional concerns: the detainee's "interest in being free from physical detention by one's own government"[230] and "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."[231] The result is that

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222 Non-Detention Act, 18 U.S.C. § 4001(a) (2012).

223 AUMF § 2(a), 115 Stat. at 224.

224 *Hamdi*, 542 U.S. at 518 (internal quotation marks and alterations omitted).

225 *See id.* at 516–17.

226 *Id.* at 523–24.

227 *Id.* at 544 (Souter, J., dissenting). Justice Souter does acknowledge the executive branch's more functionalist arguments for presidential authority, but finds that the President's claimed authority to detain Hamdi goes beyond even what Justice Jackson's *Youngstown* concurrence might allow and that while in a "moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people," no such emergency is present in this case. *Id.* at 552. Justice Souter's response to this functionalist logic demonstrates how much sway it held over the Court during this period.

228 *Id.* at 536 (majority opinion).

229 *Id.* at 536–37.

230 *Id.* at 529.

231 *Id.* at 531.

> while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.[232]

7. Rasul v. Bush

The main holding in *Rasul v. Bush* did not necessarily turn on functionalist considerations. Justice Stevens's majority opinion that the habeas statute applied to detainees at Guantanamo Bay turned more on a careful reading of statutory language and zigzagging caselaw.[233] Where functionalism does come up is in his analysis of whether the presumption against extraterritoriality should bar application of the statute to Guantanamo Bay, Cuba, specifically. There, Justice Stevens found the presumption inapplicable, as "the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it so chooses,"[234] "formal notions of territorial sovereignty"[235] notwithstanding. Presaging the Court's opinion in *Boumediene*, Justice Kennedy's concurrence much more explicitly embraces functionalism, adopting a test for habeas jurisdiction based on how much control the United States has over Guantanamo Bay and how much process the detainees have already been given, together with considerations of military necessity.[236]

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232 *Id.* at 535.

233 Rasul v. Bush, 542 U.S. 466, 475–79 (2004). *Compare* Braden v. 30th Jud. Cir. Ct., 410 U.S. 484, 494–95 (1973) ("So long as the custodian can be reached by service of process, the court can issue a writ within its jurisdiction . . . even if the prisoner himself is confined outside the court's territorial jurisdiction." (internal quotation marks omitted)), *with* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950) ("We are cited to no instance where a court . . . has issued [a writ of habeas corpus] on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."), *and* Ahrens v. Clark, 335 U.S. 188, 192 (1948) ("[T]he jurisdiction of the District Court to issue the writ [of habeas corpus] is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court . . . ." (footnote omitted)).

234 *Rasul*, 542 U.S. at 467–68.

235 *Id.* at 482.

236 *Id.* at 485–88 (Kennedy, J., concurring).

8. Functionalism's Philosophy

Individually, the functionalism of these decisions has been interpreted in different ways. *Garamendi* has often been interpreted as an endorsement of strong Executive authority, *Crosby* as a victory for federal exclusivity and a defeat for state experimentation, and *Sosa* as a guarded victory for human rights plaintiffs.[237] Aside from their functionalism, is there any coherent philosophy animating all of these Souter Court cases?

One thing that should be immediately clear is that the functionalism of the Souter Court cases does not necessarily favor the Executive—a typical description of foreign affairs functionalism.[238] Although a case like *Garamendi* clearly and dramatically does, *Rasul* certainly does not. Other cases are more complicated. In both *Sosa*[239] and *Altmann*,[240] the Court specifically chose not to adopt the more formal rule suggested by the executive branch.[241] Nonetheless, in both cases, the Court seemed quite sensitive to the executive branch's concerns and quite ready to give the Executive a powerful say over how individual cases will be handled.[242] Thus, in *Sosa*, Justice Souter opened the door to "case-specific deference to the political branches,"[243] an idea that seems to have echoes of *Garamendi*. And in *Altmann*, Justice Stevens suggested that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy."[244]

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237 *See generally* Ku & Yoo, *Beyond Formalism*, *supra* note 142.

238 *See supra* note 100 and accompanying text.

239 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 723 (2004) (rejecting "Sosa's argument that legislation conferring a right of action is needed").

240 Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) (rejecting "the United States' recommendation to bar application of the FSIA to claims based on pre-enactment conduct"); *id.* ("While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference.").

241 *See* Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 316–18 (2006).

242 It should also be noted that in *Sosa*, the Executive "wins" the case. The majority found against Alvarez-Machain on his claim, one that was, even if indirectly, a challenge to the Executive's actions. There is also a possibility that the rule announced in that case, that a one-day detention was not a cognizable customary international law claim, was made with an eye towards the situation described in *Rasul*. *See* Cohen, *supra* note 241, at 288 n.84.

243 *Sosa*, 542 U.S. at 733 n.21.

244 *Altmann*, 541 U.S. at 702.

Nor is it clear that functionalism favors plaintiffs. It did in *Altmann*, allowing Maria Altmann to sue regarding conduct arising *before* the passage of the FSIA, and it might have in *Sosa*,[245] but perhaps not as much as a formal rule in favor of incorporating customary international law more broadly. Functionalism certainly did not favor plaintiffs in *Empagran*.[246]

Instead, the philosophy (or impulse) behind the Souter Court's functionalism seems more complex. For the Souter Court, the three branches are not in opposition—they are working together. The Court's functionalist decisions seem to envision the three federal branches in partnership, cooperating to manage the nation's foreign affairs. Again, the three key Justice Souter-authored decisions tell much of the story. One consistent part of the trend is that states fare badly. This seems to be the lesson of *Crosby* and *Garamendi*. Only the federal government—whether the executive branch, Congress, or the courts—has the necessary expertise and judgment to manage the international implications of modern governance. Adding *Sosa* to the equation adds nuance. In *Crosby* and *Garamendi*, the Court's job is to give Congress and the executive branch, its partners, room to work. The Court's language in each decision emphasizes the federal government's carefully chosen and highly calibrated policies[247] and the importance of allowing those policies to follow their course. In *Sosa*, though, the policy of the federal government seems less clear. In that case at least, the executive branch sought to narrow the ATS.[248] Congress, though, may have originally intended the ATS to have teeth in at least some cases and had seemingly (and approvingly) acquiesced to the litigation experiment over the prior twenty years.[249] Rather than cut off the experiment as the Executive had suggested, the Court chose to let it run its course, although with ample space for the Executive to express its views in specific cases. The assumption seems to be that Congress has the power to change the game if it so wishes[250] and

245 Though, of course, *Sosa*'s approach failed to help the specific plaintiff in that case, whose claim failed to meet *Sosa*'s standard of specificity, universality, or obligation. *See* Cohen, *supra* note , at 286–88.

246 *See* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 159 (2004) (holding that the domestic-injury exception to the FTAIA "does not apply where the plaintiff's claim" is based exclusively on "independent foreign harm").

247 *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 425 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377–79 (2000).

248 *See Sosa*, 542 U.S. at 712; *see also* Brief for the United States as Respondent Supporting Petitioner at 11–20, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339).

249 *See Sosa*, 542 U.S. at 730–31.

250 This seems to be the point in *Crosby* of emphasizing congressional silence on the issue.

the President should be able to protect his foreign policy through statements of interest. In the absence of either, the Court will try to protect and fulfill current policy, managing both it and the relations between the branches. The Court's decisions are, in its estimation, designed to help the branches work together.

Globalization, for the Souter Court, is an exciting opportunity, but also complicated and a little bit dangerous. Managing the United States's relationship with globalization requires subtlety, diplomacy, and experimentation. The foreign affairs functionalism of the Souter Court seems designed to enable those goals, creating space for the three branches to manage and tweak these processes over time. The functionalism of each of the decisions operates to keep space open for policies to play out, rather than cut them off. Thus the President's negotiating room is protected in *Crosby* and *Garamendi*;[251] the "door is still ajar"[252] for ATS claims in *Sosa*; the Commander-in-Chief has some leeway in the detention of enemy combatants in *Hamdi*;[253] plaintiffs can generally bring old claims against foreign state entities in *Altmann*;[254] and the extraterritorial application of laws will be measured against prescriptive comity in *Empagran*.[255] At the same time, the Court is careful to leave room for all three branches, particularly Congress and the President, to change policies when necessary: *Crosby* is careful to rely on perceived congressional intent, leaving it open to Congress to authorize state legislation like Massachusetts's;[256] *Garamendi* emphasizes that Congress has not spoken on the question (but could);[257] *Sosa*, *Altmann*, and *Hamdi* all leave room for the Executive to tweak policies at the edges;[258] and *Rasul*, *Sosa*, *Altmann*, and *Empagran* all rely on statutes and congressional intent,[259] seemingly inviting Congress to chime in with legislation if it disagrees.

In the absence of congressional recognition that federal and state law conflict, the Court may still assume that Congress is in favor of preemption. *See Crosby*, 530 U.S. at 387–88.

251 *See supra* notes 172–84 and accompanying text.

252 *Sosa*, 542 U.S. at 729.

253 *See supra* Part II.A.4.

254 *See supra* Part II.A.5.

255 *See supra* notes 206–14 and accompanying text.

256 *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–74 (2000) (holding that the state law is unconstitutional on the basis that it undermines congressional objectives).

257 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 429 (2003).

258 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004); Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004); Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004).

259 *See Sosa*, 542 U.S. at 727–28; Rasul v. Bush, 542 U.S. 466, 472–75 (2004); F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 169–70 (2004); *Altmann*, 541 U.S. at 694–99.

There is thus an optimism to these decisions—a belief that experimentation leads to positive outcomes and that the three branches can and do work together. It is a philosophy of partnership, management, and facilitation.

B. Roberts Court Formalism

This optimism, though, may have been short lived. Starting with *Hamdan* in 2006, and carrying through *Medellín*, *Morrison*, *Zivotofsky*, *Mohamad*, *Kiobel*, *Daimler AG v. Bauman*,[260] and *Bond*, pessimism and formalism started to creep into the Court's views.[261] These experiments with globalization might not always produce positive results; the three branches may not be willing or able to work together.

The first clouds of this pessimism can be spotted in *Hamdi*.[262] Justice O'Connor's functionalist opinion only garnered a plurality, with four politically disparate Justices in Scalia, Stevens, Souter, and Ginsburg expressing concern over the power the Executive had claimed.

1. Hamdan v. Rumsfeld

The combination of pessimism and formalism first won a majority of the Court in *Hamdan*. In that case, the Court was faced with the validity of the military commissions established by the President to try detainees at Guantanamo Bay.[263] Had the Court applied some of the functionalist tests it had previously used in such cases, it might have upheld the commissions. As Justice Thomas's dissent demonstrates, functionalist readings of the Commander-in-Chief power in decisions like *The Prize Cases*[264] suggest that the President has "broad constitutional authority to protect the Nation's security in the manner he deems fit"[265] and that he is afforded great deference on questions regarding the scope and duration of the conflict.[266] *Hamdi* held that "trial of unlawful combatants" was an "'important incident[ ] of war,'"[267] triggered by Congress's authorization of the use of "neces-

260 Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

261 Notably, although Justice Souter remained on the Court until 2009, Justice Souter-authored majorities, so noticeable before, seem to disappear at 2004.

262 *See* discussion *supra* notes 221–32 and accompanying text.

263 Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

264 The Prize Cases, 67 U.S. (2 Black) 635 (1862).

265 *Hamdan*, 548 U.S. at 679 (Thomas, J., dissenting).

266 *Id.* at 679, 684.

267 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)).

sary and appropriate force."[268] Under Justice Thomas's reading of Justice Jackson's *Youngstown* concurrence, the President was acting either in the face of congressional silence or with its approval, and thus due great deference.[269] The President's reading of the Geneva Conventions was due traditional deference,[270] as were the Executive's arguments for diverging from the traditional procedures of courts-martial.[271] To top it all off, Justice Thomas threw in the oft-stated functional argument for presidential primacy in foreign affairs: "the decisiveness, activity, secrecy, and dispatch that flow from the Executive's unity."[272]

Justice Stevens, writing for the majority, did not go down this route. Instead of focusing on why functionally it would be a good or bad idea to allow the President to establish military commissions, Justice Stevens focused on what Congress had already formally done. Regardless of whether the President might have the constitutional authority to establish commissions on his own (an issue specifically not taken up),[273] Congress had spoken with regard to them, authorizing them through Article 21 of the Uniform Code of Military Justice ("UCMJ").[274] This put the situation in Justice Jackson's third category.[275] But giving a formalist twist to Justice Jackson's concurrence, Justice Stevens cited *Youngstown* for the proposition that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[276] Gone is Jackson's famous ambiguity or any of the room for constitutional "math."[277]

It is against Congress's limited authorization, then, that the President's commissions must be assessed. For a plurality of the Court, this

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268 *Id.*

269 *Hamdan*, 548 U.S. at 679 (Thomas, J., dissenting) (citing *Hamdi*, 542 U.S. at 581 (Thomas, J., dissenting)).

270 *Id.* at 719.

271 *Id.* at 713.

272 *Id.* at 679 (internal quotation marks omitted).

273 *Id.* at 592 (majority opinion).

274 *See* 10 U.S.C. § 821 (2012).

275 *See supra* notes 85–98 and accompanying text.

276 *Hamdan*, 548 U.S. at 593 n.23 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

277 *See Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring) (explaining that in the third category, the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only be disabling the Congress from acting upon the subject.").

had implications both for the specific charges brought against Hamdan—which the plurality found to be beyond those authorized by the common law of war[278]—and the procedures laid down by the President's order—which the plurality found violated "the judicial guarantees which are recognized as indispensable by civilized peoples."[279] For the majority, the latter—procedure—was the real problem. First, explained Justice Stevens, Article 36(b) of the UCMJ requires that the rules for all military trials be "uniform insofar as practicable."[280] The majority found that the President had not made a sufficient showing that applying the rules of courts-martial in these military commissions would be impracticable, nor in turn, that the military commission's changes in hearsay rules or the defendant's ability to be present were justified.[281] Second, the UCMJ authorized military commissions only to the extent they complied with the law of war.[282] Brushing aside the President's interpretation of the Geneva Conventions, the majority found that Common Article 3 ("CA3") of the Geneva Conventions did apply to the conflict with Al Qaeda.[283] Among other things, CA3 requires that all trials be before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[284] Courts-martial are the regularly constituted courts in the area; accordingly, wrote Justice Stevens, the military commissions ordered by the President violated the Geneva Conventions and exceeded Congress's authorization for military commissions.[285]

The majority is also quite formalist in its reading of the Detainee Treatment Act[286]—Congress's response to the Court's opinions in *Rasul* and *Hamdi*.[287] Section 1005(e)(1) of the Act orders that "no court, justice, or judge shall have jurisdiction to hear or consider—(1) an application for a writ of habeas corpus filed by or on behalf of

278 *Hamdan*, 548 U.S. at 563.

279 *Id.* at 630 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention]).

280 *Id.* at 622 (emphasis omitted) (quoting 10 U.S.C. § 836 (2012)).

281 *Id.* at 623–24. Nor was the President due any special deference, as he is with regard to Art. 36(a), which allowed him to diverge from the rules of the federal district courts "so far as he considers practicable." *Id.* at 622 (emphasis omitted); *see* 10 U.S.C. § 836.

282 *Id.* at 613.

283 *Id.* at 631–32.

284 Geneva Convention, *supra* note 279.

285 *Hamdan*, 548 U.S. at 594, 625.

286 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680.

287 *See, e.g.*, Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL'Y 299, 300 (2007) (contextualizing passage of the Detainee Treatment Act).

an alien detained by the Department of Defense at Guantanamo Bay, Cuba."[288] A functionalist reading might have found that Congress meant to foreclose habeas corpus for all Guantanamo detainees—a response to the Court's holding in *Rasul* that the habeas statute applied to Guantanamo Bay.[289] The majority instead focused on the fact that another section of the Act mentioned application to "pending" cases.[290] The absence of the same language in Section 1005(e)(1) suggested that it was not meant to apply to pending cases like the one before them.[291]

Why the sudden shift to formalism? One part of the answer seems obvious. The majority's faith that the President is still part of the federal team is dissipating. For the Justice Stevens-led plurality, the President's procedures violated "the judicial guarantees which are recognized as indispensable by civilized peoples."[292] Justice Kennedy added his worries "that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review," putting "personal liberty in peril of arbitrary action by officials."[293] Even at its most functional, the Court was wary to give the Executive unfettered control of foreign affairs law, rejecting on multiple occasions the executive branch's view of the law.[294] But even where it did defer to the Executive, it did so with a faith that the Executive would not abuse the discretion it had been given. For the majority in *Hamdan*, this faith had clearly run out. If the President cannot be trusted with the broad discretion granted by the Court, formal limits might be the only answer.

But it is important to note also here the Court's view of Congress. The earlier functionalist decisions also seem to assume a Congress willing to play its constitutional role and check the President effectively. *Hamdan* seems to suggest that that faith too is dissipating. Seemingly worried that Congress is not taking habeas corpus seriously enough, *Hamdan* requires Congress to be crystal clear if it wants to remove the option entirely. Moreover, the concurrences' strong invitations, even exhortations, to Congress to enter the fray and legislate

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288 Detainee Treatment Act § 1005(e)(1), 119 Stat. at 2742.

289 A different formalist reading could also have foreclosed habeas corpus for all Guantanamo detainees, as Justice Scalia illustrates in his dissent. For Scalia, the "no court, justice, or judge" language is "unambiguous[ ]." *See Hamdan*, 548 U.S. at 655 (Scalia, J., dissenting).

290 *Id.* at 578–80 (majority opinion).

291 *Id.*

292 *Id.* at 633 (plurality opinion) (internal quotation marks omitted).

293 *Id.* at 638 (Kennedy, J., concurring).

294 *See supra* notes 239–41 and accompanying text.

on military commissions[295] suggest that, in their view, Congress was falling down on the job, all too willing to let the President take the lead and the heat for hard national security decisions. The Souter Court's model of interbranch partnership seems to be breaking down, or worse, corrupted.

Notably this formalism is *not* about judicial humility or taking the courts out of foreign affairs decisions, as Goldsmith suggested it could be.[296] This version of formalism is about the Court reasserting control and taming the political branches. It is the formalism of distrust.

2. Medellín v. Texas

Medellín, a decision with a very different majority, demonstrates similar distrust. That case, part of a long-running saga over the rights of foreign-national state criminal defendants to consult their consulates under the Vienna Convention on Consular Relations ("VCCR"), raised two questions for the Court. First, how much force should be given to a judgment of the International Court of Justice ("ICJ") requiring the United States to give specific noncitizen death row inmates a hearing to see if they had been prejudiced by the failure to inform them of their VCCR rights? Second, how much force should be given to the President's memorandum to Texas, ordering it to comply with the ICJ's judgment?[297]

The first question raised the complicated issue of whether any of the United States's international commitments were or were not self-executing. Under the Supremacy Clause of the U.S. Constitution,[298] if a treaty provision is self-executing it is immediately enforceable as U.S. law, preempting any state law to the contrary.[299] For Chief Justice Roberts, writing for the majority, the question was not whether the VCCR is self-executing, nor whether the Optional Protocol granting the ICJ jurisdiction over disputes is self-executing. Instead, the relevant analysis was whether the United States's commitment to abide by ICJ judgments—enshrined in the U.N. Charter—is self-executing.[300]

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295 *Id.* at 636 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); *id.* at 637 (Kennedy, J., concurring) ("If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.").

296 *See* Goldsmith, *supra* note 26, at 1437.

297 Medellín v. Texas, 552 U.S. 491, 498 (2008).

298 U.S. CONST. art. VI, cl. 2.

299 *See Medellín*, 552 U.S. at 504–505.

300 *See id.* at 507–11.

Tests for self-execution developed in the lower courts had become notably functionalist, involving careful analysis of the intent of the treaty-drafters and the function of the treaty.[301] Chief Justice Roberts adopted a much more formal approach. It is the language of the treaty provision itself that matters.[302] Where a treaty uses language implying immediate legal effect, words like "shall" or "must," it is self-executing.[303] A requirement, however, that states "undertake[ ] to comply"—the language of the U.N. Charter—seems to imply that states must take some action before giving the provision domestic legal effect.[304] Chief Justice Roberts accordingly found the requirement to follow the ICJ judgment in question non-self-executing and therefore, on its own, not preemptive of Texas law.[305]

That still left the question of the President's memorandum. To what extent should it preempt Texas law? Under *Garamendi*, the Souter Court precedent, the Court seemed quite ready to preempt state law in favor of executive branch foreign policy concerns.[306] Chief Justice Roberts, however, refused to grant such authority to the President's directive in this case. Again adopting a more formalist vision of Justice Jackson's *Youngstown* concurrence, the majority explained that when the Senate gives its advice and consent to a non-self-executing treaty, it assumes that further congressional action will be needed to give that treaty full domestic effect.[307] When the President acts on his own to order the treaty implemented, he is acting

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301 *See* Goldsmith, *supra* , at 1436; *see also* United States v. Postal, 589 F.2d 862, 877–84 (5th Cir. 1979) (applying a complicated multifactor analysis to determine whether a treaty provision is self-executing). As the dissenters in *Medellín* explain, this was not without good reason. Different states have different constitutional rules about the domestic effect of international treaties. As a result, finding a single answer to the self-execution question in the language of a treaty, particularly a multilateral treaty, is unlikely. *See Medellín*, 552 U.S. at 549 (Breyer, J., dissenting) (describing the inquiry as "hunting the snark").

302 *Medellín*, 552 U.S. at 506–07 (majority opinion) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

303 *Id.* at 508.

304 *Id.* at 508–09. Chief Justice Roberts may simply be wrong about the meaning of the term "undertakes to comply" as used in treaties. *See, e.g.*, Meera Rajnikant Shah, *Unnecessary Complications for Basic Obligations:* Medellín v. Texas *and Common Article 3*, 41 COLUM. HUM. RTS. L. REV. 883, 896 (2010) ("However, in international law, the term 'undertakes' has a well-established meaning as creating a definite obligation."); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 661 (2008) ("In international law usage, an 'undertaking' is well recognized to be a hard, immediate obligation."). However, that does not in any way undermine the formalism of his analysis.

305 *Medellín*, 552 U.S. at 505–06.

306 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 429 (2003).

307 *Medellín*, 552 U.S. at 526.

within Jackson's third category, against the implied will of Congress, and thus beyond his authority.[308] Gone is any of Jackson's ambiguity about the meaning of congressional silence or the boundaries between his "practical situations."[309] The memorandum cannot preempt state law.

And what of *Garamendi*? Chief Justice Roberts distinguished it. He narrowed the precedent to the sole context of international claims settlement.[310]

Medellín, to be sure, is not without functionalist language. In finding the U.N. Charter non-self-executing, Chief Justice Roberts looked also to the United States's role in the U.N. Security Council and its ability to veto any resolution ordering it to comply with ICJ judgments. The United States *must*, in Chief Justice Roberts's estimation, have intended to leave itself maximum flexibility.[311] Moreover, there is considerable discussion of what the Senate must be presumed to assume about non-self-executing treaty provisions and their operation.[312] Both lines of thought emphasize judgments about how American foreign policy is meant to operate as opposed to specific interpretative or constitutional rules. Nonetheless, the tone and rhetoric of the majority opinion is very much that of formalism, of clear roles, of rules, and of constraint.

3. Morrison v. National Australia Bank Ltd.

This newly invigorated formalism was not confined to *Hamdan* and *Medellín*. In *Morrison*, a suit by foreign securities purchasers against a foreign bank regarding securities sold on a foreign exchange, Justice Scalia, writing for the majority, rejected the Second Circuit's longstanding "conduct" and "effects" tests for jurisdiction over securities fraud cases brought under Section 10(b) of the Securities Exchange Act of 1934.[313] Designed to capture Congress's likely intent in enacting 10(b), the tests found jurisdiction whenever "the wrongful conduct had a substantial effect in the United States or upon United States citizens," or when "the wrongful conduct occurred in the

308 *Id.* at 528.

309 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

310 *Medellín*, 552 U.S. at 532.

311 *See id.*

312 *See id.* at 525–27.

313 Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. § 78j (2012)); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010).

United States."[314] Justice Scalia rejected this "judicial-speculation-made-law."[315] Instead of "divining what Congress would have wanted if it had thought of the situation before the court,"[316] wrote Justice Scalia, the courts should "apply the presumption [against extraterritoriality] in all cases, preserving a stable background against which Congress can legislate with predictable effects."[317] Applying the presumption and returning to the text of the statute, the proper test would turn on whether the securities "transaction" took place in the United States.[318]

Emphasizing the stakes of the case, Justice Scalia painted the government and petitioners arguing for another test as functionalists, "set[ting] forth a number of purposes such a test would serve."[319] That alternative test, however, has "no textual support,"[320] Justice Scalia concluded. And, "[i]t is [the Court's] function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve."[321]

4. Kiobel v. Royal Dutch Petroleum

Chief Justice Roberts's majority opinion in *Kiobel* cites *Morrison* and follows a similar logic. *Kiobel* initially came to the Court on the question of corporate liability under the ATS.[322] Determining whether corporations could be liable under the statute would have required careful analysis of international law, federal common law, and their interaction in the wake of Justice Souter's functionalist *Sosa* decision.[323] In fact, it was *Sosa*'s open-ended, functionalist analysis of the ATS that opened up the corporate liability question in the first place: the question was one specifically left open in one of *Sosa*'s foot-

314 *Id.* at 257 (quoting SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003)).

315 *Id.* at 261.

316 *Id.*

317 *Id.*; *cf.* Dodge, *supra* note 218, at 548 (contrasting a more functionalist Ginsburg-Breyer "legitimate sovereign interest" approach to transnational regulatory conflicts visible in *Empagran* with a more formalist Thomas-Scalia "territorial" approach visible in *Morrison*).

318 *Morrison*, 561 U.S. at 266–68.

319 *Id.* at 270 ("The Solicitor General sets forth a number of purposes such a test would serve: achieving a high standard of business ethics in the securities industry, ensuring honest securities markets and thereby promoting investor confidence, and preventing the United States from becoming a 'Barbary Coast' for malefactors perpetrating frauds in foreign markets."). Justice Scalia also expresses serious skepticism about such functionalist endeavors. *Id.*

320 *Id.*

321 *Id.*

322 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

323 *See, e.g.*, Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1931–32 (2010).

notes.[324] At oral arguments, though, it became clear that at least some Justices wanted to explore a different question, whether the ATS applied to extraterritorial conduct at all.[325] The Court ordered briefing and re-argument on that issue,[326] and in its eventual decision in the case "conclude[d] that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."[327] The Nigerian plaintiffs' claims in *Kiobel*, arising as they did out of the conduct of a Dutch corporation in Nigeria, were thus barred.[328]

Again, as with other formalist opinions, *Kiobel* is not without its functionalist flourishes. Chief Justice Roberts cited "the danger of unwarranted judicial interference in the conduct of foreign policy"[329] as a reason to apply the presumption. He also noted that the traditional rule applies to statutes in which Congress is regulating conduct rather than jurisdiction; the Court applied the rule to this jurisdictional statute, the ATS, because it shares functional similarities that suggest that similar principles should apply.[330] Most noted, he seems to leave open a new functional-sounding test for the causes of action that can be brought: "claims [which] touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[331] Whatever this means, "mere corporate presence" does not "suffice[ ]."[332] Again though, the rhetoric of the opinion is thoroughly formalist, arguing for a rule-based approach that keeps the courts from overstepping their constitutional role.

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324 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.").

325 *See* Transcript of Oral Argument (Feb. 28, 2012) at 9–14, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No.10-1491), 2012 WL 628670. *See generally* Transcript of Oral Argument (Oct. 1, 2012), Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 4486095.

326 Order in Pending Case at 1, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), *available at* http://www.supremecourt.gov/orders/courtorders/030512zr.pdf.

327 *Kiobel*, 133 S. Ct. at 1669.

328 *Id.*

329 *Id.* at 1664.

330 *Id.*; *see* Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in* Kiobel *and Beyond*, 44 GEO. J. INT'L L. 1329, 1345 (2013) (arguing that in *Kiobel*, "the Supreme Court contradicted Congress's intent by using the presumption against extraterritoriality to limit the reach of the ATS"); Austen L. Parrish, Kiobel*, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208, 211 (2013) (framing *Kiobel* as one case in a line of cases involving "unilateral, extraterritorial regulation").

331 *Kiobel*, 133 S. Ct. at 1669.

332 *Id.*

Notably, the concurring Justices adopted a considerably more functionalist test, one that would find jurisdiction where

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[333]

But even that test is considerably more rules-oriented than the free-wheeling, open-ended standards of *Sosa*.[334]

5. Mohamad v. Palestinian Authority *and* Daimler AG v. Bauman

The limited nature of the *Kiobel* concurring Justices' functionalism is apparent from two other Roberts Court majority opinions written by those Justices: *Mohamad*, written by Justice Sotomayor, and last Term's *Bauman*, written by Justice Ginsburg.

Mohamad raised a question very similar to one originally before the Court in *Kiobel*[335]: to what extent could plaintiffs sue organizations for torture and extrajudicial killing, in this case, under the statutory language of the Torture Victim Protection Act[336] rather than the broad vague jurisdictional grant of the Alien Tort Statute?[337] Rejecting the arguments made by the plaintiffs and accepted in some lower courts that the functional purpose of the Act required holding organizations liable, Justice Sotomayor focused on the formal language of the statute and its repeated use of the term "individual" when discussing liability.[338] No functionalist argument could overcome such clear language, explained Justice Sotomayor.[339]

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333 *Id.* at 1674 (Breyer, J., concurring).

334 *See supra* notes 185–205 and accompanying text. In fact, the concurring Justices' test, which might be thought of as a presumption against "extrajurisdictionality," echos Justice Scalia's dissenting approach in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 813–21 (1993) (Scalia, J., dissenting), a more formalist alternative to the functional comity test adopted by the Justice Souter-led majority.

335 The two were initially treated as parallel cases by the Court. *See* Marcia Coyle, *Torture Victims Cannot Sue Foreign Organizations Under Federal Act*, N.Y. L.J., Apr. 19, 2012, at 2 (stating that *Mohamad* was "argued in tandem" with *Kiobel* in February 2012).

336 Torture Victim Protection Act, 28 U.S.C. § 1350 (2012).

337 *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1706 (2012) ("[P]etitioners filed this action against respondents, the Palestinian Authority and the Palestinian Liberation Organization, asserting . . . claims of torture and extrajudicial killing under the TVPA.").

338 *Id.* at 1706–11.

339 *Id.* at 1710.

Bauman raised a different set of issues related to human rights litigation. In that case, the question was when and how plaintiffs could establish personal jurisdiction over a parent company through the local activities of one of its subsidiaries.[340] A group of Argentinian plaintiffs had sought to sue DaimlerChrysler Aktiengesellschaft (Daimler), a German company, for the company's alleged complicity in human rights abuses committed during Argentina's Dirty War.[341] The plaintiffs sued in California, asserting that Mercedes-Benz USA's (Daimler's Delaware-incorporated American subsidiary) extensive contacts with the forum (it sells cars in California) were sufficient to establish personal jurisdiction over Daimler for the alleged acts in Argentina.[342] Writing for the majority, Justice Ginsburg rejected the highly functionalist test applied by the Ninth Circuit to impute Mercedes-Benz USA's contacts to Daimler. Withholding judgment on the Circuit's more general agency theory of attribution, Justice Ginsburg rejected the Ninth Circuit's test of whether the subsidiary's services were "important" to the parent.[343] "Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer,"[344] Justice Ginsburg wrote. Moreover, even if Mercedes-Benz USA's contacts could be attributed to Daimler, neither Mercedes-Benz USA's nor Daimler's contacts with California were sufficient for the exercise of general jurisdiction (the only basis for extending jurisdiction over acts in Argentina as opposed to California). The test for general personal jurisdiction, Justice Ginsburg explained, is not "whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are "so continuous and systematic" as to render [it] essentially at home in the forum State.'"[345] A functionalist sounding test ("continuous and systematic" contacts), devised for functionalist purposes (due process, notice, and

340 Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014).

341 *Id.* at 750–51.

342 *Id.* at 751–52.

343 *See id.* at 759–60.

344 *Id.* at 759.

345 *Id.* at 761 (alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)). Importantly, Justice Ginsburg does then strike a functionalist note, explaining how concerns about comity and foreign relations militate against broad claims of personal jurisdiction that might reach actions and entities with little relation to the United States. *Id.* at 763 ("The Ninth Circuit . . . paid little heed to the risks to international comity its expansive view of general jurisdiction posed.").

confidence in structuring one's affairs),[346] turns out to be considerably more formal and rule-like in application.

6. Bond v. United States

The most recent evidence of the Justices' common, developing aversion for foreign affairs functionalism comes from *Bond*. The case revolved around Carol Anne Bond, who, finding that her husband had an affair, sought to poison his mistress by putting toxic chemicals on her car door handles and mailbox.[347] After her scheme was discovered, Bond was charged with and eventually convicted of a federal crime—violation of the Chemical Weapons Convention Implementation Act.[348] In the face of broad statutory language suggesting that her actions were in fact covered by the Act,[349] Bond challenged her conviction on Tenth Amendment grounds, arguing that the criminalization of a purely "domestic" affair was beyond Congress's power.[350] The Third Circuit Court of Appeals affirmed the conviction,[351] relying on the longstanding precedent of *Missouri v. Holland*[352] and its holding that Congress could pass laws "necessary and proper" to implement valid treaties of the United States, even if those laws would otherwise be beyond Congress's enumerated powers.[353]

Although *Bond* did not present a circuit split—*Holland* has been consistently applied over the near century since it was decided—the Court's interest in the case was unsurprising. Justice Holmes's *Holland* opinion upholding the Migratory Bird Treaty Act[354] strikes a highly functionalist tone.[355] The opinion describes the Constitution as a living, adapting organism, one now very different from the one first

346 *See id.* at 753, 761–62.

347 *See* Bond v. United States, 134 S. Ct. 2077, 2085 (2014).

348 Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended in scattered sections of the U.S. Code).

349 Section 229(a)(1) of the Act prohibits "any person knowingly—(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1) (2012). Section 229F(1)(A) defines "chemical weapon" as "[a] toxic chemical." *Id.* § 229F(1)(A). Section 229(F)(8)(A) defines "toxic chemical" as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A).

350 *Bond*, 134 S. Ct. at 2086.

351 *Id.*

352 Missouri v. Holland, 252 U.S. 416 (1920).

353 *See id.* at 432.

354 Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918).

355 Much as William Eskridge would suggest, *see supra* note 70, at 29, Justice Holmes's *Holland* opinion upholding the Migratory Bird Treaty Act presents a grab-bag of interpretive

drafted and ratified.[356] "We must consider what this country has become,"[357] Justice Holmes observed. Moreover, the case involved "a national interest of very nearly the first magnitude,"[358] and the Court saw "nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed."[359] And the result of that functionalism is a famously (or infamously, depending on one's perspective) broad grant of authority to the political branches. So long as there is a valid treaty and the act "does not contravene any prohibitory words"[360] in the Constitution (for example, Bill of Rights protections[361]), there may be no limits on what Congress can do to implement a treaty.[362]

Bond highlighted the breadth of that power. In an era of globalization, the domestic affairs of states—from human rights to crime control to economic and social policies—are increasingly the subject of international coordination and agreement. Federal power over treaty implementation might even reach a purely local crime like Bond's; the decision seemed to lie entirely in the hands of federal prosecutors. For a Roberts Court seemingly worried about political branch foreign-affairs overreach, *Holland* must have looked ripe for reconsideration.

Most observers have focused on the fact that, in the end, a majority of the Court chose to leave *Holland* intact.[363] Only the concurring

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methodologies, including textualist and historical arguments. But it is the opinion's functionalism that stands out.

356 *Holland*, 252 U.S. at 433 ("With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.").

357 *Id.* at 434.

358 *Id.* at 435.

359 *Id.*

360 *Id.* at 433.

361 *See, e.g.*, Boos v. Barry, 485 U.S. 312, 324 (1988); Reid v. Covert, 354 U.S. 1, 18 (1957).

362 *See Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.").

363 *See, e.g.*, Robert Barnes, *Chemical Arms Pact Doesn't Cover Case of Romantic Rivalry*, WASH. POST, June 3, 2014, at A4 ("But the unanimous court sidestepped a broader constitutional question about the power of Congress to pass laws implementing international treaties. This question had elevated Carol Anne Bond's case from a soap opera to the latest chapter in the nation's long-running political debate over the limits of federal power."); David Golove &

Justices, Justices Scalia, Thomas, and Alito, would have adopted strong formalist tests to either circumscribe Congress's power to implement[364] or to define a valid treaty.[365] Focusing entirely on the majority's decision to leave *Holland* in place, however, misses the real story.

Chief Justice Roberts's majority decision rejects the government's determination that Bond's actions were covered by the Chemical Weapons Convention Implementation Act, dismissing the broad (seemingly dispositive) language Congress used.[366] The Court was not simply going to defer to the other branches' unfettered judgment. Congressional legislation, even seemingly clear legislation, must be read in light of a "background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.'"[367] Only a clear statement from Congress that it intends to alter that balance can override such a presumption. Bond's crime, which would normally fall under state authority, should be assumed to remain outside the ambit of the Conventional Weapons Convention Implementation Act, notwithstanding the Act's broad language or the executive branch's views.

Like some of Chief Justice Roberts's other opinions, *Bond* is hard to categorize as purely formalist or functionalist. His discovery of ambiguity, not in the statute's language,[368] but in conventional,[369] colloquial[370] understandings of "chemical weapons," certainly seems

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Marty Lederman, *Stepping Back from the Precipice in* Bond, JUST SECURITY (June 3, 2014, 5:40 PM), http://justsecurity.org/11161/bond-golove-lederman/.

364 Bond v. United States, 134 S. Ct. 2077, 2098–99 (2014) (Scalia, J., concurring) (arguing that the Constitution's "necessary and proper" clause and treaty clause authorize Congress to enact laws to facilitate the treaty-making process, but "do not authorize Congress to enact laws for carrying into execution 'Treaties'").

365 *Id.* at 2108 (Thomas, J., concurring) (advocating limiting the United States' treaty-making power to agreements that "relate to intercourse with other nations (including their people and property), rather than to purely domestic affairs"); *id.* at 2111 (Alito, J., concurring) (arguing "that the treaty power is limited to agreements that address matters of legitimate international concern"). Of course, a formal test limiting treaties to "matters of international intercourse" like that suggested by Justices Thomas and Alito might itself be subject to highly functionalist (and subjective) views of what would count. *Id.* at 2109 (Thomas, J., concurring).

366 *See supra* note 349.

367 *Bond*, 134 S. Ct. at 2091 (majority opinion) (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)).

368 *Id.* at 2096 (Scalia, J., concurring).

369 *See id.* at 2090 (majority opinion) (explaining that "an educated user of English would not describe Bond's crime as involving a 'chemical weapon'").

370 *See id.* (looking to what an "an ordinary person would associate with instruments of chemical warfare").

functionalist in approach.[371] And it certainly is not as formalist as the textualist approach advocated by Justice Scalia.[372] But the tone of Chief Justice Roberts's opinion fits well with the others described in this Article.[373] He describes the "presumption of federalism" applied in *Bond* as a formal tool: a generally applicable[374] presumption that should be used to resolve *all* ambiguities in statutory language, a clear statement rule[375] Congress *must* follow if it wants to legislate with regard to traditionally local affairs. And while this result may be narrow with regard to treaties (far narrower than overruling *Holland* would have been), it may have far broader consequences across the broader expanse of foreign affairs law, suggesting that all foreign affairs legislation should be read against (and arguably narrowed by) this presumption.[376] Certainly, this presumption provides a new tool the Court can use to rein in political branch foreign-affairs overreach.

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371 In an example of the opinion's sometime-functionalism, Chief Justice Roberts writes of the particular circumstances that determine this case: "In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—'chemical weapon'—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism." *Id.* This functionalist rationale is certainly Justice Scalia's criticism. *See id.* at 2095–96 (Scalia, J., concurring).

372 *See id.* at 2094–102.

373 One might be tempted to describe Roberts's opinions in *Bond*, *Kiobel*, and *Medellín* as a sort of faux-formalism, a formalism in name only that smuggles functionalist considerations into formalist sounding tests like the presumption against extraterritoriality, a textualist approach to the self-executing treaty provisions, or a "presumption of federalism." Certainly, each of these opinions has been criticized along these lines. *See supra* notes 140–41, 329–31, 371 and accompanying text. Far from undermining the formalist trend of the current Court though, this functionalism-disguised-as-formalism would actually underline it, demonstrating how important formalist *rhetoric* has become in justifying the Court's opinions.

374 *Bond*, 134 S. Ct. at 2090 (majority opinion) ("These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute."); *see also id.* at 2089 (describing the presumption as a "well-established principle").

375 *Id.* at 2089 (explaining that "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991))); *id.* at 2090 ("We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.").

376 This could, for example, have a significant impact on preemption doctrine. It has sometimes been assumed that in contrast to domestic affairs, where statutes are presumed *not* to preempt state law, *see, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), in foreign affairs, statutes might be presumed to preempt state laws, *see* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). *Arizona v. United States*, 132 S. Ct. 2492, 2498–99 (2012), actually seems to re-endorse such a presumption in favor of preemption in the immigration context. *See infra* note 420 and accompanying text.

But what is most notable about *Bond* is the absence of any dissents. Chief Justice Roberts's opinion was joined by Justices Kennedy, Breyer, Ginsburg, Kagan, and Sotomayor. None of them wrote separately to protect the deference traditionally granted to the political branches' views of treaty implementation. None wrote separately to argue against a "clear statement" rule in light of functionalist concerns about the complexity of foreign affairs. All nine Justices, including the three writing concurrences, seemed convinced that the era of unreviewed political branch discretion over treaty implementation needed to end.

7. Zivotofsky ex rel. Zivotofsky v. Clinton

The case, though, that truly highlights the Court's newfound foreign affairs formalism is *Zivotofsky*. This case involves a challenge to the State Department's longstanding policy of recording "Jerusalem," rather than "Israel" in U.S. passports as the place of birth for those born in that city. Citing legislation requiring the State Department to record "Israel" when the parents so request,[377] Menachem Binyamin Zivotofsky's parents filed suit. The majority in the D.C. Circuit found the suit to be a nonjusticiable political question.[378] The policy in question involved the recognition of governments, a power textually committed to the President in the Article II power to "receive ambassadors."[379] Under Supreme Court precedent, the majority explained, "courts may not consider claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution."[380] Judge Edwards added a concurrence, agreeing that the State Department's policy was a valid use of the President's recognition power, but disagreeing that it was a political question.[381]

Given the lack of a circuit split and the fact that Zivotofsky lost on either opinion in the D.C. Circuit, many observers wondered why the Court would grant certiorari.[382] The eventual decision left no

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377 Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107–228, 116 Stat. 1350, 1366 (2002).

378 Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1228 (D.C. Cir. 2009), *vacated sub nom.* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

379 *See* U.S. CONST. art. II, § 3; *Zivotofsky*, 571 F.3d at 1231–33.

380 *Zivotofsky*, 571 F.3d at 1230.

381 *Id.* at 1233–45 (Edwards, J., concurring).

382 *See, e.g.*, Doug Mataconis, *Supreme Court Asked to Decide if "Born in Jerusalem" Means "Born in Israel,"* OUTSIDE THE BELTWAY (July 26, 2011), http://www.outsidethebeltway.com/supreme-court-asked-to-decide-if-born-in-jerusalem-means-born-in-israel/ ("Given the extent to which Federal Courts have typically demurred in ruling on issues involving foreign affairs and disputes between the Executive and Legislature Branches, it's somewhat surprising

doubt: a large majority of the Justices (only Justice Breyer dissented) wanted to discipline the lower courts in their use of the political question doctrine.[383]

In an earlier decision, *Baker v. Carr*,[384] the Supreme Court listed six factors to consider in determining whether a case should be dismissed as a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[385]

Over the decades that followed *Baker*, decisions finding political questions based on those factors became extraordinarily rare. Only with regard to foreign affairs was the doctrine regularly applied to justify judicial abstention.[386] Moreover, the use of the doctrine was very loose. Any case threatening to undermine a foreign policy judgment of the political branches or the government's ability to speak with "one voice" on foreign affairs might be dismissed on political question grounds. The effect of this highly functionalist inquiry was to insulate the decisions of the political branches, and particularly the President, from ordinary judicial scrutiny.[387]

Chief Justice Roberts, writing for himself and five other Justices,[388] announced the return of the courts to foreign affairs. Noting that "the Judiciary has a responsibility to decide cases properly before

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that the Supreme Court has apparently decided to take the case on directly on the merits of the argument.").

383 *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430–31 (2012).

384 Baker v. Carr, 369 U.S. 186 (1962).

385 *Id.* at 217.

386 *See* Goldsmith, *supra* note 26, at 1403 (citing THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 19–20 (1992)).

387 *See id.* at 1401–02 (stating the prevailing view after *Baker* that courts should not scrutinize the decisions of the political branches that touch directly on foreign affairs).

388 Justices Sotomayor and Alito added separate concurrences.

it, even those it 'would gladly avoid,'"[389] and describing the political question doctrine as a "narrow exception," the Court held that Zivotofsky's claim was justiciable.[390] The Court will dismiss those cases that force it to review a question textually committed to another branch, Justice Roberts explained.[391] But that is not the claim Zivotofsky raised. Instead, the question raised by Zivotofsky's claim was one of constitutional interpretation: which branch, Congress or the President, has the authority to determine the "place of birth" notation on U.S. passports?[392] The political question doctrine only kicks in once that decision is made. Once it is determined which branch has the authority to make that policy judgment, then policy decisions of that branch will be nonjusticiable.

Importantly, beyond disciplining the use of the first *Baker* factor, the Court also seemed to implicitly disapprove of others. Only the first two factors—"a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it"—are mentioned by the majority as reasons to abstain.[393] Notably, these are the most formal and rule-like of the factors. The others (the avoidance of judicial policymaking, the need to avoid embarrassment, the need for finality, or concerns about maintaining one voice in foreign affairs),[394] each requiring its own functional analysis and collectively responsible for the expansion of the political question doctrine over the decades following *Baker*,[395] seem to have slipped away.

8. Formalism's Function?

What should one make of the Roberts Court's formalist shift in foreign affairs law? One might be tempted to see the formalist rhetoric in these decisions as purely opportunistic. Opposing a Republican President's claims of unilateral power in detainee affairs, a liberal majority of the Court used formalist reasoning to reign him in; a conservative majority of the Court, believed to be favorable to corporations and hostile to plaintiffs, used formalist rhetoric to narrow the opportunities to sue foreign defendants. Undoubtedly, polit-

389 Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

390 *Id.* at 1427, 1430.

391 *Id.* at 1427.

392 *Id.* at 1427–28.

393 *Id.* at 1427 (quoting Nixon v. United States, 506 U.S. 224, 228 (1993)).

394 Baker v. Carr, 369 U.S. 186, 211, 217 (1962).

395 *See* Goldsmith, *supra* note , at 1402–03.

ics are part of the story of particular opinions. But by now, this trend seems deeper, broader, and more durable than any political explanation would suggest, with some opinions defying easy ideological characterizations.[396] At the very least, there has been a shift in the Court's mood.

The real evidence of this shift may come in the concurrences. The Justices who rejected Justice Scalia's and Chief Justice Roberts's formalist approaches to extraterritoriality in *Morrison*[397] and *Kiobel*[398] nonetheless found against the plaintiffs in both cases and suggested alternative ways to limit excessive litigation. Tellingly, they did not make the robust argument for discretion that one might find in *Sosa*.[399] As suggested above, this is formalism's and functionalism's rhetorical force—it can change the terms of the debate, forcing everyone to respond.[400]

It is *Zivotofsky* that brings the Roberts Court trend[401] into sharp focus. The political question doctrine has often been the poster child for both functionalism and foreign affairs exceptionalism. In *Zivotofsky*, the Court reached out to decide the case—not to resolve a circuit split, or even the claim at hand, but to bring discipline to the political question doctrine, to give form to a functionalist doctrine, and to bring ordinary judicial scrutiny to political branch foreign affairs decisions.

This rounds out the story that began with *Hamdan*. The formalism of these cases is the formalism of distrust. In *Hamdan*, a majority that included the more liberal Justices expressed distrust in how the executive branch was using the wide berth it has traditionally been given. In *Medellín*, a majority that included the more conservative Justices expressed a similar view. *Bond* unified all nine. In *Hamdan*,

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396 *See, e.g.*, Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1706–07 (2012) (in which Justice Sotomayor narrowed the ability of plaintiffs to sue for human rights abuses); Medellín v. Texas, 552 U.S. 491, 532 (2008) (in which Chief Justice Roberts rejected President Bush's claims of Executive authority); *see also Zivotofsky*, 132 S. Ct. at 1424 (in which Chief Justice Roberts was joined by a very broad majority of the Court). One part of the story might be a shift in the style of conservatism represented on the Court, moving from a strand that favors executive power to a more libertarian one.

397 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 274–86 (2010) (Stevens, J., concurring).

398 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1670–78 (2013) (Breyer, J., concurring).

399 *See supra* Part II.A.3 (discussing *Sosa*'s approach).

400 *See supra* Part I.B.

401 Another case that could be discussed here is *Samantar v. Yousuf*, 560 U.S. 305 (2010), in which the majority applied formalist reasoning to hold that the Foreign Sovereign Immunity Act does not cover individuals, even as functionalist arguments strongly suggested it should. *Id.* at 313–26.

the majority expressed its doubts about congressional silence. Majorities in *Medellín*, *Morrison*, and *Kiobel* seemed to agree.[402]

This distrust is amplified by the realization that the line between foreign and domestic affairs may no longer be sustainable. Each of the decisions expresses its own unease with this reality. In *Hamdan*, the broad discretion associated with the terms "foreign affairs" or "national security" seems poorly suited to the President's absolute control over detainees.[403] *Medellín* and *Bond* express the opposite worry—that in a globalized world, even the most domestic of affairs, local murder and assault prosecutions, now plausibly raise foreign policy concerns. If presidential foreign policy is enough to preempt state laws, few state laws will be safe; if treaty implementation can federalize crimes, state police power will quickly be crowded out. And in *Morrison* and *Kiobel*, the Court seemed concerned with the ease with which foreigners and foreign conduct can be brought under American regulation. The Court seems like the worried parents of a teenager, watchful of both the (potentially negative) influence of their child's friends and how their child's (potentially dangerous) acts might impact others. Foreign affairs functionalism, the Court seems to worry, like the keys to the family car or no curfew, might just be too much of a temptation. Gone is the Souter Court's confidence in the three branches' ability to work together; gone is its optimistic view of globalization. The argument for foreign affairs exceptionalism seems outdated.

This formalism is also the formalism of constraint. The Souter Court's functionalism sought to empower the federal government. But if the President, Congress, and even the courts cannot be trusted with discretion, they will have to be hemmed in by rules and doctrine. Special deference to the Executive on foreign affairs now seems ill-placed. The Executive will now be bound by the same rules in foreign affairs that bind him in domestic ones. Nor will he be given the benefit of the doubt when acting on his own. *Youngstown*'s famous "practical situations" become formal categories. Presidential action in Justice Jackson's third category becomes forbidden; the scope of that category grows larger. Congress too is constrained. Congress will have to speak much more clearly if it wants to take away rights, step

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402 The Justices in *Bond* are skeptical of Congress even when it speaks. *See supra* Part II.B.6.

403 *See supra* notes 292–94 and accompanying text; *see also supra* notes 131–37 and accompanying text (discussing the Court's unwillingness to shield U.S. forces from judicial control merely because they are a part of a multilateral force).

into traditional state domains, or extend its regulations abroad. Congress cannot simply delegate the decision to plaintiffs and watch what happens; it must actively consider the policy implications of what such suits might mean.[404] The real dividing line in the Court is whether the lower courts need to be constrained as well. The conservative majorities in *Kiobel*, *Morrison*, and *Medellín* seemed to think so, rejecting the more discretionary rules those courts had been developing or applying. The more liberal justices seemed less sure, reining in courts in *Zivotofsky*, *Bauman*, and *Mohamad*, but also more willing to adopt standards rather than rules in *Kiobel*, *Morrison*, and *Medellín*.

But most of all, the Roberts Court's formalism is the formalism of control. The Court is taking it back from the President, from Congress, and even from the lower federal courts.[405] That is the message of *Zivotofsky*. The Court is skeptical of the executive branch's claims that it knows better, that it should not be second-guessed, and that it needs room to maneuver in a dangerous world. From *Hamdan*[406] and *Medellín*[407] to *BG Group*,[408] *Bond*,[409] *and NML Capital*,[410] the Executive's views are being brushed aside. Perhaps in a post-Cold War world, more than a decade removed from the terrorist attacks of September 11, 2001, the foreign policy threats to the United States no longer look as existential, as dangerous, or as incomprehensible to the Court as they once did.[411] The costs of making a mistake no longer seem so profound. The Court views itself to be as well-placed as any other actor to make the hard decisions—perhaps even better placed.

It should be noted that there are two key exceptions to this trend during this period. The first is *Boumediene*, in which the majority

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404 In a sense, this makes *Kiobel* and *Morrison* "democracy forcing" decisions in the same vein as *Hamdan*, *see, e.g.*, Pearlstein, *supra* note 105, at 830–33, striking down potential meanings of the law in order to incentivize Congress to be more active. *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2094–95 (2011) (discussing "democracy-forcing" generally).

405 This control is augmented by the uncertain boundaries of many of the formalist rules the Court announces. Despite the language of formalism, many of the rules are novel, e.g., the application of the rules against extraterritoriality to the ATS or the "presumption of federalism" announced in *Bond*. This means that the Court will by necessity continue to control what exactly these rules mean and how they apply.

406 *See* discussion *supra* Part II.B.1.

407 *See* discussion *supra* Part II.B.2.

408 *See* discussion *infra* Part III.A.

409 *See* discussion *supra* Part II.B.6.

410 *See* discussion *infra* Part III.A.

411 *See* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 Ohio St. L.J. 649, 652–53, 713 (2002) (prophesizing that in a plurilateral, post–Cold War world, the Court would start to pull back on its traditional deference to the executive branch).

found that constitutional habeas corpus applied to detainees held at Guantanamo Bay based on a highly functionalist reading of habeas corpus and a highly functionalist conception of de facto sovereignty.[412] The test adopted of what habeas review should entail also took the form of a highly functionalist multifactor balancing test.[413] The second, *Arizona v. United States*,[414] relied heavily on the highly functionalist decision in *Hines v. Davidowitz*[415] and the purported foreign affairs implications of immigration policy to preempt Arizona's immigration law.[416] It would be anachronistic and odd if every decision fit a single pattern, particularly given the shifting majorities in these cases. But some explanation is possible.

First, both decisions were written by Justice Kennedy, an avowed foreign affairs functionalist. Justice Kennedy had been suggesting the functionalist "what process is due" analysis since at least as far back as his concurrence in *United States v. Verdugo-Urquidez*.[417] His continuing commitment to foreign affairs functionalism is evident in his concurrence in *Kiobel*, where he emphasized that the majority opinion properly "is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[418] (There is an irony in the fact that shifting 5-4 majorities have formed around formalism, even as the Court's usual fifth vote remains a functionalist.) Moreover, as will be discussed in the next section, the Court has repeatedly refused to revisit or extend *Boumediene*, perhaps indicating some discomfort with the decision and its functionalist framework.[419] *Arizona* also operates to constrain the states and their impacts on foreign affairs. Constraining the federal government and constraining the states may not be an either-or choice. In a globalized world, both the federal government and the states may be able to en-

412 *See* Boumediene v. Bush, 553 U.S. 723, 797–98 (2008).

413 *Id.* at 766–69.

414 Arizona v. United States, 132 S. Ct. 2492, 2495 (2012).

415 Hines v. Davidowitz, 312 U.S. 52 (1941).

416 *See Arizona*, 132 S. Ct. at 2498 (relying on brief from former Secretary of State Madeleine K. Albright).

417 United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (internal quotation marks omitted) (quoting Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).

418 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring).

419 Also, while *Boumediene* is unquestionably functionalist in style, it exhibits no less distrust that other Roberts Court opinions. *See* Boumediene v. Bush, 553 U.S. 723, 765–66 (2008) (emphasizing that "[t]he test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain"). It thus serves to emphasize the underlying sentiment animating the Court during this period.

danger the Republic if unconstrained.[420] Even as it embraces functionalism, *Arizona* may emanate from the same impulse as the other decisions' formalism.[421] In a sense, *Arizona* may be the exception that proves the rule. As discussed earlier, the patterns of formalism and functionalism across different cases can reveal aspects of the Court's underlying philosophy. Here, maintaining functionalism as a constraint on *state* action may highlight the Court's desire to constrain *all* actors in the face of globalization.

III. When Foreign Affairs Becomes Ordinary

What should we make of this turn to formalism in foreign affairs? How might the Roberts Court's concerns about globalization and distrust of the government manifest itself going forward? At the very least, litigants before the Court would be well-advised to adjust their arguments accordingly. Functionalist arguments for deference and discretion may not fare as well as narrower, more formalist ones. But two broader trends associated with the Court's new formalism are worth watching: (1) the continued formalization of foreign affairs related doctrines and (2) the potential emergence of stealth or backdoor functionalism.

A. Formalism's Future

At this point, the Roberts Court's distrust of the government and its associated turn to foreign affairs formalism look like durable trends. This resilience allows us to make some predictions about future Supreme Court opinions. Given the many moving parts in a particular case as well as the dynamics of building five-Justice majorities, the end result of a case is always uncertain. Nonetheless, the Court's demonstrated desire to rein in other constitutional actors suggests the type of cases that may be of interest over the next few years. As the Court reconsiders the trust it has long deposited with political branches in foreign affairs, longstanding functionalist doctrines de-

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420 There is some tension here between *Arizona* and *Medellín*, the latter of which seemed unconcerned about the foreign policy problems Texas was creating for the United States. In fact, the argument that Texas's actions had foreign policy implications was probably stronger than the argument that Arizona's actions had such implications. That said, one way to distinguish the two is that in *Medellín*, the Texas court was simply applying its ordinary criminal procedure; any foreign affairs implications were an afterthought. In *Arizona*, the state was actively trying to involve itself in immigration policy, an area long connected with foreign affairs. *Compare Arizona*, 132 S. Ct. at 2498, *with* Medellín v. Texas, 552 U.S. 491, 494 (2008).

421 It may even be evidence of how deep that philosophy of peril and distrust runs.

signed to maximize political branch foreign affairs discretion should be subject to new scrutiny.

The first such case is already on the Court's docket. *Zivotofsky* is already making its second appearance before the Court, in *Zivotofsky II* to be decided this Term. As explained above,[422] the case involves the conflict between a longstanding State Department policy requiring that the place of birth of Americans born in Jerusalem be recorded in their passport simply as "Jerusalem" and a congressional act allowing Americans to opt to have "Israel" recorded there instead. Citing the President's long-recognized power to recognize foreign governments (derived from a functionalist reading of the Constitution's grant to the President of the power to "receive ambassadors"), the executive branch claimed authority to ignore the statute.[423] Continuing to serve as an honest broker in peace talks, the Executive explained, required the United States to express no opinion about Israeli or Palestinian sovereignty over the disputed city of Jerusalem. Forced to decide the case after the Court rejected its view that the case presented a nonjusticiable political question, the D.C. Circuit agreed with the Executive, finding the recognition power exclusive to the President.[424]

It should hardly be surprising that the Court granted certiorari. The Court has said little beyond dicta in the past about the recognition power, leaving the President to claim broad, exclusive powers over anything related to the recognition of foreign governments, claims to which lower courts have long deferred. But it is exactly those broad claims for deference, based on functionalist justifications for presidential preeminence or even exclusivity in foreign affairs, which have now caught the Court's attention. Moreover, *Zivotofsky II* pits presidential claims against congressional actions, putting the case squarely in *Youngstown*'s third category. While prior Courts might have been open to the idea of powers exclusive to the President allowing him to override or ignore contrary congressional action, the Roberts Court has not viewed the third category that way. On the contrary, *Hamdan* and *Medellín* suggest a more formal rule that presidential action in this category is simply forbidden.[425] We will have to wait to see what this Court actually does with *Zivotofsky II*, but it should not be surprising if it second-guesses the Executive's claims

422 *See supra* Part II.B.7.

423 *Zivotofsky II*, 725 F.3d 197, 206 (2013).

424 *Id.* at 219–20.

425 *See supra* notes 275–77, 304–10 and accompanying text.

about the dangerousness of passport designations and attempts to define limits on the recognition power.[426]

But the recognition power is not the only area in which functionalist doctrines imbue the political branches with broad authority. Another such area might be the scope of the Foreign Commerce Clause of the U.S. Constitution.[427] That clause has generally been construed as a broad grant of authority to Congress to manage our economic relations with the rest of the world, one unconstrained by federalism or the doctrinal constraints applied to the Interstate Commerce Clause. *United States v. Clark*[428] is a good example of how broadly the clause has been construed. It also serves as an example of how globalization allows the United States to regulate ever more conduct abroad, potentially eroding the case for foreign affairs exceptionalism. *Clark* involved an individual who had been charged and convicted for traveling to Cambodia to engage in commercial sex with a minor.[429] On appeal, the Ninth Circuit Court of Appeals considered whether the statute, 18 U.S.C. § 2423(c), which provides that "[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both,"[430] was beyond Congress's enumerated powers with regard to foreign commerce. The Ninth Circuit held that it was not, that "[t]he Court has been unwavering in reading Congress's power over foreign commerce broadly."[431]

For a Roberts Court worried about the expansive reach of American law, whether with regard to military detention and trial, securities law, or human rights litigation, Congress's ability to regulate virtually any conduct anywhere in the world that at least touches upon commerce would seem ripe for revisiting. Anthony Colangelo has suggested a more formal reading of the phrase "with foreign nations" in

426 One potential twist in this case is that Congress is also making somewhat extravagant claims of authority. Although the statutory provision in question in *Zivotofsky II* concerns passport technicalities, the title of that section of the statute, "United States Policy with Respect to Jerusalem as the Capital of Israel," highlights Congress's intention to do much more. *See* Jack Goldsmith, *How the Supreme Court Should Resolve* Zivotofsky, LAWFARE (Oct. 30, 2014, 8:09 AM), http://www.lawfareblog.com/2014/10/how-the-supreme-court-should-resolve-zivitofsky/. The Court's distrust of both Congress and the Executive thus makes the case something of a wildcard.

427 U.S. CONST. art. I, § 8, cl. 3.

428 United States v. Clark, 435 F.3d 1100 (9th Cir. 2006).

429 *Id.* at 1103–04.

430 18 U.S.C. § 2423(c) (2012).

431 *Clark*, 435 F.3d at 1113.

the clause that would require a United States nexus for any congressional regulation.[432] He has also suggested analogs to the sorts of limits now imposed on Congress's power under the Interstate Commerce Clause.[433] One could imagine these being attractive to a newly formalist Court eager to limit foreign affairs exceptionalism.

The *Charming Betsy* doctrine presents a more complicated case. Creating a presumption that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[434] the doctrine might in some cases provide a formal means (much like the presumption against extraterritoriality, discussed above[435]) to rein in political actors who go too far or who are too cavalier about international obligations.[436] Arguably, the Court used something like a *Charming Betsy* presumption in *Hamdan* to read the Uniform Code of Military Justice as consistent with the laws of war and to guarantee that neither the President nor Congress violated U.S. obligations too quickly or carelessly.[437] In doing so, however, the *Charming Betsy* doctrine also empowers courts, letting them decide what international law requires, how ambiguous a statute actually is, and when to incorporate international law into U.S. law. In some cases, the *Charming Betsy* doctrine may provide a tool for courts to impose an international obligation—for example, a human right.[438] Given that one portion of the Court is seeking to constrain not only political actors but lower federal courts as well, it would be unsurprising if they sought to discipline the use of the *Charming Betsy* doctrine. An example of a rule that might prove attractive to the more conservative wing of the Court can be found in Judge Kavanaugh's concurrence in *Fund for Animals, Inc. v. Kempthorne*.[439] There, Judge

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432 *See* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 970–71 (2010).

433 *Id.*

434 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

435 *See supra* notes 313–33 and accompanying text.

436 Justice Scalia suggested as much in his *Hartford Fire* dissent. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814–21 (1993) (Scalia, J., dissenting). Justice Breyer's concurrence in *Kiobel* likewise uses the Charming Betsy presumption to fashion a more permissive test than the majority's, but one still capable of reining in ATS cases. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1677 (2013) (Breyer, J., concurring).

437 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006) (stating that the UCMJ requires that the President's actions accord with the law of nations).

438 *See* Ma v. Reno, 208 F.3d 815, 829–30 (9th Cir. 2000), *vacated sub nom.* Zadvydas v. Davis, 533 U.S. 678 (2001); Beharry v. Reno, 183 F. Supp. 2d 584, 598–99 (E.D.N.Y. 2002), *rev'd sub nom.* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

439 Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 879–82 (D.C. Cir. 2006) (Kavanaugh, J., concurring).

Kavanaugh argued that non-self-executing treaties did not deserve *Charming Betsy* treatment.[440] The argument, much like Chief Justice Roberts's in *Medellín*,[441] was that by ratifying a non-self-executing treaty, the President and Senate had specifically reserved to Congress the decision on how and when to implement it.[442] While this view is hard to reconcile with the fact that *Charming Betsy* applies to customary international law as well as treaties (and thus seems to turn solely on whether the United States has an international law obligation), it does reflect the sort of bright-line constraints on federal judges attractive to the conservative wing of the Court.

Finally, a formalist turn by the Court may have an effect on the traditional deference granted to executive branch treaty interpretations. Although the precise weight given to executive branch interpretations has remained somewhat unclear, some deference at least has been the norm.[443] But for a Roberts Court concerned about executive branch overreach and opportunistic arguments about foreign affairs, even that much deference may seem too much. Such skepticism is visible in the majority opinion in *Hamdan*, which quickly dismisses the President's interpretation of the Geneva Conventions in favor of the Court's own construction.[444] It is also on display in the Court's recent decision in *BG Group*, in which a majority led by Justice Breyer brushed aside the United States's interpretation of the United Kingdom-Argentina investment treaty.[445] In that case, the Solicitor General made the functionalist-sounding argument that the prerequisites to investor-initiated international arbitration were of great importance to states (whether Argentina and the United Kingdom here or the United States elsewhere), and that given that context, the "consent" language of the treaty might be interpreted to make the treaty's local litigation requirement "a condition on the State's consent to enter into

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440 *Id.* at 879.

441 *See supra* notes 300–11 and accompanying text.

442 *Kempthorne*, 472 F.3d at 879 (Kavanaugh, J., concurring).

443 *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 513 (2008) ("It is . . . well settled that the United States' interpretation of a treaty is entitled to great weight." (internal quotation marks omitted)); El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("[T]he meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight."); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) ("[T]he construction of a treaty by the political department of the government, while not conclusive upon courts . . ., is nevertheless of weight.").

444 *See* discussion *supra* Part II.B.1.

445 BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198, 1208–09 (2014).

an arbitration agreement."[446] The Court was unmoved. Notwithstanding the Court's "respect [for] the Government's views about the proper interpretation of treaties," the Court "d[id] not accept the Solicitor General's view as applied to th[is] treaty."[447] Adopting a formalist tone, the Court framed the question as one of ordinary contract interpretation (here, a contract between states), and thus one fully within the expertise of the Court.[448] Contrary to the Solicitor General's suggestion, the Justices in the majority were "unable to find any other authority or precedent suggesting that the use of the 'consent' label in a treaty should make a critical difference."[449]

The opinion suggests that the Court has become suspicious either of the executive branch's position on the meaning of treaty provisions or of the wisdom of deferring to it. Whether that suspicion means that executive branch interpretations will carry less weight or that they will be ignored altogether remains to be seen.[450]

These are but a few examples.[451] The point is that any current foreign affairs law doctrine that uses functionalist logic to grant federal actors broad discretion is an open target for reconsideration by the current Supreme Court.

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446 *Id.* at 1208.

447 *Id.* at 1208–09.

448 *Id.* at 1208.

449 *Id.* at 1209.

450 The case was of course concerned not with a treaty of the United States, but of two other states. Perhaps the Court would be more deferential to the Executive's interpretation of a treaty it had actually ratified. That said, this decision may at least suggest the outer boundaries of the deference a newly formalist, newly distrustful Court is willing to grant. In a related case from the same Term, *NML Capital*, the Court similarly brushed aside the executive branch's views on judgment discovery under the Foreign Sovereign Immunities Act. Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250, 2258 (2014). The Executive's concerns that a broad discovery rule might create serious tensions with foreign states was easily dismissed in favor of a more formal reading of the statute. Although the Court has never been as deferential to the Executive in FSIA cases as in treaty interpretation, the decision stands in some contrast to an earlier FSIA decision, *Altmann*, *see supra* Part II.A.4, in which the Court suggested some room for executive branch statements of interest in FSIA cases. *See* Republic of Austria v. Altmann, 541 U.S. 677, 702 & n.21 (2004); Ingrid Wuerth, Republic of Argentina v. NML Capital*: Discovery and the Foreign Sovereign Immunities Act*, LAWFARE (June 16, 2014, 10:28 PM), http://www.lawfareblog.com/2014/06/republic-of-argentina-v-nml-capital-discovery-and-the-foreign-sovereign-immunities-act/.

451 For example, another topic ripe for consideration by a distrustful and formalist Court might be the scope and authority of sole executive and congressional-executive agreements. *See* Peter Spiro, *Are Sole Executive Agreements Next on the Roberts Court Chopping Block?*, OPINIO JURIS (May 8, 2014, 12:25 PM), http://opiniojuris.org/2014/05/08/sole-executive-agreements-next-roberts-court-chopping-block/.

B. Formalism's Functionalism

Functionalism has long exerted a magnetic pull over foreign affairs cases. It is easy to understand the attraction. The world around the United States is constantly changing; dealing with it may require flexibility. Foreign countries are not bound by our Constitution and may not have patience for its strictures. Moreover, as has long been said, foreign affairs can be delicate, requiring special knowledge, expertise, and secrecy. Courts, reasonably or unreasonably, may feel compelled to defer to the political branches as better situated to understand the situation and the ramifications of any U.S. action. It is for these reasons that federal courts have long sought out doctrines of abstention and deference to resolve foreign affairs cases, even as they formalistically constrained political actors at home.[452]

The formalist trend in Roberts Court jurisprudence suggests that the Court is trying to break free of functionalism's pull. But can functionalism's visceral appeal simply be willed away? One might be skeptical. Undoubtedly, there will still be cases that seem so delicate, so beyond the Court's expertise, so political dangerous, and so hard to solve with typical judicial tools that any court would think twice about wading in. Perhaps in such cases the Court's newfound formalism will be brushed aside in favor of more traditional functionalism, which is arguably what happened in *Boumediene* and *Arizona*.[453]

But there is another possibility: the Court may avoid those cases altogether. The Court has clearly become uncomfortable with functionalism and the broad discretion it provides to various constitutional actors. Retreating back to those methods when the issues seem too fraught might undo all the Court's work over the last nine years to rein those actors in.[454] And yet, formal tools seem inappropriate; the only option may be to avoid the case altogether. Perhaps the plaintiff has not pled properly or does not have standing. Important challenges to government antiterrorism efforts have been rejected by the Court as too loosely pled[455] or beyond the Court's jurisdiction.[456] Could members of the Court have shied away from *Ashcroft v.*

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452 *Compare* Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936) (holding that the Coal Conservation Act was not within Congress's Commerce Clause power using formalist reasoning), *with* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936) (refusing to apply the doctrine to foreign affairs). In both cases, the majority opinion was written by Justice Sutherland.

453 *See supra* notes 414–20 and accompanying text.

454 One might say, when the going gets rough, the courts get functionalist.

455 *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009).

456 *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1155 (2013) (finding plaintiffs had

Iqbal[457] and *Clapper v. Amnesty International USA*[458] for the same reasons others embraced foreign affairs formalism? It is impossible to know.

Even more extreme though, the Court may simply choose not to grant a writ of certiorari at all. Observers have noted the Court's extreme reluctance to consider any of the post-*Boumediene* detainee cases. The Court has denied certiorari in nearly all of them,[459] despite the fact that many of them raise questions specifically left open in *Boumediene* and in the face of near open defiance and naked disrespect by some members of the D.C. Circuit who have questioned the wisdom of the decision and the Justices that voted for it.[460] The best account of this high court passivity may simply be uncertainty among the other Justices as to how Justice Kennedy would hold in these follow-on cases. Without any guarantees as to how he would hold, the other Justices may be wary to grant certiorari. But *Boumediene* was, of course, notably functionalist in its approach, an exception to current trends that may weigh on the Justices. They may be uncomfortable with *Boumediene*'s open-ended logic, but uncertain of a formalist alternative.[461] The Court may be equally unwilling to reaffirm it and uncomfortable reconsidering it.

In a sense, these techniques might serve as a sort of functionalism by other means, allowing the Court to retreat from foreign affairs issues that may simply seem too fraught while granting the political branches a certain amount of space to operate. The problem is that this approach, if used (even implicitly or subconsciously), completely lacks transparency. It is functionalism without accountability. When

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no standing to challenge Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (2012)).

457 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

458 Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).

459 The Court did grant certiorari in *Kiyemba v. Obama*, 559 U.S. 131 (2010), only to vacate and remand it after the Administration notified the Court that it had procured agreements from states willing to accept all the detainees in question. *Id.* at 131–32.

460 *See* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1455 (2011) ("And in public speeches and concurrences, senior D.C. Circuit Judges A. Raymond Randolph and Laurence Silberman have gone even further, belittling the Supreme Court for what Judge Randolph referred to as the 'mess' they made and what Judge Silberman described as a 'charade,' prompted by the Court's 'defiant—if only theoretical—assertion of judicial supremacy' in *Boumediene*."); Lyle Denniston, *Court Bypasses All New Detainee Cases*, SCOTUSBLOG, http://www.scotusblog.com/2012/06/court-bypasses-all-new-detainee-cases/ (last updated June 11, 2012, 11:39 AM).

461 Arguably, the eventual functionalism of *Boumediene* stemmed from a concern that only an open-ended grant of review authority could actually constrain an executive branch that had pushed back hard, working to narrow each of the Court's prior detainee decisions.

the Court applies functionalist reasoning to defer to the government in an opinion, it provides something for citizens to consider and scrutinize. Observers can decide for themselves whether the Court is being overly deferential or whether the government has overreached or needs to be pulled back in some other way. In a sense, the functionalist approach is meant to signal exactly that: scrutiny of the government's actions should come through the political process.

But even if the Court is not ducking cases, there is a risk that lower courts will. One of the lessons of the shifting rhetoric of formalism and functionalism is that it does not dictate outcomes. Different aspects of a case and different doctrines can be looked at in formalist or functionalist terms. It is the choices of which to focus on rather than formalist or functionalist rhetoric itself that seem to drive the result. Functionalism can be used as a doctrine of deference or a tool of judicial control. Formalism can restrain government actors or judicial discretion. The point of exploring the Souter Court's functionalism or the Roberts Court's formalism is to reveal the patterns of formalism and functionalism and the ideology that might be animating them.

One possibility suggested by the patterns and their relationship to traditional critiques of formalism and functionalism is that formalism and functionalism may have different uses for the Supreme Court and lower courts. Whether using functionalist or formalist techniques, the Supreme Court has been accused of giving itself the final say in foreign affairs cases. On the flipside, lower courts are accused of being too deferential when they apply loose doctrines of abstention or strict rules regarding standing to make foreign affairs cases disappear. One thing to watch out for in the latest rhetorical turn is that the formalism of distrust might become, in the hands of lower court judges, the formalism of trust, with the lower courts leaning on the Court's formalist standing and pleading decisions rather than its formalist tests of governmental power.[462]

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462 A different, interesting example might be the comparison between two recent decisions on the legality of the NSA telephony metadata program, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), and *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013). Judge Pauley's decision for the Southern District of New York uses more formalist reasoning to suggest the legality of the program and its insulation from certain lawsuits. *Clapper*, 959 F. Supp. 2d at 741–42. Judge Leon's decision for the District of the District of Columbia, by contrast, uses functionalist considerations to look past the formal terms of the statute and prior precedent and find the program likely unconstitutional. *Klayman*, 959 F. Supp. 2d at 19–23.

CONCLUSION

When it comes to foreign relations, the Roberts Court has trust issues. As far as the Court is concerned, everyone—the President, Congress, the lower courts, and plaintiffs—has played hard and fast with the rules, taking advantage of the Court's functionalist approaches to foreign affairs issues. The only response, the Justices seem to be saying, is for the Court to dispense with its traditional foreign affairs functionalism and embrace a new brand of foreign affairs formalism. Only clean lines, clear rules, and cabined roles can bring foreign affairs back under control.

And over the past eight years, the Roberts Court has followed this prescription aggressively, dipping its toes (or really doing the cannonball) into waters it usually avoids, distinguishing fifty-year-old decisions on the trial and detention of enemy combatants,[463] upturning decades old tests from the circuit courts on extraterritoriality[464] and the scope of the Alien Tort Statute,[465] making a rare intervention to correct (in its view) the scope of the political question doctrine,[466] toying with limits on the ever-questioned but long-resilient holding of *Missouri v. Holland*, and making its first foray in nearly two centuries into the treaty self-execution doctrine, capsizing longstanding circuit court tests in its wake.[467] The broad, exclusive power over recognition, long claimed by Presidents and acquiesced to by Congress and the courts, may be next.[468]

This shift to foreign affairs formalism is now too longstanding, too widely applied, and too dramatic to ignore. The mood of the Court has shifted, and with it so too must our gaze. The question is no longer whether the Court is too willing to defer, but whether it is too eager to intercede. At least until the pendulum swings again.

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463 *See supra* Part II.B.1 (discussing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

464 *See supra* Part II.B.3 (discussing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)).

465 *See supra* Part II.B.4 (discussing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)).

466 *See supra* Part II.B.6 (discussing *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012)).

467 *See supra* Part II.B.2 (discussing *Medellín v. Texas*, 552 U.S. 491 (2008)).

468 *See supra* Part III.A. (discussing *Bond v. United States*, 134 S. Ct. 2077 (2014)).