

# REVIEW ESSAY

## THE FOREIGN AFFAIRS POWER: DOES THE CONSTITUTION MATTER?

A Review of

**Peter Irons, War Powers: How the Imperial Presidency Hijacked the Constitution (Henry Holt & Co., 2005)**

**John Yoo, The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11 (University of Chicago Press, 2005)**

*Reviewed by D.A. Jeremy Telman\**

*Peter Irons's War Powers favors congressional initiative in questions of war and peace but makes a historical argument that our government has strayed from the constitutional design in the service of an imperialist foreign policy. John Yoo's The Powers of War and Peace seeks to overthrow the traditional perspective on war powers espoused by Irons in favor of executive initiative in war. Yoo also pursues a revisionist perspective on the treaty power, which favors executive initiative in treaty negotiation and interpretation but insists on congressional implementation so as to minimize the impact of international obligations on domestic law. This Essay criticizes Irons's approach for its failure to provide a normative defense of congressional initiative in war and takes issue with some of the historical and structural analyses underlying Yoo's defense of executive unilateralism in the realm of war powers. Because Yoo's arguments on the treaty power raise questions of methodological consistency, he is susceptible to the criticism that his arguments are motivated more by prudential and policy considerations than by fidelity to constitutional text, structure, and history. The Essay concludes that, while the constitutional text, structure, and history are clear and consistent and support Irons's arguments favoring congressional war powers, the Constitution provides little guidance on how the treaty power should operate. Yoo's view that treaties do not bind the President finds no support in constitutional text or structure. This Essay offers a structural interpretation of the constitutional*

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*treaty power different from Yoo's that would promote U.S. participation in multilateral treaty regimes that foster security and the rule of law.*

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#### I. INTRODUCTION

Just when it seemed that Congress and the federal judiciary were going to let the executive branch have its way in the war on terror, the five-Justice majority in *Hamdan v. Rumsfeld*<sup>1</sup> announced that it will scrutinize executive conduct in that conflict for compliance with norms mandated by both Congress and international law.<sup>2</sup> The Court asserted its power to have some say in the debate over foreign affairs powers. It remains to be seen just how active a role the courts will play, thus reinvigorating a debate that was beginning to seem purely academic over the proper allocation of such powers under the U.S. Constitution.

1. 126 S. Ct. 2749 (2006).

2. See *Hamdan*, 126 S. Ct. at 2759 (“[W]e conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions.”).

This Essay reviews two new books that take diametrically opposed positions. In his *War Powers*,<sup>3</sup> Peter Irons favors congressional initiative in the realm of war powers, while John Yoo's *The Powers of War and Peace*<sup>4</sup> favors deference to the executive on foreign affairs. The *Hamdan* decision is to be welcomed not because it resolves thorny questions regarding the foreign affairs power, but because it opens a debate that both Irons and Yoo would like to foreclose. As Justice Breyer put it:

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.<sup>5</sup>

While Yoo has argued that the judiciary's role in foreign affairs should be very small,<sup>6</sup> Irons blames executive decision making for substantive policy decisions that he claims have "hijacked" the Constitution. This Essay argues, with Justice Breyer, that the direction of our country's foreign affairs must ultimately be determined through democratic processes involving all three branches of the federal government, participatory politics, and compliance with the United States' obligations under international law.

John Yoo is a self-described "revisionist"<sup>7</sup> legal scholar who, in a series of controversial articles,<sup>8</sup> and now in this book, has sought to challenge traditional

3. PETER IRONS, *WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION* (2005).

4. JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

5. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

6. Yoo criticized the *Hamdan* decision in an editorial published just one day after the decision. "What the justices did would have been unthinkable in prior military conflicts: Judicial intervention in the decisions of the president and Congress on how best to wage war." John Yoo, *5 Wrong Justices: Ruling Mistakes War for Familiarity of Nation's Criminal Justice System*, USA TODAY, June 30, 2006, at A22.

7. See YOO, *supra* note 4, at 7 (noting that his book "will be counted as a contribution to the revisionist side" and naming Curtis Bradley, Jack Goldsmith, Saikrishna Prakash, and Michael Ramsey among revisionists questioning "dominant intellectual paradigm" on foreign affairs power).

8. Many of Yoo's arguments in the book were anticipated in earlier publications. See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) [hereinafter Yoo, *War and the Constitutional Text*] (advocating textualist approach to determining allocation of constitutional war powers); John C. Yoo, *Law as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001) (advocating structural approach to explain limited constitutionality of congressional-executive agreements); John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001) (reviewing FRANCES FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR* (2000)) [hereinafter Yoo, *Politics as Law*] (defending President's authority unilaterally to interpret, implement, and abrogate treaties); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1689 (2000) (addressing effects of multilateral defense treaties on constitutional allocation of war powers); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999) [hereinafter Yoo, *Clio at War*] (criticizing historical methodology of legal scholars in war powers debate and making historical argument in favor of

scholarly views on the foreign affairs power—comprising the treaty power and war powers. Yoo is an especially important figure because he not only has advocated his positions in well-placed and influential scholarly articles but has worked to put them into practice as legal advisor to the Justice Department during the first term of President George W. Bush.<sup>9</sup> Relying neither on the *postratification* statements of the Framers nor on court precedent, Yoo interprets the constitutional text, structure, and *preratification* history<sup>10</sup> as supporting his expansive views on the proper scope of executive foreign affairs powers.<sup>11</sup> For example, despite the Declare War Clause,<sup>12</sup> Yoo argues that the Constitution actually empowers the executive, not Congress, to take the initiative in committing the United States to the use of force.<sup>13</sup> With respect to the treaty power, Yoo contends that the Constitution primarily empowers the President to negotiate, to implement, to interpret, and, if necessary, to abrogate treaties.<sup>14</sup> He denies treaty law any binding force as U.S. law unless implemented through the exercise of congressional legislative powers.<sup>15</sup>

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executive war powers); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) (arguing that treaties should be presumptively non-self-executing); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (same); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) [hereinafter Yoo, *Continuation of Politics*] (arguing that constitutional design was for political branches to share war powers, sometimes cooperatively and sometimes antagonistically, but that judicial supervision of war powers is both unworkable and undesirable).

9. According to the *New York Times*, despite the fact that he was only a midlevel advisor, because of Yoo's expertise in the area, he quickly established himself "as a critical player in the Bush administration's legal response to the terrorist threat, and an influential advocate for the expansive claims of presidential authority that have been a hallmark of that response." Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1; see also David Cole, *What Bush Wants to Hear*, N.Y. REV. BOOKS, Nov. 17, 2005, at 8, 8 ("Yoo had a hand in virtually every major legal decision involving the US response to the attacks of September 11. . .").

10. See YOO, *supra* note 4, at 8 ("[T]his book concentrates less on judicial precedent and more on constitutional text, structure, and history.").

11. See, e.g., Cole, *supra* note 9, at 8 (contending that Yoo's advice to President was always the same: "the president can do whatever the president wants"); Golden, *supra* note 9 (stating that Yoo authored legal opinions contending that Geneva Conventions did not apply to war on terror, "countenanc[ing] the use of highly coercive interrogation techniques on terror suspects" and approving of warrantless eavesdropping on "international communications of Americans and others inside the United States").

12. U.S. CONST. art. I, § 8, cl. 11.

13. See YOO, *supra* note 4, at 8 ("The president need not receive a declaration of war before engaging the U.S. armed forces in hostilities."); Yoo, *Continuation of Politics*, *supra* note 8, at 170 ("[T]he Framers created a framework designed to encourage presidential initiative in war.").

14. See YOO, *supra* note 4, at 8 (stating that Constitution dictates that President is empowered with "primary initiative to make, interpret, and terminate international agreements"); Yoo, *Politics as Law*, *supra* note 8, at 870 (arguing that executive has unilateral power to interpret domestic effect of treaty obligations).

15. See YOO, *supra* note 4, at 281 (arguing that in order to maintain "the line between executive and legislative power, and between treatymaking and lawmaking," treaties must be presumptively non-self-executing and congressional-executive agreements must be permitted only in substantive legal areas that implicate Congress's enumerated powers).

Peter Irons is a political scientist who has previously published *A People's History of the Supreme Court*.<sup>16</sup> His frequent citations to that previous work and to Howard Zinn's *A People's History of the United States: 1492 – Present*<sup>17</sup> telegraph the radical political perspective that underlies Irons's approach to the question of war powers.<sup>18</sup> Although Irons never directly addresses either the methodology or the substantive arguments of Yoo and other revisionist scholars, he clearly believes that the Constitution allocates war powers to Congress.<sup>19</sup> He nevertheless acknowledges that “the Constitution has not stood firm as a barrier against presidential disregard of its command that only Congress has the power to declare war.”<sup>20</sup>

Irons and Yoo have diametrically opposed views of the meaning of the Constitution as to war powers, but that would only lead them to have opposed views on the proper allocation of war powers if they were both convinced constitutional originalists. Neither Yoo nor Irons, however, express any commitment to originalism.<sup>21</sup> Irons makes the traditional argument that the Framers *intended* to entrust war powers to Congress,<sup>22</sup> but he makes no normative argument for why we should be bound to that allocation today. Yoo's position is more complicated. He rejects Irons's “intentionalist” approach in favor of a “textualist” approach that inquires into the original meaning of the constitutional text as it would have been understood by informed readers at the time of its ratification.<sup>23</sup> Yoo argues that this textual approach supports “a

16. PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* (1999).

17. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 – PRESENT* (2003).

18. The minimal scholarly apparatus appended to Irons's book likely does not do justice to Irons's scholarly exertions. Nevertheless, the number of secondary sources to which he cites is strikingly small and includes only Abraham Sofaer's *War, Foreign Affairs and Constitutional Power* representing the pro-executive side of the war powers debate. *E.g.*, IRONS, *supra* note 3, at 25 (citing ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 49 (1976)) (discussing debates that took place during constitutional conventions over powers delegated to executive and legislative branches). Since Irons writes to address the current war on terror, it is also noteworthy that the only post-9/11 secondary sources to which he cites are written by journalists, Nat Hentoff and Bob Woodward. *See id.* at 275-90 (citing NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE* 66 (2003); BOB WOODWARD, *BUSH AT WAR* 15, 118, 340 (2002); BOB WOODWARD, *PLAN OF ATTACK* 132 (2004)) (discussing aftermath of 9/11 and Bush's response).

19. *See* IRONS, *supra* note 3, at 3-4 (stating that “Framers placed the war-declaring power solely in the hands of Congress” while limiting President's authority to that of repelling attacks on American territory or authorizing reprisals for attacks on U.S. citizens or property abroad or on high seas).

20. *Id.* at 242. Unlike Yoo's book, Irons's book focuses exclusively on war powers and does not address the treaty power.

21. Yoo provides an oddly diffident account of originalism, noting that some Supreme Court Justices support originalism while others favor a “living Constitution.” YOO, *supra* note 4, at 25. He also notes, without taking sides, that academics differ over “how much deference to provide the Framers.” *Id.*

22. *See* IRONS, *supra* note 3, at 23 (arguing that Framers intended five war powers clauses of Article I to be read together in order to “lodge[] the ultimate power over the nation's armed forces in Congress”).

23. *See* YOO, *supra* note 4, at 28 (“It is the original *understanding* of the document held by its ratifiers that matters, not the original *intentions* of its drafters.”).

flexible decisionmaking system that can respond to such sweeping changes in the international system and in America's national security posture."<sup>24</sup> On war powers, Yoo stresses that the Constitution leaves the political branches of the federal government free to work out the allocation of war powers as they wish.<sup>25</sup> But where—as with respect to aspects of the treaty power—the constitutional text does not support such flexibility, Yoo cannot rely on an original understanding of the Constitution. Rather, he makes prudential arguments, suggesting that his primary allegiance as a scholar and as a political figure is not to textualist originalism.<sup>26</sup>

Part II of this Essay summarizes Irons's traditional approach to war powers—which focuses on the intentions of the Framers and postratification history—and argues that his book fails to resolve the central tension it describes between the constitutional allocation of war powers and recent practice, in which Presidents make key decisions involving use of force. Part III reviews Yoo's revisionist, textualist approach to war powers and suggests that textualism need not lead to results at odds with the traditional approach to the constitutional allocation of war powers. Part IV reviews Yoo's arguments with respect to the treaty power and contends that these arguments are linked less by their commitment to textualist originalism than by their ingenuity in promoting executive primacy in foreign affairs and in promoting federalist and separation of powers principles over other constitutional principles that would give treaty law binding force as U.S. law.

Finally, in Part V, this Essay argues that the Constitution's meaning should not be left for the executive branch to determine. With respect to war powers, this Part presents alternative "structural" interpretations of the Constitution and argues that the Ninth and Tenth Amendments to the Constitution undermine both Irons's interpretation, which does not permit for the evolution of constitutional doctrines relating to the allocation of war powers, and Yoo's interpretation, which presumes grants of executive power that are neither express nor implied in the constitutional text. While Yoo's structural interpretation with respect to the treaty power focuses on separation of powers, Part V explores other structural elements to the Constitution, including limited government, federalism, checks and balances, and a commitment to the efficacy of international law.

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24. *Id.* at x-xi.

25. *Id.* at 8 ("On the question of war, flexibility means there is no one constitutionally correct method for waging war.").

26. *See id.* at 182 (arguing that government practice with respect to treaty power "represents the practical outcome of the struggle between the executive and legislative branches"); *cf.* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982) (defining prudential arguments as "advancing particular doctrines according to the practical wisdom of using the courts in a particular way"). Bobbitt later notes, summarizing Justice Hugo Black's textualist attack on the prudential jurisprudence of Justice Felix Frankfurter, "[I]f a prudential approach is used to decide between texts, then the texts themselves really count for nothing in the decision." *Id.* at 60.

## II. IRONS AND THE TRADITIONAL PERSPECTIVE ON WAR POWERS

What I will here call the “traditional perspective” on war powers was formed in the decades following the Vietnam War, when scholars such as Louis Fisher, Louis Henkin, Michael Glennon, Harold Koh, and John Hart Ely all published books contending that the constitutional allocation of war powers calls for congressional involvement in decisions involving the use of force and judicial review of decisions relating to war and peace.<sup>27</sup> Although the sudden scholarly passion for congressional war powers was linked to the Vietnam War and the ill-fated War Powers Resolution,<sup>28</sup> its proponents maintain that their views on war powers were simply assumed to be correct until the Nuclear Age. As Louis Fisher puts it:

With studied care and deliberation, the Framers of the Constitution created a structure to prevent presidential wars. . . . Making fundamental judgments about representative government, popular control, and human nature, they placed the power of war and peace with the legislative branch and divided foreign policy between the President and Congress. For the most part, the Framers’ model prevailed from 1789 to 1950.<sup>29</sup>

Support for the traditional perspective derives largely from three sources: the constitutional text; statements by the Framers during the Constitutional Convention, the ratification debates, or the early republic; and statements by

27. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed., rev. 2004); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990) [hereinafter HENKIN, *CONSTITUTIONALISM*]; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996) [hereinafter HENKIN, *FOREIGN AFFAIRS*]; HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* (1981); FRANCIS D. WORMUTH ET AL., *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986). Yoo critiques the traditional approach as follows:

Conventional wisdom on the legal framework governing American foreign relations has suffered from three significant flaws. First, scholars have sought to impose a strict, legalistic process on the interaction of the executive and legislative branches in reaching decisions on war and peace. Second, they have claimed that the original understanding of the framing generation both dictates the limitation of presidential power in foreign affairs and establishes a broad power in the federal government to make and implement international agreements and international law. Third, they rely on judicial intervention to enforce this precise vision of the balance of powers in foreign affairs, backed up as it is by the original understanding.

YOO, *supra* note 4, at 293.

28. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (2000)).

29. Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000). As late as 1973, the Senate Foreign Relations Committee remarked in its report on the War Powers Resolution: “The transfer from Congress to the executive of the actual power—as distinguished from the constitutional authority—to initiate war has been one of the most remarkable developments in the constitutional history of the United States [sic].” S. REP. NO. 93-220, at 14 (1973).

later politicians, judges, and scholars.<sup>30</sup> In short, advocates of the traditional perspective argue that the original intentions of the Framers, as reflected in the constitutional text, legislative history, and subsequent statements by the Framers and others, were that Congress holds the power to place the country in a state of war.

Irons assumes that the traditional perspective on war powers is the only reasonable one, and his book demonstrates the problems that arise under the traditional approach. In Irons's view, the greatest harm done to the United States by the current war on terror consists neither in the loss of human life nor in the economic costs of war, but in the "gradual but increasing subversion of the U.S. Constitution."<sup>31</sup> The subversion consists of presidential usurpation of the congressional power to declare war.<sup>32</sup> Irons points out, however, that Presidents have not acted alone in such usurpation. Congress and the federal courts have been willing accomplices, as have "generations of Americans" who have not called on their elected representatives to reclaim their constitutional war powers.<sup>33</sup>

Because Irons takes no notice of recent challenges to his intentionalist approach to divining the meaning of the Constitution, he merely insists rather than shows that those who think the Presidents have extensive war powers are wrong.<sup>34</sup> The main weakness of Irons's thesis, however, is that his book presents a version of U.S. history and foreign policy in which the political branches of the U.S. government have consistently strayed from what he takes to be the constitutional design in pursuit of what he describes as imperialist goals. While Irons sets out to demonstrate that the imperial presidency hijacked the constitutional allocation of war powers, what he in fact shows is that the political branches have acted *together* to pursue an aggressive foreign policy and have not let the niceties of the constitutional text, as he understands them, interfere with implementing their policy goals. If Irons is correct that our constitutional history strays from the Framers' intentions regarding war powers, he needs to provide a normative argument for why those intentions should guide us today.

#### A. Irons's Intentionalist Approach

One of the strengths of Irons's book is that he economically sets out the basics of the traditional perspective's claim that the constitutional text itself, especially when considered in light of the Constitution's legislative history, establishes the Framers' intent to locate the vast majority of war powers in the

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30. For the most extended versions of this approach, see FISHER, *supra* note 27, REVELEY, *supra* note 27, and WORMUTH ET AL., *supra* note 27.

31. IRONS, *supra* note 3, at 2.

32. *Id.*

33. *Id.*

34. See, e.g., *id.* at 24 (criticizing U.S. Presidents for relying on Commander in Chief Clause to "claim for themselves the war-making power the Framers specifically placed in the hands of Congress"); *id.* at 267-69 (arguing that disparities in funding, staffing, and media coverage explain why "Congress has virtually abdicated its constitutional war powers to the imperial presidency").

Congress.<sup>35</sup> He recounts the familiar narrative of how the constitutional draft language, which would have given Congress the power to “make” war, was changed, substituting “declare” for “make.”<sup>36</sup> Pierce Butler had proposed granting the power to make war to the executive. This proposal, tellingly, died for want of a second.<sup>37</sup> All agreed (and all still agree) that the President must have the power to “repel sudden attacks.”<sup>38</sup> Still, Irons argues, the Framers’ intent was that “only Congress could authorize the deployment of forces outside the nation’s territory in combat against foreign troops.”<sup>39</sup>

For Irons, the Framers’ intent to repose war powers in Congress is made manifest when one considers not just the Declare War Clause but the totality of war powers enumerated in Article I.<sup>40</sup> In addition to granting Congress the power to declare war, the Constitution also gives Congress the power to issue letters of marque and reprisal and set rules concerning captures on land and water;<sup>41</sup> “[t]o raise and support Armies;”<sup>42</sup> “[t]o provide and maintain a Navy;”<sup>43</sup> “[t]o make Rules for the Government and Regulation of the land and naval Forces;”<sup>44</sup> “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;”<sup>45</sup> and “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”<sup>46</sup> Moreover, in case there was any doubt, Congress also has the appropriations power,<sup>47</sup> its power to tax is linked to its obligation to “provide for the common Defence and general Welfare of the United States,”<sup>48</sup> and it has the power to make all “Laws which shall be necessary and proper for carrying into Execution”<sup>49</sup> any of the other enumerated powers. There is no other area where the Framers made their intentions manifest through so many separate constitutional provisions.

The President’s war powers derive from two textual sources: the commander-in-chief power<sup>50</sup> and Article II’s Vesting Clause.<sup>51</sup> The treaty power

35. See, e.g., FISHER, *supra* note 27, at 12 (“Whether declared or undeclared, the decision to initiate war was left to Congress.”).

36. IRONS, *supra* note 3, at 21.

37. *Id.* at 20-21.

38. *Id.* at 21.

39. *Id.*

40. See *id.* at 23 (“Read together, as the Framers clearly intended them to be, the five clauses in Article I of the Constitution lodged the ultimate power over the nation’s armed forces in Congress.”).

41. U.S. CONST. art. I, § 8, cl. 11.

42. *Id.* art. I, § 8, cl. 12.

43. *Id.* art. I, § 8, cl. 13.

44. *Id.* art. I, § 8, cl. 14.

45. *Id.* art. I, § 8, cl. 15.

46. U.S. CONST. art. I, § 8, cl. 16.

47. *Id.* art. I, § 7, cl. 1.

48. *Id.* art. I, § 8, cl. 1.

49. *Id.* art. I, § 8, cl. 18.

50. *Id.* art. II, § 2, cl. 1.

51. U.S. CONST. art. II, § 1.

and the Appointments Clause supplement these clauses to constitute a considerable grant of foreign relations power to the President, but that power is not generally viewed as granting war powers to the President.<sup>52</sup> From the traditional perspective, these provisions grant the President broad powers to conduct foreign relations on behalf of the United States, but subject to the limitations provided through the enumeration of congressional powers in Article I.<sup>53</sup>

The traditional view that the commander-in-chief power is narrowly circumscribed is buttressed by the constitutional text, which specifies that the President “shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, *when called into the actual Service of the United States.*”<sup>54</sup> The Framers saw standing armies under the control of a powerful executive as a threat to democracy and thus anticipated that there would be no significant federal army.<sup>55</sup> Alexander Hamilton, no enemy of executive power, acknowledged that the President would exercise his commander-in-chief power only in “the direction of war when authorized or begun.”<sup>56</sup> Moreover, as Irons indicates in the one area of seventeenth- and eighteenth-century history where he is more thorough than Yoo, the point of the commander-in-chief power traditionally was not to create executive war powers but to subordinate the military to civil authority.<sup>57</sup>

52. Neither the traditional perspective nor Yoo’s revisionist approach treat the treaty power or the Appointments Clause as creating war powers. Indeed, Yoo reasons by analogy that the Appointments Clause limits the President’s power to authorize U.S. military personnel to serve under foreign command as part of multinational forces. See YOO, *supra* note 4, at 176-81 (stating that foreign commanders would not be subject to executive power in same way other appointees would be, and as result, unless executive “[r]etain[s] policy and tactical command,” use of foreign commanders would likely violate Constitution); cf. FISHER, *supra* note 27, at 12-13 (discussing only Commander in Chief Clause as source for executive war powers).

53. See IRONS, *supra* note 3, at 23 (arguing that executive war powers were limited to response to “immediate situation” and that Congress alone could grant President authority to command troops).

54. U.S. CONST. art. II, § 2 (emphasis added).

55. See, e.g., MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 120-21 (2003) (recounting Anti-Federalist opposition to standing armies and discussing Federalist plans for peacetime force of 3000, including corps of engineers); REVELEY, *supra* note 27, at 65 (characterizing federalist view as “there would be no armies, navies, or militia for [the President] to lead unless Congress so provided”); WORMUTH ET AL., *supra* note 27, at 110 (recounting Federalist responses to concerns about executive abuse of commander-in-chief power, which centered on Congress’s ability to check that power through its power to raise fleets and armies); Yoo, *War and the Constitutional Text*, *supra* note 8, at 1680 (“After the peace with Great Britain, the United States did not immediately maintain a large peacetime army or navy and did not really do so until the Cold War.”).

56. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (Max Farrand ed., 1966); see also IRONS, *supra* note 3, at 26-27 (citing Iredell, Hamilton, and Madison and concluding that “Madison’s emphatic statement, and the entire record of the Constitutional Convention, leaves no doubt that the Framers agreed that Congress, the body elected by the people, should hold the awesome power to commit the nation to war”).

57. See IRONS, *supra* note 3, at 24-25 (stating that it became fundamental principle of U.S. Constitution, as it was in British Army, that military officers be placed under command of a civilian);

That leaves Article II's Vesting Clause as the most likely source for significant war powers. As Yoo and others have pointed out,<sup>58</sup> unlike Article I, which vests in Congress only "[a]ll legislative Powers herein granted,"<sup>59</sup> Article II simply states that "[t]he executive Power shall be vested in a President of the United States of America."<sup>60</sup> Yoo takes this to signify that, while Congress's constitutional powers are limited to those enumerated in Article I, the President has all powers associated with executive power at the time of the framing.<sup>61</sup> The traditional perspective rejects any claim of executive war powers based on the Vesting Clause alone, which on its face seems to indicate only that the executive power will be invested in one President rather than in a plural body, as it was, for example, under the Articles of Confederation.<sup>62</sup> Yoo's argument for executive powers purports to be a textual argument based on the Article II Vesting Clause.<sup>63</sup> In fact, Yoo's argument is based on an interpretation of seventeenth- and eighteenth-century political theory and practice, which in turn generates an interpretation of the constitutional text.<sup>64</sup> The text of the Constitution, standing alone, lends strong support to the traditional perspective on war powers.<sup>65</sup> As John Hart Ely has pointed out, while the original intent of the Framers is often so obscure that we are really left to our own devices, the Constitution is perfectly clear in the realm of war powers.<sup>66</sup>

### B. Irons's Historical Approach

If the textual argument in favor of congressional control over war is not convincing enough, Irons's book also does an excellent job of setting out some of the best evidence from the legislative history and from subsequent historical glosses on the constitutional text to establish a strong foundation for the

cf. WORMUTH ET AL., *supra* note 27, at 105-07 (providing brief history of office of commander in chief in English and colonial history from 1639 through American Revolution).

58. See, e.g., YOO, *supra* note 4, at 18 (quoting Justice Scalia as stating that Article II's Vesting Clause "does not mean *some* of the executive power, but *all* of the executive power" is vested in the President (citing *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting))).

59. U.S. CONST. art. I, § 1.

60. *Id.* art. II, § 1.

61. YOO, *supra* note 4, at 18 ("If we assume that the foreign affairs power is an executive one, Article II effectively grants to the president any unenumerated foreign affairs powers not given elsewhere to the other branches.").

62. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 554 (2004) ("The Article II Vesting Clause may simply make clear *where* the executive power is being vested—in a unitary President—not the scope of that power.").

63. YOO, *supra* note 4, at 18, 183-84.

64. See *id.* at 30-54 (examining allocation of war and treaty powers in seventeenth- and eighteenth-century thought and in Anglo-American practice).

65. REVELEY, *supra* note 27, at 29 ("If we could find a man in the state of nature and have him first scan the war-power provisions of the Constitution . . . he would marvel at how much Presidents have spun out of so little. On its face, the text tilts decisively toward Congress.").

66. ELY, *supra* note 27, at 3 (contending that "original understanding" of Constitution is often "obscure to the point of inscrutability," but that Framers were clear in vesting power to declare war in Congress).

traditional perspective on war powers. On the structural level, Irons points to numerous writings by the Framers indicating their desire to have checks on executive power and their fear of executive unilateralism—especially in the domain of war powers.

After their experience with the English monarchy, the Framers sought to prevent such powers from being vested solely in the executive.<sup>67</sup> Upon hearing Pierce Butler's recommendation that the power to initiate war be vested in the President, Elbridge Gerry remarked, "[I] never expected to hear in a republic a motion to empower the Executive alone to declare war."<sup>68</sup> Madison even proposed prohibiting the President from having a role in negotiating peace treaties.<sup>69</sup> He feared that a President might try to impede the peace in order to derive "power and importance from a state of war."<sup>70</sup>

Later commentary by important Framers, both during the ratification debates and during the early republic, was consistent with statements made at the Constitutional Convention.<sup>71</sup> As James Madison put it in a letter to Thomas Jefferson: "The constitution supposes . . . that the Ex[ecutive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ature]."<sup>72</sup> Similarly, writing as Helvidius in his exchange with Alexander Hamilton, Madison asserted that "[i]n no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the

67. Thomas Jefferson wrote to James Madison: "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) (footnote omitted).

68. IRONS, *supra* note 3, at 21 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 56, at 318). Eight delegates stated their opposition to giving the executive the power to initiate war. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 56, at 64-66, 70, 291-92, 318, 319 (recording statements of Charles Pinckney, John Rutledge, James Wilson, James Madison, Alexander Hamilton, Roger Sherman, Elbridge Gerry, and George Mason). Two other delegates, Oliver Ellsworth and Rufus King, strongly suggested that the President should not have substantial war powers. *Id.* at 319.

69. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 56, at 540.

70. *Id.*

71. See Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1713-17 (2002) [hereinafter Ramsey, *Text and History*] (reviewing evidence from 1790s in favor of expansive reading of Declare War Clause); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1603-09 (2002) [hereinafter Ramsey, *Textualism*] (collecting quotations from Alexander Hamilton, James Iredell, Charles Pinckney, James Madison, and James Wilson and reviewing practice of Washington presidency, all favoring congressional over executive war powers).

72. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON, 1790-1802, at 311, 312 (Gaillard Hunt ed., 1906). Madison expressed the same views during his Helvidius/Pacificus exchange with Hamilton: "[T]he executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." James Madison, *Letters of Helvidius, No. IV*, GAZETTE U.S., Sept. 14, 1793, *reprinted* in 6 THE WRITINGS OF JAMES MADISON, *supra*, at 138, 174.

executive department.”<sup>73</sup> As Michael Ramsey put it, “Madison, Hamilton, Jefferson, Wilson, Washington, Jay, Marshall, and an array of lesser figures indicated that war power lay primarily with Congress, and no prominent figure took the other side.”<sup>74</sup>

In the early republic, courts, to the extent that they weighed in on the subject, generally supported the notion of congressional control over questions of war and peace. In *Bas v. Tingy*,<sup>75</sup> Justices Washington and Patterson analyzed the state of affairs between the United States and France in terms of whether congressional actions sufficed to establish a state of war between the two nations.<sup>76</sup> In *Little v. Barreme*,<sup>77</sup> Justice Marshall, although originally inclined to excuse Captain Little’s trespass against a Dutch vessel on the ground that Captain Little’s conduct was authorized by President Adams, acquiesced in the views of his brethren “that the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass.”<sup>78</sup> In short, the President could not unilaterally authorize a military action, even a trifling one, that exceeded the Congress’s authorization for the use of force. Justice Paterson, riding circuit in New York, stated in *United States v. Smith*<sup>79</sup> that the President does not possess the power of making war because “[t]hat power is exclusively vested in congress.”<sup>80</sup>

More significant, however, were the attitudes of the United States’ first chief executives, as expressed during their presidencies. As early as 1793, when the Governor of Georgia asked President Washington to send U.S. troops to intervene in border skirmishes between frontier settlers and Indians, Washington declined, explaining that “no offensive expedition of importance” could be taken without congressional authorization.<sup>81</sup> Washington’s Secretary of War warned territorial governors that military operations were confined to defensive measures unless Congress decided otherwise,<sup>82</sup> because Congress alone was

73. Madison, *Letters of Helvidius, No. IV, supra* note 72, at 174.

74. Ramsey, *Textualism, supra* note 71, at 1566.

75. 4 U.S. (4 Dall.) 37 (1800).

76. *Bas*, 4 U.S. (4 Dall.) at 40-42 (Washington, J.) (discussing possibilities of “solemn” and “imperfect” war); *id.* at 45 (Paterson, J.) (noting that United States and France were engaged in imperfect war and asserting that “[a]s far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations”); IRONS, *supra* note 3, at 36-37.

77. 6 U.S. (2 Cranch) 170 (1804).

78. *Little*, 6 U.S. (2 Cranch) at 179; IRONS, *supra* note 3, at 39. Marshall was never inclined to think that an executive order standing alone could authorize seizure of a foreign vessel. Rather, he thought that such an order might support excuse of damages. See *Little*, 6 U.S. (2 Cranch) at 179 (“I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages.”).

79. 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

80. *Smith*, 27 F. Cas. at 1230; IRONS, *supra* note 3, at 41.

81. Letter from George Washington to William Moultrie (Aug. 28, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON 73, 73 (John C. Fitzpatrick ed., 1940).

82. Letter from Henry Knox to Governor Blount (Oct. 9, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY SOUTH OF THE RIVER OHIO, 1790-1796, at 194, 195 (Clarence Edwin Carter ed., 1936) [hereinafter THE TERRITORIAL PAPERS OF THE UNITED STATES].

“vested with the powers of War”<sup>83</sup> and Congress alone was “competent to decide upon an offensive war.”<sup>84</sup> Jefferson similarly explained to Congress that an American Navy Captain had disabled a Tripolitan pirate ship but had released the captured pirates because the Navy was not authorized to take nondefensive measures without the sanction of Congress.<sup>85</sup> In Jefferson’s view, Congress alone could determine the scope of a conflict, and if only a ransom should be demanded, Congress would set the amount.<sup>86</sup>

John Yoo has argued that a declaration of war is merely an official recognition that a state of war exists.<sup>87</sup> The Declare War Clause thus is not a grant of legislative power to the Congress, but rather confers on Congress the power to make a declaratory judgment, which gives it authority to pass legislation appropriate for wartime.<sup>88</sup> As Irons shows, however, in the early republic, Presidents recognized that they needed a congressional declaration of war before they could commence hostilities—or even before they could expand existing hostilities. The Declare War Clause thus was not understood as a grant of judicial power but as a grant of war powers. In June 1812, Madison declared that a “state of war” existed between the United States and Britain but presented Congress with ““a solemn question which the Constitution wisely confides to the legislative department of the Government.””<sup>89</sup> The Senate at first refused to declare war and wanted to limit the U.S. response to reprisal but approved the declaration of war a few days later.<sup>90</sup> The incident makes clear that Madison, acting as President, believed that he needed congressional authorization before committing American forces to war, even though he believed that a state of war already existed. Irons shows that this perspective on war powers was generally shared by U.S. Presidents.<sup>91</sup>

83. Letter from Henry Knox to Governor Blount (Nov. 26, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 82, at 220, 221.

84. Letter from Henry Knox to Governor Blount (Mar. 23, 1795), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 82, at 386, 389.

85. Thomas Jefferson, *First Annual Message* (Dec. 8, 1801), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 326, 326-27 (James D. Richardson ed., 1900).

86. *Id.* at 327; see also IRONS, *supra* note 3, at 31 (quoting Jefferson as stating, “Upon the whole, it rests with Congress to decide between war, tribute, and ransom as the means of re-establishing our Mediterranean commerce.”).

87. See Yoo, *Continuation of Politics*, *supra* note 8, at 207-08 (“[A] declaration of war served the purpose of notifying the enemy, allies, neutrals, and one’s own citizens of a change in the state of relations between one nation and another. In none of these situations did a declaration of war serve as a vehicle for domestically *deciding on or authorizing* a war.”).

88. See YOO, *supra* note 4, at 332 n.14 (“[T]he Declare War Clause gives Congress the power to ‘declare’ whether . . . a certain state of affairs legally constitutes a war, which then gives it the authority to enact wartime regulations of individual persons and property both within and outside the United States.”).

89. IRONS, *supra* note 3, at 47.

90. *Id.*

91. See, e.g., *id.* at 59-60 (quoting Lincoln to effect that authors of Constitution had placed war power in hands of Congress because they “resolved to so frame the Constitution that *no one man* should hold the power’ of taking the nation into war”); *id.* at 64 (quoting Buchanan, who told Congress in 1858 that the President “cannot legitimately resort to force without the direct authority of

But Irons also presents a counternarrative that establishes a long tradition of U.S. Presidents exercising unilateral nondefensive war powers. According to Irons, Thomas Jefferson “first cracked open the door through which later presidents barged with impunity.”<sup>92</sup> In 1807, when a British vessel fired on the American frigate *Chesapeake*, Jefferson responded while Congress was in recess.<sup>93</sup> Irons thinks the incident constituted a “compelling” crisis to which Jefferson had to respond, but he also thinks later Presidents have used the excuse of necessity to justify executive unilateralism in much more questionable cases.<sup>94</sup>

In 1846, President Polk claimed that Mexico had invaded U.S. territory and requested a declaration recognizing an *existing* state of war between the two countries.<sup>95</sup> Still, Polk recognized that a formal declaration was required, and members of Congress at the time recognized that the President’s declaration of war had no constitutional significance.<sup>96</sup> But by midcentury, as Irons acknowledges, the federal judiciary was increasingly deferential toward executive authorizations of the use of force.<sup>97</sup> In the twentieth century, Irons laments, U.S. Presidents have become far bolder in their assertions of unilateral authority to use military force.<sup>98</sup>

### C. Conclusion: The Normative Limitations of Originalism

Irons’s book offers two arguments: first, that Congress, the courts, and U.S. citizens have permitted Presidents to usurp war-making authority from the Congress; and second, that Presidents have exercised their war powers illegitimately, not only as a constitutional matter, but also geopolitically, to pursue an imperialist foreign policy. Irons believes that the United States goes to war far too readily and without much thought to the constitutional procedures that ought to guide it.

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Congress, except in resisting and repelling hostile attacks”); see also REVELEY, *supra* note 27, at 277-85 (providing “sampler” of executive statements supporting congressional control over powers of war and peace).

92. IRONS, *supra* note 3, at 42.

93. *Id.*

94. *Id.* at 42-43.

95. *Id.* at 57.

96. *Id.* (quoting Senator John Calhoun’s denunciation of Polk for announcing war when “there is no war according to the sense of our Constitution”).

97. See IRONS, *supra* note 3, at 63-64 (discussing Southern District of New York’s ruling in *Durand v. Hollins*, 8 F. Cas. 1123 (C.C.S.D.N.Y. 1860) (No. 4,186)), which upheld decision of naval commander to order bombardment of Nicaraguan port as part of executive authority to protect lives and property of U.S. citizens); *id.* at 71-75 (discussing Civil War *Prize Cases*, 67 U.S. (2 Black) 635 (1862), and siding with four dissenters in accusing Supreme Court of abdicating its constitutional responsibility to say what law is).

98. See, e.g., *id.* at 108 (discussing Woodrow Wilson’s view that Presidents have absolute control over foreign affairs); *id.* at 129 (criticizing Franklin Delano Roosevelt’s commitment to lend destroyers to United Kingdom six months prior to congressional authorization of that deal through Lend-Lease Act); *id.* at 211 (noting that every President since Gerald Ford has claimed “the ‘inherent’ right to initiate military action without prior congressional approval”).

Irons does not argue, however, that congressional foreign policy objectives were any less imperialist than those of the executive. Thus, the relation between Irons's title, *War Powers*, and his subtitle, *How the Imperial Presidency Hijacked the Constitution*, is unclear.<sup>99</sup> Moreover, even if we assume that Irons is correct about the constitutional design with respect to war powers, he provides no normative argument for why the Constitution must mean for us today what the Framers intended it to mean. Therefore, it is hard to see why Irons's narrative of executive war powers is one of constitutional *hijack* rather than one of constitutional development. In short, Irons's book provides an argument that the Constitution allocates war powers to Congress and a historical narrative that demonstrates that our practice has strayed from the historical design. He does not ponder the question of whether or to what extent the constitutional design should matter.

### III. YOO'S TEXTUALIST INNOVATION

Yoo's work is indebted to a textualist approach that can be found in some recent scholarship on war powers,<sup>100</sup> much of it inspired by Justice Scalia's approach to statutory and constitutional interpretation.<sup>101</sup> These scholars argue that the best way to get at the original meaning of the Constitution is to try to understand what the constitutional text originally meant—that is, how that text would have been understood by the eighteenth-century mind.<sup>102</sup> The approach that tries to get at original *intentions*, say the textualists, is antidemocratic. Since the Constitution is an agreement that was ratified through representative

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99. Irons's narrative of congressional and popular support for the United States' expansive foreign policy undercuts any possible claim that executive usurpation of congressional war powers is at the root of American imperialism. See, e.g., IRONS, *supra* note 3, at 47 (suggesting that War of 1812, which Madison's critics dubbed "Mr. Madison's war," was one that Madison himself had tried to avoid and noting that "inflammatory newspaper reports" led American public to issue "heated calls for war"); *id.* at 89-90 (recounting President Cleveland's refusal to lead war against Spain despite congressional threat to declare war).

100. Recent scholarship exemplifying a textual approach to war powers includes an exchange between Michael Ramsey and John Yoo: Ramsey, *Textualism*, *supra* note 71, and Yoo, *War and the Constitutional Text*, *supra* note 8, as well as Ramsey, *Text and History*, *supra* note 71, and Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

101. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22-23 (Amy Gutmann ed., 1997) ("The text is the law, and it is the text that must be observed. I agree with Justice Holmes[] . . . : 'We do not inquire what the legislature meant; we ask only what the statute means.'").

102. See YOO, *supra* note 4, at 107 (arguing for controlling significance of constitutional text in ratification debates, since those who ratified Constitution had only constitutional text and not legislative history that was published later); Prakash & Ramsey, *supra* note 100, at 234 n.1 ("[W]e think the best evidence of the meaning of a text is to see how intelligent and engaged people at the time it was written commonly understood the words it employs."); Ramsey, *Textualism*, *supra* note 71, at 1553-54 ("[M]odern theories of original understanding focus much less on a reconstructed or subjective Framers' intent and much more on the objective meaning of the constitutional text, as it would have been understood at the time it was written.").

processes, it ought not to bind its ratifiers to intentions that are not manifest in the constitutional text itself.<sup>103</sup> Rather, the constitutional text should bind U.S. citizens to what an ordinary reader at the time would likely have understood the text to mean.<sup>104</sup>

One can—and others have—raised numerous objections to this textualist approach to both statutory and constitutional interpretation.<sup>105</sup> With respect to war powers, however, those criticisms seem beside the point. Whether one attempts to establish the meaning of the Constitution through a reconstruction of the intentions of the Framers or through an inquiry into the meaning of the constitutional text, one can arrive at the same results. While there might be areas where the Framers' intentions and textual meaning diverge, the war power is not one.<sup>106</sup> The traditional perspective is largely a product of the intentionalist approach to constitutional interpretation,<sup>107</sup> and it arrives at the conclusion that

103. See YOO, *supra* note 4, at 27-28 (“[T]his book focuses on the Framers’ beliefs and actions in the ratification process because the Constitution was the result of a democratic political process. Ratification by popularly elected conventions gave the Constitution its political legitimacy.”).

104. See *id.* at 28 (“What those who ratified the Constitution believed the meaning of the text to mean is therefore more important than the intentions of those who drafted it.”); Ramsey, *Textualism*, *supra* note 71, at 1555 (“[T]he inquiry is not what any individual member of the constitutional generation intended, or even our best guess as to what that generation collectively intended; it is, instead, the best reading of the text.”).

105. See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 671 (1990) (arguing that, despite Scalia’s beliefs, Constitution does not favor “new textualism” more than other interpretation schemes); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1173-86 (1992) (rejecting Scalia’s argument that public respect for courts is eroded when courts depart from textualist approach and inquire into legislative intent); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 383-85 (1995) (developing positive account of methodology of textualism, as opposed to viewing textualism simply as critique of intentionalism, but concluding that textualism does not succeed in limiting or eliminating judicial discretion in statutory or constitutional interpretation); David Sosa, *The Unintentional Fallacy*, 86 CAL. L. REV. 919, 920 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997)) (arguing that indeterminacy in statutory language undermines textualist project and that textualist project becomes even more suspect when refined to originalism); Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 564-65 (1997) (reviewing SCALIA, *supra*) (defending common law approach to constitutional law as embodying “judicial modesty,” allowing for flexibility and as preferable to Scalia’s approach in terms of accommodating democratic ideals).

106. As the discussion to follow will indicate, the two approaches are not as divergent as they may appear, since textualists rely on the same sources of information to establish the most likely meaning of the constitutional text to the eighteenth-century mind as the intentionalists rely on to establish the Framers’ intentions. See, e.g., Ramsey, *Textualism*, *supra* note 71, at 1569 (conceding that “views of the drafters and their contemporaries . . . are nonetheless an important interpretive tool” for textualists).

107. Although the traditional perspective does pay careful attention to the constitutional text, the bulk of the argument relies on extensive quotations from the Framers setting out their understanding of the meaning of that text. See, e.g., ELY, *supra* note 27, at 3-5 (relying on Framers’ statements in concluding that declaring war is power vested in Congress); FISHER, *supra* note 27, at 3-14 (marshalling evidence from annals of Constitutional Convention, ratification debates, and correspondence of Framers); WORMUTH ET AL., *supra* note 27, at 17-19 (reviewing legislative history and ratification debates relating to Declare War Clause); *id.* at 108-10 (reviewing legislative history and ratification debates relating to Commander in Chief Clause). Reveley devotes a chapter to the constitutional text.

the Declare War Clause was intended to give Congress authority to commence hostilities, whether by formal declaration or otherwise.<sup>108</sup> Although Yoo disagrees, a textualist account of the constitutional allocation of war can lead to the same conclusion.<sup>109</sup>

If one is accustomed to the traditional approach to war powers, Yoo's approach can be disorienting. Rather than proceeding from a discussion of the text to a discussion of what the Framers said about the text, Yoo begins with his synopsis of the views of seventeenth- and eighteenth-century writers on the appropriate allocation of war powers in a constitutional monarchy.<sup>110</sup> There follows a discussion of the practice of the colonies and the states during the so-called "Critical Period" before the ratification of the Federal Constitution.<sup>111</sup> Yoo then asserts that the views of the actual authors of the Constitution are not the best guide to the meaning of the document.<sup>112</sup> Rather, what really matters, Yoo argues, is what the ratifiers of the Constitution believed the Constitution meant—insofar as we can tell.<sup>113</sup> Having reviewed this historical material, Yoo concludes that the Constitution, properly understood against the background of

REVELEY, *supra* note 27, at 29-50. But he devotes three to a discussion of the eighteenth-century background, the Constitutional Convention, and the ratification debates. *Id.* at 51-115.

108. Irons devotes his first chapter to the Constitutional Convention. IRONS, *supra* note 3, at 11-27. He does not devote nearly as much space to the ratification debates and weighs the evidentiary value of utterances in those debates no differently from later statements regarding the meaning of the Constitution. *See id.* at 25 ("The debates in the convention, the later writings of delegates to that meeting, and speeches in the state conventions that voted on ratification of the Constitution leave no doubt that the president's title and role as commander in chief gave him no powers that Congress could not define or limit.").

109. *See Ramsey, Textualism, supra* note 71, at 1609 (stating that text, structure, and ratification debates support congressional power to initiate war "through words . . . or action" because "declare war" has ambiguous textual meaning from eighteenth-century viewpoint).

110. YOO, *supra* note 4, at 30-54.

111. *Id.* at 55-87.

112. *See id.* at 107 (noting that Madison's notes on Constitutional Convention were not available to ratifiers, who could rely only on text itself and on their knowledge of political and constitutional history, and calling ratification debates "perhaps the most important source for understanding the Constitution"). Yoo's position on the significance of the ratification debates is not unusual. The argument in favor of privileging the history of ratification over that of the Philadelphia Convention goes back to James Madison but has recently been revived by the historian Jack Rakove and by legal scholars such as Charles Lofgren and Bruce Ackerman. *See Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2126-27 & nn.139-40 (1999) (reviewing original and modern views on privileging ratification debates over those at Constitutional Convention).

113. Yoo acknowledges that there are difficulties associated with using the ratification debates as a source for getting at the Constitution's meaning, but he does not fully acknowledge the nature of those difficulties. YOO, *supra* note 4, at 107. As one of Yoo's critics points out, "we have records of only some of these conventions, and the records that do exist are abysmal." Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2162 (1999); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 17 (1996) (noting problems with relying on ratification debates, for example, "spotty" manner of reporting on debates and "obscure" participants in debates and concluding that only definite conclusion drawn from debates is ratifiers' preference for Constitution over Articles of Confederation).

eighteenth-century political theory,<sup>114</sup> “does not establish a fixed process for foreign relations decisionmaking”<sup>115</sup> and thus “provide[s] the political branches with far more flexibility in managing foreign relations than is commonly assumed.”<sup>116</sup>

### A. *Political Theory and the Constitutional Text*

In the war powers context, textualism arises as a critique of the traditional perspective’s characterization of the Constitution as riddled with lacunae on the subject of the foreign affairs power.<sup>117</sup> Textualism sets out to show that “there are no gaps in the Constitution’s allocation of foreign affairs powers.”<sup>118</sup> Textualism can make this argument because part of its agenda has been an expansive reading of executive authority, a reading that can fill any gaps in the constitutional enumeration of the powers of the federal government by allocating such powers to the executive.<sup>119</sup> According to this textualist view, the Constitution enumerates only the powers associated with executive power that were transferred to Congress.<sup>120</sup> According to Yoo and other textualists, the “lacunae” identified by the traditional perspective reflect eighteenth-century assumptions that the powers in question are executive in nature.

#### 1. Political Theory and Practice

The scope of Yoo’s historical perspective on the framing of war powers is impressive, encompassing “the British constitution in the seventeenth and eighteenth centuries, state constitutions, and the Articles of Confederation.”<sup>121</sup> Yoo’s great innovation is to develop the argument that there was a consensus among eighteenth-century politicians and political theorists about the proper

114. See YOO, *supra* note 4, at 8 (noting that his book “concentrates less on judicial precedent and more on constitutional text, structure, and history. . . [and] begins by telling the story of the place of foreign affairs in the development of the American constitutional system during the late eighteenth century”).

115. *Id.* at 7-8.

116. *Id.* at 8.

117. See, e.g., HENKIN, FOREIGN AFFAIRS, *supra* note 27, at 14-15 (cataloguing myriad foreign relations power questions left unaddressed in Constitution); REVELEY, *supra* note 27, at 31-49 (discussing Constitution’s “ill-defined, frequently competitive provisions” as well as “gaps in the war-power provisions”). At times, Yoo seems to adopt the “gap theory,” at least with respect to the foreign affairs power. See YOO, *supra* note 4, at 24 (acknowledging that significant details regarding foreign affairs power are absent from Constitution’s text).

118. Prakash & Ramsey, *supra* note 100, at 236.

119. See, e.g., YOO, *supra* note 4, at 30 (stating that British approach to foreign affairs, constitutional ratification events, and views of Federalists and Anti-Federalists led to understanding in eighteenth century that executive retained “war and treaty powers”); Prakash & Ramsey, *supra* note 100, at 234 (interpreting Article II, Section 1 of Constitution as vesting “‘residual’ foreign affairs power” in executive); Ramsey, *Textualism*, *supra* note 71, at 1568 (summarizing textualist position that executive has “foreign affairs power” that textually is not allocated elsewhere in Constitution).

120. See YOO, *supra* note 4, at 18 (asserting that executive, under Article II, retains power it once enjoyed that has not been explicitly delegated elsewhere).

121. *Id.* at 27.

allocation of war powers between the executive and the legislature, a consensus that he finds reflected in these diverse sources:

Both political theory, as primarily developed by thinkers such as Locke, Montesquieu, and Blackstone, and shared Anglo-American constitutional history from the seventeenth century to the time of the framing, established that foreign affairs was the province of the executive branch of government. Thus, when the Framers ratified the Constitution, they would have understood that Article II, Section I continued the Anglo-American constitutional tradition of locating the foreign affairs power generally in the executive branch.<sup>122</sup>

According to Yoo, while the Framers understood war and treaty powers to rest with the executive, they followed the British model in giving the legislature power over funding so as to check the executive.<sup>123</sup> The management of foreign relations thus was “dynamic,” based on the interaction between the political branches.<sup>124</sup>

The Framers’ understanding of the dynamic relation between the political branches would be supported, says Yoo, by the political theorists who were most widely read and influential at the time. Grotius and Vattel, for example, placed the foreign relations power in the executive. They recognized that international agreements that transfer sovereign powers may not be made unilaterally by the executive but require approval of the legislature.<sup>125</sup> Yoo discusses Locke’s notion of executive prerogative, which would permit the executive to act “without the prescription of the law, and sometimes even against it”<sup>126</sup> and implies that the doctrine was incorporated *sub silentio* into the Constitution. Locke and Montesquieu both believed that the executive exercised sole power over foreign affairs—through what Locke called the “federative” power.<sup>127</sup> While Montesquieu recognized legislative checks on executive foreign affairs power—through the power of the purse and through its power to disband the army—neither Locke nor Montesquieu envisioned the judicial branch as having any role in foreign affairs.<sup>128</sup> Blackstone likewise considered “warmaking and treatymaking powers as part of the royal prerogative,” while allowing for legislative checks through the power of impeachment.<sup>129</sup> Although the British King seemed to have sovereign control over foreign affairs, during the eighteenth century, Parliament, through its power over domestic legislation and

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122. *Id.* at 19.

123. *Id.* at 30-31.

124. *Id.* at 31.

125. YOO, *supra* note 4, at 34-36.

126. *Id.* at 37 (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 160 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690)); *see also id.* at 44 (discussing Blackstone’s version of notion of executive prerogative, which somewhat alters Locke’s theory).

127. *Id.* at 37-40 (quoting LOCKE, *supra* note 126, § 146).

128. *Id.* at 39-40.

129. YOO, *supra* note 4, at 44.

the power of the purse, exerted “a more direct influence over foreign policy than the formal allocation of constitutional powers would suggest.”<sup>130</sup>

This aspect of Yoo’s argument has been criticized in two ways. First, some scholars simply dismiss the relevance of seventeenth- and eighteenth-century political theory and the practice of the British monarchy on the ground that “the framers consciously departed from so much of it.”<sup>131</sup> It is safe to predict that Irons would be in this camp, as he provides myriad quotations from the Framers indicating their hostility to the notion of an executive empowered with war powers akin to the “prerogative” of English kings.<sup>132</sup> As James Wilson put it, “The prerogatives of the British Monarchy’ . . . were not ‘a proper guide in defining the executive powers. Some of the prerogatives were of a legislative nature. Among others that of war and peace.’”<sup>133</sup>

Other scholars have objected to Yoo’s reading of the seventeenth- and eighteenth-century background as oversimplified and thus incorrect.<sup>134</sup> According to these scholars, Yoo and other textualists have postulated a consensus regarding notions of executive powers where none existed.<sup>135</sup> Michael Ramsey, Curtis Bradley, and Martin Flaherty review seventeenth- and eighteenth-century political theory and conclude that there was no consensus among such theorists as to where the power to make war was to be vested.<sup>136</sup> In addition, Ramsey points out that the English Constitution was not the only

130. *Id.* at 54 (internal citation and quotation omitted).

131. Cole, *supra* note 9, at 8; *see also* Bradley & Flaherty, *supra* note 62, at 572 (criticizing those who argue for expansive executive powers based on Article II’s Vesting Clause as erring “dramatically in [the] presumption that America’s constitutional practitioners mechanically applied European political and legal theory”).

132. *See* IRONS, *supra* note 3, at 20 (noting Charles Pinckney’s concern that giving President responsibility over “‘peace and war . . . would render the Executive a Monarchy, of the worst kind, to wit an elective one’”); *id.* (noting John Rutledge’s opposition to “‘giving [the executive] the power of war and peace’”); *id.* (noting James Madison’s view that “‘executive powers . . . do not include the rights of war and peace . . . but should be confined and defined—if large we should have the evils of elected Monarchies’”).

133. *Id.* (quoting James Wilson, who spoke against incorporating British government into U.S. Constitution).

134. *See* Bradley & Flaherty, *supra* note 62, at 572 (“[E]xecutive-power essentialists have painted too simplistic a picture of the relevant eighteenth-century political, constitutional, and legal thought.”). *See generally* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983) (“Where the interpretivist seeks clarity and definiteness, the historian finds ambiguity.”).

135. *See* Bradley & Flaherty, *supra* note 62, at 559 (arguing that neither constitutional text nor historical evidence supports theory that Article II’s Vesting Clause can be read as grant of plenary foreign affairs powers to executive); Ramsey, *Text and History*, *supra* note 71, at 1701<sup>1</sup> (noting that history, by itself, cannot shed most meaningful light on what constitutional text signifies).

136. *See* Bradley & Flaherty, *supra* note 62, at 560-71 (canvassing writings of John Locke, William Blackstone, Baron de Montesquieu, Thomas Rutherford, Jean de Lolme, Jean Jacques Burlamaqui, Samuel Puffendorf, Hugo Grotius, and Emmerich de Vattel and finding no consensus on which branch of government should wield foreign affairs powers); Ramsey, *Text and History*, *supra* note 71, at 1701-02 & n.58 (arguing that Yoo constructs argument of historical inevitability based on “selective emphasis” and that none of leading historians on whom Yoo relies has endorsed his view of executive war powers).

model that influenced the Framers. The Roman Republic was also a significant model, and under that system, at least in theory, the power to initiate war was vested in the legislature.<sup>137</sup>

## 2. State Constitutions, the Articles of Confederation, and the Ratification Debates

Yoo's account of the significance of state constitutions during the revolutionary period is heavily indebted to the work of Gordon Wood.<sup>138</sup> Wood's argument, as summarized by Yoo, is that the American colonists were chastened when their early experiments in increased democracy "produced chaos, leading some states to adopt admired constitutions that returned power to the executive branch."<sup>139</sup> While Thomas Jefferson advocated reining in executive power in state constitutions, John Adams's approach prevailed. Yoo concludes:

While the Revolution may have represented a rebellion against the presence of the Crown, it was not an assault on the traditional relationship between the executive and legislature. As under the royal governors, the common practice of the states either assumed that the governors had broad warmaking authority, or explicitly gave them such power in terms reminiscent of the British constitution and the colonial charters.<sup>140</sup>

South Carolina's Constitution, which imposed substantive limitations on executive war powers, was an exception;<sup>141</sup> but according to Yoo, this exception "underscores the common presumption that such powers lay with the executive."<sup>142</sup>

Here, as in other contexts, Yoo argues by negative implication: "If the Framers had wanted to prevent the president from commencing war without congressional approval, . . . they could have adopted a provision not unlike South Carolina's."<sup>143</sup> But that argument is unconvincing, as one could also point to

137. See Ramsey, *Text and History*, *supra* note 71, at 1699-1700 (discussing influence of Roman Republic and John Adams's writings on Roman Constitution, which demonstrate that "at least in theory," Roman legislature controlled declarations of war).

138. See, e.g., YOO, *supra* note 4, at 29 (citing work of Wood, Bernard Bailyn, Forrest McDonald, and Jack Rakove as sources for his understanding of intellectual context of Revolution); *id.* at 36 (following Wood's and Bailyn's views on influence of Locke, Montesquieu, and Blackstone on revolutionary generation).

139. Yoo, *War and the Constitutional Text*, *supra* note 8, at 1648; see also YOO, *supra* note 4, at 63 (asserting similar argument that states chose to sustain "the executive's traditional powers" as opposed to distributing power structurally).

140. YOO, *supra* note 4, at 65.

141. See *id.* at 72 (noting that South Carolina was only state to substantively limit war power of executive).

142. *Id.* at 86.

143. *Id.* at 72; see also *id.* at 148 ("If the Framers had intended to grant Congress the power to commence military hostilities, they could easily have imported the phrase from the Articles of Confederation into the Constitution, as they did with other, related powers."); YOO, *supra* note 4, at 153 ("If the Framers had sought to establish a system that requires *ex ante* congressional approval . . . Article II, Section 2 should have included an additional clause that the president 'shall have Power, by

express language granting state governors war powers, which the Framers did not incorporate into the Constitution.<sup>144</sup> Nor did they adopt language from Article IX of the Articles of Confederation and grant the President “the sole and exclusive right and power of determining on peace and war.”<sup>145</sup>

Moreover, Yoo’s argument that there was a “common presumption” that war powers lay with the executive is undercut by his own narrative, which indicates that the issue was a subject of considerable debate. That being the case, one cannot blithely fill lacunae in the Constitution with a presumption in favor of executive authority.<sup>146</sup> In any case, Yoo fails to demonstrate that colonial charters and state constitutions reflect in an intelligible way on the emerging sense among the Framers of the proper allocation of war powers on the *federal* level. Yoo provides no evidence that state constitutional experience played any determinative role in the ratification debates over war powers. He gives no consideration to the possibility that Anti-Federalist fear of a centralized federal

and with the advice and consent of Congress, to engage in War.”). One reviewer of Yoo’s work has criticized such arguments by negative implication as “‘when the dog doesn’t bark’ statements.” David J. Bederman, *Recent Books on International Law*, 100 AM. J. INT’L L. 490, 492 (2006) (reviewing YOO, *supra* note 4). Bederman points out that Yoo ignores arguments by negative implication that would undercut his position that treaties should be presumptively non-self-executing. Bederman concludes, “Yoo’s dog is well trained; it barks only on his command.” *Id.*

144. One example is New Hampshire’s 1784 constitution:

The president . . . shall have full power by himself, or by any chief commander, or other officer, or officers . . . to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of this state to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, expulse, repel, resist and pursue by force of arms, as well by sea as by land, within and without the limits of this state; and also to kill slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of this state . . . .

N.H. CONST. pt. II (1784), *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2463-64 (Frances Newton Thorpe ed., 1909). Massachusetts’s 1780 constitution was nearly identical. MASS. CONST. ch. II, § 1, art. VII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, *supra*, at 1901.

145. U.S. ARTICLES OF CONFEDERATION art. IX (1777). Yoo’s discussion of the Articles of Confederation is riddled with baffling contradictions. The Articles pose a problem for Yoo, since under the Articles all national powers were vested in the Continental Congress. *See* YOO, *supra* note 4, at 73 (noting that “the Articles vested all national powers in the Continental Congress, including those over war and peace”). But one should not think of the Continental Congress as a legislature, says Yoo; it was in fact the national government’s executive branch. *Id.* at 74. “Legislative powers—even in the foreign affairs arena—remained with the state assemblies.” *Id.* (emphasis added). On the same page, however, Yoo states that “the Articles transferred *all* foreign affairs powers to the Continental Congress.” *Id.* (emphasis added). On the next page, Yoo states that “the Congress exercised a mixture of judicial, legislative, and executive functions.” *Id.* at 75.

146. Yoo has argued that because Article II’s Vesting Clause is not limited in the way Article I’s Vesting Clause is, “any ambiguities in the allocation of a power that is executive in nature, such as the power to conduct military hostilities, must be resolved in favor of the executive branch.” Yoo, *War and the Constitutional Text*, *supra* note 8, at 1677. But no such resolution is possible if the presumption in favor of executive war powers did not obtain in the eighteenth century.

government would lead the Framers to constrain federal executive power—especially in the area of war making—in ways they did not think necessary with respect to state executive power. In fact, the Framers freely and repeatedly expressed their desires to minimize executive war powers.<sup>147</sup>

The historical record on the eighteenth-century view of executive power is confused enough to permit differing conclusions. Martin Flaherty and Curtis Bradley review the experience of the American states in the revolutionary and critical periods.<sup>148</sup> They find no evidence to support the thesis that people steeped in political theory of the framing period would simply assume executive control over the powers of war and peace.<sup>149</sup> Rather, Flaherty and Bradley argue that when some states moved “to enhance the independence and authority of the executive branch,”<sup>150</sup> they did so not because they thought that certain powers were inherently executive in nature but for the pragmatic reason of providing a check on the legislature. The actual allocation of executive power was, say Flaherty and Bradley, “specific and functional rather than categorical and essentialist.”<sup>151</sup>

Yoo chastises John Hart Ely, Harold Koh, and Jack Rakove for ignoring the ratification debates.<sup>152</sup> But Yoo’s use of these debates appears selective, and the selection tendentious. Yoo contends that, since the ratifiers did not have Madison’s notes on the Constitutional Convention, they had to rely on “the background of Anglo-American political and constitutional history of the preceding century,” which featured not “the enfeebled governors of many of the early state constitutions . . . [but] a rejuvenated presidency.”<sup>153</sup> The result, Yoo claims, is a Constitution in which “the president played the primary role in war and a significant, if not primary, role in determining peace. Customary executive power over foreign affairs had returned to a unitary, energetic executive, but one that took the form of a republican president rather than a hereditary monarch.”<sup>154</sup>

This argument is based in part on Yoo’s claim that Virginia was the “key state” in the ratification process, and thus, that the debate there “powerfully suggests what original meaning we should attach to the relative roles of the president, Senate, and Congress in wielding the foreign affairs power.”<sup>155</sup> As a political matter, it is true that without ratification in Virginia, the constitutional

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147. See *supra* notes 67-74 and accompanying text for a discussion of various Framers’ views of limiting executive powers.

148. Bradley & Flaherty, *supra* note 62, at 571-85.

149. *Id.* at 581 (noting that the “pattern [in state constitutions] — strong legislatures and limited and defined executive powers — extended to foreign affairs”).

150. *Id.* at 584.

151. *Id.* at 585.

152. YOO, *supra* note 4, at 106-07.

153. *Id.* at 107.

154. *Id.* at 107-08.

155. *Id.* at 140-41.

enterprise would have been shaky if not doomed.<sup>156</sup> It is also the case that the Virginia debate featured an extraordinary collection of both Federalists and Anti-Federalists and a rousing debate on war powers. Still, given Yoo's contractarian views on the significance of the ratification debates,<sup>157</sup> it is peculiar for him to argue that the tenth state to ratify should have some decisive role in determining the meaning of the Constitution. After all, the other participants in the ratification process were no more privy to the Virginia ratification debates than they were to Madison's notes on the Constitutional Convention.

In any case, with respect to war powers, Yoo's discussion of the debates between Federalists and Anti-Federalists seems to miss the point. Anti-Federalists criticized the draft Constitution on the ground that it gave too much power to the executive.<sup>158</sup> The Federalists' response was not to defend the unitary executive but to highlight the limits of executive power under the Constitution.<sup>159</sup> Yoo contends that, in the war powers debate, the Federalists engaged in a conscious "strategy of exaggerating the British King's powers and intentionally distorting Anti-Federalist arguments."<sup>160</sup> As Jack Rakove has noted, however, one can recognize the political and rhetorical context in which various statements were made without dismissing "all statements on either side of the question as so much propaganda."<sup>161</sup> The ratification debates strongly suggest that neither Federalists nor Anti-Federalists favored an expansive executive.<sup>162</sup> They differed only in their estimation of how successfully the Constitution had fettered that branch of the federal government.

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156. *See id.* at 131-32 (citing views of Alexander Hamilton and Forrest McDonald on importance of ratification in Virginia).

157. *See YOO, supra* note 4, at 107 (arguing that ratification debates "carried the greatest political legitimacy" and forced Federalists "to explain the meaning of specific constitutional provisions and how they would work").

158. *See id.* at 111 ("To Anti-Federalists, both president and king held the same powers over war and peace, and thus threatened the same tyranny."). An interesting, though different, take was that of Patrick Henry in the "key" Virginia ratification debates. Henry criticized the Constitution on the ground that it gave Congress all war powers. *See* 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 172 (1836) ("The Congress can both declare war and carry it on, and levy your money, as long as you have a shilling to pay."). Henry clearly did not share Yoo's assumptions about war powers being inherently executive in nature.

159. *See YOO, supra* note 4, at 122 (noting that Federalists in New York ratification debate "stressed the formal differences between the American and British plans of government," contrasting "powers of the king, and the relative weakness of the president").

160. *Id.*

161. RAKOVE, *supra* note 113, at 17.

162. *See Ramsey, Text and History, supra* note 71, at 1712 (noting that when Anti-Federalists complained about scope of presidential authority, "Federalists responded by saying that the President's powers were not as great as the Anti-Federalists supposed").

### B. *Yoo's Textual Analysis*

Because he thinks an expansive reading of Congress's war powers is inconsistent with the notion of executive power as understood in the eighteenth century, Yoo rejects the traditional perspective's textual argument regarding congressional war powers. His textual argument has two components—an expansive reading of Article II's Vesting Clause and a narrow reading of Article I's enumeration of congressional war powers.

Yoo's argument in favor of executive war powers is simple and straightforward. Because the Constitution states that "executive power shall be vested" in the President, the best way to understand the constitutional text is as a grant of *all* executive powers, as those powers would have been understood in the eighteenth century.<sup>163</sup> Since Yoo argues that informed people at the time of the Constitution's ratification would have assumed that foreign affairs powers are executive in nature, "Article II effectively grants to the president any unenumerated foreign affairs powers not given elsewhere to the other branches."<sup>164</sup> For the reasons given in Part III.A.1, *supra*, this Essay has argued that Yoo's reading of Article II's Vesting Clause is unpersuasive.<sup>165</sup>

Yoo is at his most brilliant in fashioning creative textual and structural arguments for a narrow reading of congressional war powers. Here too, however, the arguments, while interesting, are not convincing enough to overcome the clear statements of the Framers and the practice of the early republic, both of which uniformly support congressional primacy in decision-making processes relating to the advent of hostilities.

163. YOO, *supra* note 4, at 18; *see also* Myers v. United States, 272 U.S. 52, 118 (1926) ("The executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . ."); Alexander Hamilton, *Pacificus No. 1*, GAZETTE U.S., June 29, 1793, reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39 (Harold C. Syrett et al. eds., 1969) ("The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qu[al]ifications which are expressed in the instrument."). The difference between the Article I and Article II Vesting Clauses has recently been called into question. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-50 (1994) (arguing that Vesting Clause of Article II implicitly includes "herein granted" provision similar to that of Vesting Clause of Article I). For an extended refutation of Lessig and Sunstein and a defense of the theory of a unitary executive, *see* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

164. YOO, *supra* note 4, at 18.

165. In addition to the historical arguments of Bradley and Flaherty discussed *supra*, those opposing the Vesting Clause thesis have relied on Justice Jackson's opinion in the *Steel Seizure* case: "[I]t is difficult to see why the forefathers bothered to add several specific items, including some trifling ones." *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring). In the same vein, Bradley and Flaherty explain that "the Founders' decision to list what they meant by 'executive Power' would tend to suggest, pursuant to the *expressio unius* canon, that their list was complete, rather than merely illustrative." Bradley & Flaherty, *supra* note 62, at 555.

Yoo focuses his discussion of Article I on the Declare War Clause. He has very little to say about Congress's other enumerated powers.<sup>166</sup> Relying on Samuel Johnson's English dictionary, Yoo concludes that the phrase "declare war" connotes "recogniz[ing] a state of affairs—clarifying the legal status of the nation's relationship with another country—rather than authoriz[ing] the creation of that state of affairs."<sup>167</sup> Yoo then professes puzzlement at the different language used in Article I, Section 8, which grants Congress the power to "declare War," and in Article I, Section 10, which provides that the states may not "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."<sup>168</sup> Yoo points out that the language in Section 10 creates precisely the allocation of war powers "between Congress and the states" that the traditional perspective would like to establish "between Congress and the president."<sup>169</sup> This shows the difficulties of the traditional approach, says Yoo, "because it requires us to believe that the Framers did not know how to express themselves in one part of the Constitution but did in another part of the Constitution on exactly the same subject."<sup>170</sup>

There is a methodological difficulty here because Yoo's reading of the Declare War Clause treats it in isolation and thus ignores an important element of the constitutional structure, which grants Congress numerous war powers.<sup>171</sup> But it is not really so hard to imagine why the Framers would prefer "declare" in Article 1, Section 8 but "engage" in Article 1, Section 10. The Constitution provides that the states have no power to declare war, but also that they may not engage in war, unless in response to an invasion. Parallel construction could not have achieved the desired effect here without significantly infringing on the President's power to repel sudden attacks that do not rise to the level of invasion.<sup>172</sup>

In addition, Yoo himself provides two strong arguments for the choice of "declare" in Article 1, Section 8. First, Yoo recognizes that "in times of declared war, certain actions by the federal government would survive strict scrutiny but

166. Yoo provides a brief discussion of "letters of marque and reprisal" and concludes that they refer only to "one species of commercial warfare." YOO, *supra* note 4, at 147-48.

167. *Id.* at 145 (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (W. Strahan ed., 1755)). Michael Ramsey reads Johnson's dictionary as permitting a broader understanding of "declare" to include "to 'make known'" through action. See Ramsey, *Textualism*, *supra* note 71, at 1590-91 (interpreting definition of "declare" as including declaration of war "by action" as well as "by proclamation"). David Cole points out that, even in the eighteenth century, the phrase "declare war" was a legal term of art referring to "both the commencement of hostilities and . . . officially recognizing that war was ongoing." Cole, *supra* note 9, at 9.

168. YOO, *supra* note 4, at 146 (quoting U.S. CONST. art. I, § 10, cl. 3).

169. *Id.*

170. *Id.*

171. See *supra* notes 41-49 and accompanying text outlining constitutional provisions granting various powers to Congress pertaining to war.

172. See Ramsey, *Text and History*, *supra* note 71, at 1706-07 (arguing that, because restrictions on President's war powers are not same as restrictions on states' war powers, the different language in two clauses is perfectly reasonable).

would certainly fail if attempted in peacetime.”<sup>173</sup> Thus, even if Congress’s power to declare war does not constrain the executive’s powers as commander in chief, it does constrain the President and hold him to his oath to defend the Constitution and implement the laws of the United States. States have no such power, and so the word “declare” has no place in Article 1, Section 10.

Second, Yoo’s discussion of the Declaration of Independence<sup>174</sup> illustrates how the efficacy of congressional declarations of war could go beyond mere recognition of an existing state of war. The Declaration, Yoo tells us, “did not ‘authorize’ military resistance to Great Britain.”<sup>175</sup> Rather, it “announced the legal relationship between the mother country and its former colonies.”<sup>176</sup> It is not surprising that the Declaration did not create a state of war between Great Britain and its former colonies. Its purpose was to declare independence, not war. What is noteworthy is that Yoo recognizes that the effect of the Declaration was not merely declaratory but transformative: “The Declaration’s importance was not in authorizing combat, but in transforming the legal status of the hostilities between Great Britain and her colonies from an insurrection to a war between equals.”<sup>177</sup>

As speech-act theory has long recognized, certain utterances are “performative.”<sup>178</sup> Such utterances create states of affairs rather than reporting or commenting on them.<sup>179</sup> Thus, Yoo recognizes that a congressional declaration of war could do more than merely grant official recognition to a preexisting condition; it could bring about a new state of affairs, one with both legal and political ramifications.

Just as scholars who have undertaken historical research with a thoroughness that rivals Yoo’s have disputed the accuracy of his arguments regarding eighteenth-century views of executive power,<sup>180</sup> such scholars have similarly disputed Yoo’s arguments regarding the meaning of the Declare War Clause. In a lengthy article, Michael Ramsey looks not only to Grotius, Vattel,

173. YOO, *supra* note 4, at 151. In the book, Yoo does not explain how a declaration of war permits Congress to pass laws that it could not otherwise pass. In an earlier work, he has cited the notorious *Korematsu v. United States*, 323 U.S. 214 (1944), decision as the sole support for his contention that “legal restrictions which curtail the civil rights of a single racial group may be justified by [p]ressing public necessity.” Yoo, *War and the Constitutional Text*, *supra* note 8, at 1673 n.102 (internal quotations omitted) (citing *Korematsu*, 323 U.S. at 216). *But see* Ramsey, *Text and History*, *supra* note 71, at 1692-93 (acknowledging possibility that governmental powers increase during wartime, though stating that “augmentation turns upon the war itself, not upon the proclamation”).

174. YOO, *supra* note 4, at 149-50.

175. *Id.* at 149.

176. *Id.* at 150.

177. *Id.*

178. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 6 (J.O. Urmson & Marina Sbsià eds., Harvard Univ. Press 2d ed. 1975) (1962).

179. *Id.* Austin provides some familiar examples: Saying “I do” in the context of a marriage ceremony; uttering the words “I name this ship the *Queen Elizabeth*” while smashing a bottle against the stem; writing in a will “I give and bequeath my watch to my brother”; and saying “I bet you sixpence it will rain tomorrow.” *Id.* at 5.

180. Bradley & Flaherty, *supra* note 62, at 560-71.

Locke, Montesquieu, and Blackstone, but also to Samuel Puffendorf, Matthew Hale, Cornelius van Bynkershoek, Jean Jacques Burlamaqui, Thomas Rutherford, and Christian Wolff.<sup>181</sup> Ramsey demonstrates that eighteenth-century theorists used the phrase “declare war” to signify both a formal proclamation that hostilities existed and the commencement of war through conduct.<sup>182</sup>

In a response to Ramsey’s article, Yoo takes Ramsey to task for discussing political theorists whose influence on the Framers was negligible.<sup>183</sup> Here, Yoo seems to misunderstand his own textualist project. As Ramsey points out, his argument that the evidence is conflicting regarding the eighteenth-century understanding of the phrase “declare war” shifts the burden of proof to Yoo and other textualists who claim that the phrase “declare war” could only be about written declarations rather than declarations through action.<sup>184</sup> The textual advantage shifts to the argument in favor of congressional primacy in decision making relating to war.

To argue, as Yoo does, that we should ignore theorists to whom the Framers did not specifically cite in the ratification debates is to return to an intentionalist approach and to reject the argument that the Constitution means what an informed eighteenth-century reader would understand it to mean. Ramsey’s approach is truer to the textualist project, but he concludes that the text itself does not support a narrow interpretation of the Declare War Clause<sup>185</sup> and that recourse to extrinsic material is therefore justified.<sup>186</sup> Ramsey contends that the extrinsic material fully supports the traditional perspective favoring congressional war powers, and Yoo does not argue otherwise.<sup>187</sup>

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181. Ramsey, *Textualism*, *supra* note 71, at 1570-96.

182. *See id.* at 1596 (“There would have been nothing remarkable in using ‘declare war’ to mean initiation of a state of war by sovereign action, as well as by proclamation.”). Yoo concedes that “some eighteenth-century writers appeared to use the phrase ‘declare war’ to mean commence war.” Yoo, *War and the Constitutional Text*, *supra* note 8, at 1660.

183. *See* Yoo, *War and the Constitutional Text*, *supra* note 8, at 1645-46 (contending that views of political theorists whose ideas did not influence framing generation are irrelevant). Ramsey convincingly argues that Yoo is wrong about the influence of the writers in question and shows that Yoo had in fact relied on the very same writers in some of his earlier work. Ramsey, *Text and History*, *supra* note 71, at 1690-91 & n.21.

184. *See* Ramsey, *Text and History*, *supra* note 71, at 1686-87 (arguing that “Declare War Clause . . . is capable of a broad meaning” and thus Yoo ultimately fails to overcome his burden of proof).

185. *See* Ramsey, *Textualism*, *supra* note 71, at 1602 (“In sum, the narrow meaning of declaring war does not proceed as satisfactory an account of the text and structural role of the Declare War Clause.”).

186. *See id.* at 1569 (discussing usefulness of looking to “views of the drafters and their contemporaries” to interpret textual meaning, in order to “cross-check” interpretation).

187. Yoo concedes that “[p]ractice plays an important interpretive role for the question of the proper allocation of war powers.” Yoo, *War and the Constitutional Text*, *supra* note 8, at 1664; *see also* Yoo, *supra* note 4, at 234 (“While not as relevant as the records of the ratification debates—arguments and events after 1788 cannot have influenced the minds of those who adopted the Constitution in 1787—postratification evidence can show how the Constitution’s structures worked in practice.”). Significantly, while he provides a discussion of twentieth-century practice, which could not possibly evidence the original meaning of the Constitution, Yoo does not incorporate a discussion of

In terms of the range of historical sources that Yoo consults and the sophistication with which he integrates primary and secondary historical source materials, Yoo's scholarship is an improvement over that of an earlier generation of scholars. Yoo is always eager to point out the failings of other legal scholars' use of history.<sup>188</sup> He acknowledges, however, that scholars such as William Treanor and Martin Flaherty, who "have brought more sophisticated historical methodology to the study of foreign affairs questions," nonetheless support the traditional perspective.<sup>189</sup> At the very least, reasonable minds could differ as to whether the constitutional text, structure, and history support the traditional view of war powers. And where the text itself is not dispositive, legislative history and postratification practice provide significant evidence of the text's original meaning. That evidence overwhelmingly supports the traditional perspective on war powers.

#### IV. YOO'S REVISIONISM AND THE TREATY POWER

Unlike his arguments relating to war powers, Yoo's analysis of the treaty power does not always favor executive unilateralism. While Yoo strongly advocates executive power to implement, interpret, and, if necessary, terminate treaties, he insists on a role for Congress in giving treaties domestic effect. Yoo thus provides an elegant solution to the practical problems raised by our constitutional separation of powers, which gives the President the power to bind the United States through treaties but generally favors congressional control of domestic legislation. Yoo has undertaken impressive research in an attempt to reconcile constitutional design with constitutional practice in the realm of the treaty power. It is not surprising that, in defending a view of the Constitution that accords with his policy preferences for a strong executive and against the binding force of international law, Yoo cannot always provide convincing defenses of his positions based on constitutional text, structure, and history.

##### A. *Interactions of War Powers and the Treaty Power*

Yoo repeatedly states that he relies on "constitutional text, structure, and history."<sup>190</sup> In fact, it is more accurate to say that he takes a historical approach to understanding the structure of the Constitution with respect to war powers and a structural approach to understanding the text of the Constitution with respect to foreign affairs. History and text play a role in Yoo's views on the treaty power because his reading of the Article II Vesting Clause underpins all of

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arguments and practice in the early republic into his treatment of the question of the constitutional allocation of war powers.

188. See Yoo, *War and the Constitutional Text*, *supra* note 8, at 1643-48 (criticizing historical methodology in Ramsey, *Textualism*, *supra* note 71); Yoo, *Clio at War*, *supra* note 8, at 1171, 1179-91 (criticizing John Hart Ely, Jane Stromseth, and Jules Lobel for their use of "law office history" in legal scholarship on war powers).

189. YOO, *supra* note 4, at 26.

190. *Id.* at viii, 8; see also *id.* at 5 (stating that book studies "text, structure, and ratification history of the Constitution").

his arguments.<sup>191</sup> But the main focus here is on one structural element of the Constitution—separation of powers. Yoo’s view is that the President has plenary powers over foreign affairs while Congress has plenary powers over domestic legislation.<sup>192</sup> The President thus has the power to make, interpret, implement, and abrogate treaties. If Congress does not approve of the way the President exercises those powers, it may use its appropriations or other legislative power to deny executive decisions domestic effect.<sup>193</sup>

Yoo’s discussion of treaties begins with a transitional chapter that addresses the question of whether international treaties can require the United States either to commit its armed forces to hostilities or to refrain from the use of force.<sup>194</sup> On the first question, even some supporters of congressional war powers have argued that the executive has the power under the UN Charter to commit the United States to participation in multinational military operations authorized under Chapter VII of the Charter.<sup>195</sup> Yoo finds the argument irrelevant as, in his view, the President would have such constitutional authority even if the UN Charter did not exist.<sup>196</sup> Moreover, based on the example of congressional inaction in the face of the arguably illegal NATO intervention in Kosovo authorized by President Clinton, Yoo contends that international law cannot constrain the President in the exercise of his constitutional war powers.<sup>197</sup>

Yoo finds “more interesting and difficult” the question of whether Congress is constitutionally obligated to support executive-authorized uses of force backed

191. See *id.* at 183-84 (“Article II’s Vesting Clause requires that we construe any ambiguities in the allocation of executive power in favor of the president.”).

192. See, e.g., *id.* at 18 (describing executive foreign affairs powers as “plenary”); YOO, *supra* note 4, at 183 (claiming that “the Framers understood the conduct of foreign affairs to be executive in nature, while the legislature controlled funding and domestic regulation”).

193. See *id.* at 293 (“[F]oreign policy emerges from the interaction of the plenary powers of the different branches of government. Congress may set its powers over funding and legislation against the president’s Article II authorities in war and treaty-making and his structural advantages in wielding power, or the branches may choose to cooperate to reach foreign policy outcomes.”).

194. *Id.* at 143-81 (Chapter 5: War Powers for a New World).

195. See David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of War Powers*, 70 U. COLO. L. REV. 1491, 1492-93 (1999) (stating that executive has “unilateral power to use armed force in United Nations collective security actions,” yet asserting that power is restricted on several bases with Security Council sanction playing vital role); Thomas M. Franck & Faiza Patel, *Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT’L L. 63, 68, 74 (1991) (arguing that President has power to commit United States to participation in UN-authorized police actions without congressional approval). These positions are criticized in D.A. Jeremy Telman, *A Truism that Isn’t True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 169-78 (2001).

196. See YOO, *supra* note 4, at 165 (“Because the president already has the domestic constitutional authority to initiate military hostilities without any authorizing legislation, he need not rely on treaty obligations for legal justification.”).

197. See, e.g., *id.* at 171 (“In neither Kosovo nor Iraq did international law impose a restraint on presidential action, nor were federal courts about to enforce treaty obligations so as to restrict the commander-in-chief power.”); *id.* at 172 (“Kosovo provides a clear demonstration that presidents are not constitutionally or legally bound by international law.”).

by UN or NATO resolutions.<sup>198</sup> He notes that Alexander Hamilton favored the argument for binding Congress to implement U.S. treaty obligations as required under the Supremacy Clause.<sup>199</sup> Yoo rejects this view, however, as “inconsistent with the balance struck by the Constitution between the executive and legislative powers.”<sup>200</sup>

In a final section of his chapter on the interaction of war powers and the treaty power, Yoo recognizes one significant limitation on unilateral executive war powers. Although he contends that Presidents may freely ignore treaty obligations in pursuit of policy goals,<sup>201</sup> in certain circumstances Presidents may not, in pursuit of policy goals, *abide* by a treaty requiring the use of force.<sup>202</sup> Specifically, Yoo criticizes President Clinton’s willingness to commit American troops to fight in Kosovo under the command of non-U.S. officers.<sup>203</sup> Yoo makes a very interesting textual argument, based on an analogy to the Supreme Court’s Appointments Clause jurisprudence, which would seem to require that any commander of U.S. troops must be approved through the constitutional appointments process and be accountable to the executive.<sup>204</sup>

Yoo’s close textual reading is persuasive. If his analogy to the Appointments Clause is permitted, however, one wonders how U.S. good-faith participation in any collective security regime would be possible. Yoo suggests that U.S. soldiers and officers acting under foreign command must be free to disobey orders.<sup>205</sup> No military can operate under such conditions, as evidenced by the punishments, including death, provided under the U.S. Code of Military Justice for soldiers who disobey their officers.<sup>206</sup> In any case, in the unlikely event that executive authority would be challenged in such a case, it is hard to see why a court would insist on viewing the U.S. soldiers as serving under foreign command rather than viewing them as seconded to a NATO or UN force, thus relieving the President of any constitutional constraints on command.

With respect to other aspects of the interaction of treaty and war powers, Yoo abandons close textual readings and relies on the loosest form of structural argumentation. He insists, for example, that legislative power is the main structural check on executive powers contemplated in the constitutional

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198. *Id.* at 165-66.

199. *Id.* at 166.

200. YOO, *supra* note 4, at 166-67.

201. See *supra* note 196 and accompanying text for Yoo’s argument that the President has such power.

202. See YOO, *supra* note 4, at 165 (noting that external treaty obligations should not affect executive decision to use force).

203. *Id.* at 173-77. Yoo calls Clinton’s willingness to do so “unprecedented.” *Id.* David Bederman has shown that, even on Yoo’s evidence, it is not. See Bederman, *supra* note 143, at 494 (noting that Wilson placed American forces under French strategic command in World War I and that contingents of Continental Army were under French command during American Revolution).

204. YOO, *supra* note 4, at 176-77.

205. *Id.* at 180 (noting that American commanders at policy, tactical, and strategic levels may contradict any orders that non-U.S. commanders give).

206. *Id.* at 336-37 n.73 (citing 10 U.S.C. §§ 890-892 (2000)).

design.<sup>207</sup> But numerous other structural arguments could find support in the text and history of the Constitution. One could argue that in the context of the treaty power, Congress's check on executive power is provided through the requirement that the Senate give its advice and consent. Once it has done so, Congress is bound to authorize funding for the treaties that have become law of the land, and it has consented to the participation of U.S. forces in military engagements authorized under such treaties, even if American soldiers would thereby be placed under foreign command.

Clearly, one concern here for Yoo is that the judiciary could become involved in interpreting treaties and thus act as a check on executive foreign affairs powers. Yoo thinks that such a check "would expand the federal judiciary's authority into areas where it has little competence, where the Constitution does not textually call for its intervention, and where it risks defiance by the political branches."<sup>208</sup> It is hard to reconcile this contention either with the constitutional text, which expressly grants the federal judiciary power over all cases arising under treaties,<sup>209</sup> or with the practice in the early republic, in which courts quite often interpreted treaties, usually in ways that undercut the interpretations proffered by the government.<sup>210</sup>

Moreover, Yoo's institutional competence argument is hard to square with his political career. The arm of the executive branch that is entrusted with interpreting and implementing treaties is the Department of State.<sup>211</sup> When Yoo was in the Justice Department, however, he clashed with State Department lawyers about the extent to which the Geneva Conventions would apply to the war on terror.<sup>212</sup> The Bush administration seems to have relied on the advice of

207. See *id.* at 167 (arguing that "Framers believed that the legislative power . . . would provide a crucial constitutional and political check on executive power and policies" while treaty-making powers were executive's alone).

208. *Id.* at 172.

209. U.S. CONST. art. III, § 2, cl. 1.

210. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 498-99 (2007) (finding that government lost fourteen of nineteen federal cases decided between 1789 and 1838 in which treaty questions arose and concluding that judiciary's lack of deference to executive interpretations of treaties was consistent with Framers' views).

211. See OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 2006/2007, at 298 (2006) (noting that lawyers in Office of Legal Adviser to Secretary of State "draft, negotiate and interpret treaties [and] international agreements . . . [and] represent the United States in meetings of international organizations and in international negotiations . . . [and] before international tribunals"); Website of the Office of the Legal Adviser, <http://www.state.gov/s/l/treaty> (last visited June 3, 2007) (setting forth Legal Adviser's role in advising "other Department bureaus (including posts overseas), and other governmental agencies on all aspects of treaty law and procedure").

212. William H. Taft, IV, Legal Adviser to the Department of State under President George W. Bush, rejected Yoo's arguments that the Geneva Conventions did not apply to Afghanistan because Afghanistan was a "failed state," or because the President has the power under international law to suspend the United States' treaty commitments. See Unclassified Memorandum from William H. Taft, IV to John C. Yoo, Deputy Assistant Attorney Gen., Office of the Legal Counsel, 4-12 (Jan. 11, 2002),

Yoo and others in the Justice Department, and not on the State Department, in determining what forms of interrogation constitute torture under international law.<sup>213</sup> In the *Hamdan v. Rumsfeld*<sup>214</sup> case, the Supreme Court sided with the experts in the State Department and ruled that the Geneva Conventions will apply to detainees at Guantanamo Bay.<sup>215</sup> When the substance of the now-notorious “torture memos” were leaked to the press in January 2005, the Bush administration retreated from its earlier position.<sup>216</sup> These episodes hardly support Yoo’s thesis that the executive branch is best positioned to provide dispositive rulings interpreting treaties.

### B. *The Power to Interpret and Terminate Treaties*

Yoo contends that the structure of the Constitution suggests that the President has power to interpret, implement, and abrogate treaties.<sup>217</sup> Because the Constitution is silent on the subject,<sup>218</sup> Yoo again argues by analogy to the Appointments Clause. As courts have consistently held that the President has the power to remove from office appointees who must be approved by the Senate, he must similarly be empowered to implement, interpret, and abrogate treaties that were approved by the Senate, even if the Senate differs on the matter.<sup>219</sup>

Yoo’s contention that the executive has the primary role in implementing treaties and thus engages on a daily basis in treaty interpretation seems beyond dispute. The Restatement (Third) of Foreign Relations Law states that “[t]he President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states.”<sup>220</sup>

The issue is whether the President should act unfettered in the area of interpretation, implementation, and abrogation, and Yoo here overstates the

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available at <http://www.cartoonbank.com/newyorker/slideshows/01TaftMemo.pdf> [hereinafter Taft Memo].

213. Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455, 457-58 (2005).

214. 126 S. Ct. 2749 (2006).

215. *Hamdan*, 126 S. Ct. at 2793-96 (ruling that military commissions lacked power to proceed against petitioners, detainees at Guantanamo Bay, because rules governing such commissions violate Geneva Conventions).

216. The Justice Department issued a new memo superseding its earlier memo and withdrawing its statement that “only pain equivalent to such harm as serious physical injury or organ failure constitutes torture.” John Yoo, *Commentary: Behind the “Torture Memos,”* UC BERKELEY NEWS, Jan. 4, 2005, [http://www.berkeley.edu/news/media/releases/2005/01/05\\_johnyoo.shtml](http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml).

217. YOO, *supra* note 4, at 182-214 (Chapter 6: Interpreting and Ending Treaties).

218. *See id.* at 182 (“[T]he constitutional text does not explicitly address a host of other questions, such as those surrounding treaty interpretation and termination . . .”).

219. *Id.* at 185-87.

220. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(1) (1986).

case for presidential unilateralism.<sup>221</sup> While courts in recent years have tended to defer to the authority of executive interpretations of treaties, that result is not constitutionally mandated, as they did not do so in the early republic.<sup>222</sup> Moreover, while Yoo treats *Goldwater v. Carter*<sup>223</sup> as establishing “that any presidential termination of a treaty would be unreviewable in the courts,”<sup>224</sup> only four Justices signed onto the opinion that took that position.<sup>225</sup> Four Justices rejected that position, and one Justice remained silent.<sup>226</sup>

Nonetheless, Yoo would give the President a gap-filling role in treaty interpretation akin to the role of courts in interpreting statutes.<sup>227</sup> But unlike courts interpreting statutes, the executive branch need not concern itself with the legislative history of the treaty it interprets.<sup>228</sup> Legislative history should not guide treaty interpretation, Yoo contends, because where treaties must be approved by two-thirds of the Senate, the on-the-record comments of one Senator are even less persuasive than in the case of statutes, which require only a majority vote.<sup>229</sup> This line of argument is extremely difficult to reconcile with Yoo’s insistence, in the context of his arguments about war powers, that the

221. See Taft Memo, *supra* note 212, at 9 n.16 (calling Yoo’s view of executive authority in treaty matters “somewhat overstated” and noting that “neither the Congress nor the Supreme Court would agree that the President has plenary power over the interpretation of treaties and of international law”). Some treaties expressly permit unilateral denunciation, but the default rule is that absent such express provision or clear evidence that the parties intended to permit unilateral denunciation, unilateral denunciation or withdrawal from a treaty regime is a breach of international law. Vienna Convention on the Law of Treaties art. 56(1), opened for signature May 23, 1969, 1155 U.N.T.S. 331. Yoo does not distinguish between withdrawals permitted by international law and withdrawals that would place the United States in violation of international law.

222. See Sloss, *supra* note 210, at 1-2 (noting that Supreme Court recently stated that government agencies’ treaty interpretations will be given great weight, but arguing that courts did not defer to executive in first fifty years of U.S. constitutional development).

223. 444 U.S. 996 (1979).

224. YOO, *supra* note 4, at 190.

225. *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring).

226. See *id.* at 996 (Powell, J., concurring) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”); *id.* at 1006 (Blackmun, J., dissenting in part) (voting to “set the case for oral argument and give it the plenary consideration it so obviously deserves”). Yoo’s characterization of Brennan’s vote to affirm the D.C. Circuit court’s dismissal of the case is misleading. Brennan would have dismissed on far narrower grounds than the D.C. Circuit’s opinion indicated. See *id.* (Brennan, J., dissenting) (rejecting application of political question doctrine to case, but voting to affirm based on President’s “well-established authority to recognize, and withdraw recognition from, foreign governments”).

227. YOO, *supra* note 4, at 192-93. Curiously, Yoo gives no consideration to the role of international adjudicatory bodies in interpreting treaties. Treaties routinely provide for dispute resolution through neutral adjudicatory bodies. His claim that the U.S. executive should have authority to determine what a treaty means is akin to a rule that one party to a contract should have authority to determine what the contract means.

228. Yoo argues against the authority of legislative history generally. See *id.* at 196 (“[T]he use of legislative history expands the judicial function beyond its proper boundaries.”).

229. *Id.*

ratification debates provide the most decisive evidence of the Constitution's original meaning.<sup>230</sup>

There are three major problems with Yoo's argument on treaty interpretation. First, Yoo's Appointments Clause analogy fails because appointments and treaties are fundamentally different. Under the Supremacy Clause,<sup>231</sup> a treaty, once enacted, is law, and under the Take Care Clause,<sup>232</sup> the President is bound to execute the laws. An appointment is not law and binds no one, by operation of law. Yoo's argument hinges on his belief that the President is free to breach treaties as a matter of constitutional law, a position that is hard to square with the Supremacy Clause and the Take Care Clause.

Second, despite those constitutional clauses, Yoo gives no consideration to the internationally and domestically recognized mechanisms for treaty interpretation that are inconsistent with his views. International law requires giving effect to the intentions of the parties as embodied in the treaty's text, read in the context of the treaty's legislative history, and with an eye to the treaty's object and purpose.<sup>233</sup> Courts generally recognize this approach as part of U.S. law.<sup>234</sup>

Finally, Yoo attempts to defend his call for executive unilateralism in treaty interpretation with an appeal to democratic populism, calling the President the "head of the most democratically accountable branch in the national government" and maintaining that "the people can hold the president directly accountable for his interpretation of a treaty."<sup>235</sup> First, it is certainly not the case that the executive branch is more democratically accountable than the legislature. Other than the President, no member of the executive branch is democratically accountable at all.<sup>236</sup> Moreover, even the President is not directly elected and also is not generally subject to dismissal for one or even for a series

230. Curiously, Yoo relies on legislative history to defend his arch-textualism: "Part of the reason that the Framers established the two-thirds supermajority requirement for treaties was to render treaties difficult to make and to protect the interests of the states." *Id.* at 196.

231. *See* U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land . . . ." (emphasis added)).

232. *See id.* art. II, § 3 (requiring that President "take Care that the Laws be faithfully executed").

233. Vienna Convention on the Law of Treaties, *supra* note 221, arts. 31-32.

234. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. a (1986) (noting that, while Vienna Convention on the Law of Treaties has not come into force for United States, "it represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis"); *see also, e.g.,* *Air France v. Saks*, 470 U.S. 392, 396, 400-03 (1985) (considering legislative history in interpreting Warsaw Convention relating to air transportation).

235. YOO, *supra* note 4, at 198.

236. In another section of the book, Yoo indicates that the process of approving treaties and international agreements could be made more democratic if Congress were bypassed entirely and the President were permitted to make such agreements alone. In support of this argument, Yoo contends that "the president . . . (aside from the vice president) is the one federal officer chosen by the entire electorate." *Id.* at 258. It is hard to imagine that, for example Dan Quayle, was "chosen by the entire electorate" to serve as Vice President.

of constitutional missteps. In any case, when it suits his argument, Yoo argues that the House of Representatives is “the most directly democratic part of the government,”<sup>237</sup> a statement more in keeping with the constitutional design.

### C. *Self-Executing and Non-Self-Executing Treaties*

Yoo’s structural approach to constitutional interpretation, which focuses on separations of foreign affairs powers and legislative powers, leads him to conclude that treaties must be presumptively non-self-executing.<sup>238</sup> Otherwise, Yoo contends, legislative powers would be transferred to the executive and “treatymakers could regulate any area that lies within Article I’s enumerated powers.”<sup>239</sup> Yoo here seeks to protect from executive encroachment not only congressional legislative powers but also the federalist principle embodied in the Tenth Amendment.<sup>240</sup>

Yoo’s separation of powers argument here seems weak. If Congress’s appropriations power is sufficient to check executive war powers, why should a structural interpretation of the Constitution not permit the same check on executive treaty powers? Indeed, as Yoo acknowledges, Congress’s ability to override a treaty through subsequent legislation is recognized under the “last-in-time” doctrine.<sup>241</sup> In any case, as Yoo knows from his own experience in the Justice Department, whether the Framers envisioned a strict separation between executive and legislative power, the reality is that the executive branch plays a

237. *Id.* at 224. Elsewhere, Yoo calls the House “the most democratic body of government,” *id.* at 240, and calls Congress “the most popular branch of government.” *Id.* at 244. Later, he varies the theme, calling the House “the most popular part of the government” and referring to Congress and the executive as “the most democratic branches.” YOO, *supra* note 4, at 257.

238. *See id.* at 217 (arguing that non-self-execution “harmonizes treaties with constitutional structure and maintains the important distinction between foreign relations and domestic lawmaking”). *See generally id.* at 215-49 (Chapter 7: Treaties and the Legislative Power) (discussing Congress’s role in formation of treaties).

239. *Id.* at 218. As David Bederman has pointed out, Yoo’s argument is rendered a bit confusing because he does not distinguish between self-execution—that is, the notion that treaties automatically become U.S. law without congressional implementation—and the question of whether a treaty gives rise to a private right of action enforceable in court. Bederman, *supra* note 143, at 494. For example, Yoo argues that neither the Constitution nor statutes are self-executing because not all rights arising under a statute give rise to a private right of action. YOO, *supra* note 4, at 226; *see also id.* at 229 (associating self-execution with court enforcement of treaties).

240. *See* YOO, *supra* note 4, at 221 (“Self-execution also would free the treatymakers and their legislative power from federalism limitations.”).

241. *Id.* at 225-26. One would expect Yoo to object to the last-in-time doctrine on the ground that it permits Congress to control foreign affairs. The fact that Yoo objects to it only to the extent that it permits a treaty to override a statute, *id.* at 226, suggests that his primary concern is not to defend a structural understanding of the Constitution, but to limit the impact of treaties as binding U.S. law. Yoo goes so far as to state that “Congress, under the last-in-time rule, also has the power to terminate treaties.” *Id.* at 209. This is incorrect. Congress can override a treaty as a matter of domestic law, but as a matter of international law, Congress has no power to affect the United States’ treaty obligations or to terminate those obligations.

central role in setting the legislative agenda and even in drafting legislation.<sup>242</sup> The strict separation between treaty powers and domestic legislative powers that Yoo asserts is part of the constitutional structure is nowhere to be found in constitutional practice.

Moreover, Yoo is in this case inattentive to relevant textual and historical evidence that provides an alternative structural solution to the separation of powers problem that he identifies. As Curtis Bradley and Martin Flaherty have shown, the Constitution grants the Senate power not only to consent to treaties but also to provide “advice” in relation to treaties.<sup>243</sup> Early practice suggests that both George Washington and the Senate believed that the Senate had constitutional power to advise the President as part of the treaty-making process.<sup>244</sup> Practice has moved away from this original understanding of the Constitution, but Yoo might explore reviving the practice in order to reconcile constitutional practice with text, structure, and history. Still, Yoo seems here to be taking his separation of powers principles to extremes. By assuming that treaties are non-self-executing, Yoo would rob the executive of its power to make binding federal law through the treaty process.

Yoo’s federalism concerns are more interesting in this context. In *Missouri v. Holland*,<sup>245</sup> the Supreme Court held that Congress could regulate migratory birds through legislation passed pursuant to a bilateral treaty even if Congress would have lacked the power to regulate absent a treaty.<sup>246</sup> As Yoo acknowledges, given the subsequent expansion of Congress’s Commerce Clause powers, “there can be little doubt that the Migratory Bird Treaty Act would be constitutional without the need of a treaty” today.<sup>247</sup> Still Yoo thinks that the case illustrates the “textual and structural difficulties created by the theory of self-execution” because it gives the federal government a way to legislate in areas in which the Tenth Amendment would otherwise prevent such legislation.<sup>248</sup>

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242. See Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 983-1005 (1999) (chronicling presidential control of budget process since 1974). Yoo has argued that the Supreme Court read Congress’s post-9/11 Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), too narrowly in *Hamdan*. Yoo claims that he had a hand in drafting the legislation and that he wrote it to grant the executive as broad an authorization as possible. Adam Liptak, *The Court Enters the War, Loudly*, N.Y. TIMES, July 2, 2006, § 4, at 1.

243. See U.S. CONST. art. II, § 2, cl. 2 (granting President power to make treaties “with the Advice and Consent of the Senate”); Bradley & Flaherty, *supra* note 62, at 631 (noting that Founders seemed to envision that Senate would possess advisory role “beyond a mere affirmative or negative vote”).

244. See Bradley & Flaherty, *supra* note 62, at 634 (“[B]oth the Senate and the President understood that the Senate would consult with the President and give the President advice before treaties were finalized.”).

245. 252 U.S. 416 (1920).

246. *Holland*, 252 U.S. at 433 (“Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.”).

247. YOO, *supra* note 4, at 222-23.

248. *Id.* at 223.

For Yoo, the solution is to treat treaties as non-self-executing, requiring congressional implementation.<sup>249</sup> But since *Holland* involved a challenge to implementing legislation, Yoo's solution would not address the issue. Rather, what Yoo must really want is a reversal of *Holland* and a rule that Congress's powers to implement treaties through legislation are coextensive with the Article I, Section 8 enumeration. Yoo presents good structural and practical arguments for why *Holland* undermines federalism,<sup>250</sup> but David Golove has provided exhaustive historical and textual arguments supporting the decision,<sup>251</sup> to which Yoo offers no response. It is hard to see why structure should trump text and history in this instance.

Indeed, Yoo's arguments on the self-execution of treaties have been criticized generally as being without support in the historical record.<sup>252</sup> Jack Rakove concludes that "the framers were virtually of one mind" in assuming that the Supremacy Clause's statement that treaties are "supreme Law" meant that they were self-executing and enforceable in both state and federal courts.<sup>253</sup> For both Rakove and Yoo, this unity of mind among the Constitution's drafters would not be dispositive if the ratification debates indicated a different "original understanding" of the Constitution. Martin Flaherty, however, has carefully scrutinized the ratification debates on this subject and concluded that "[i]f anything, the debates demonstrate that the Antifederalists had put the nation on notice about the consequence of self-executing treaties and that the requisite majorities of We the People ratified the proposal anyway."<sup>254</sup>

#### D. *Treaties and Other International Agreements*

In his final chapter on the treaty power, Yoo argues against the interchangeability of treaties and congressional-executive agreements and against treaty exclusivity—that is, the notion that Article II's Treaty Clause provides the only lawful mechanism whereby the United States can enter into

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249. *Id.*

250. *See id.* (arguing that almost limitless power accorded to treaty makers under *Holland* is inconsistent with principle that federal government is one of limited powers).

251. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1314 (2000) (defending decision in *Holland* and hailing it as "one of the cornerstones of the whole edifice of the constitutional law of foreign affairs"). *But see* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1868, 1875 (2005) (criticizing *Holland* as wrongly decided and arguing that Louis Henkin's historical defense of *Holland* is based on false premise).

252. *See* Flaherty, *supra* note 112, at 2120-51 (reviewing records of Constitutional Convention and ratification debates and finding them to support notion that treaties were to be presumptively self-executing); Vázquez, *supra* note 113, at 2161 (contending that not one "shred of evidence" exists that anyone intended to allow House of Representatives authority "to block compliance with treaties already in force").

253. Jack Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSP. AM. HIST. 233, 264 (1984). Yoo's response to the argument based on the Supremacy Clause is that it is a federalist clause that does not address separation of powers. YOO, *supra* note 4, at 230.

254. Flaherty, *supra* note 112, at 2127.

international agreements.<sup>255</sup> Instead, Yoo would require that the United States enter into international agreements pursuant to Article II's treaty provisions "for regulating subjects that rest outside of Congress's Article I powers" and "in areas that are the subject of the concurrent powers of the executive and legislative branches."<sup>256</sup> But congressional-executive agreements are permissible "in areas such as international trade and finance, where any international agreement would require [congressional] cooperation for implementation anyway."<sup>257</sup>

Yoo maintains that there is no "convincing textual or structural support" for treating congressional-executive agreements as interchangeable with Article II treaties.<sup>258</sup> He rejects the textual readings offered by Myres McDougal, Bruce Ackerman, and David Golove,<sup>259</sup> as well as the judicial precedent-based arguments of McDougal and others.<sup>260</sup> Since he sees these arguments as flawed, Yoo concludes that the real reason scholars support permitting the United States to enter into congressional executive agreements is prudential.<sup>261</sup> But the "interchangeability" argument is unacceptable to Yoo because it distorts the constitutional structure by weakening the "president's formal foreign affairs powers."<sup>262</sup> Indeed, Yoo's arguments against interchangeability are powerful. Full interchangeability would permit "Congress to pursue its own foreign policy" and deprive Presidents of their power to terminate treaties unilaterally, unless we want to allow an exception to the general rule that Presidents cannot override a statute in cases where the statute in question is an international agreement.<sup>263</sup> Moreover, if we accept the claim that the federal government can do more pursuant to its treaty powers than Congress can do pursuant to the Article I enumeration, interchangeability would permit Congress to expand its legislative

255. Yoo, *supra* note 4, at 250-92 (Chapter 8: Law as Treaties? Statutes as International Agreements).

256. *Id.* at 253.

257. *Id.* at 274.

258. *Id.* at 253.

259. *Id.* at 253-56 (citing Bruce Ackerman & David M. Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 811 (1995); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1808-14 (1998); Myers S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 203-06 (1945)).

260. Yoo, *supra* note 4, at 256-57 (citing EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 43-46 (1944); McDougal & Lans, *supra* note 259, at 261-90; Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 342-45 (1944)). Yoo also rejects Bruce Ackerman and David Golove's argument that the permissibility of congressional-executive is established through a constitutional transformation that occurred as part of an informal amendment process associated with the New Deal. *Id.* at 260-64.

261. *See id.* at 257 ("Congressional-executive agreements represented an effort to replace what was seen as an outmoded method for dealing with international affairs with a more efficient, democratic process.").

262. *Id.* at 270.

263. *Id.* at 271.

power in ways that would undermine both the separation of powers and federalism.<sup>264</sup>

Yoo is far more sympathetic to arguments that the Article II treaty process should be the exclusive means by which the United States enters into international agreements.<sup>265</sup> In his view, this “exclusivist” argument fails, however, because it confuses U.S. sovereignty as a matter of international law with domestic sovereignty. It would permit the federal government to bind state and local governments through international agreements in a way that cannot be reconciled with federalist principles.<sup>266</sup> Thus, for example, when the United States agreed to certain World Trade Organization (“WTO”) provisions, it remained free to choose how and whether to live up to the WTO’s requirements, and no WTO body could order one of the states to abide by its regulations.<sup>267</sup> Yoo is certainly correct about the WTO, but it is hard to see how the point relates to treaty exclusivity.

While Yoo’s case against interchangeability is multivalent and consistent with his structural approach, his argument against treaty exclusivity seems undertheorized. Yoo is correct that if exclusivity were embraced, “about 90 percent of the international agreements made by the United States since World War II would be invalid.”<sup>268</sup> But such prudential arguments should count for little if the object is to be true to constitutional text, structure, and history. The Constitution provides for a treaty process. It does not contemplate an alternative. This is not to say that we should abandon congressional-executive agreements, but only to point out that Yoo has not offered a satisfactory constitutional argument against treaty exclusivity. In addition, given the focus on separation of powers in Yoo’s structural approach, one would think he would be concerned with sole executive agreements, which bypass entirely the constitutionally ordained role of the Congress in treaty making. But Yoo barely mentions sole executive agreements and relegates to a footnote discussion of Nixon’s use of such an instrument to terminate the Vietnam War.<sup>269</sup>

#### *E. Conclusion: Balancing Executive Power and International Law*

The second half of Yoo’s book contains a series of arguments about the treaty power, all of which purport to derive from his view that the constitutional design calls for a strict separation between foreign affairs powers, which are exercised by the President, and legislative powers, which belong to Congress. Despite the Supremacy Clause and the Take Care Clause, Yoo does not seem to recognize treaty law or international law as meaningful constraints on the

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264. YOO, *supra* note 4, at 271-73.

265. See *id.* at 264-66 (favorably discussing Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995)).

266. *Id.* at 266-69.

267. *Id.* at 268-69.

268. *Id.* at 269.

269. YOO, *supra* note 4, at 285 & n.58.

President. Thus, Yoo believes that the President is free to implement, interpret, and terminate treaties in a manner consistent with the interests of the United States as he perceives them.<sup>270</sup> Alejandro Lorite Escorihuela has suggested that what Yoo calls “revisionism” is more aptly described as a “school” of “Nationalist International Law,”<sup>271</sup> and a nationalist approach is very clear in Yoo’s rejection, in the context of his discussion of the treaty power, of the efficacy of international law.

Yoo promotes the notion that treaties be presumptively non-self-executing, lest the executive treaty power encroach on legislative powers in the domestic arena. Congressional-executive agreements are permissible only in those substantive areas within Congress’s Article I powers. In this way, Congress will not be permitted to use the treaty power to encroach on the executive’s foreign affairs power, nor will it be permitted to broaden the scope of its legislative powers at the expense of the states and the people. At the same time, the executive’s foreign affairs power will always be subject to a legislative check, as congressional implementation will always be required, whether the United States enters into an international agreement by treaty or by statute.<sup>272</sup>

This Part has argued that Yoo’s arguments on the treaty power, which are generally inventive, sophisticated, and well-researched, and many of which are persuasive, are nonetheless burdened with a methodological eclecticism that renders suspect his commitment to developing an interpretation that is true to constitutional text, structure, and history. But one cannot simply conclude, as some have, that Yoo’s aim is to expand executive power at all costs.<sup>273</sup> Yoo is genuinely concerned that the federal government’s treaty-making power be constrained and answerable to the political institutions most directly accountable to the American people.

While Yoo is committed to an expansive view of executive power, a view that permits the President to act aggressively in pursuit of the national interest, he also warns against permitting any branch of the federal government to be empowered to bind the United States to abide by international law.<sup>274</sup> Yoo would not subordinate national security to the United States’ commitments under the UN Charter to refrain from the unauthorized use of force,<sup>275</sup> nor

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270. See *id.* at 187 (observing that Presidents interpret or terminate treaties as necessary incident to executing U.S. foreign policy).

271. Alejandro Lorite Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States*, GLOBAL JURIST FRONTIERS, 2005, at 1, 5, 14.

272. YOO, *supra* note 4, at 273-74.

273. See Cole, *supra* note 9, at 8 (contending that Yoo’s argumentation would support legality of presidential resort to genocide).

274. See YOO, *supra* note 4, at 172-73 (treating Kosovo intervention as evidence in support of his view that Presidents are not bound by international law); *id.* at 209 (contending that Congress has power to terminate treaties).

275. See *id.* at 245 (positing that, except for self-defense or Security Council authorization, self-execution of treaties makes any executive use of force illegal and unconstitutional); *id.* (“In using force against Kosovo, the United States violated the U.N. Charter and President Clinton, under a self-execution theory, failed to perform his constitutional duty to enforce the laws of the land.”).

would he permit the United States to commit its armed forces to an international engagement because the UN Security Council authorizes the use of force.<sup>276</sup> Yoo is also apprehensive that the United States might have to abide by adverse decisions of international courts<sup>277</sup> and that American citizens might be subjected “to international rules and organizations.”<sup>278</sup> When Yoo’s arguments relating to treaties reflect a policy bias, it is a bias not in favor of executive power but against international law.

## V. THE FOREIGN AFFAIRS CONSTITUTION AFTER 9/11

Although both books under review in this Essay suggest that 9/11 and the war on terror have had an impact on the constitutional allocation of foreign affairs powers, neither book specifies what that impact ought to be.<sup>279</sup> Yoo comes the closest, in arguing that the flexibility built into the Constitution permits unilateral executive acts of war in response to the novel threats of the post-9/11 world.<sup>280</sup> But Yoo formulated many of the arguments in his book in essays published before 9/11, so it is hard for him to claim that either 9/11 or the war on terror justify novel approaches to the constitutional design. The threats to national security posed by terrorist organizations, while certainly significant, pale in comparison to the national security threats that the United States faced during the Cold War, or even to the threats that the young republic faced when it was a fledgling state confronting eighteenth- and nineteenth-century superpowers. The

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276. *See id.* at 246 (noting that “many scholars believe . . . that if the Security Council authorizes war—as it did in the 1991 Persian Gulf War—the United States must use force to meet the goals set out by the Council”). This is a strange claim. First, a Security Council Resolution *authorizing* the use of force (not “war”) does not obligate *any* member state to actually use force. Second, since such a Resolution cannot pass over U.S. opposition, the United States would never be called on to join in UN-authorized military action against its will, unless one believes, and Yoo does not, that the U.S. executive lacks the power to embroil the U.S. armed forces in conflict.

277. *See* YOO, *supra* note 4, at 248 (“Presidents are not about to issue unilateral orders to state prisons halting the executions of foreign nationals duly convicted of capital murder.”). It is open to question whether the foreign nationals at issue here were “duly convicted,” since the United States does not dispute that they were not accorded their consular rights guaranteed under the Vienna Convention on Consular Relations. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 1, 42-43 (Mar. 31), *available at* <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> (finding that United States breached its obligations under Article 36 of Geneva Convention on Consular Relations to inform detained Mexican nationals of their consular visitation rights); Memorandum from George W. Bush, President of the United States, to the Attorney General of the United States (Feb. 28, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> (stating that United States would comply with *Avena* decision “by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision”).

278. YOO, *supra* note 4, at 267.

279. *See id.* at x (“These new threats [the 9/11 attacks] to American national security, driven by changes in the international environment, should change the way we think about the relationship between the process and substance of the warmaking system.”); IRONS, *supra* note 3, at 3 (suggesting that issue of constitutional allocation of war powers is especially significant in light of war on terror).

280. YOO, *supra* note 4, at x (arguing that after 9/11, “United States must have the option to use force earlier and more quickly than in the past”).

fact that the enemies in the war on terror are often nonstate actors also does not present novel legal issues, as the United States faced threats from nonstate actors, in the form of Indian tribes and the Barbary pirates, at the time of the founding and in the early republic.

If the post-9/11 world does pose new challenges in the realm of the constitutional allocation of foreign affairs powers, it is not because of 9/11 but because of the rise of international organizations, including the United Nations and other collective security organizations. The problem with Irons's approach is that it would freeze the constitutional allocation of war powers, even if our current practice ignores that allocation, without providing a normative argument for why we should today remain bound by an eighteenth-century model. From a methodological perspective, Yoo's approach is clearly preferable, and this brief concluding Part suggests how one might follow Yoo's methodology to different conclusions about the constitutional allocation of foreign affairs powers.

In Part V.A below, this Essay lays out alternative structural readings of the Constitution that would produce different results. In Part V.B, this Essay provides a prudential argument for a new understanding of the constitutional allocation of war powers that moves beyond both Irons's traditionalism and Yoo's revisionist nationalism.

#### A. *An Alternative Structural Approach to the Foreign Affairs Power*

A structural approach to the Constitution builds arguments based on inferences from the fundamental principles underlying the Constitution as well as from the relationships among those principles.<sup>281</sup> Structural arguments are thus at least one and possibly two steps removed from textual arguments.<sup>282</sup> They require no specific textual hook; rather, they are persuasive to the extent that the interpreter can convince us both of the importance of the structural principles at issue and that their interactions within the constitutional edifice have been properly specified. In short, a structural approach takes a holistic view of the Constitution, envisioning "the document as a unified whole and its various provisions and clauses as mutually reinforcing"<sup>283</sup> and "attending to the overall design of the Constitution and the mutually conditioning relationships among its provisions."<sup>284</sup> Advocates of structural approaches to the Constitution argue that our textual approach to constitutional adjudication forces courts to bind

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281. See BOBBITT, *supra* note 26, at 74 ("Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.").

282. See *id.* ("[Structural arguments] are to be distinguished from textual and historical arguments, which construe a particular constitutional passage and then use that construction in the reasoning of an opinion.").

283. Donald P. Kommers, *The Constitutionalism of Mary Ann Glendon*, 73 NOTRE DAME L. REV. 1333, 1349 (1998).

284. Mary Ann Glendon, *Toward a Structural Approach to Constitutional Interpretation*, in BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 141, 148 (Terry Eastland ed., 1995).

themselves to “the stated intent, however nonsensical, of somebody else.”<sup>285</sup> For better or worse, structural approaches permit much more creativity in constitutional interpretation, as one can always stress one structural element over others in order to reach a desired result. What follows is a small exercise in the art—not science—of structural interpretation designed not to displace Yoo’s approach but to suggest how it might be supplemented.

Yoo’s structural approach emphasizes separation of powers, at times at the expense of other structural elements and even at the expense of express language that undercuts his view of constitutional structure. Preservation of individual rights figures not at all in his approach to executive power, nor does his discussion of war powers ever acknowledge the principle of limited government as a significant element of the Constitution’s structure. His approach is thus inconsistent, as principles of federalism and of limited government figure prominently (and appropriately) in his discussion of the treaty power.<sup>286</sup> Much of Yoo’s approach to the foreign affairs power hinges on the thesis that Article II’s Vesting Clause functions as a general grant of foreign affairs power to the President, subject only to the limitations enumerated in the Constitution. Yoo does not consider how the principles of limited government and federalism embodied in the Ninth and Tenth Amendments impact on this Vesting Clause thesis.<sup>287</sup>

Irons’s approach to the constitutional allocation of war powers assumes congressional control and judicial oversight. But recent scholarship has suggested that a large role for the judiciary in deciding vital matters of war and peace would not have accorded with the Framers’ conviction that sovereignty ultimately resides with the people and their representatives.<sup>288</sup> Although Yoo does not invoke this scholarship, it is supportive of the part of his attack on the traditional perspective of war powers that would not hold the executive accountable through judicial mechanisms. Still, Yoo could not wholeheartedly embrace the perspective of popular constitutionalism because its main structural focus is on popular sovereignty as the ultimate check on the federal government.

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285. CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22 (1969).

286. See *supra* notes 245-51 and accompanying text for a discussion of *Missouri v. Holland* within the context of Yoo’s federalism.

287. See Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt’s Constitutional Fate*, 75 MISS. L.J. 495, 497 (2006) (noting that traditional view of Ninth Amendment is to establish that federal government is one of limited powers); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 336 (2004) (arguing that original purpose of Ninth Amendment was to create “a rule of construction that limited the interpretation of enumerated federal power”); Telman, *supra* note 195, at 184-88 (arguing that notion of inherent executive authority is inconsistent with principle of limited government embodied in Tenth Amendment).

288. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (noting that people possess “[f]inal interpretive authority” of Constitution and both courts and political branches were subordinate to this authority); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, at x (1999) (developing populist theory of constitutional law in which judiciary’s constitutional interpretation “has no special normative weight”).

The popular constitutionalists thus view the Framers as having embraced a robust form of participatory democracy that could fetter unilateral executive action.<sup>289</sup>

Finally, neither Yoo nor Irons provides a satisfactory account of the interaction between international law and domestic law or of the Framers' views on the extent to which international law, or the law of nations, is incorporated into U.S. law. The Supreme Court's recourse to international and foreign law in determining "society's evolving standards of decency" under the Eighth Amendment in *Roper v. Simmons*<sup>290</sup> has revived academic interest in this issue.<sup>291</sup> Recent scholarship suggests that the Framers fully expected international law to be binding law enforceable through U.S. courts.<sup>292</sup> International law could thus be another structural element to consider in interpreting the Constitution's foreign affairs powers provisions. Alternatively, from a nonoriginalist perspective, developments in international law—and especially in collective security since World War II—provide grounds for argument that the constitutional allocation of war powers should be set aside in favor of the modern law of multinational cooperation and collective security.<sup>293</sup>

### B. *The Foreign Affairs Power in an Age of Multilateralism*

Because this Essay has rejected the Vesting Clause thesis, it concludes that the constitutional text, structure, and pre-1950 history overwhelmingly support the traditional perspective, favoring congressional involvement in decision-making processes relating to war. But the fact that Irons has the stronger

289. According to Kramer, the Federalists envisioned that "formidable popular resistance – via elections, juries, popular outcries, or, in the unlikely event that all these failed, by more violent forms of opposition" would prevent abuse of power by the federal government. KRAMER, *supra* note 288, at 83-84.

290. 543 U.S. 551 (2005).

291. See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 7 (2006) (arguing that constitutional design encourages consultation of international law); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109-10 (2005) (hailing *Roper* as "a return to traditional methods of analysis, dating back to the Court's earliest discussions of the Eighth Amendment" in which the Supreme Court considered foreign law in determining what constitutes cruel and unusual punishment); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 140 (2005) ("[E]ven if the modern death penalty is quintessentially and peculiarly American, the accumulated legal wisdom of mankind, embodied in *ius gentium*, may still have something to offer us."); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005) ("The Supreme Court's use of foreign law in constitutional interpretation is hardly new.")

292. See G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 780 (2006) ("[I]t is clear that the framers of [the Alien Tort Statute] anticipated that both state and federal courts would be treating 'the law of nations' as part of the common law they declared and applied in their decisions.")

293. Both Thomas Franck and David Golove have argued that the constitutional allocation of war powers have already been changed due to the impact of collective security agreements. See *supra* note 195 for a discussion of U.S. executive power when committing to U.N. actions. They may overstate the extent to which that change has already occurred, but they also point the way for fuller U.S. commitment to global security through collective security.

argument on constitutional interpretation does not put him in a celebratory mood, because there is no question that the constitutional allocation of war powers has been disregarded in the nuclear age. During the Cold War, Congress acquiesced in executive unilateralism in response to “three decades of almost uninterrupted crisis in foreign policy”<sup>294</sup> and the sense that, given the nuclear threat, the President needed the capacity for immediate and decisive response to perceived national security threats. Such congressional acquiescence in executive unilateralism is no longer appropriate.

Irons’s book sets out to demonstrate the dangers of executive unilateralism, which he links to the United States’ imperialist foreign policy. However, his book actually demonstrates that the political branches have largely worked in harmony in shaping U.S. foreign policy. Where Congress supports executive unilateralism<sup>295</sup> but the United States’ treaty obligations demand cooperation, national unilateralism poses larger constitutional problems than does executive unilateralism. The United States committed itself in 1945 to a collective security system that prohibits unilateral use of force other than in self-defense.<sup>296</sup> The Cold War did not permit that system to operate as it was designed,<sup>297</sup> but the end of the bipolar world offered an opportunity to revive a collective security system of which the United States was the chief architect.<sup>298</sup> That opportunity is slipping away but is not yet lost. In order to be true to the design of both the Constitution and the UN Charter, the President should work with Congress to realize U.S. treaty obligations relating to peace and security.

Yoo’s view that treaties do not bind the President finds no support in constitutional text or structure. Yoo and the revisionsists would have us favor domestic policy ends over international law and treaty obligations in every instance.<sup>299</sup> That is contrary both to the understandings of the Framers and to our constitutional history, which has long recognized that international law is

294. S. REP. NO. 93-220, at 8 (1973).

295. See IRONS, *supra* note 3, at 269 (arguing that Congress has responded to executive unilateralism in realm of war powers with “blank-check authorizations”).

296. U.N. Charter arts. 2(4), 51; see also HENKIN, FOREIGN AFFAIRS, *supra* note 27, at 250 (“The prohibition on the use of force is the principal norm of modern international law.”).

297. HENKIN, FOREIGN AFFAIRS, *supra* note 27, at 253-54.

298. See STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS, A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD, at xiii (2003) (noting “historic role of the United States in creating” United Nations).

299. See, e.g., YOO, *supra* note 4, at 171 (contending that “inclusion of customary international law as federal common law is open to serious doubt”); *id.* at 172-73 (concluding, upon review of recent U.S. military conduct, that “international law is not binding within the American legal system”); see also John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 221 (2000) (characterizing “globalist” agenda of international law as reducing constitutional autonomy, impairing popular sovereignty, reducing U.S. international power, and limiting its domestic and foreign policy options); John R. Bolton, *U.S. Isn’t Legally Obligated to Pay the U.N.*, WALL ST. J., Nov. 17, 1997, at A27 (arguing that United States is not obligated to pay UN dues because treaties are not law but merely political obligations).

part of our law.<sup>300</sup> A President acts in bad faith—with respect both to the Constitution and to international law—by ratifying a treaty without first making certain that portions of the treaty requiring domestic implementation can and will be implemented. Failure to do so implicates the Take Care Clause and the Supremacy Clause and violates the primary norm of international law: *pacta sunt servanda*.<sup>301</sup> The Senate similarly acts in bad faith when it consents to the ratification of a treaty that requires domestic implementation and then does nothing to implement the treaty.<sup>302</sup>

## VI. CONCLUSION: THE FUTURE OF U.S. FOREIGN AFFAIRS

Yoo and Irons both assume that the Constitution matters, but they do not tell us why or to what extent. The Constitution should matter. In areas where the constitutional text is clear, we should presumptively follow the constitutional text. The Declare War Clause may not be a model of clarity. It was hastily composed “toward the end of the [Constitutional] Convention, in response to objections raised from the Convention floor.”<sup>303</sup> John Yoo describes the clause as the product of an “obscure, garbled, last-minute debate.”<sup>304</sup> However, the enumeration of other war powers in Article I, the Constitution’s structural limitations on executive power, the statements of the Framers as to their understandings of the constitutional allocation of war powers, and the practice of the political branches in the early republic all support the traditional view favoring congressional initiative in matters relating to war and peace.

Increasingly since World War II and certainly since 9/11, Congress has instead ceded its constitutional war powers to the executive.<sup>305</sup> It seems unlikely

300. See *Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

301. See Vienna Convention on the Law of Treaties, *supra* note 221, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

302. For example, the International Covenant on Civil and Political Rights (“ICCPR”) specifies that the parties to it are obligated to implement it. See International Covenant on Civil and Political Rights art. 2, para. 2, opened for signature Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”). The Senate, in granting its advice and consent to the treaty, specified that it viewed the treaty as non-self-executing. See 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) (declaring that United States regards provisions of Articles 1 through 27 of Covenant non-self-executing). Because Congress has never passed implementing legislation, plaintiffs have been unable to sustain causes of action claiming violations of the ICCPR in U.S. courts. See, e.g., *White v. Paulson*, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (concluding that ICCPR does not give rise to private right of action with respect to plaintiffs’ claims, as treaty is non-self-executing and Congress has passed no implementing legislation).

303. Ramsey, *Text and History*, *supra* note 71, at 1709.

304. Yoo, *War and the Constitutional Text*, *supra* note 8, at 1656.

305. See IRONS, *supra* note 3, at 180-204 (decrying “congressional abdication” of its constitutional war powers, beginning with Vietnam War); Fisher, *supra* note 242, at 946-83 (arguing that multilateral treaties have facilitated postwar expansion of executive war powers).

that any court will ever decide whether that abdication was lawful or whether Congress can retrieve the powers that it ceded. The question is thus far more likely to be decided through politics than law. As John Yoo acknowledges, through its appropriations power, Congress has the power to rein in the executive whenever it likes.<sup>306</sup> The real problem is not institutional competence but institutional self-confidence.

Although the Constitution provides the starting point for any serious discussion of the allocation of the foreign affairs power, ultimately the issue will not be decided based on the original intentions of the Framers. As Irons concludes with resignation, “only the collective voices and votes of the American people can provide answers to the questions posed in this book: How and why do we go to war?”<sup>307</sup> But Breyer’s *Hamdan* concurrence, combined with the new academic interest in popular constitutionalism, puts a more hopeful spin on Irons’s conclusion. The Framers expected that the country would work out constitutional conflicts through democratic means. All three branches have constitutional authority to interpret the constitutional allocation of the foreign affairs powers, and the citizens of the United States must hold them accountable when they do so in error.

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306. See YOO, *supra* note 4, at 9 (“Congress’s authority over funding and lawmaking is a powerful tool that can easily frustrate unilateral executive policies.”).

307. IRONS, *supra* note 3, at 263.

