

Address

The Foreign Policy of Our Government's "Least Dangerous Branch"

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I am honored to be here today to deliver the Leslie H. Arps Memorial Lecture, named in honor of an exemplary lawyer, a consummate public servant, and a pillar of the New York Bar. And I am grateful for the kind introduction of Barry Garfinkel,¹ another exemplary lawyer and pillar of the New York Bar.

One aspect of today's lecture—namely America's place in the world—is a subject for strategic thinkers, historians, and philosophers. Lest there be any doubt about my pretensions, I am none of these. At best, I am a *reader* of strategic thinkers, historians and philosophers, and other intellectuals.

And so, I come here merely as someone who has been a judge on certain cases touching upon the interaction between our judicial system and that of foreign entities—state and non-state alike. More pointedly, I come here today as someone who has spent most of his professional career on the bench and who has some appreciation for the limits of our competence as judges. In saying what I have to say, I emphasize that I am *not* commenting on *any* pending case.

I begin by recalling an insight of a third pillar of the New York Bar: Alexander Hamilton. Writing under the pseudonym Publius in Federalist No.

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1. [Eds.] Barry Garfinkel had introduced Judge Cabranes's lecture, noting:

At Yale Law School he was a student in the very first course on international human rights law offered at any American university, and . . . he [has] published several law review articles on international law and human rights. . . . In 1971 Judge Cabranes left law practice to become an Associate Professor of Law at Rutgers University Law School, where he was one of the first law teachers to teach courses in the international protection of human rights. . . . While serving as Yale's General Counsel he was also a Lecturer in Law at the Law School teaching courses in international law and human rights. . . . In the years before his appointment to the federal bench, Judge Cabranes served as chairman of two major Hispanic civil rights organizations: *Aspira* of New York, the educational agency that helps inner-city Hispanic youth prepare for college, and the Puerto Rican Legal Defense and Educational Fund (of which he was a founding member). He was also vice president and counsel of the International League for Human Rights, one of the earliest international human rights organizations, founded at the time of the adoption of the U.N. Charter in San Francisco in 1945.

78, Hamilton referred to the judiciary as the “least dangerous” branch of the new government in gestation. According to Hamilton, the judiciary, lacking both the power of the sword and the power of the purse, may “truly be said to have neither FORCE nor WILL, but merely judgment.”²

Over time, Hamilton has been proven wrong—particularly with respect to the role of the courts in foreign affairs. In this area, courts in fact have tremendous power and, without the proper constraints, can do much harm. As our nation has grown over the last 250 years from a small set of colonies along the Atlantic to a transcontinental Republic and then to a global superpower, our courts have taken on an increasingly expansive docket.³ But as the world has become more interdependent and multipolar, the limits of our nation’s legal reach—as well as the limited competency of our courts in foreign affairs—have become more apparent.

Granted, “foreign affairs” is a broad topic—our federal courts have increasingly faced questions touching on foreign affairs in areas ranging from public to private international law and from international trade to national security. While interesting, these topics are not directly the subject of today’s remarks. To be precise, the focus of these remarks will be on two related questions.

The first is virtually rhetorical: should the United States continue to aspire to be the world’s leading power? The second question flows from the first: if the answer to question one is yes—if we intend to remain, in the words of President Clinton, the “indispensable nation”⁴ of the world community—what role should the courts play in this endeavor?

In responding to the *first* question, I confess a personal preference for strong and robust American leadership. The *Pax Americana* of the last seventy years has given billions of people around the world life, liberty, and the ability to pursue happiness.⁵ None of us should wish to live in a world where our enemies are undeterred, our allies are unassured, and human rights abuses go unanswered. Indeed, a strong America is—and always has been—good for the world.

To answer the *second* question, I strongly believe that courts *should not* be the means by which we project American power. When the United States

2. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (Gideon ed., 1818).

3. My perspective on the criminal-procedure aspect of this general subject was explored in the Charles Evans Hughes Memorial Lecture at the New York County Lawyers’ Association, delivered on November 18, 2008, and later published in expanded form as José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660 (2009).

4. Bill Clinton, Second Inaugural Address (Jan. 20, 1997), reprinted in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 43, 44 (1997) (“America stands alone as the world’s indispensable nation.”); see also Madeleine Albright, Remarks on NBC’s Today Show (Feb. 19, 1998), reprinted in U.S. DEP’T OF STATE ARCHIVE, <http://1997-2001.state.gov/www/statements/1998/980219a.html> (“Let me say that we are doing everything possible so that American men and women in uniform do not have to go out there [to the Persian Gulf] again. It is the threat of the use of force and our line-up there that is going to put force behind the diplomacy. But if we have to use force, it is because we are America; we are the indispensable nation.”).

5. Cf. The Declaration of Independence (U.S. 1776).

must act vigorously in matters touching on its foreign affairs, it should do so by action of the executive and legislative branches of government, not through the process of adjudication. The political branches are constitutionally, structurally, and strategically better situated to project global power.

To this end, the Supreme Court has recently reinvigorated the so-called “presumption against extraterritoriality” in a pair of cases that originated in our Circuit. In the 2010 case *Morrison v. National Australia Bank*,⁶ the Supreme Court held that a securities statute was presumed to lack effect outside of the territorial jurisdiction of the United States absent a clearly expressed affirmative intent by Congress that it apply extraterritorially.

Subsequently, in the 2013 case *Kiobel v. Royal Dutch Petroleum Co.*, our nation’s highest court once again applied the presumption against extraterritoriality—this time to the Alien Tort Statute (ATS), a law enacted by the First Congress in 1789—in order to avoid “foreign policy consequences not clearly intended by the political branches.”⁷

These decisions may seem uncontroversial, but support for a thus-constrained judiciary is by no means universal. Academics,⁸ judges,⁹ editorial boards,¹⁰ and those purporting to practice or to celebrate international human rights law¹¹ have all urged our courts to play a more prominent role in policing

6. 561 U.S. 247, 255 (2010).

7. 133 S. Ct. 1659, 1664 (2013) (internal quotation marks and citations omitted).

8. See, e.g., Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 461 (1989) (“Scholars and human rights lawyers hailed [the Second Circuit’s revival of the Alien Tort Statute in] *Filatiga* for . . . opening up a new field of human rights litigation.”); Gregory H. Fox, *International Litigation in Practice: Alien Tort and Other Claims Before National Courts*, 94 AM. SOC’Y INT’L L. PROC. 149, 149 (2000) (“[I]t is not an exaggeration to say that the Alien Tort Claims Act (ATCA) has proven to be one of the most fertile wellsprings for the judicial development of international human rights law.”); Mia Swart, *Alien Tort Ruling Is a Snub for Global Justice*, BUS. DAY LIVE (May 7, 2013), <http://www.bdlive.co.za/opinion/2013/05/07/alien-tort-ruling-is-a-snob-for-global-justice> (“The Alien Tort Claims Act provided an important and exciting forum to plaintiffs who could not find relief in their home countries. With the Supreme Court choosing an interpretation of the act that denies its extraterritorial application, it reverts to isolationism. With *Kiobel*, the US once again snubs the international criminal justice movement and the great strides it has made in creating a new normative framework that prioritises human rights over national sovereignty.”).

9. See, e.g., Pierre N. Leval, *Distant Genocides*, 38 YALE J. INT’L L. 231 (2013) (Remarks at 2012 Arps Lecture).

10. See, e.g., Editorial, *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 17, 2013, <http://www.nytimes.com/2013/04/18/opinion/the-supreme-courts-setback-for-human-rights.html> (“The Supreme Court’s conservatives dealt a major blow [in *Kiobel*] to the ability of American federal courts to hold violators of international human rights accountable.”); Editorial, *Wrong Way on Human Rights*, L.A. TIMES, Apr. 19, 2013, <http://articles.latimes.com/2013/apr/19/opinion/la-ed-torts-20130419> (“Human rights groups are appropriately appalled by the breadth of a U.S. Supreme Court decision this week that would make it exceedingly difficult for some victims of human rights abuses committed in other countries to win redress in U.S. courts.”).

11. See, e.g., Press Release, Human Rights First, *Kiobel Ruling Undermines U.S. Leadership on Human Rights* (Apr. 17, 2013), <http://www.humanrightsfirst.org/press-release/kiobel-ruling-undermines-us-leadership-human-rights> (“Human Rights First President and CEO Elisa Massimino stated, ‘[*Kiobel*] so severely limited a law that has for decades been a beacon of hope for victims of gross human rights violations. The United States has been a leader in the fight against impunity, but this decision cuts a hole into the web of accountability. Human rights abusers may be rejoicing today, but this is a major setback for their victims, who often look to the United States for justice when all else fails. Now what will they do?’”); see also Louise Weinberg, *What We Don’t Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1478 (2014) (“*Filatiga*, like a modern ‘We

activities in distant lands. Their view appears to be that American judges are well situated—perhaps uniquely so—to decide matters of international justice, international commerce, and even international relations.

I disagree. I will make the case today that when it comes to managing our foreign affairs, the bench should follow, rather than lead. Indeed, this is the one place in our international relations where the recently minted concept of “leading from behind” actually makes sense.¹² We judges should have a constrained, but not invisible, role in foreign affairs, and we should not, on our own initiative, extend the reach of U.S. laws beyond U.S. borders.

By giving due deference to the political branches, we, as judges, can ensure that our commitment to the rule of law continues to be an inspiration to countries with developing legal traditions, rather than a tool to bludgeon them and their economies. Courts should be, in the oft-quoted words of the Puritan father John Winthrop, a “city upon a hill,” emulated by others because they are honest, fair, and unpretentious.¹³

Over the course of this Lecture, I would like to first present some historical perspective on our nation’s foreign affairs and the role of our judiciary and then turn to the limitations of the courts. I will then apply these observations to the current day. Finally, I will offer some perspectives on how America can—and, indeed, *must*—remain a global superpower, without claiming the mantle of a global super-court.

I. THE CANON AND THE GAVEL

Since the dawn of the Republic, *isolationists*—those seeking a significantly limited global role for the United States—and *internationalists*—those calling for a more extroverted American foreign policy—have engaged in a tug-of-war of sorts.¹⁴ And while the contours—and the stakes—of this

hold these truths to be self-evident,’ electrified international lawyers, and indeed is increasingly influencing writers and judges throughout the Western world.”); Arvind Ganesan (Director of the Business and Human Rights Program, Human Rights Watch), *Corporate Crime and Punishment*, HUFF. POST, Feb. 28, 2012, http://www.huffingtonpost.com/arvind-ganesan/corporate-immunity-supreme-court_b_1305321.html.

12. Cf. Josh Rogin, *Who Really Said Obama Was “Leading from Behind”?*, FOREIGN POLICY (Oct. 27, 2011), <http://foreignpolicy.com/2011/10/27/who-really-said-obama-was-leading-from-behind> (tracing the origin of the phrase, as well as the Obama Administration’s later efforts to distance itself from the notion).

13. See, e.g., Jed Rubenfeld, *Reading the Constitution As Spoken*, 104 YALE L.J. 1119, 1138 (1995) (quoting Justice Brennan); Ronald Reagan, *Farewell Address to the Nation*, 2 PUB. PAPERS 1718, 1722 (Jan. 11, 1989).

14. Some definitional clarity is in order. Those seeking a binary approach to defining American global engagement—perhaps bookended by isolationism on the one hand and internationalists on the other—will be disappointed. Labels tend to over-describe and under-predict how an individual or group will view American action under a particular set of facts. Nonetheless, throughout American history there have been those advocating for a more active global role for our country and there have been others calling for us to focus our energies inward. For the sake of clarity, the former group will be referred to in this lecture as internationalists and the latter groups as isolationists. Cf. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000) (noting “the political divide between isolationists who want to preserve the United States’s sovereign prerogatives, and internationalists who want the United States to increase its involvement in international institutions”).

conflict have evolved over the past two-and-a-half centuries, the underlying fault line has remained remarkably constant: what should America's role in the world be? Throughout this long national conversation, federal courts have played an important, but usually circumscribed, role.

From the beginning, American foreign policy operated on the basis of a paradox: we were at once ambitious and cautious, expansionist yet deeply wary of foreign entanglements.

This tension was evident when President Washington, in his Farewell Address, famously warned against "permanent alliances" with other nations.¹⁵ But for Washington, the objective was clear: America needed to "gain time . . . to . . . mature [and to gain] command of its own fortunes."¹⁶

In the ensuing years, as America became a respectable but modest regional military power, successive presidents loosely followed Washington's warning against grand strategies of global engagement.¹⁷ Rather, the young nation pursued a muscular, albeit somewhat haphazard, foreign policy that prized sovereignty, independence, and commerce.¹⁸ In the words of President Monroe's Secretary of State, John Quincy Adams, America was "the well-wisher to the freedom and independence of all," but it "goes not abroad in search of monsters to destroy."¹⁹

15. George Washington, Farewell Address (Sept. 19, 1796), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 34, (Walter Lowrie & Matthew St. Clair Clarke eds., 1833).

Hamilton struck a similar note:

It ought to teach us not to overrate foreign friendships: and to be upon our guard against foreign attachments. The former will generally be found hollow and delusive; the latter will have a natural tendency to lead us aside from our own true interest, and to make us the dupes of foreign influence. . . . Foreign influence is truly the Grecian horse to a republic. We cannot be too careful to exclude its entrance.

Alexander Hamilton, Letters of Pacificus No. 6 (July 17, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 100-06 (Harold C. Syrett ed., 1969), <http://founders.archives.gov/documents/Hamilton/01-15-02-0081>.

16. Washington, *supra* note 15, at 38.

17. To be sure, our early leaders by no means adopted a policy of total disengagement. President John Adams led us into a (*quasi*-)war with France to protect American vessels being attacked on the high seas. Presidents Jefferson and Madison both launched wars against the Barbary States of North Africa in response to raids on our merchants. In 1812, Madison became the first American president to ask for a declaration of war on another nation, Great Britain, after Jefferson's trade embargo of 1807 turned out to be a disaster, both diplomatically and economically. And President Monroe, in announcing the doctrine that famously bears his name, risked conflict with Spain to assert that the New World and Old World were to be distinctly separate spheres of influence. Nevertheless, these foreign policy initiatives were limited and generally in service of goals of independence and commerce.

18. *See, e.g.*, ROBERT KAGAN, DANGEROUS NATION: AMERICA'S FOREIGN POLICY FROM ITS EARLIEST DAYS TO THE DAWN OF THE TWENTIETH CENTURY (2006); *see also* Marion Smith, *The Myth of American Isolationism: Commerce, Diplomacy, and Military Affairs in the Early Republic*, HERITAGE FOUND. (Sept. 9, 2013), <http://www.heritage.org/research/reports/2013/09/the-myth-of-american-isolationism-commerce-diplomacy-and-military-affairs-in-the-early-republic> ("[E]arly U.S. statesmen did not adhere to a non-interventionist foreign policy as they sought to secure the nation's interests.").

19. JOHN QUINCY ADAMS, AN ADDRESS, DELIVERED AT THE REQUEST OF THE COMMITTEE OF ARRANGEMENTS FOR CELEBRATING THE ANNIVERSARY OF INDEPENDENCE, AT THE CITY OF WASHINGTON, ON THE FOURTH OF JULY 1821, UPON THE OCCASION OF READING THE DECLARATION OF INDEPENDENCE 32. Adams, as Monroe's Secretary of State, was a principal architect of the Monroe Doctrine. *See* SAMUEL FLAGG BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY (1949); DEXTER PERKINS, A HISTORY OF THE MONROE DOCTRINE (rev. ed. 1955).

As early American presidents established America's military, economic, and diplomatic capabilities, the federal judiciary was establishing its own footing within our system of government. As we all know, in 1803 the Supreme Court, led by John Marshall, established the basis for judicial review in *Marbury v. Madison*.²⁰ Only slightly less well-known is an exchange between the Executive Branch and the Supreme Court that took place ten years earlier and included one of Marshall's predecessors, our first Chief Justice, John Jay.

By the second term of Washington's presidency, a number of thorny issues under domestic and international law had arisen—issues that threatened our neutrality in the ongoing war between France and Britain.²¹ Deciding that these questions could best be addressed by the judicial branch, Washington's Secretary of State, Thomas Jefferson, sent twenty-nine separate questions to the Supreme Court, formally requesting its advice.²²

Chief Justice Jay, himself one of our country's most influential and most controversial diplomats,²³ responded, along with the Associate Justices, by politely declining to answer.²⁴ Over two centuries later, this decision²⁵ is still cited as a precedent for a variety of judicial doctrines of "nonjusticiability"—including the "case or controversy" requirement, the prohibition on advisory opinions, and the doctrines of standing, ripeness, and mootness.²⁶ Importantly, for our purposes, this decision also suggested a reluctance by the judiciary to be the prime actor on questions concerning foreign affairs.²⁷

20. 5 U.S. (1 Cranch) 137 (1803).

21. Soon after Washington established America's neutrality in the conflict between France and Britain in 1793, the ambassador from the revolutionary French government, Edmond Charles Genet, seized upon pro-French sentiments in the United States and began commissioning and arming privateers, manned by American sailors, to capture British vessels on behalf of France. Citizen Genet also established French prize courts to oversee the condemnation and sale of captured prize vessels. France claimed that Genet's actions were consistent with prior French-American treaties while the British protested that these activities—and America's subsequent acquiescence—violated American neutrality and the law of nations. See Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 554-56 (2012).

22. Letter to the Justices of the Supreme Court (July 18, 1793), reprinted in 26 THE PAPERS OF THOMAS JEFFERSON 520, 534-36 (John Catanzariti ed., 1995).

23. Jay was the principal negotiator of the Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America—usually known simply as the "Jay Treaty." Signed in 1794 but only made public the following year, the Jay Treaty sparked an intense debate over both its merits and its constitutionality. The Senate consented to the treaty only after a public debate "of an intensity that has been matched in American history only rarely." See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1039-40 (2010) (describing the Jay Treaty as producing "the most politically explosive diplomatic policy crisis of the Washington administration").

24. See Mathew Van Hook, *Founding the Third Branch: Judicial Greatness and John Jay's Reluctance*, 40 J. SUP. CT. HIST. 1, 8 (2015).

25. Letter from Supreme Court Justices to President Washington (Aug. 8, 1793), <http://founders.archives.gov/documents/Washington/05-13-02-0263>.

26. See FOREIGN RELATIONS LAW: CASES AND MATERIALS 26 (Curtis Bradley & Jack Goldsmith eds., 5th ed. 2014); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50-52 (6th ed. 2009).

27. Cf. STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997) (arguing that the Justices declined to answer Washington primarily to ensure executive control of foreign policy).

This reluctance was enshrined a few years later, in 1812, in the famous case of *The Schooner Exchange v. McFaddon*,²⁸ in which Chief Justice Marshall articulated the first definitive statement of the doctrine of foreign sovereign immunity.²⁹ The opinion is also important because it is the first known use by the Supreme Court of the word “extraterritorial.”³⁰

A law is said to have “extraterritorial” effect if it has force *beyond* a country’s *territory*. Generally, the Founders—and American jurists until the twentieth century—subscribed to the so-called “Westphalian” tradition of “strict territoriality.” The Westphalian tradition is named after the Peace of Westphalia of 1648, which ended the Thirty Years’ War and is now generally credited with the creation of the modern state system. Under the Westphalian tradition, as generally understood, territorial control established sovereignty, and sovereignty established exclusive jurisdiction.³¹ Land and law were inextricably linked.³² Borders were not just lines on a map but representations of the outer bounds of a sovereign’s legal reach. In other words, a court only

28. 11 U.S. (7 Cranch) 116 (1812).

29. In that case, the Supreme Court held that federal courts lack jurisdiction over a foreign naval vessel, “in the service of a foreign sovereign, with whom the government of the United States is at peace,” when that vessel was visiting an American port. *Id.* at 147. Chief Justice Marshall explained that holding as deriving from broader immunities possessed by foreign sovereigns:

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

Id. at 136.

30. “This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring *extra-territorial* power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.” *Id.* at 137 (emphasis added).

31. See, e.g., PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 17, 22, 25, 116-17, 118-43 (2002) (detailing the formation of modern territorial states in the wake of the Thirty Years’ War); HENRY KISSINGER, *WORLD ORDER* 31-35 (2014); KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?* 32 (2009); cf. *Campbell v. Hall* (1774) 98 Eng. Rep. 1045, 1047; 1 Cowper 204, 208 (Lord Mansfield) (“A country conquered by the British arms becomes a dominion of the King in the right of the Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.”).

32. For example, the Territory Clause of the Constitution states that “Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art IV, § 3. Importantly, Article I grants Congress the power “to define and punish Piracies and Felonies committed on the High Seas.” While the high seas are certainly beyond the sovereign territory of the United States, they are not within the sovereign territory of another country. Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1661 (2013) (“[A]lthough the offense of piracy normally occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country, applying U.S. law to pirates does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences.”); see also Letter from Mr. Jefferson, Secretary of State, to Mr. Morris, Minister of Plenipotentiary of the United States with the Republic of France (Aug. 16, 1793), reprinted in 1 *AMERICAN STATE PAPERS: FOREIGN RELATIONS* 167, 169 (photo. reprint 1998) (1833) (“Every nation has, of natural right, entirely and exclusively, all the jurisdiction which may be rightfully exercised in the territory it occupies. If it cedes any portion of that jurisdiction to judges appointed by another nation, the limits of their power must depend on the instrument of cession.”).

had jurisdiction where its sovereign's flag flew.³³

The Westphalian doctrine of "strict territoriality" was the first of the two major currents in the adjudication of extraterritorial matters. In many ways, this was a doctrine of legal non-interventionism—and one perfectly suited for our young and relatively weak Republic. America had more to lose by abandoning the doctrine of strict territoriality than it stood to gain by flexing its legal muscles globally. While strict territoriality thus constrained our ability to impose our law on others, it also ensured that others, particularly the European powers, did not impose their laws on us.

However, our continuous and unabashed westward and outward expansion began to pose some vexing challenges to the Westphalian conception of law. For example, how do we distinguish between U.S. states and territories not yet absorbed into the Union? Were the territories conquered in the late 1840s during the Mexican-American War, but not yet part of the Union, subject to U.S. laws?³⁴ Did the state-granted "property rights" of a slave owner have "extraterritorial" effect if his slave escaped to a free state or territory?³⁵ Far from being a mere abstract and philosophical inquiry, this last question—regarding the legal basis of slavery in the territories—sparked the Civil War.³⁶

America emerged from this dark period as a reunified nation and, by the end of the nineteenth century—through technological advances, massive immigration, and the rise of American entrepreneurship—we had become a global economic power.

33. As Secretary of State John C. Calhoun put it in 1844, the jurisdiction "of a nation is limited to its own dominions and to vessels under its flag . . . [I]t cannot extend it to acts committed within the dominion of another without violating its sovereignty and independence." PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES FOR THE YEAR 1887, at 832 (Washington, D.C., Gov't Printing Office 1888). Indeed, at that point in time, it was generally accepted that "every nation possesses exclusive sovereignty and jurisdiction within its own territory." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18, at 19 (Boston, Little, Brown, and Co. 6th ed. 1865) (1834); STORY, *supra*, § 20, at 21 ("[N]o state or nation can, by its laws, directly affect, . . . or bind persons not resident therein, whether they are natural-born subjects or others. . . . [I]t would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory.").

34. *See, e.g.*, *Cross v. Harrison*, 57 U.S. 164 (1853).

35. *See, e.g.*, *Scott v. Sandford*, 60 U.S. 393 (1856).

36. While the Civil War was an undeniably "inward focused" period of American history, foreign relations were still crucial to Union victory. This was most prominently the case in the intense diplomatic efforts by Lincoln to prevent the British from intervening and upending his military strategy of blockading the South. *See, e.g.*, HENRY ADAMS, THE EDUCATION OF HENRY ADAMS 110-93 (1918) (Ernest Samuels, ed. 1973) (describing, from his recollections as secretary to his father, the U.S. ambassador to Britain during the Civil War, the challenges faced by the Lincoln Administration); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 144-46 (2012); *see also* GIDEON WELLES, LINCOLN'S SWEARD: REMARKS UPON THE MEMORIAL ADDRESS OF CHAS. FRANCIS ADAMS, ON THE LATE WILLIAM H. SEWARD . . . 117 (New York, Sheldon & Co. 1874) ("English enterprise, if not English diplomacy from the commencement to the close of our domestic difficulties was vigilant and unceasing in schemes to evade the blockade and establish intercourse with the rebels . . ."). The Supreme Court, incidentally, also played an important role in sustaining Lincoln's blockade. In the *Prize Cases*, the Court held that the President had inherent authority to suppress the Southern insurrection. Notably, the Court also foreshadowed the development of the political question doctrine when it asserted that the president's military decisions were "question[s] to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." 67 U.S. 635, 670 (1862) (emphasis added).

At the same time, a series of military encounters reflected America's remarkable rise as a global *political* power: the war with Spain in 1898; the dispatching of U.S. Marines to China in response to the Boxer Rebellion in 1900; the conquest of our new colony in the Pacific, the Philippines, by 1902; and, finally, our decisive entry into the First World War.³⁷ Having finally, in Washington's words, gained "command of [our] own fortunes," the United States was (in effect) able to pursue the foreign policy of President Theodore Roosevelt—"speak[ing] softly and carry[ing] a big stick."

But despite policies of the political branches that now thrust the United States into world leadership, the "least dangerous branch" of our government still generally adhered to a "territorial" understanding of the jurisdiction of the courts.³⁸ In essence, the Supreme Court feared that extending our laws abroad would infringe on the sovereignty of other states.³⁹ In the famous 1909 antitrust case *American Banana Co. v. United Fruit Co.*, Justice Oliver Wendell Holmes formulated what came to be known as the "presumption against extraterritoriality"—or, as Holmes put it, the idea that "[a]ll legislation is *prima facie* territorial in nature."⁴⁰

The doctrine of "territoriality" thus evolved from the Westphalian concept of statehood into a legal or constitutional "presumption" that all U.S. laws were "territorial in nature." This "presumption" could only be rebutted by

37. Our country also became, for the first time, an imperial power. Guam, the Philippines, Puerto Rico, and Hawaii were now colonial possessions. See, e.g., Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 805-06 (2011).

38. The Supreme Court in *Pennoy v. Neff* asserted that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the States in which it is established." 95 U.S. 714, 720 (1878). Similarly, in 1895, the Court stated, as an immutable fact, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

39. See *In re Ross*, 140 U.S. 453, 464 (1891) ("When . . . the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.").

40. 213 U.S. 347, 357 (1909) (quoting *Ex parte Blain* [1879] L.R. 12 Ch. Div. 522, 528): See also *id.* ("The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."). Holmes provided an eloquent voice to the concerns underlying his presumption:

For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. . . . [T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

Id. at 356. Justice Holmes cited *Underhill v. Hernandez*, 168 U.S. 250 (1897), in support of his application of territorial sovereignty. 213 U.S. at 358. The Supreme Court in *Underhill* had held that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." 168 U.S. at 252. The territoriality of the *Underhill* Court, and subsequently the *American Banana* Court, can be directly traced back to Chief Justice Marshall's articulation of the jurisdictional doctrine in *Schooner Exchange*: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." 11 U.S. 116, 136 (1812). See *supra* text accompanying notes 28 and 30.

evidence that Congress intended a statute to reach conduct committed abroad.⁴¹ In short, Holmes announced a “default rule” of judicial restraint—a default rule against applying U.S. statutes “extraterritorially.”⁴²

Moving to the post-World War I period, the United States finally had, for the first time, the capacity to shape the world order. The question then became: did we have the will for world leadership and the willingness to bear its many costs?

Many Americans did not. Isolationism became the prevalent foreign policy of the political branches from the signing of the Treaty of Versailles, which ended World War I, until the date that President Franklin Roosevelt said would “live in infamy,” the date that ushered us into another World War—the day the Empire of Japan attacked Pearl Harbor.

The United States emerged from that Second World War as a dominant global superpower. We were the primary architects of the postwar international order, including the United Nations and the Bretton Woods monetary institutions. We were also, by far, the world’s largest economy.⁴³

41. English jurists had developed a similar presumption regarding the application of parliamentary statutes to British colonies. See *Rex v. Vaughan* (1769) 98 Eng. Rep. 308, 311 (Mansfield, C.J.) (“No Act of Parliament made after a colony is planted, is construed to extend to it, without express words shewing the intention of the Legislature to be ‘that it should.’”).

42. At the same time, in the early decades of the twentieth century, the Supreme Court faced distinct but related questions regarding the extension of U.S. law to America’s new empire. This issue became known by the aphorism “Does the Constitution follow the flag?” The Court, in a series of opinions that became known collectively as the *Insular Cases*, concluded that constitutional rights do not automatically extend to those residing in areas America controlled. See Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 58 n.3 (2013) (listing the cases). Ironically, the *Insular Cases*, after decades in which they were forgotten in a byway of constitutional law, would be rediscovered in our time and would become critical precedents for cases concerning the extension of constitutional rights to areas under varying levels of American control. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that aliens detained as enemy combatants at Guantanamo Bay were entitled to privilege of habeas corpus to challenge legality of their detention); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (concluding that Fourth Amendment protections do not apply to searches and seizures by United States agents of property owned by a nonresident alien in a foreign country); *Reid v. Covert*, 354 U.S. 1 (1957) (ruling that U.S. citizen civilians abroad have the right to Fifth Amendment and Sixth Amendment constitutional protections). The holding of the *Insular Cases* in 1901 ratified the election returns of 1900, which the Democratic Party and William Jennings Bryan—the “anti-imperialists”—had proclaimed a referendum on the question of whether the Constitution had to “follow the flag” to overseas territories populated by people of different races and languages. The *Insular Cases* gave birth to a favorite adage of legal realists, originally coined by the satirist Finley Peter Dunne through his character Mr. Dooley, that “no matter whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ iliction returns.” FINLEY PETER DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (Edward J. Bander ed. 1963). Another notable constitutional quip was offered by a dean of the New York Bar, Secretary of War Elihu Root, who observed, “the Constitution follows the flag, but it does not catch up with it.” H.W. BRANDS, BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES 77 (1992). These debates effectively rehearsed seventeenth- and eighteenth-century British controversies about the extent to which English law extended to Britain’s colonies. See generally Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW & HIST. REV. 439 (2003) (describing Sir Coke’s view on the jurisdictional limitations of the common law of England).

43. See, e.g., 1 THE OXFORD ENCYCLOPEDIA OF AMERICAN BUSINESS, LABOR, AND ECONOMIC HISTORY 301 (Melyvn Dubofsky ed. 2013) (noting that in 1945, American gross domestic product was three times larger than the Soviet Union’s, and that the United States dominated the global economy according to several other metrics); RAUSTIALA, *supra* note 31, at 95 (noting that the United States accounted for nearly half of global manufacturing activity in 1945).

Meanwhile, American *courts*—busy interpreting the many New Deal regulatory statutes—were now more willing in the postwar period to exert authority over activities taking place abroad. The strict “presumption against extraterritoriality” that had prevailed for many decades before and after *American Banana* was set on a path to obsolescence in 1945, when my court, the Court of Appeals for the Second Circuit, planted the seed of a competing doctrine to govern the application of U.S. law abroad.

This second major current of judicial interpretation eventually came to be known as the “effects” theory of extraterritoriality, and the case where it was first announced was *United States v. Aluminum Company of America (Alcoa)*.⁴⁴ The issue in *Alcoa* was whether the Sherman Antitrust Act could punish the creation, by foreign companies, of a cartel that was formed abroad. In an opinion written by Judge Learned Hand, our court held that the cartel’s agreement to constrain the quantity of aluminum imported into the United States *did* violate the Sherman Act and that the United States could prosecute this violation. As Judge Hand explained, “any state may impose liabilities, even upon persons *not* within its allegiance, for conduct *outside* its borders that has consequences *within* its borders.”⁴⁵ Over time, *Alcoa* came to be widely cited for the general proposition that the conduct of foreigners abroad could lead to legal liability in our federal courts so long as it caused harmful “effects” within the United States.

This shift away from strict territoriality, and towards a more flexible “effects” doctrine, occurred in other areas of our law as well. For example, also in 1945, the Supreme Court replaced the strict territoriality of *Pennoyer v. Neff*,⁴⁶ an 1878 case that had taken a rigidly limited view of personal jurisdiction, with the minimum contacts test for personal jurisdiction of *International*

44. 148 F.2d 416 (2d Cir. 1945).

The “effects” theory had earlier roots. A decade before *Alcoa*, a project known as the Research in International Law, organized by the faculty of Harvard Law School under the direction of Professor Manley O. Hudson, had published an influential Draft Convention on Jurisdiction with Respect to Crime, which documented state practice recognizing five bases for extraterritorial criminal jurisdiction. See *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. SUPP. 435 (1935). The Second Circuit later summarized these principles as follows:

- 1) the “objective territorial principle,” which provides for jurisdiction over conduct committed outside a State’s borders that has, or is intended to have, a substantial effect within its territory;
- (2) the “nationality principle,” which provides for jurisdiction over extraterritorial acts committed by a State’s own citizen;
- (3) the “protective principle,” which provides for jurisdiction over acts committed outside the State that harm the State’s interests;
- (4) the “passive personality principle,” which provides for jurisdiction over acts that harm a State’s citizens abroad; and
- (5) the “universality principle,” which provides for jurisdiction over extraterritorial acts by a citizen or non-citizen that are so heinous as to be universally condemned by all civilized nations.

United States v. Yousef, 327 F.3d 56, 91 n.24 (2d Cir. 2003); see also GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 595-98 (5th ed. 2011) (describing the origins of this doctrinal shift in the 1920s and 1930s).

45. *Alcoa*, 148 F.2d at 443 (emphasis added).

46. 95 U.S. 714 (1878).

Shoe.⁴⁷ And in the field of “conflicts of law,” courts shifted from the strict territoriality associated with Justice Joseph Story, Professor Joseph Beale of Harvard Law School, and the first *Restatement of Conflict of Laws*,⁴⁸ toward an “interest-based” analysis advocated by, among others, Professor Brainerd Currie and the New York Court of Appeals under Chief Judge Stanley Fuld.⁴⁹

What are we to make of the shift from strict territoriality to these more flexible, “balancing” approaches? There were certainly a number of contributing causes including the decline of legal “formalism,” the rise of legal “realism,” the evolution of the modern regulatory state, and the desire to coordinate legal regimes in an increasingly interconnected and interdependent world.⁵⁰

But this shift *also* reflected our new status as the world’s dominant economic and political power. The political branches now had the confidence to apply and enforce our writ in far-away lands. At the same time, U.S. courts were attracted to these more flexible tests as a way of enabling the extension of our laws to conduct occurring abroad. Moreover, as foreign firms flocked here to take advantage of our markets and their assets became vulnerable to attachment, American courts could now be secure in the knowledge that their judgments against these foreign companies were likely enforceable. And so, in areas as diverse as antitrust,⁵¹ securities, and employment, federal courts dramatically expanded the extraterritorial reach of American law in the postwar period. With the territoriality principle of *American Banana* quickly eroding, foreigners who obeyed the law in their home countries now faced liability for violating our statutes, even if all of the relevant conduct took place abroad.⁵²

Not surprisingly, this expansion of our laws to regulate conduct abroad caused significant diplomatic tension, especially with our allies and trading partners.⁵³ After all, one of the most frequently invoked justifications for the

47. *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

48. J. BEALE, *CONFLICT OF LAWS* § 1.10 (1935).

49. *See* LEA BRILMAYER, *CONFLICT OF LAWS* 47-68 (2d ed. 1995).

50. *See id.*

51. For example, the reach of our antitrust laws was the subject of a report of a committee of the International Law Association at its Tokyo Conference in 1964. REPORT OF FIFTY-FIRST CONFERENCE: HELD AT TOKYO: AUGUST 16TH TO AUGUST 22ND, 1964, INT’L L. ASS’N 348-592 (1965). The Association adopted a resolution affirming that “the actions of States in this field are subject to rules of international law.” *Id.* at xxix. The report requested the committee recommend “practical methods for eliminating, reducing or resolving conflicts between States arising out of the extraterritorial application of such legislation.” *Id.*

52. *See* BORN & RUTLEDGE, *supra* note 44, at 680-81; RAUSTIALA, *supra* note 31, at 114-15. As just one example of this wholesale shift, the Supreme Court in 1993, in *Hartford Fire v. California*, held that British reinsurance companies could be sued under the Sherman Act, even though all of the alleged conduct took place in London, and even though the sued entities had conceded compliance with British law. 509 U.S. 764 (1993). This newly expansive approach to interpreting U.S. law had been noted earlier and already criticized by non-American commentators. *See, e.g.,* R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT’L L. 146, 150-61 (1957) (emphasizing the need to cabin the scope of extraterritorial jurisdiction).

53. As John Nott, MP, Britain’s former Secretary of State for Trade and future Secretary of State for Defence, told the House of Commons:

[W]e do not dispute the right of the United States or any other nation to pass and enforce what economic laws it likes to govern business operating fully within its own country. Our objection arises only at the

old system of territoriality was that it served to minimize conflicts between nations. With the rise of the “effects” test, U.S. courts throughout the second half of the twentieth century and the beginning of the twenty-first century were increasingly thought to be imposing a “Yankee ‘jurisdictional jingoism’” that spurred widespread resentment.⁵⁴

For instance, in an antitrust case decided by the Supreme Court in 2004, *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*,⁵⁵ several of our closest trading partners—including Germany, Belgium, Canada, the United Kingdom, Ireland, the Netherlands, and Japan—submitted amicus briefs⁵⁶ expressing concern that our judges had become the global arbiters in matters of competition law, even regarding claims that had little or no connection to the United States.⁵⁷

Similar tensions arose in the context of the Alien Tort Statute, which confers jurisdiction for “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.”⁵⁸ One foreign head of state, whose citizens brought an ATS suit in the Southern District of New York for conduct committed in his country, decried what he described as “judicial imperialism” at work.⁵⁹ He raised the alarm that, in his words,

point when a country attempts to achieve the maximum beneficial regulation of its own economic environment by ensuring that all those having any contact with it abide by its laws and legal principles.

973 Parl Deb HC (5th Ser.) (1979) col. 1541; *see also* BORN & RUTLEDGE, *supra* note 45, at 681 (quoting and discussing this passage); RAUSTIALA, *supra* note 31, at 116 (same). Many commentators have agreed with the sentiment expressed by Nott, noting that “exorbitant jurisdictional assertions” can “readily arouse foreign resentment [and] provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields.” Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 28-29 (1987).

54. John Byron Sandage, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Laws*, 94 YALE L.J. 1693, 1698 (1985).

55. 542 U.S. 155 (2004).

56. *See, e.g.*, Brief of Amicus Curiae Government of Canada at 21, *F. Hoffmann-LaRoche v. Empagran*, 540 U.S. 1088 (2003) (No. 03-724) (“Extending jurisdiction in this case without consideration of the reasonableness of exercising the courts’ powers . . . would elevate the courts of the United States to an unwarranted and unintended position of preeminence in international antitrust regulation and enforcement, and to a position of appearing indifferent to the impact of the exercise of their powers on other countries. The United States should not, and the Government of Canada would not, welcome such a result.”); *see also* Brief of Amici Curiae United Kingdom of Great Britain and Northern Ireland, Ireland, and the Kingdom of the Netherlands at 6, *F. Hoffmann-LaRoche v. Empagran*, 540 U.S. 1088 (2003) (No. 03-724) (“[S]uch a rule potentially would permit virtually any significant commercial transaction to be the basis for private United States treble damage claims, usurping the enforcement systems of other countries to United States private actions.”).

57. Ultimately, the Supreme Court issued a narrowly framed and unanimous decision, which held that our antitrust law *did not* apply to claims where the alleged price-fixing conduct affected *only* foreign customers who had purchased the products outside of the United States. In *Hoffman-LaRoche*, then, we were perhaps witnessing some retrenchment—limited steps to rein in the “effects” test and revitalize the discarded doctrine of “territoriality.” Notably, in a short concurrence, Justice Scalia, joined by Justice Thomas, addressed the concerns expressed in the foreign nations’ amicus briefs, stating that the majority opinion’s interpretation of the law was correct, because it was the only one “consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories.” *Id.* at 176 (Scalia, J., concurring).

58. 28 U.S.C. § 1350 (2012). The ATS was passed as part of the Judiciary Act of 1789.

59. Thabo Mbeki, President, Rep. of S. Africa, Address to the National Assembly of South Africa (Nov. 8, 2007) (transcript at 26), http://www.parliament.gov.za/live/commonrepository/Processed/20091112/87709_1.doc. President Mbeki drew the phrase “judicial imperialism” from the dissenting opinion in the case he was criticizing: A decision to hear these cases would reflect the worst sort of judicial imperialism . . . and send the

“matters that are central to the future of *our country* should be adjudicated in foreign courts which bear no responsibility for the well-being of our country.”⁶⁰

Explicitly recognizing these legitimate complaints by foreign nations, the Supreme Court, as noted earlier, has recently breathed new life into the presumption against extraterritoriality articulated by Justice Holmes over a century ago. In the 2010 case *Morrison v. National Australia Bank Ltd.*, the Supreme Court reaffirmed that U.S. statutes are presumed *not* to have extraterritorial effect.⁶¹ Therefore, lower courts *may not* displace foreign laws and impose liability on foreign actions by foreign actors without express congressional authorization.

In some respects, *Morrison* can be read as a strong return to the default rule of territoriality; after all, the case was decided unanimously.⁶² Notably, however, Justice John Paul Stevens wrote a separate opinion, joined by Justice Ruth Bader Ginsburg, in which he expressed support for a type of minimum contacts test. Justice Stevens took issue with what he deemed to be the Court’s conversion of the presumption against extraterritoriality from a “flexible rule of thumb into something more like a clear statement rule.”⁶³

Court watchers know that the tension between rules grounded on “territoriality” and “effects” continues to generate live controversies. In the other case mentioned earlier, *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court in 2013 applied *Morrison* to the Alien Tort Statute.⁶⁴ Because the ATS, as its name implies, concerns torts committed by “aliens,” lawsuits brought under that statute have a particularly high chance of generating tension with foreign countries. Recognizing this risk, the Supreme Court, in a prior

message that the United States does not respect the ability of South African society to administer justice by implying that US courts are better placed to judge the pace and degree of South Africa’s national reconciliation.

Id.; see *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., dissenting) (quoting Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT’L L. 153, 166 (2003)); *cf.* *Kiobel v. Royal Dutch Petrol. Co.*, 642 F.3d 268, 269 (2d Cir. 2011) (Jacobs, C.J., concurring in the denial of panel rehearing) (“The dominant view elsewhere is well expressed by former South African President Thabo Mbeki . . .”).

60. President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation, on the Occasion of the Tabling of the Report of the Truth and Reconciliation Commission (Apr. 15, 2003), <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030610presrec.htm> (emphasis added); see also *Kiobel*, 642 F.3d at 270 (2d Cir. 2011) (Jacobs, C.J., concurring in the denial of panel rehearing).

61. See 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

62. Eight Justices considering the case concurred in the outcome; Justice Sotomayor was recused.

63. See 561 U.S. at 278 (Stevens, J., concurring). Justice Stevens expressed concern that private parties should not be foreclosed from bringing § 10(b) actions when the fraud at issue has sufficient contacts with the United States, even if the relevant securities were purchased or sold abroad and were not listed on a domestic exchange. However, despite this objection, Justice Stevens also acknowledged that the presumption against extraterritoriality was useful “as a theory of congressional purpose, a tool for managing international conflict, a background norm, [and] a tiebreaker.” See *id.* at 280.

64. 133 S. Ct. 1659 (2013). In *Sosa v. Alvarez-Machain*, the Supreme Court held that federal courts may “recognize private claims under federal common law” for a “modest number of international law violations.” 542 U.S. 692, 724, 732 (2004).

2004 decision, had warned that the potential foreign policy implications of ATS cases “should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”⁶⁵

In *Kiobel*, the Court went a step further, applying the presumption against extraterritoriality to the ATS and concluding that the presumption was *not* rebutted. Because nothing in the text or history of the ATS suggested that Congress had intended for the law to have extraterritorial reach, the Supreme Court held that the ATS did not reach violations of the law of nations occurring abroad, except when the claims at issue “touch and concern the territory of the United States” with “sufficient force to displace the presumption against extraterritorial application.”⁶⁶

The stated concern underlying the Supreme Court’s holding in *Kiobel* was that extending the reach of U.S. law abroad could result in “clashes between our laws and those of other nations,” which could lead to “international discord.”⁶⁷ More specifically, the Court was concerned that courts were “run[ning] interference in . . . a delicate field of international relations.”⁶⁸ Only the political branches, said the Court, had the ability “to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.”⁶⁹ In virtually so many words, the Court declared that, in foreign affairs, we judges are simply out of our depth.

In light of the substantial risk—and, indeed, the documented instances—of “diplomatic strife,”⁷⁰ the Supreme Court held that, if the political branches *want* the courts to apply the ATS—or any other statute—to extraterritorial conduct, then the political branches *must say so*.

II. THE LIMITS OF THE JUDICIAL FUNCTION IN FOREIGN AFFAIRS

This brief review of the history of judicial involvement in foreign affairs provides some context for the argument that *Morrison* and *Kiobel* represent a healthy trend and why the so-called political branches of our government, rather than the judiciary, are better suited to handle questions affecting the nation’s foreign policy—constitutionally, structurally, and strategically.

Professor Edward S. Corwin long ago observed that the Constitution “is an invitation to struggle for the privilege of directing America’s foreign

65. *Id.* at 727.

66. *Kiobel*, 133 S. Ct. at 1669; *see also id.* at 1664 (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

67. *Id.* at 1664 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

68. *Id.*

69. *Id.* Additionally, the Court discussed the fact that ATS litigation has caused significant international discord—the following countries all objected to extraterritorial applications of the ATS: Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom. *Id.* at 1669 (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part)).

70. *Id.*

policy.”⁷¹ Over the past 226 years, it is safe to say that the courts have *not* won that struggle—and for good reason.

The words “foreign policy,” “foreign affairs,” and “international relations” do not appear in the Constitution, but the Founders surely prescribed for our national government a division of labor when it came to how our nation would interact with its peers.

The President is the commander-in-chief and has the power to receive foreign “Ambassadors and other public Ministers”⁷² and, “by and with the Advice and Consent of the Senate,” to appoint ambassadors and make treaties.⁷³ Congress also has vital functions in the area of foreign relations: the power of the purse, the power to declare war, the power to make rules governing the armed forces, and the requirement that the Senate give its advice and consent to the appointment of ambassadors and to the making of treaties.⁷⁴

By contrast, the Constitution does not enumerate any specific foreign affairs powers for the courts. This silence does not suggest that courts have *no* role. Nevertheless, the Founders’ decision not to vest any *specific* powers concerning foreign affairs in the judiciary was surely an acknowledgment of its structural disadvantage in such matters.⁷⁵

71. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 201 (Randall Bland et al. eds., 5th rev. ed. 1984).

72. U.S. CONST. art. II, § 3.

73. *Id.* § 2; cf. *THE FEDERALIST NO. 75*, at 389 (Alexander Hamilton) (Gideon ed., 1818) (arguing that foreign affairs must be governed by a single executive characterized by “decision, secrecy, and despatch”).

74. U.S. CONST. art. I, § 8. Some commentators have argued that it was Congress, not the President, that was given the primary role in foreign affairs. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIRS* 75 (1990) (“[T]he first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with Congress, not the president being granted the dominant role.”). But see Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 *GEO. L.J.* 725, 732 (2013) (noting that “there is a category of cases where the President can enter a binding international agreement based on his own independent, Article II authorities, without action from Congress,” and arguing that in such cases, “the President makes international law based on his independent constitutional authority”).

75. Our courts have generally recognized their limited role, and the risk that their involvement could undermine the handling of foreign affairs by the political branches. Starting with Chief Justice Jay’s letter to Secretary of State Jefferson, courts have regulated themselves by developing numerous doctrines to curb their own powers in this area. See *supra* notes 21-27 and accompanying text. These include the doctrines of foreign sovereign immunity, international comity, *forum non conveniens*, and the act of state doctrine. Other more general jurisdictional rules have been applied by courts to avoid unduly infringing on foreign relations, including political question, standing, ripeness, and mootness. When it comes to weighing in on matters related to our affairs with other nations, courts have, over time, largely adopted Professor Alexander M. Bickel’s idea of the “passive virtues” of the judiciary, refusing to decide cases on substantive grounds if narrower grounds exist. As Bickel explained in his seminal work of 1962, *The Least Dangerous Branch*, courts must wield their power selectively in order to preserve their legitimacy in a republican form of government. An excessively interventionist judiciary would inevitably dilute its own moral virtue and institutional authority. Bickel also understood that “private ordering” and the voluntary, organic process of working out problems were preferable to judicial solutions. This is particularly true in the realm of foreign relations, where the process of adjudication is not likely to resolve disputes that arise in the complex and multifaceted relationships between and among sovereign states. Cf. Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 *HARV. L. REV.* 1980 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)) (linking judicial review of foreign-affairs questions to the debate between Bickel and Herbert Wechsler on the desirability of

What do I mean by “structural disadvantage”? In our adversarial system of adjudication, courts are limited to the arguments and the record before them. They do not—and, indeed, often cannot—consider the many facets of a complicated issue affecting our nation’s foreign relations. Similarly, they typically are not equipped to weigh how a given decision would affect another nation’s sovereignty or whether it might cause conflict with foreign laws or foreign governments.

We judges are generalists. We interpret the law, not the law’s effects on diplomacy or matters abroad. And while we, for the most part, have expertise in interpreting the law, we usually lack the substantive knowledge or experience needed to balance delicate foreign policy considerations. This is particularly true when it comes to conduct occurring in the territory of a foreign state.⁷⁶ Indeed, there are good reasons why the word *foreign* has come to be synonymous with the word *unfamiliar*.

In the same vein, judges are institutionally constrained by the information on which we can rely—information that is far more limited than that available to the political branches. In our system of adjudication, a generalist judge must rely exclusively on presentations by the parties in a given case. There is no guarantee that these presentations will contain all relevant facts and arguments. Meanwhile, political actors are entitled (indeed, *required*) to rely upon all sources, including those expressly precluded by the Federal Rules of Evidence.

In any event, the judicial process is not a coordinated endeavor. Judging is an individual—and somewhat monastic—process, focused on interpreting the law through the myopic lens of a particular case. Over time, this creates a risk of disparate and inconsistent outcomes—both between different judges and between different branches of government—as each judge tends to be the lord of his or her own fiefdom. By contrast, the process of policy formation within the political branches is a deliberative, collaborative, and cooperative endeavor intended to produce a coherent national stance. This is vital in foreign affairs, more than in any other realm, because our country’s international relations demand what the Supreme Court has called a “single-voiced statement of the Government’s views.”⁷⁷

Finally, our prevailing posture, as judges, is backward-facing. Our job is to resolve disputes *after* the relevant conduct has already occurred. Those charged with managing our foreign relations, in contrast, frequently confront situations as they unfold in real time. To a much greater extent than judges, they must try to anticipate and, hopefully, solve problems *before* they happen.

These structural disadvantages make it a strategic imperative for courts to tread cautiously in cases touching upon foreign affairs. The sovereignty of

judicial review in general).

76. As Professor Curtis Bradley has suggested, “the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.” Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 516 (1997).

77. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

another nation is not something to be disregarded casually. And so, when our country decides to act in ways that may offend foreign sovereigns—which, of course, include foreign democracies—the *political* branches should take the lead.

There is a simple reason for this hierarchy of decision-making: application of our domestic law to foreign people in foreign places generates understandable irritation and resentment.⁷⁸ Our legal regime is a development of our distinct legal tradition. The people of other nations had no stake in its creation and therefore understandably resist its imposition upon them.⁷⁹ In many ways, the application of our laws extraterritorially is in direct tension with the principles of self-governance and self-determination that we rightly advance as the basis for good government, both here and abroad.

In addition, the law is just one tool in America's foreign policy toolbox, and it is usually not the one best suited to achieving our aims. Traditionally, we project power globally by diplomatic, economic, and military means. These tools of national power—tools that are more squarely the province of the political branches—allow our government to pursue calibrated responses to situations as they unfold. They leave room for subtlety, fluidity, and movement in the joints. They provide a space for context, for horse-trading, and for compromise. They allow for informal discussions, interpersonal relations, and interstitial solutions. In sum, they provide space for politics high and low. Indeed, foreign ministers can achieve levels of candor that opposing lawyers cannot. As we have been reminded recently and often, presidents can pick up the phone. Judges cannot. And while litigation picks winners and losers, disputes within the realm of foreign affairs are rarely “zero-sum” propositions.

One final reason that we, as judges, should be particularly vigilant when adjudicating cases that may affect foreign relations is the very real prospect that other nations will reciprocate. Other countries may begin to realize the value of what some have called “lawfare.”⁸⁰ What if a Chinese court allows a lawsuit against an American company for transactions in America that were perfectly legal under American law? Or if a European court permits a lawsuit against a

78. See *supra* notes 53-60 and accompanying text.

79. See, e.g., Austen L. Parrish, Morrison, *the Effects Test, and the Presumption Against Extraterritoriality: A Reply to Professor Dodge*, 105 AM. SOC'Y INT'L L. PROC. 399, 401 (2011) (“Extraterritorial laws regulating foreigners are inherently undemocratic and impose obligations on individuals and groups who have no formal voice in the political process and who have not consented to those laws.”).

80. See, e.g., Parrish, *supra* note 79, at 401-02 (“When the United States was the only country applying its laws extraterritorially, the effects test was more palatable as a way to build empire and project American influence. But now that American-style litigation has globalized, other countries have begun experimenting with expanding the geographic reach of their own laws. For weaker nations, extraterritorial laws become a meaningful way to exert greater influence beyond what they could expect as a result of multilateral negotiation. Americans should be concerned that, following the U.S. lead, other countries will embrace extraterritoriality as a way to impose liability on Americans for conduct occurring in the U.S. and lawful under U.S. law, that is alleged to have an effect abroad.”); see also Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966) (“Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals.”).

retired American President for ordering a drone strike on a target abroad? Or a lawsuit against an American Secretary of Defense or a government lawyer who advised that President to deploy the drone?

This may be the world toward which we are heading. And it is safe to say that the more we are willing to entertain “exorbitant jurisdictional” claims,⁸¹ the more we are encouraging the courts of other nations to do the same.

Thus, from a strategic perspective, when American courts are asked to deploy law globally, even in the service of a good cause, they should tread lightly. To paraphrase the words of John Quincy Adams, our task as judges is decidedly not to go “abroad[] in search of monsters to destroy.”⁸²

III. JUDICIAL ACTION IN MATTERS OF FOREIGN AFFAIRS

What, then, should be the foreign policy of our government’s “least dangerous branch”? I submit that, as judges, we should approach cases that affect foreign affairs with three ideas in mind. First, we should be particularly wary of interfering in the management of our foreign affairs by the political branches. Second, we should rigorously apply the presumption against extraterritoriality, thereby forcing the political branches to decide whether to extend a given statute to cover acts that are within the territory of a foreign sovereign. Finally, we should adhere to our constitutional and historical role, thereby serving as a model to other countries of the judicial function and the rule of law.

With regard to the first of these principles—the need to be wary of interfering in the management of foreign affairs by the political branches—it is worth underscoring that *judicial restraint* is not the same as *judicial abdication*. A case touching on foreign relations should *not* automatically signal a reflexive judicial retreat. The political branches should not be allowed, routinely or invariably, to sidestep judicial review in cases touching upon our foreign relations. But, as Justice William J. Brennan observed in another context, judges faced with such cases must scrutinize an issue closely, look to “the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.”⁸³ In short, when it comes to foreign affairs, courts should recognize that while we play a limited role, it is not an invisible role.

Part of this role, as the Supreme Court has recently signaled in *Morrison* and *Kiobel*, involves a philosophical return to our founders’ Westphalian doctrine of territoriality. The default rule of territoriality (or *territorialism*) is admittedly formalistic or positivistic. It is mechanical, and it is seemingly rigid. And today, as yesteryear, it is a soft target for theoreticians of the law.

81. Born, *supra* note 54, at 28-29, (noting that “exorbitant jurisdictional assertions” can “readily arouse foreign resentment [and] provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields”).

82. See ADAMS, *supra* note 19.

83. *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

Nevertheless, to paraphrase Churchill on democracy, the territorial doctrine may be the worst possible rule of jurisdiction, *except for all the others*.⁸⁴

The second idea—the rigorous application of the presumption against extraterritoriality—can enable the judiciary to act as a spur to the political branches to correct inconsistencies or jurisdictional gaps in our law. One example concerns a 2000 case called *United States v. Gatlin*. In *Gatlin*, a Second Circuit panel faced a question of first impression—whether a civilian could be prosecuted in federal court for a crime committed on a U.S. military installation overseas.⁸⁵ What made this question tricky was that the Supreme Court had ruled in 1957, in *Reid v. Covert*,⁸⁶ that it was unconstitutional to prosecute civilians in a *military court*. This resulted in a “jurisdictional gap,” in that a civilian on a base in Europe could not be tried by courts martial, but there was no express congressional authorization to try that civilian in a regular Article III federal court.

The defendant Gatlin fell right into this jurisdictional gap. He had pleaded guilty in federal court to a charge of sexually abusing a minor (his thirteen-year-old stepdaughter) in violation of a federal sexual abuse statute. But he was a civilian, and he had committed his offense on a military base in Germany leased by the United States. After applying the presumption against extraterritoriality, our panel concluded that Congress did not intend for this statute to apply to military bases abroad. Despite the particularly heinous nature of Gatlin’s crime, we held that the district court lacked jurisdiction over his case. We reversed the conviction and dismissed the indictment.

Unlike most cases, the story did not end there. Because our panel believed that the existence of this “jurisdictional gap” warranted serious congressional consideration, our opinion directed the clerk of our court to forward a copy of our opinion to the Chairmen of the Armed Services and Judiciary Committees of both houses of Congress.⁸⁷ Within five months, and in direct response to our decision, Congress closed this jurisdictional gap and passed the Military Extraterritorial Jurisdiction Act of 2000, giving federal courts the necessary jurisdiction to prosecute civilians who commit crimes on overseas military installations.⁸⁸ In this way, the *Gatlin* panel demonstrated how courts can play a

84. Cf. 444 Parl Deb HC (5th ser.) (1947) col. 207 (statement of Winston Churchill) (“Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time . . .”).

85. *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (Cabranes, J.).

86. *Reid v. Covert*, 354 U.S. 1 (1957).

87. *Gatlin*, 216 F.3d at 209. In doing so, we made it clear that we did not “express a view on the justice or wisdom of any potential legislation,” since, in our system of government, “[t]he responsibility for the justice or wisdom of legislation rests with Congress, and it is the province of the courts to enforce, not to make, the laws.” *Gatlin*, 216 F.3d at 223 (citing *United States v. First Nat’l Bank of Detroit*, 234 U.S. 245, 260 (1914)). That said, we noted that bills to cure this jurisdictional gap had been pending in successive Congresses for several decades. *See id.* at 222 (noting that “Congress has held several hearings on the matter, and, over the last four decades, has entertained more than thirty bills aimed at closing the gap” (footnote omitted)).

88. Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (as codified at 18 U.S.C. §§ 3261–3267). *Gatlin* was decided on June 15, 2000, and MEJA became effective on November 22, 2000.

constrained, but important, role in encouraging our political branches to decide which of our laws should apply extraterritorially.⁸⁹

The third and last way our courts can have an impact on our foreign affairs is admittedly less tangible but should not be overlooked. Our judiciary is one of the oldest and most distinguished in the world. Other countries continue to look to our courts as a model for their developing legal systems. It is therefore important that we guard against the perception that our judiciary is a means of making policy—for the world as well as for ourselves—without the trouble of democratic politics. Rather, we should strive to make the judiciary an exemplar of the important role that courts can play in ensuring that the law is *faithfully* interpreted, rather than stretched beyond its meaning to achieve particular policy goals, however noble those goals may be.

IV. CONCLUSION: AMERICA AS A GLOBAL POWER, NOT A GLOBAL COURT

In closing, let us situate this discussion within a broader contemporary foreign policy debate. As we all know, two lengthy wars have prompted suggestions for a diminished U.S. role in the world. This revived plea for retrenchment is not a project of just the left or the right. Across the political spectrum, we hear voices calling for the United States to exit the world stage or to reduce its role in the shaping of world public order. It is not an overstatement to say that we are witnessing, within both major parties, a revival of the familiar isolationist impulse in our politics.

Indeed, a recent poll found that fifty-two percent of Americans wanted the United States to “mind its own business internationally,” the largest percentage since polling began on this question a half-century ago.⁹⁰ And so, many Americans are increasingly asking themselves *not* “what level of global engagement should our government have,” *but rather* whether we should “be globally engaged at all.”

My answer to this latter question, as I noted earlier, is a decided and emphatic *yes*. To turn autobiographical, I personally believe that the United

89. Judges and commentators have generally recognized *Gatlin*'s importance in prodding congressional action. See, e.g., *United States v. Corey*, 232 F.3d 1166, 1172 n.3 (9th Cir. 2000); Eugene R. Fidell, *Criminal Prosecution of Civilian Contractors by Military Courts*, 50 S. TEX. L. REV. 845, 850 (2009); Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT'L L. 446, 446 (2001). At least one commentator has disagreed, pointing out that Congress had started work on MEJA in 1999. See Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad*, 51 CATH. U. L. REV. 55, 102 n.252 (2001). But that misses the point. Although Congress had been aware of the jurisdictional gap for decades and had even taken various inconclusive steps to address it, see *Gatlin*, 216 F.3d at 222, Congress only passed MEJA after *Gatlin* highlighted the real-world consequences of congressional inaction. In fact, after the bill was passed, I (in my capacity as the author of the *Gatlin* opinion) received a call from Senator Jeff Sessions of Alabama, a member of the Senate Armed Services Committee who sponsored the bill in the Senate, thanking us for alerting him and his colleagues to the jurisdictional gap.

90. Pew Research Center & Council on Foreign Relations, *Public Sees U.S. Power Declining as Support for Global Engagement Slips: America's Place in the World 2013* (Dec. 3, 2013), <http://www.people-press.org/files/legacy-pdf/12-3-13%20APW%20VI%20release.pdf>; see also Max Fisher, *American Isolationism Just Hit a 50-Year High. Why That Matters*, WASH. POST (Dec. 4, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/12/04/american-isolationism-just-hit-a-50-year-high-why-that-matters/> (“That number has historically ranged between about 20 and 40 percent.”).

States can and should continue to have a robust foreign policy. In short, it can and should continue to be the “dangerous nation” predicted by European observers at the beginning of the nineteenth century—a “dangerous nation” because we were (and are) a nation whose liberal values threaten the ambitions of autocracies everywhere—a “dangerous nation” committed to securing a safe, just, and humane world order.⁹¹ We should not be embarrassed by the idea of American nationalism or hegemony—from the Greek *hēgemonía*, meaning leadership. Nor should we be intimidated by accusations of “American imperialism”—especially when these accusations are hurled by autocrats, theocrats, and gangster-crats.

Indeed, as a son of Puerto Rico, a colonial society brought under the American flag at the conclusion of the Spanish-American War in 1898, I am a direct and grateful beneficiary of “American imperialism.” It is enough to say that the vast majority of my people treasure our citizenship in this most exceptional empire—in Jefferson’s formulation, an “Empire of liberty”⁹²—indeed, the only empire whose “subjects”⁹³ consistently reject separation.⁹⁴

My argument takes as a point of departure the simple proposition that history has bestowed upon the United States, at least since the Second World War, an equally exceptional role in maintaining international peace, prosperity, and security—including the protection of the human rights of all people. I stress this to make the basic point that opposing the global application of our laws *by courts* does not entail rejecting the global expansion of our ideals—especially with respect to human rights. The world is a better place when the United States is actively engaged as a force for good. We know from experience that a great power founded on the principles of our Declaration of Independence cannot sit quietly by in the face of injustice and flagrant human rights violations—violations that may undermine world order and threaten the peace.

The Westphalian state system, created in 1648, is today under great stress from new and old threats alike.⁹⁵ Terrorists have gone from clandestinely fighting states to declaring their own states. At the same time, we have also witnessed a resurgence of old-fashioned state-backed armed aggression. And so, the United States does indeed remain *the* indispensable nation for the indefinite future. Only our country has the *ability* to defend a liberal world order and to stand up for the very concept of universal human rights.

If you think otherwise, ask the Poles, the Bosnians, and the Taiwanese.

91. See generally KAGAN, *supra* note 18.

92. Letter from Thomas Jefferson to George Rogers Clark (Dec. 25, 1780), reprinted in 4 THE PAPERS OF THOMAS JEFFERSON 233, 237 (Julian P. Boyd ed., 1951).

93. Since 1917, Puerto Ricans have not been *subjects* at all, but rather American *citizens*. See generally JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS (1979).

94. See Burnett, *supra* note 37, at 803 (noting that “a right to independence has long been asserted” in Puerto Rico but “never actually embraced by a majority”).

95. For a discussion of the Westphalian state system, see *supra* notes 31-33 and accompanying text.

Ask the Koreans, the Kuwaitis, and the Kosovars. Ask the people of the Baltic States. Ask the Israelis and the Soviet Jews released following intense American political pressure: to whom have *they* looked for the protection of their most basic human rights?

In freeing Europe from Nazism, liberating Buchenwald and Dachau, stopping the spread of Communism in South Korea, protecting the world from the predations of the Soviet Union, and ending genocide in the Balkans, the most important work in the struggle for the protection of global human rights has *not* been done in or by the courts. The most important work protecting human rights abroad has never been done by a plaintiff in an ATS lawsuit. That's because the world's greatest human rights organizations are *not* non-governmental organizations, impact litigation firms, or law school clinics appearing before the courts. The greatest human rights organizations in the world—yesterday, today, and tomorrow—are the *Armed Forces of the United States of America*.

We should all celebrate America's leadership in world affairs, recalling that, in the great work of maintaining world public order and protecting human rights, it is the *political branches* of our government—*not* the “least dangerous” branch of our government—that has done, and must continue to do, the heavy lifting.

I have deep sympathy and understanding for the concerns of victims of heinous human rights abuses. They, like all of us, seek justice. And I know that this noble concern is what motivates the desire of many to permit extraterritorial suits under the Alien Tort Statute. Some go as far as to say that closing our courts to extraterritorial ATS lawsuits would signal American apathy to atrocities committed abroad.⁹⁶

This is not so. Serious breaches of the peace—including genocide—are most assuredly the business of the United States, our friends, and our allies. But the courts are not particularly competent in handling any such business. This is because protecting a liberal world order is not something that well-intentioned lawyers, academics, and judges are in a position to achieve on their own. Indeed, judgments for money damages in civil litigation have little relevance to *preventing* human rights atrocities on a large scale. Protecting innocent people from the predations of others requires *American* global leadership, and that leadership can only come from the vigorous efforts of our political branches.

And so, my understanding of *Morrison* and *Kiobel*—and indeed, my understanding of the history of our country and the involvement of our judiciary in foreign relations—is *not* that America should exit the global stage or evade any responsibility for the protection of human rights abroad. Rather, it is that the *courts* should shy away from being at the tip of America's spear. America's beneficent powers can be, must be, projected around the world—by the political branches of our government, not by our *courts*.

Hamilton was right—our judiciary has neither *force* nor *will*. All we

96. See, e.g., Leval, *supra* note 9, at 249; notes 8, 11, 11 and accompanying text.

judges really have, as Hamilton observed, is our *judgment*. And when it comes to foreign affairs, the reach of our judgment is quite limited. It is only through the *judicious* exercise of that judgment—by showing proper restraint and deference to the political branches—that we, as judges, can be an inspiration and a beacon to the world.

To paraphrase the Book of Isaiah, our judiciary cannot be a sheriff unto the nations, but we can be—and should be—a shining “light unto the nations.”⁹⁷

Thank you.

97. *Isaiah* 49:6.