THE FUTURE AND PAST OF U.S. FOREIGN RELATIONS LAW

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I

INTRODUCTION

Well before Iraq, the United States had carved for itself a reputation of a global power that tried not to concern itself with the rest of the globe, even, or perhaps especially, when it sent its armed forces abroad. The nation's recent experience in Iraq casts this paradox in still higher relief. As the war shows, the United States has never occupied a more commanding international position, nor a greater readiness to assert itself. Epithets such as "sole superpower," "hegemon," and "empire" now commonly describe the once isolated republic, whose first president warned of foreign entanglements. By contrast, the aftermath of the war suggests that, for better or worse, Americans make lousy imperialists thanks to our aversion to longstanding foreign commitments; and pretty much only for worse, remain inward-looking and ignorant of the societies that we so profoundly affect.[1]

Law imitates life overseas as well as at home. The increasing role that the United States plays in the world can only mean a correspondingly greater role for foreign affairs law in the U.S. legal community. As if on cue, the Supreme Court has recently cited international and comparative law materials to a striking, and all but unprecedented, degree. One result of the growing importance of foreign affairs law will be the renewed focus on who can legitimately make foreign policy: Congress, the President, or even the states. Most compelling here is the perennial issue of the war power, which happened not to surface with regard to the Iraq war, but which might, sooner or later, emerge in connection with a continued U.S. military presence. Another result of U.S. engagement will be the consideration of how international law—treaties, executive agreements, transnational authorities—applies domestically. Slowly and not entirely surely the U.S. has determined that it cannot avoid becoming an international citizen. The pressures and opportunities of globalization make participation in multilateral regimes such as NAFTA, the IMF, the WTO, not to mention the U.N. Commission on Human Rights, the U.N. Human Rights Committee, and the United Nations

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1. For recent expositions of this theme, see MICHAEL HIRSH, AT WAR WITH OURSELVES (2003) (arguing that in order for the United States to perpetuate the global system it has built, it must rely on the international community); CLYDE PRESTOWITZ, ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS (2003) (exploring foreign policy ramifications of U.S. unilateralism).

itself harder to avoid. Concurrently, therefore, there will be an increased focus on U.S. foreign affairs law at future conferences on constitutional law.[2]

Just as U.S. foreign policy ventures abroad while looking inward, so too does U.S. foreign affairs law. Not long ago a group of young, original, and energetic scholars set out to question many of the internationalist premises in constitutional law that have prevailed in the field at least since World War II.[3] One prominent scholar sympathetic to the overall trend heralded this development as the potential genesis of a "new American foreign affairs law."[4] Critics have been less charitable, offering terms such as "new sovereigntists."[5] As these labels imply, one hallmark of the new foreign affairs law has been an effort to revive limitations on the ability of federal institutions to make international commitments, or recognize international standards, that would have binding domestic effects, especially in the face of claims on behalf of states' rights. This revival of state-oriented federalism has proceeded hand-in-hand with a resurgence of executive-oriented separation of powers advocacy.[6] Though less obviously inward looking—the standard assumption has long been that presidents are more interventionist than the other branches—the impetus for this trend stems more from assumptions about the role of the executive in the U.S. constitutional order than from any assumptions about the president's likely performance in foreign affairs.

To a remarkable degree, recent foreign affairs scholarship has not merely looked inward, but backward. Perhaps even more so than domestic constitutional law, its conclusions rest upon originalism outright or draw heavily upon ostensible understandings at the time of the Founding.[7] Taken together, the historical claims tell a mutually reinforcing story of continuity and consensus. Eighteenth-century Americans, following their eighteenth-century British counterparts, were generally skeptical of foreign commitments unless authorized by normal democratic process.[8] On this basis John Yoo, for example, argues that originalism compels the conclusion that treaties, above all international human rights treaties, are not to be presumed self-executing.[9] Likewise, eighteenth-century Anglophones remained united in believing that the conduct of foreign affairs was inherently executive and held fast to this view. From this

2. To the extent that globalization obtains, the U.S. legal community will also continue to confront the need to study international law itself. *See* Martin S. Flaherty, *Aim Globally*, 17 CONST. COMMENTARY 205, 214-16 (2000) (discussing U.S. courts ruling on international customs).

3. The classic expression of this postwar orthodoxy remains LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (2d ed. 1996). *See* Curtis A. Bradley & Jack N. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 843-45 (1997) (summarizing Henkin's argument that customary international law resembles federal law for the purpose of the last-in-time rule). As the American Law Institute's Chief Reporter, Henkin earned further recognition for this principle in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §1 reporters' notes 1, 4 (1987).

4. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 *passim* (1999).

5. Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000, at 9-10.

6. *See infra* text accompanying notes 67-78.

7. *See infra* text accompanying notes 80-96.

8. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2024-25 (1999)

9. *See id.* at 1969 (explaining the Marshall Court rejection of the idea that all treaties should be self-executing in *Foster v. Neilson*, 27 U.S. 253 (1829)).

premise Professors Prakash and Ramsay conclude that all foreign affairs authority falls to the President by default, unless otherwise specified in the text of the Constitution.[10] In good originalist fashion, it follows that any departure from the clear and considered foreign affairs thinking that prevailed from the colonial era through the early years of the Republic must be presumptively invalid.

But doctrinal claims, to the extent they rely on history, can prevail if they are historically credible.[11] Happily, a number of prominent challenges have been issued, questioning specific historical claims made by the new foreign affairs movement.[12] But no one has yet noted the common themes that the revisionist history puts forward nor the common flaws that undermine much of revisionist foreign affairs law. As with domestic originalism, the story of continuity and consensus offers an immediate source of doubt. The past is notoriously messy, because a contentious area, such as the proper ordering of government, is usually replete with conflicting voices, especially during an era of rebellion, revolution, and innovation. More concretely, revising the revisionist account gives rise to an alternative story. This story, first of all, gives the lie to any notion that constitutional thinkers of the Founding had early on worked out well-settled solutions to foreign affairs issues that have since vexed their modern descendants. Still less does the evidence suggest that any dominant pattern that did emerge settled on either an executive brand of separation of power or a localist version of federalism. To the extent a close examination does reveal trends, it is an embrace of internationalism and ambiguity with regard to which branch, if any, would control foreign policy—positions both borne of new lessons learned amid the rapidly changing circumstances and ideas that independence initiated. As this last point suggests, the early constitutional history of foreign affairs indicates how little the Founding generation actually established, rather than how much.

Better foreign relations history points to a better approach to foreign relations law. Of course it is an open question why the views of the Founders who, however experienced and prescient otherwise, remained neophytes in global affairs at a time when the United States was globally marginal, should be binding upon modern constitutional actors. As Ronald Dworkin has pointed out, the question of the weight accorded history in constitutional theory should in the end be resolved by theory.[13] But to the extent history matters—and most theories posit that the past carries some weight—a more complete account of early foreign affairs points in a direction that even skeptics of originalism might find congenial. Precisely because the Founding generation had resolved so little, rather than so much, in their new Constitution, it quickly became apparent that many key constitutional issues in foreign affairs would have to be worked out over time by the three branches in light of the likely consequences. While leading historians have pointed out that this result also frequently obtains in domestic

10. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

11. Martin S. Flaherty, *Article and Responses: History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

12. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

13. RONALD DWORKIN, A MATTER OF PRINCIPLE 33, 53-55 (1985).

constitutional issues,[14] in foreign affairs it is close to systemic. In foreign affairs, the Founding paradoxically bolsters nothing as much as the method espoused by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*,[15] often seen among the most anti-originalist opinions in the modern canon. Whereas Jackson merely assumed history was invariably inconclusive, here a careful reconstruction of the Founding era decisions tends to confirm the assumption. In consequence, ongoing tradition and custom step in to determine the constitutional meaning. This is not to say, with Jackson, that the Founding generation never settled upon certain understandings. When it did, however, more often than not the conclusion cuts against the revisionist story, especially with regard to localism.[16]

All this leaves the historical foundations of the new foreign affairs law movement on doubly shaky ground. First, the specific agreements established by the Founding generation were more often than not either internationalist, as in the doctrine of self-executing treaties, or non-presidentialist, as in conferring the War Power upon Congress. More systemically, the Founding generation simply left unresolved many central foreign affairs questions, such as whether the President and Senate or the President alone may terminate treaties, thus leaving such matters to be resolved through custom. For these reasons, modern foreign affairs claims that rely on the myth of consensus and continuity should at least face the twofold presumption that they must rebut. In contrast, foreign affairs history—perhaps more so than in any other area of constitutional law—points beyond itself, leaving it to subsequent generations to pragmatically determine constitutional arrangements in foreign affairs by considering their likely results. This forward and outward-looking project might be daunting. But, if only on historical grounds, it beats reliance on myth.

This article seeks to clear the way for just such an approach. Part II explores in greater detail the growing prominence of foreign affairs issues in constitutional law and surprisingly atavistic solutions that have been proffered in response. Part III turns to the historical case on which many of these new foreign affairs solutions are built and exposes these as fundamentally inconsistent with the general scholarly narrative of the era as well as with the specific historical sources bearing upon foreign affairs. The underbrush cleared, Part IV then describes Justice Jackson's reliance on constitutional custom in *Youngstown* as the counterintuitive guided by the history of foreign affairs law.

14. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 159-60 (1996).

15. *See* Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (stating that historical authorities are often ambiguous).

16. *See* Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 KANSAS L. REV. 993, 1009-11 (1997).

II

COSMOPOLITANS AT THE GATES

A. Global Legal Reality

As Anne-Marie Slaughter has pointed out, "judicial globalization" marches on in almost the same inexorable fashion as its economic cousin.[17] This observation holds true in particular regarding judges of one nation making reference to the analogous laws of another, as well as judges of any nation citing relevant international law. So powerful has the tide become that it has recently swept up several justices—and even an occasional majority—of the Supreme Court of the United States.

This past term provides the latest cases in point. With regard to international law, easily one of the most important decisions handed down was *Sosa v. Alvarez-Machain*.[18] Despite an excess of cautionary rhetoric, the Court in essence upheld modern litigation under the Alien Tort Statute (ATS), through which aliens have brought tort suits in federal court for human rights violations under customary international law.[19] In so doing, the *Sosa* majority guaranteed that the federal judiciary's duty to engage with international legal standards in ATS suits would continue.

Less noted, but perhaps even more significant, was the Court's rejection of Justice Scalia's contention that *Erie v. Tompkins*[20] in effect deprived the Federal courts of the power to recognize international norms absent further congressional action. To the contrary, Justice Souter's majority opinion indicates that the Court stands by its traditional understanding, as conventionally understood in such cases as *The Pacqute Habana*,[21] that customary international law was part of the domestic law of the United States. While this confirmation came in the specific context of considering whether federal judges could identify evolving international norms under the ATS, its import is to confirm that international custom was part of judicially enforceable federal law even in the absence of a statute.[22]

Justice Souter, joined by Justice Ginsburg, likewise displayed an internationalist bent in *Hamdi v. Rumsfeld*, in which an American citizen seized in Afghanistan and held incommunicado in the United States as an "enemy combatant" sought habeas relief from the federal courts.[23] Here Justice Souter came closer to the core of judicial globalization in looking to international law to resolve a domestic legal issue. Specifically, the Justice considered the government's contention that the Congressional resolution authorizing military action against al-Qaida and the Taliban authorizes the President, as Commander-in-Chief, to detain enemy belligerents according to the international laws of war. Accordingly, the argument continued, the Resolution author-

17. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
18. Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).
19. *Id.* at 2754-67.
20. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
21. 175 U.S. 677, 700 (1900).
22. *Sosa*, 124 S. Ct. at 2764-65 & n.19.
23. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

ized detention consistent with 18 U.S.C. § 4001(a), which prohibits detention of citizens except pursuant to an act of Congress. Souter (and Ginsburg) rejected this argument on the grounds that the laws of war as codified in the Third Geneva Convention appeared to require that Hamdi be treated as a prisoner of war, or at least receive a hearing to determine that he is an unlawful combatant. The opinion, in short, concluded that Congress could not have authorized Hamdi's detention as consistent with the laws of war on the assumption that the government was violating exactly those laws.[24]

If anything, the previous term was even more significant. In the widely anticipated University of Michigan affirmative action cases, a 5-4 majority in *Grutter* v. *Bollinger* held that "the Equal Protection Clause does not prohibit the [University of Michigan] Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body,"[25] even while the court struck down the more "mechanical" race-conscious scheme in undergraduate admissions in *Gratz v. Bollinger*.[26] Likewise anticipated, but far more surprising, another one-vote majority in *Lawrence v. Texas*[27] overruled *Bowers v. Hardwick*[28] to hold that a state statute criminalizing homosexual sodomy was inconsistent with substantive due process.

For all the obvious domestic importance of these rulings, their embrace of international law may prove to be more compelling in the long run. In *Grutter,* for example, Justice Ginsburg, joined by Justice Breyer, filed a concurring opinion that commences with citations to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[29] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[30] The concurrence brings in these standards to argue that although the majority opinion that affirmative action programs must have an end point "accords with the international understanding," the United States has not yet gotten there.[31]

Even more striking was Justice Kennedy's majority opinion in *Lawrence*, which stressed that Western standards regarding the regulation of homosexual conduct had for all intents and purposes made *Bowers* an anomaly in most of the industrialized world.[32] For this proposition, *Lawrence* relied on a string of decisions issued by the European Court of Human Rights, as well as a brief submitted by former Irish President and UN High Commissioner for Human Rights Mary Robinson, who had liti-

24. *Id*. at 2652, 2657-60 (Souter, J., concurring in part and dissenting in part).

25. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

26. Gratz v. Bollinger, 539 U.S. 244, 280 (2003) (O'Connor, J., concurring).

27. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

28. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

29. *Grutter*, 539 U.S. at 344 (2003) (Ginsburg, J., concurring) (quoting Annex to G.A. Res. 2106, U.N. GAOR, 20th Sess., Annex, Art. 2(2), U.N. Doc. A/6014, (1965)).

30. *Id.* (quoting G.A. Res. 180, 34th Sess., U.N. GAOR, Annex, Art. 4(1), U.N. Doc. A/34/46, (1979)).

31. *Id*.

32. *See Lawrence*, 539 U.S. 572-79.

gated several of these cases while still a law school professor.[33] These references, moreover, follow on the previous term's *Atkins v. Virginia*, in which the Court likewise referenced international standards in holding that the execution of the mentally retarded violated the Eighth Amendment.[34]

What makes these references striking is not their content but that they were included at all, especially in such high profile, ostensibly domestic cases. With certain exceptions—such as Justice Breyer[35] and Justice Stevens[36]—the Justices of the Supreme Court of the United States are notorious for their aversion to referring to legal developments abroad unless absolutely necessary. This aversion has long stood in ironic contrast to courts around the world that regularly examine both international and comparative law, including the jurisprudence of the U.S. Supreme Court.[37] When the Court has turned to foreign materials in major cases, it has usually been in areas of law where U.S. sources had yet to exist, as in Justice Blackmun's account of the Persian Empire in *Roe v. Wade*[38] or Chief Justice Burger's musings on the "Judeo-Christian" heritage in *Bowers* itself.[39] By contrast, the decisions of the past term stand out precisely because they go out of their way to consider contemporary international standards—in particular, international human rights law—in dealing with fundamental domestic issues.

Evidence of the Court's creeping internationalism did not end there. Of more subtle significance are cases such as *American Insurance Ass'n v. Garamendi*.[40] *Garamendi* involved an international device determining internal law as the Court for the first time held that a foreign policy commitment staked out by the President and reflected in an executive agreement with another nation preempts inconsistent state law.[41] Despite the novel extension of preemption doctrine, the Court's reliance on an international instrument to which the United States is a party—as opposed to decrees of human rights tribunals that have no jurisdiction over the United States—is entirely conventional. Rather, *Garamendi*'s significance is as an example of the growing scope of international agreements that the United States and other nations will increasingly forge. In this particular instance, the U.S. and Germany entered into an agreement to resolve the outstanding insurance claims of Holocaust survivors with a novel settlement fund, implicitly in lieu of domestic tort litigation.[42]

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33. *Lawrence*, 539 U.S. at 576-77. *But see id.* at 539 U.S. 586-605 (Scalia, J., dissenting) (questioning the relevance of this source).

34. *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (referring to an international norm against execution of the mentally retarded).

35. *See, e.g.*, Printz v. United States, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting) (referring to the European Union).

36. Knight v. Florida, 528 U.S. 990, 990-91 (1999).

37. *See* Flaherty, *supra* note 2, at 205-07 (providing examples of foreign courts relying on U.S. jurisprudence); *see also* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1067 (2002) (describing I.C.J.'s reliance on U.S. Supreme Court precedent in resolving a water-rights case in sub-Saharan Africa).

38. Roe v. Wade, 410 U.S. 113, 130 (1973).

39. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring).

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

41. *Id*. at 421-23.

42. *Id*. at 464-65.

Most of all, however, *Garamendi* dealt with both the domestic applicability of an international commitment, and who within the nation gets to make such commitments.[43] Here, the Court clearly opted against the states, striking down California's statute mandating that insurance companies disclose information which might facilitate further suits.[44] Conversely, the Court declined to reaffirm the controversial *Zschernig v. Miller*,[45] which announced a "dormant foreign affairs power" doctrine that precludes state action even when the federal government is silent.[46] With regard to the federal government itself, *Garamendi* gave a fairly broad account of what counts as preemptively binding exercises of presidential authority in foreign affairs.[47] Not only does a formal executive agreement count, but so too apparently do statements informally made by executive officials before and after negotiations.[48] Also expressly left unaddressed is the exact relationship between this broad vision of binding presidential foreign affairs policy and Acts of Congress regulating the same foreign affairs matters.

It would not go too far to argue that these cases represent a breakthrough for the U.S. judiciary belatedly participating in the "internationalization of the law."[49] The legal result of globalization is by definition so vast that it requires separate treatment.[50] Suffice it to say that for several reasons the need for the U.S. legal system to develop a more integrated and comprehensive relationship with outside legal frameworks will almost surely be among the principal legal stories of the new century.[51]

One set of reasons for this trend hearkens back to the position of the United States as the current global "superpower," "empire," or "hegemon." However much the terrorist attacks on September 11 may have been the provocation, we have witnessed a President—one who had barely traveled abroad and who displayed an early penchant for treating the rest of the world as if it did not exist—lead the nation in successive wars, regime-changes, and attempts at nation-building. These activities, moreover, may be seen as highly dramatic supplements to ongoing U.S. intervention in the formation and maintenance of international law and legal institutions. Examples of this intervention include the drafting of NAFTA and the Convention for the International Sale of Goods and, perhaps ironically, run back at least to U.S. influence in the creation of such international standards as the Universal Declaration on Human Rights. Even actions such as the cutting off of military aid to nations that participate in the new International Criminal Court represent a self-conscious acknowledgment, how-

43. *Id.* at 412-13.

44. *Id*. at 429.

45. *Id.* at 417-20.

46. *See generally* Zschernig v. Miller, 389 U.S. 429 (1968).

47. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-16, 421-23 (2003).

48. *See id.* at 420-22.

49. Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 DICK. J. INT'L L. 493, 505-11 (2000).

50. For an original treatment on the judicial aspect of the process, see Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

51. *See generally* Harold Hongju Koh, *Address: The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1988) (describing the process of integrating international legal norms into U.S. law).

ever isolationist, that continuing U.S. participation abroad will run up against international precepts.

A second set of reasons for further U.S. engagement with legal internationalization has to do with the growth of the international precepts that the United States will increasingly encounter. More and more public international law covers not just relations between sovereign nation states, but also transnational organizations; and, especially through international human rights law, individuals as well. Likewise, international norms also increasingly arise not just from treaties, but from pronouncements of a growing number of transnational and regional bodies such as International Center for the Settlement of Investment Disputes, the ICCPR Human Rights Committee, and the European and Inter-American Courts of Human Rights. Add to this what Harold Koh terms the increasing "internalization" of international law within other domestic legal systems, and the pressure on a globally dominant United States to more coherently grapple with global norms becomes ever more substantial.[52]

The Supreme Court's recent case law shows this process to be underway along at least a couple of axes. However much a departure, *Lawrence* and *Grutter* illustrate how international standards may influence domestic U.S. law directly. In each instance, the relevant opinions did what courts from other jurisdictions have commonly done in referring to U.S. decisions—apply developments from beyond the borders to define fundamental rights. How the opinions did this remains unclear. Justices Kennedy and Ginsburg were probably looking abroad merely for comparative purposes. The norms they cited, however, could also be viewed as directly binding: for Kennedy on the theory that tradition for substantive due process is not merely American, for Ginsburg on the grounds that the United States ratified the relevant treaties.

Other applications of international law also percolate. The vigor of customary international law will receive renewed attention in the ATS that follow *Sosa*, not least actions such as UNOCAL, in which aliens have sued major U.S. corporations for human rights violations.[53] Likewise, the Court will soon revisit the issue of the juvenile death penalty, and with it, the debate over whether international and foreign standards are relevant to the concept of evolving standards under the Eighth Amendment.[54] When, sooner or later, the United States ratifies a human rights treaty that lacks a reservation relevant to a potential U.S. violation, expect renewed discussion, already evident in scholarship, focusing on the ostensibly settled doctrine that treaties are self-executing in domestic law. Not necessarily least, and certainly not last, *U.S. Reports* will almost surely feature straightforward comparative analysis beyond rights, along the lines of Justice Breyer demonstrating how the federalism of the European Union did not preclude the higher sovereign commandeering the executive officers of the constituent units.[55]

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52. *Id.* at 641-63.

53. John Doe I v. UNOCAL Corp. 2002 U.S. App. LEXIS 19263 (9th Cir. 2002).

54. *See* Roper v. Simmons, 124 S. Ct. 1171 (2004) (granting certiorari to the Supreme Court of Missouri regarding a case involving a 17-year-old defendant sentenced to death after being found guilty of murder).

55. *Printz*, 521 U.S. at 976-78 (1997) (Breyer, J., dissenting).

The recent Supreme Court jurisprudence deals also with the no less intricate problem of who within the United States may make official foreign policy commitments. As *Garamendi* suggests, even large issues that pertain to the federalism aspect of this question remain surprisingly ambiguous.[56] The decision itself, *Crosby v. National Foreign Trades Council*, declined to reaffirm the dormant foreign affairs power, instead relying on specific expressions of federal policy.[57] When, if ever, state foreign policy initiatives will be struck down in the absence of a federal policy remains unclear. Yet, thanks to *Garamendi*, likewise unclear is what will count as an expression of at least presidential foreign policy.[58] Beyond all this, certain scholars seek to obfuscate the doctrine of *Missouri Holland*, which states that Congress may legislate under the Treaty Power what it may not be able to do under a domestic power grant, such as the Commerce Clause. Here the argument runs that at least some of the states rights protections the Court has enunciated domestically should obtain against treaties as well as statutes.[59] What makes these and related questions all the more intriguing is that, unlike many areas of domestic policy, in foreign affairs states and localities often appear in a progressive guise ahead of the federal government on key issues such as human rights.[60]

But for all the interesting twists provided by federalism, the principal foreign affairs action will likely remain regarding the separation of powers at the federal level. Post *Garamendi*, what courts should do if presidential spokespeople tell the states to stay away from foreign policy initiatives that Congress might tacitly approve of is as unclear as the situation is increasingly likely to occur.[61] Also, in both regards, are such perennial issues as whether the president may unilaterally terminate a treaty or, for that matter, get us into a war.

B. Sovereign Fictions

A still relatively new group of iconoclasts offers a range of provocative answers to these, and related, foreign affairs questions. Loosely grouped under the "new foreign affairs law" banner, these scholars and sometimes government officials stand united in challenging what they deem to be the foreign affairs law "orthodoxy" that has prevailed at least since the end of the Second World War.[62] Set out most comprehen-

56. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 412-18 (2003).

57. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000).

58. *Garamendi*, 539 U.S. at 423 n.13.

59. *Compare* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) *and* Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) (arguing for federalism limit in Congressional treaty implementation) *with* Golove, *supra* note 12 (opposing federalism limitations in this context).

60. *See* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001) (noting the allocation of authority between federal and sub-federal systems in the implementation of the international human rights law); Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567 (1997) (describing the significance of subnational responsibility as it applies to international human rights).

61. *See Garamendi*, 539 U.S. at 428-29.

62. *See* Curtis A. Bradley, *A New American Foreign Affairs Law?* 70 U. COLO. L. REV. 1089 (1999).

sively in the *Restatement (Third) of the Foreign Relations Law of the United States*,[63] this orthodoxy remains above all internationalist by generally approving of doctrines that facilitate U.S. participation in, and adherence to, the international legal order. Less obviously, this dominant foreign affairs school takes balanced positions on relevant separation of powers issues, in particular rejecting the idea that the President enjoys the default position of power in any grey area.[64] By contrast, the new foreign affairs pretenders stress U.S. sovereignty and related constitutional barriers to limit U.S. legal commitments abroad.[65] Less routinely, a number of advocates within the movement argue for a broad, indeed hegemonic role in foreign affairs for the President.[66]

Many commentators have already decried or applauded this would-be foreign affairs law reformation, but almost no one has accounted for its sudden emergence. As Peter Spiro has noted, a certain "brand of anti-internationalism runs deep in the American political tradition."[67] However much this tradition ebbed and flowed beforehand, it seems clear that it receded for a sustained period in light of World War II, the Cold War, and the consensus for U.S. international engagement that the two conflicts fostered. It should therefore have come as no surprise that the end of the Cold War would have eroded that consensus and the dominant legal vision that sprang from it. From the perspective of its defenders, the new foreign affairs school usefully challenges untested assumptions, especially those willing to overlook the ostensible lack of democratic participation in U.S. involvement in international legal structures. To its critics, the challengers merely serve up Federalist Society dogma, taking it one level further on the international plane, mainly on the supposition that keeping things local, rather than international, and presidential, rather than congressional and judicial, will serve a particular political agenda. Ironically, the post-September 11 war on terrorism might have a similar effect, undermining some aspects of the new foreign affairs movement as it is getting started. Then again, some ideas, once advocated, can take on lives of their own.

International skepticism cascades across several doctrines, none more so than those dealing with the applicability of international law domestically.[68] Here foreign affairs law revisionists would deny the doctrine, established at least since the Supreme Court's decision in *The Paquete Habana*,[69] that the judiciary can apply customary international law as a type of federal law.[70] The same school likewise rejects the more

63. RESTATEMENT OF THE LAW, THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

64. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 83-130 (2nd ed. 1996).

65. *See* Bradley, *supra* note 4, at 1100-02.

66. *See, e.g.*, Prakash & Ramsay, *supra* note 10.

67. Spiro, *supra* note 5, at 9.

68. *See* Bradley, *supra* note 4 (noting the recently diminished role of the judiciary in foreign affairs law). One further indication of localist-oriented ferment in foreign affairs law appears in CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (2003). In contrast to previous casebooks, this work considers various types of federalism constraints in foreign affairs evident in scholarship, and in certain lower court opinions. *See id.* at 275-337, 373-85.

69. *The Paquete Habana*., 175 U.S. 677 (1900). The prevailing interpretation of the case is set out in the RESTATEMENT OF THE LAW, THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES §111 (1987).

70. *E.g.*, Curtis A. Bradley & Jack L. Goldsmith, *supra* note 3; Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); A. M. Weisburd,

recent understanding, set out in *Filartiga v. Peña-Irala*,[71] that Congress has implemented customary international standards through the Alien Tort Statute,[72] and even that it has the power to do so.[73] Also slated for demolition is the rule, set out in *Missouri v. Holland*,[74] that Congress possesses legislative power to implement treaties it otherwise might not enjoy under domestic grants of power that leave certain areas of regulation to the states.[75] Out of similar federalism concerns, the Supreme Court's greater readiness to find statutory preemption in a statute dealing with foreign affairs cannot survive.[76] It follows that *Zschernig*'s enunciation of a dormant foreign affairs authority that can preempt state laws even in the absence of a federal statute, treaty, or executive agreement must also go.[77] And at least one new foreign affairs law enthusiast has suggested that, contrary to the ostensibly plain text of the Supremacy Clause, treaties that the United States has ratified should not be presumptively treated as the supreme law of the land but instead must be implemented by Congress in order to have domestic effect.[78]

While the major key of foreign affairs revisionism has been concern for sovereignty, an emerging minor key is presidential primacy. This position has its own longstanding history, running through Justice Sutherland's much maligned opinion in *United States v. Curtiss-Wright*[79] to more venerable assertions by Alexander Hamil-

State Courts, Federal Courts, and International Cases, 20 YALE J. INT'L. L. 1 (1995). For rejoinders, see, for example, Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after* Erie, 66 FORDHAM L. REV. 393 (1997). For earlier statements articulating the internationalist position, see Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295 (1994); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

71. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

72. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (arguing that the Alien Tort Statute was intended to implement Article III alienage jurisdiction). *But see* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . offenses against the Law of Nations"*, 42 WM. & MARY L. REV. 447 (2000) (defending the conventional view that the Alien Tort Statute implements customary international law as analogous to federal common law).

73. *See* Bradley & Goldsmith, *supra* note 3, at 873.

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

75. *See, e.g.*, Bradley, *Treaty Power I*, *supra* note 59; Bradley, *Treaty Power II*, *supra* note 59. For a vigorous defense of broad national foreign affairs power, see Golove, *supra* note 12. *See also*, Gerald L. Neuman, *The Global Dimensions of RFRA*, 14 CONST. COMMENT. 33 (1977) (arguing that Congress could enact the Religious Freedom Restoration Act under the International Covenant on Civil and Political Rights as ratified by the United States).

76. Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that the state's power to legislate in the area of foreign relations was subordinate to the federal government's power to do so). For one challenge to this presumption, see Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175 (2000). For a defense, see Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 1013 (2001).

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

78. Yoo, *supra* note 9. *But see* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (re-affirming traditional understanding of *Foster v. Neilson*, 27 U.S. 253 (1829), that treaties are presumed to be self-executing); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (relying on constitutional text, doctrine and structure to rule out Professor Yoo's claim that treaties are not presumed self-executing).

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

ton.[80] In contrast to the localist tradition, engagement in foreign affairs imperatives such as the Cold War tends to weigh in favor of the presidentialist position. Amidst a backdrop of international engagement, the White House and Congress each marshaled support that ebbed and flowed between legislative claims such as the War Powers Resolution[81] and executive assertions like the unilateral termination of the Panama Canal Treaty.[82] Revisionists who seek a logical connection between foreign affairs localism and presidentialism might find common ground in the concept of democratic accountability. Like national and state governments relative to international bureaucracies, relative to the President, Congress or the courts more accurately reflects popular will. Skeptics might add that both positions dovetail more with the views associated with the current White House.

Presidential foreign affairs revisionism has yet to claim the same doctrinal turf as the sovereigntist branch.[83] At least one revisionist argument, however, seeks to revive the sweeping claim that the so-called "Vesting Clause" of Article II[84] implicitly grants the President substantial residual powers not specified in the remainder of that Article. Alexander Hamilton famously, though diffidently, raised this argument in his first *Pacificus* essay defending President Washington's 1793 neutrality proclamation.[85] Its fortunes have risen and fallen ever since. Domestically, the Supreme Court most nearly embraced the idea in *Myers v. United States*,[86] though this stance has since been greatly qualified.[87] Perhaps not coincidentally, among the Court's more notable repu-

80. *See* Alexander Hamilton, Pacificus Nos. 1-7 (1793) reprinted in 15 PAPERS OF ALEXANDER HAMILTON 33-135 (Harold C. Syrett et al. eds., 1969).

81. War Powers Resolution, 50 U.S.C. § 1541 (2000).

82. Goldwater v. Carter, 444 U.S. 996 (1979). Not to be forgotten is the judiciary's own assertions, or lack thereof, in foreign affairs. In *Goldwater*, for example, the Court declined to referee a dispute between the political branches on justiciability grounds. *Id.* at 997.

83. One area in which the two ideas come together is John Yoo's claim that the Chemical Weapons Convention violates the Appointment's Clause in mandating the appointment of executive officers by international bodies rather than by the Executive Branch. John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998).

84. This clause provides that "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art II, § 1, cl. 1.

85. *See* 15 THE PAPERS OF ALEXANDER HAMILTON 33-43 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

86. Myers v. United States, 272 U.S. 52, 132-41 (1926). The claim takes up only one paragraph of the Court's lengthy opinion. Much of the Court's opinion is focused instead on a 1789 debate in the House of Representatives over the President's removal power. *Id.* at 111-18, 119-39, 174-75.

87. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a statute restricting the power of the President to remove a Commissioner of the Federal Trade Commission. The Court in *Humphrey's Executor* noted that the only point actually decided in *Myers* was that "the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." *Id.* at 626. The Court also stated that it was disapproving of any statements in *Myers* that were "out of harmony with the views here set forth." *Id.* The decision in *Myers* was further qualified in *Morrison v. Olson*, 487 U.S. 654 (1988), in which the Court held that Congress could impose a "good cause" limitation on the President's power to remove an independent counsel. *Id.* at 686-89. In his lone dissent, Justice Scalia invoked the Vesting Clause Thesis. *Id*. at 705-06 (Scalia, J., dissenting). In response, the majority stated in a footnote that Justice Scalia's Vesting Clause argument for an absolute power of removal "depends upon an extrapolation from general constitutional language which we think is more than the text will bear." *Id.* at 690 n.29.

diations of the doctrine came in Justice Jackson's opinion in the foreign affairs tinged *Youngstown Sheet & Tube Co. v. Sawyer*.[88]

As with localism, this brand of presidentialism has enjoyed renewed support with a view toward foreign affairs in particular. White House officials were apparently prepared to deploy this argument in support of the Bush Administration's authority to use military force against Iraq had Congress not expressly granted such authority[89]—a readiness that almost certainly means they will dust it off should Congress grow impatient with the armed forces' continued postwar presence. The claim has also received varying degrees of support from established scholars not ordinarily associated with "new foreign affairs law" such as Phillip Trimble[90] and H. Jefferson Powell.[91] Most powerfully, it has been put forward in an important article in the *Yale Law Journal* by Saikrishna Prakash and Michael Ramsay, younger scholars who are avowedly revisionist.[92]

This reconstituted argument on behalf of presidential foreign affairs authority has served as the foundation for more specific claims. Some scholars argue, for example, that the President possesses the exclusive power to terminate treaties, since that power is inherently executive and not expressly delegated to Congress or to the Senate.[93] Others contend that the President has broad unenumerated war powers in situations not involving congressional declarations of war, since the war power, too, is executive.[94] Still others go even further and contend that the power of Congress to declare war is only the power to confirm that a state of war exists in international law and does not impose any restriction on the President's inherent executive authority to make war.[95] Even the argument that treaties are not self-executing gains support from this idea insofar as treaties are characterized as executive in nature and thus require legislative approval to enjoy domestic effect.[96]

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88. Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring); *id.* at 632 (Douglas, J., concurring) ("Article II which vests the 'executive Power' in the President defines that power with particularity.").

89. *See* Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote; Some See Such Support as Politically Helpful*, WASH. POST, Aug. 26, 2002, at A1.

90. PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW (2002).

91. H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY ON CONSTITUTIONAL INTERPRETATION (2002); *see* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337-38 (2002) (endorsing the Article II claim in passing).

92. Prakash & Ramsey, *supra* note 10.

93. *Id.* at 324-27.

94. *See, e.g.*, ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY (1991); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693 (1990).

95. *See, e.g.*, Eugene V. Rostow, *"Once More unto the Breach": The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

96. John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); Yoo, *supra* note 9; *see also* John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002); John C. Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001) (relying on the Vesting Clause Thesis to support broad presidential power to interpret treaties).

In all these ways, the new foreign affairs challenge promises to reorient the field substantially just as the United States appears to become ever more engaged on the world stage in the future. Ironically, however, much as its domestic counterpart, this reorientation is firmly grounded in the past.

III

WHY GEORGE 43 IS NOT GEORGE III (NOR THE CONSTITUTION, THE LEAGUE OF NATIONS)

A. Clio Gets a Passport

The Constitution's delphic treatment of foreign affairs authority has long forced interpreters to resort heavily to history to fill in the resulting gaps. Edward Corwin's great works read like historical monographs, though he himself was a political scientist.[97] Louis Henkin, no advocate of the past controlling the present, frequently turns to history to clarify foreign affairs doctrine.[98] Even Justice Jackson, who in *Youngstown* famously dismissed reliance on original understanding, nonetheless constructed a framework in which post-ratification history would figure prominently, as Justice Frankfurter's complementary opinion illustrated.[99]

With the possible exception of Corwin, never has history figured more prominently in foreign affairs scholarship than today. To a significant extent, this turn to history has gone hand in hand with the new foreign affairs law challenge. Many, though not all, revisionists ground their claims on some form of originialism, offering accounts of the Founding in particular that purportedly undermine the current orthodoxy. Not a few defenders of prevailing doctrine have answered in kind, with specific accounts meant to refute the revisionists. The back and forth has resulted in hundreds of law review pages dedicated to the historical background of such issues as whether the Constitution presumed treaties to be self-executing,[100] the relationship between the treaty power and U.S. federalism,[101] the legitimacy of congressional-executive agreements,[102] and the respective war powers of Congress and the President.[103] There have

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97. EDWARD S. CORWIN, NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER (1913).

98. *See* HENKIN, *supra* note 3.

99. In *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring), Jackson stated that, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from material almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." The three-part framework he advocated for assessing presidential power, however, invites consideration of the historical practices of the political branches, such as longstanding acquiescence by Congress in assertions of presidential power. *Id.* at 637 ("[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."). Frankfurter was more explicit about looking to such practices, arguing that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." *Id.* at 610-11 (Frankfurter, J., concurring).

100. *E.g.*, Flaherty, *supra* note 78; Yoo, *Public Lawmaking*, *supra* note 96; Yoo, *supra* note 9.

101. *E.g.*, Bradley, *Treaty Power I*, *supra* note 59; Bradley, *Treaty Power II*, *supra* note 59; Golove, *supra* note 12.

102. *E.g.*, Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995); David Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998); Peter J. Spiro *Treaties, Execu-*

also been important recent articles addressing the history of foreign affairs law doctrine more generally.[104] Recent assertions in favor of the President's general foreign affairs authority have also been historically driven, whether broad, such as the lengthy article by Prakash and Ramsay,[105] or more measured, such as Powell's recent monograph.[106]

All this preoccupation with the late eighteenth century is arguably the latest manifestation of a more general turn to history elsewhere in constitutional law scholarship.[107] The current vogue of "originalism" sprang initially from the political right, with which it remains most commonly associated.[108] Yet much originalist work in recent years has issued from elsewhere along the political spectrum, even if its practitioners reject the label.[109] So pervasive has this perspective become that Professor Randy Barnett can plausibly proclaim that "[o]riginalism has not only survived the debate of the eighties, but it has virtually triumphed over its rivals. Originalism is now the prevailing approach to constitutional interpretation. Even more remarkably, it has prevailed without anyone writing a definitive formulation of originalism or a definitive refutation of its critics."[110]

B. The Myth of Continuity

As is true in the domestic realm, the new foreign affairs originalism offers a story of continuity and consensus. According to this story, the Founding reflected fundamental principles of government that had already stood the test of time for nearly a century and commanded widespread assent from the American populace, so wide-

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tive Agreements, and Constitutional Methods, 79 TEX. L. REV. 961 (2001); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

103. *E.g.*, Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

104. *E.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

105. Professors Prakash and Ramsey devote almost three-quarters of their lengthy case for the Vesting Clause thesis to eighteenth century history. *See* Prakash & Ramsey, *supra* note 10.

106. Professor Powell devotes a significant portion of his work to the late eighteenth century, the Washington Administration in particular. *See* POWELL, *supra* note 91.

107. *See generally* LAURA KALMAN, THE STRANGE CAREER OF LIBERAL CONSTITUTIONALISM (1996); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002).

108. *E.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (defending originalism as a method of constitutional interpretation); Edwin Meese, Speech before the American Bar Association (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1 (2d ed. 1991) (same); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (same); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (same).

109. *E.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); Lawrence Lessig; *Fidelity and Constraint*, 65 FORDHAM. L. REV. 1365 (1997); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

110. Randy E. Barnett, *An Originalism for Non-Originalists*, 45 LOY. L. REV. 611, 613 (1999). For a strong normative dissent, see Michael J. Klarman, *Does the Constitution Deserve Our Fidelity: Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739 (1997). *See also* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

spread that certain tenets apparently no longer needed to be articulated. For foreign affairs, one key commitment was local, democratic self-rule. Just as this principle, enshrined as federalism, safeguarded the states from intrusion by the distant national government, so it also yielded doctrines protecting both the states and nation from still more distant foreign entanglements. No less important was the Founding's parallel commitment to separation of powers. Not only was this idea as deeply held and long-standing, it had also been fairly clearly worked out. Among the major corollaries was the doctrine that foreign affairs authority was executive in nature, a belief initially embodied in the British Crown and later reflected in the American executive. Change and confusion would come, but only later, as subsequent generations would fall prey to the temptations of the moment and stray from the Founders' wisdom without obtaining a popular mandate through the amendment process.

An account such as this, offering a golden age of certainty that was lost but that can be found again, strikes a deep chord. Judge Bork discovered as much in setting the course for domestic originalism in *The Tempting of America*.[111] In either case, the crucial predicate is precisely the degree to which the case for the original golden age is compelling. On this score new foreign affairs originalists appear to do better than their domestic forebears in seeking to demonstrate just how far back and deep the Founding's bedrock ideas went. A spotlight on a few of the leading offerings will suffice to show how the task typically proceeds.

The case usually begins, appropriately enough, well before the Founding itself with the great constitutional thinkers of the preceding century. Sometimes these are divided among the leading political theorists such as Locke and Montesquieu; international jurists, including Grotius, Puffendorf, and Vattel; and somewhat later experts on the English common law, such as Blackstone. However grouped, these figures are rightly claimed to have been influential in America, though at times the implication seems to be that this influence was all but dispositive. More importantly, the new foreign affairs account asserts that these great minds indeed did think alike. Enlightenment thought and English law therefore stood united in stressing the primacy of national sentiment in foreign affairs. One consequence was the conclusion that a treaty could not be binding domestically unless first approved by the national lawmaker, ordinarily the legislature. Likewise, the writings of Locke, Grotius, Blackstone, and the rest, to varying degrees, relied on the idea of separation of powers to conclude more or less uniformly that the sovereign, or executive, power exclusively comprised the authority to deal with foreign sovereigns through such means as sending and receiving ambassadors, making treaties, or making war.

With such a firm foundation, it should come as no surprise that Americans implemented these principles when they first had the chance. That opportunity arose in light of the Revolution and Independence through the first state constitutions and the Articles of Confederation. Taken together, these documents represented a high point for the principle of local self-rule. While the Confederation Congress—itself akin to

111. *See* BORK, *supra* note 108 (lamenting modern repudiation of the founders' original intention with regard to both specific issues and a general interpretive approach).

no more than a "diplomatic assembly"—undertook foreign policy-making, its initiatives were not binding without the approval of the state legislatures, the only directly elected governments around. In somewhat more complex fashion, circumstances prevented the realization of executive foreign affairs authority since the country was not yet ready for anything more than an apparently legislative diplomatic assembly at the national level. At least one scholar posits that constitutional thinkers came to terms with this problem by viewing Congress as executive when discharging such foreign affairs functions as treatymaking, and the states as legislative in having to implement such international obligations domestically.[112] Even then, congressional inefficiency in conducting foreign policy merely highlighted the need for a true executive should there be an opportunity for reform.

By curing such problems, the Constitution represented not so much an innovation responding to experience as a restoration of the established wisdom of Locke, Montesquieu, and Blackstone, which had been yet to be fully implemented. While the new framework shifted power to the federal government in foreign no less than in domestic affairs, the price was an ongoing respect for "state sovereignty" consistent with the tradition of local self-government.[113] It apparently followed, therefore, that treaties still could not preempt state law, a power that could be asserted only by an Act of Congress implementing a treaty.[114] Even then, Congress in implementing a treaty gained no additional power to intrude upon matters of state regulation that it would otherwise have under the Constitution's existing grants of power.[115] Almost *a fortiori*, the customary law of nations did not of itself apply as federal law, nor was the authority of congress to implement it clear.[116] As for separation of powers, the vesting of the executive Power in the President under the eighteenth-century definition in the Constitution meant the foreign affairs authority was subject to the few express limitations that the document set out.[117]

The early national government would confirm the established wisdom that the Constitution applied. This meant, among other things, deliberate and deliberative refusal to undertake binding foreign affairs commitments that did not fully accord with the principle of democratic self-government. Congress therefore insisted on implementing treaties that otherwise may have been deemed self-executing and passed no law intruding upon state authority or sovereignty relying upon a treaty alone.[118] Attorneys for the federal government, no less, have even put forward the argument that the first Congress may have expressly authorized federal court jurisdiction of suits un-

112. Yoo, *supra* note 9, at 2009-13.

113. *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

114. Yoo, *supra* note 9, 1960-62.

115. Bradley, *Treaty Power I*, *supra* note 59, at 410-18.

116. Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 331-32 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1641-52 (1997).

117. Prakash & Ramsay, *supra* note 10, at 265-354.

118. Bradley, *Treaty Power I*, *supra* note 59, at 418-22.

der the law of nations, but consciously declined to provide for a cause of action.[119] For its part, the Washington Administration also made sure that the Executive controlled foreign affairs. With a practical and theoretical assist from Alexander Hamilton in particular, the first President prevailed in securing sole control over management of the diplomatic corps, communications with foreign sovereigns, reception of foreign emissaries, termination of treaties, and proclamation of neutrality.[120]

C. The Unbearable Thinness of Founding Foreign Affairs

The new foreign affairs history invites strict scrutiny if only because of the weight new foreign affairs law advocates would place upon it. As almost every modern theory of constitutional interpretation reserves a place for history, each theory that does so justifies the move on the ground that the past can augment the authority of a legal argument.[121] Even theories that merely look to a Madison or Hamilton as great thinkers in the same sense as Locke or Rawls often cannot help emphasizing that the Founders' great thoughts relate to a particular system of government—ours—that they helped bring about as a historical matter, thus privileging their ideas. Theories that emphasize historical custom or tradition rely on the past somewhat more heavily by positing that post-ratification practice, a historical span that is now into its third century, can help settle doctrine when purely legal tools cannot. Most steadfast in their backward gaze, originalists of various stripes stipulate that the past fact of an understanding or intention underlying a text at a particular time and place fixes its modern legal meaning. From all these approaches it follows that, in turning to another field to seek additional authority, the standards that make conclusions in that field authoritative should be respected. If not, then the very purpose for seeking the external authority is defeated. For similar reasons, it follows that these standards must apply with the greatest rigor to originalist accounts, since these are where the legal stakes are highest.[122] As noted, originalism serves as the rationale for much of the foreign affairs revisionism that has recently been put forward.[123]

Ordinarily, a historical critique would begin with issues of method,[124] and here the story of continuity presents an interesting mix of predictable lawyerly problems with certain apparent historical strengths. On the negative side, much of the work in this area is highly selective. Ellipses appear at critical moments in key quotations.[125] Parts of quotations are paraphrased even when ambiguous.[126] These tendencies in turn shade into disregard of historical depth and complexity. Contrary voices are absent notwithstanding descriptions of hard-fought partisan or ideological battles. Bold as-

119. Brief for the United States of America as *Amicus Curiae* at 8-10, John Doe I v. UNOCAL Corp. 2002 Cal. Daily Op. Service 9585 (9th Cir., 2003).

120. Prakash & Ramsay, *supra* note 10, at 295-354.

121. *See supra* text accompanying notes 108-109.

122. Flaherty, *supra* note 11, at 549-52.

123. *See supra* Part II B.

124. Flaherty, *supra* note 11, at 552-54.

125. *E.g.*, Yoo, *supra* note 9, at 2052-54.

126. *E.g.*, Prakash & Ramsay, *supra* note 10, at 265-72.

sertions about consensus views of the Founders result.[127] All the more odd, therefore, that this body of work displays an admirable concern with those strictures that counsel adopting a broad historical context.[128] Unlike typical law office history, or even history "lite," the accounts offered here do not simply offer snapshots of what a given constitutional text meant at the Federal Convention or the ratification debates. To the contrary, the work in this area typically begins with the views of seventeenth and eighteenth century constitutional thinkers, then takes into account British practice, discusses the Revolution and Critical Period, and only then takes up the Federal Convention and debates, finally providing detailed descriptions of constitutional controversies in the early Republic to confirm all that has gone before. The nature of this account may in part explain why it grades so well on context.[129] If the story is one of continuity, as is it according to the new foreign affairs school, repeated confirmations of the basic historical roots make the claim that much stronger.

The mixed assessment of this new foreign affairs history begins to look more problematic once substantive considerations are brought into play. These considerations are less frequently proffered, but are vital in the context of the Founding. Historians working in a given field might not offer much more than a wealth of competing interpretations, but at times they might collectively agree on a general broad narrative notwithstanding their disputes of important particulars. From such general agreement arises at least a presumption that specific questions will be resolved in a way that is consistent with the overall framework. None of this is to say that historical presumptions cannot be rebutted with specific evidence. One reason why historians tend to focus on method rather than substance when critiquing other historians is precisely because knocking a dominant paradigm off its pedestal, whether with newly discovered evidence or more rigorous analysis, is to a large degree what the profession is about. It is unlikely, however, that lawyers or even legal scholars keen to carry an argument will have the time or resources that historians enjoy to smash the prevailing historical icons themselves. Assertions inconsistent with a generally accepted historical narrative should be taken seriously but skeptically.[130]

As it happens, the Founding is one of those periods that has generated a broad account that has been widely accepted among historians over the past several decades. Chief among its architects are such ideological historians as Edmund S. Morgan, Bernard Bailyn, and Gordon Wood; constitutional experts including John Phillip Reid and Barbara Black; and subsequent scholars like Jack Rakove.[131] Recent historical criticism of earlier originalist efforts has apparently prompted successors, including new

127. With the exception of Madison's writing as "Helvidius," Professors Prakash and Ramsay focus almost exclusively on the views of those in the Washington Administration, rather than anyone in Congress, for contemporary views on executive power in foreign affairs. *See id.* at 295-354.

128. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 678-91 (1987); Flaherty, *supra* note 11, at 552-53.

129. *See supra* text accompanying notes 111-119.

130. *See* Flaherty, *supra* note 11, at 554-55. For a somewhat more extended discussion of this point that considers various objections, see Martin S. Flaherty, *The Practice of Faith*, 65 FORDHAM L. REV. 1565, 1572-79 (1997).

131. Flaherty, *supra* note 11, at 536-49.

foreign affairs authors, to include liberal citations to many of these leading names.[132] What matters, however, is recognition not of their works but of what their works assert. Suffice it to say for present purposes that the dominant narrative these and other historians have set out diverges from the revisionist challenge in two fundamental respects. First, the prevailing narrative emphasizes the Founding's era constitutional innovations as opposed to continuity with preceding periods. Second, the mainstream account stresses the open-endedness of the innovations that came to be adopted, mainly as a result of the lack of consensus, or even forethought, about large details. This point stands in stark contrast to the revisionist effort to portray the constitutional choices of the time as the thoroughly established fruits of consensus.

That said, the leading historians of the Founding—much like the Americans they chronicle—have not looked at foreign affairs developments as closely as those on the domestic front. But even here the news is not necessarily good for the revisionist cause. The comparative lack of attention that Americans devoted to foreign affairs doctrine provides every reason to believe that the solutions they advanced were even less fixed and definite than in domestic law. Moreover, what work that does exist suggests substantive trends not especially congenial to the new foreign affairs account. For separation of powers, while the Constitution certainly represented a shift in power toward the executive (and judiciary), that shift resulted in unprecedented allocations of power—both domestic and foreign—with ample power remaining, or even shifting to the other branches. In a somewhat more straightforward fashion, the clear transfer of power away from the states in the Constitution went hand-in-hand with greater accommodation of international law within the domestic legal order.

This very different narrative also begins prior to the Revolution. On this account, Americans entered the second half of the eighteenth century not already having all they needed to learn from Locke and Montesquieu, but instead committed to the distinct English "Whig" or "mixed" constitution.[133] Among other things, this constitution juxtaposed classical forms of government associated with different orders of society—monarchy, aristocracy, democracy—rather than divided authority according to function as separation of powers commanded. It was to defend the English Constitution that Americans paradoxically undertook their resistance to Britain's imperial assertions of power.[134] It was also this constitutional understanding that Americans would ultimately have to reject. Looking ahead, this initial commitment to the English Constitution meant that Americans would have to experiment with different ways to allocate power within government as well as to arrange power between a central government and subordinate parts in ways that would endure longer than the British Empire in North America.[135]

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132. Professor Yoo's work, for example, typically relies on a wide-ranging array of primary and secondary sources. *See, e.g.*, Yoo, *supra* note 9, at 1982-2091.

133. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 70 (2d ed. 1992).

134. *Id*. at 70-78.

135. *See* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, 129-211 (1986).

Independence initiated the process of experimentation. At the state level, which commanded by far the most energy and effort, the former colonists generally adopted frameworks characterized as republican. In large part this result still reflected older constitutional understandings. Since few Americans believed that either monarchy or aristocracy was feasible on their side of the Atlantic, only democracy, expressed as representative republics, remained a possibility. In part, too, the republican constitutions also represented a turn toward separation of powers analysis with which they were familiar but which had never been well integrated with the mixed government paradigm. The typical allocation of power in these constitutions, however, signalled an understanding of separation of powers far different from what would develop. In broad terms, the early state constitutions concentrated substantial power in the legislatures, leaving weak and dependent executives and judiciaries.[136] Meanwhile, on the national level, the Articles of Confederation formally centered all power in the Congress yet did not include any authority to compel either individuals or the states to abide by the laws it enacted or the treaties it ratified.[137]

The resulting state of affairs initiated still further experimentation. At home, the republican state assemblies forced a fundamental rethinking of government as they violated basic rights and so facilitated the people's tyrannizing themselves, a result thought to be a contradiction in terms. Confronting this problem led to novel applications of separation of powers with a net shift in authority to the executive and judiciary. Even then, many of the later constitutions that applied these ideas shared this commitment generally (what it meant in detail varied significantly from one to another) with the federal Constitution, and ironically with the conceptions of modern separation of powers originalists.[138] With the federal Constitution also came a radically innovative reordering of power between the states and the national government, the consequence of state irresponsibility in both national and international affairs. As with separation of powers, ideas about federalism saw a clear shift, this time to the national government, which now could act upon individuals and which was now comprised of directly elected representatives. Yet, as with separation of powers, many substantial "details" remained to be worked out over time.[139] Given this prologue, the Washington Administration and the early Congresses worked out deferred or disputed matters as much as they confirmed what had been resolved.

All this presents obvious problems for the revisionist account. The dramatic discontinuities that Americans experienced in moving from the English Constitution to the republican state constitutions to the federal Constitution strain the plausibility of a highly continuous narrative. In part for this reason, some of the leading accounts extolling executive authority, while rich in detail about eighteenth century political thought and the practices of the Washington Administration, are curiously sparse with regard to the Critical Period, the Convention, and ratification. This feature is particularly ironic, given the originalist premises from which these accounts proceed. A

136. Martin S. Flaherty, *Most Dangerous Branch*, 105 YALE L.J. 1725, 1755-76 (1996).
137. Flaherty, *supra* note 78, at 2118.
138. For an effort of my own to make this point, see Flaherty, *supra* note 136.
139. For a parallel effort, this time no more than a sketch, see Martin S. Flaherty, *supra* note 16.

broadly similar point obtains with regard to federalism as the bulwark against internationalism. Here, prominent efforts accord more consistent coverage throughout the entire relevant period, including the key chapters of framing and ratification. Yet the idea that, for example, early notions about domestic implementation of international law—even if accurate—simply carried through a time of revolution, experiment, reaction, and further innovation is *prima facie* dubious. In this instance the point is reinforced, given that one aspect of the relevant reaction was local democratic frustration of treaty commitments, with a resulting high cost to fledgling U.S. standing overseas.

Revisionist accounts must also overcome historians' emphasis and how much the founding generation left unresolved. As Rakove has explained, the Constitution papered over, sidestepped, or simply failed to foresee many issues large and small.[140] Anything more would have been surprising given the enormous, often innovative, solutions for which the Founders did secure agreement. Rakove continues that, intentional or not, the net effect was to leave to the institutions that the Constitution did establish the task of resolving many important matters over time rather than with reference to an original consensus that never existed.[141] According to the revisionist accounts, however, the Founding generation did achieve consensus on matters such as treaty termination and removal of executive officers. With reference to terms such as executive or legislative, moreover, so complete was this consensus that the Founders saw no need to define these terms in detail. By incorporating these general terms in the Constitution, it is argued, the founding generation fixed their meaning thoroughly and in detail—or, more accurately, confirmed the achievements of previous thinkers who had already done so.

It is conceivable, of course, that the story of continuity and consensus is correct. Perhaps executive authority in foreign affairs is an exception to the general narrative, an exception that if multiplied might force rethinking of the general narrative itself. But precisely because there is a Founding narrative stressing change and uncertainty, a substantial burden falls upon those whose more specific accounts do not accord. To date, that burden has not been met.

IV

CONCLUSION: MARCHING FORWARD INTO THE FUTURE

A prominent historian of a previous generation once characterized the supporters of Andrew Jackson as for good or ill "marching backward into the future."[142] That image broadly applies to those who urge, also for good or ill, material reliance on his-

140. As Jack Rakove put it:

> Only the experience of government under the Constitution could finally dispel Anti-Federalist visions of an imminent descent into tyranny. The original interpretations of 1787-88 could yield nothing more than reasonable explanations and predictions of what the Constitution would mean. If events proved them false, or when ambiguities demanded resolution, intervening experience would provide the foundation for determining the course that the interpretation or revision of the Constitution should then take.

RAKOVE, *supra* note 14, at 160.

141. *See id*. at 159-60; *see also* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999).

142. *See* MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF 229-33 (2d ed. 1960).

tory to fashion constitutional doctrine to address modern controversies. It applies even more appropriately to that significant portion of revisionist foreign affairs scholarship that would turn to the past to fix a doctrine with regard to the numerous impending issues that the U.S. role abroad and the growing reach of international law will present.

Those committed to this quest should be prepared for ironic results. Contrary to the revisionist account put forward by many legal scholars, historians have for some time stressed the extent to which early American constitutionalism changed radically in light of shifting circumstances and often achieved general agreement at only the most general levels, leaving sweeping details to be worked out over time. Nowhere, moreover, do these themes appear to resonate more strongly than regarding foreign affairs, to which Americans were comparative newcomers. This is not to say that even here, the Founding could not command consensus at a level sufficiently precise to provide specific guidance in modern controversies. Such instances, however, do not necessarily support either the localism or presidentialism that foreign affairs revisionists posit. The principle that treaties would be self-executing is one instance.[143] The doctrine that the President cannot ordinarily commit the nation to armed conflict without the approval of Congress is another.[144] Conversely, translating such Founding principles to a very different nation and world two centuries later presents more than a few problems of modern application in their own right.[145] The main point remains, however, remains that the Founding's discontinuities and disagreements will leave no alternative other than marching *forward* into the future.

To that extent, foreign affairs history paradoxically will often point to the approach put forward in what is sometimes read as among the Supreme Court's most anti-historical opinions. In *Youngstown*, Justice Jackson famously dismissed reliance on the Founding, declaring:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly quotations yields no net result, but only supplies more or less apt quotations from respected sources on either side of any question. . . . They largely cancel each other.[146]

In place of the Founding, Jackson among other things turned to the Constitution's text and structure. But since "[t]hat instrument must be understood as an Eighteenth-Century sketch of a government hoped for, rather than the Government that is,"[147] Jackson's opinion also surveyed how the three branches of government had actually filled in the sketch in ways that invited political science and even international relations and comparative analysis.[148] Jackson's celebrated opinion, in short, assigns an

143. *See* Flaherty, *supra* note 78 *passim.*

144. *See* William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997). *But see* Yoo, *supra* note 95.

145. *Compare* Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993) (advocating the translation of past constitutional principles to changed contexts) *with* Klarman, *Anti-Fidelity*, *supra* note 110 (expressing skepticism).

146. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (Jackson, J., concurring).

147. *Id*. at 653.

148. *See id*. at 647-53.

ambiguity to the Founding that leading historical accounts suggest is accurate, especially in foreign affairs, then points to more present and forward-looking sources of constitutional meaning to continue the process of fashioning specific constitutional answers. Striking in this regard, for example, is Jackson's analysis of emergency powers in other jurisdictions to assist considering the question in U.S. law, an exercise that in certain regards anticipates the recent exercises of Justices Kennedy, Ginsburg, and Breyer.[149]

Then again, Jackson could not avoid the past altogether. As much as it rejected dispositive reliance on the Founding, his concurrence nonetheless made clear that taking into account how the branches of government had presumptively resolved certain issues by definition required a knowledge of constitutional history as it developed, once the hopeful sketch was in place. This source has been dubbed constitutional "tradition" or "custom" by various scholars,[150] Jackson did this in *Youngstown* itself when he concluded, as Justice Frankfurter's foldout table made clear, that over the decades Congress had not left executive seizure of private property an open question but had already addressed it, further relegating President Truman's action to Jackson's "low ebb" category.[151] So long as this source remains in play, the need to guard against historical myths, in foreign affairs or otherwise, will remain an imperative.

149. *Id.* at 651-52.

150. On the judicial side, a principle expositor of tradition as a source of constitutional meaning is the second Justice Harlan. Poe v. Ullman, 367 U.S. 497, 542-45 (1961). On the academic side, a leading exponent is Larry Kramer. Larry D. Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1631-41 (1997).

151. *Youngstown*, 343 U.S. at 639 & n.8 (Frankfurter, J., concurring).