February 26, 2018

Dear Members of the Legal History Colloquium:

Attached are the first three chapters of a forthcoming book under contract with Princeton University Press, tentatively entitled *The Supreme Court and Foreign Affairs*. I am precisely at the revision stage, so I look forward to your comments, ideas, and suggestions (not least a better title).

Thanks in advance.

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To appreciate the role of American courts in foreign affairs, it pays to go abroad. For me, the place to start was Beijing. Just before the millennium, I had the opportunity to spend a semester teaching law at China University of Political Science and Law, one of the country’s leading law schools. China was sufficiently open to now-discouraged “foreign influence” that “Fada,” as it is known in Chinese, welcomed a course in English on U.S. Constitutional law. I decided not to start with *Marbury v. Madison*,¹ the great Supreme Court decision with which almost every American constitutional law course begins. Instead I selected *Youngstown Sheet and Tube Co. v. Sawyer*, the “Steel Seizure case.”² The controversy arose when President Truman, facing a national steelworkers strike during the Korean War, ordered an emergency Federal takeover of steel mills to keep them running. The choice to leadoff with *Youngstown* had less to do with the iconic opinions than with the judgment itself. In essence, six unelected lawyers in black robes told a president of the United States that he was powerless to take an action he thought to be essential for conducting a war. In authoritarian China, however open at the time, the Chinese Constitution, or *xianfa*, could not be raised in court, nor were courts independent in any case.³ What better case than *Youngstown* to show the awesome power of the American judiciary to maintain the rule of law, the Constitution, and with them, basic rights?

Just a few years later, the lessons of *Youngstown* had apparently disappeared back home. After the attacks of 9/11, the administration of

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¹ 5 U.S. 137 (1803).
² 343 U.S. 579 (1952).
George W. Bush notoriously ordered the use of “enhanced interrogation techniques” on suspected terrorists, including hooping, sleep deprivation, subject to extreme heat and noise, sexual humiliation, and waterboarding. Nearly all of these methods violated international law, whether human rights prohibitions or the humanitarian laws of war. On any credible reading, they also violated the Federal Anti-Torture Statute. Many government lawyers, especially in the State and Defense Departments agreed. Higher placed Executive Branch lawyers, however, argued otherwise, including Attorney General Alberto Gonzales, Head of the Office of Legal Counsel, John Yoo, and Jay Bybee. In what came to be known as the “torture memos,” these officials asserted that the techniques in question did not amount to torture under the statute; they did not bother with the international law. More importantly, they argued that even if Congress did prohibit the methods in question, the President had the authority to disregard the command of Congress based upon his authority as Chief Executive and Commander in Chief. Nowhere did the memoranda mention Youngstown, nor how the Supreme Court would apply that precedent to a violation of the Federal anti-torture law.

Youngstown may suffered eclipse so far as the White House was concerned, but it was not forgotten elsewhere. When the torture memos were leaked to The New York Times, the reaction was swift and stinging. The clear majority of politicians, pundits, and scholars argued that the “enhanced” interrogation techniques amounted to torture in fact and in law, and that a President could not disregard a Federal statute making it a criminal offense to engage in the practice. A few disagreed. But at least among legal scholars, nearly everyone criticized the memos for not citing Youngstown, the leading Supreme Court case providing a framework for analyzing Executive action to meet foreign affairs threats in light of any relevant steps taken by Congress. Soon enough, the Supreme Court would rely on the case in a series of landmark decisions that checked other measures ordered by the President in response to 9/11. That Youngstown went missing in action in the Executive Branch was nonetheless remarkable. Even more striking, the case was nowhere to be found in key lower court decisions post 9/11, which in part as a result upheld the Executive’s actions.

This conflicting picture reflected a trend that long predated Youngstown and which that decision sought to stem. Arguments highlighting the President’s advantages in conducting the nation’s foreign affairs are as old as the presidency. Alexander Hamilton, perhaps the most pro-Executive of

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the Founders, enumerated several of these in articulating what a body such as the Senate lacked: “[a]ccurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, SECRECY, and despatch.”\(^5\) Yet such arguments were not originally deployed to subordinate Congress or the courts, much less marginalize them. Those attempts consistently took place only as the United States took its place as a global power, superpower, and hegemon. By the turn of the 21\(^{st}\) century, Youngstown notwithstanding, this push for an ever more powerful presidency, both within and outside the Executive, had brought matters to a crossroads. With Congress acting as at best an occasional check, the task of reigning in what had long since become the most powerful branch of government would fall to the one that Hamilton characterized as “the least dangerous”\(^6\) -- the judiciary. Yet decades of presidential advocacy, pressure, and supporting scholarship had brought the courts to a crossroads as well. The Supreme Court in particular appears especially conflicted. At times, as in the post-9/11 cases, it maintains its traditional role as a restraint on excessive government power. Yet, with apparent growing frequency, it bows to the other branches, above all in foreign affairs and most notably, when the actions issue from the Executive.

Scholarship one way or another often provides theory for those with a measure of power to transform into practice. So, at least, do many scholars hope. As with modern case law, the current scholarly literature on the courts, separation of powers, and foreign affairs also presents a conflicted picture. Here, however, the balance tilts more decidedly against a robust judicial role. Whatever their differences, this dominant view includes such leading scholars as Anthony Bellia, Brad Clark, Jack Goldsmith, Andrew Kent, Julian Ku, Saikrishna Prakash, Eric Posner, Michael Ramsey, Adrian Vermeule, and John Yoo.\(^7\) Their works advocate,
reflect, or complement the idea of a so-called “unitary” Executive. On this view, the President should wield unfettered power over the Executive Branch proper, such as the Departments of State, Justice, or Commerce, as well as administrative agencies such as the Food and Drug Administration or Environmental Agency – all with minimal control by Congress or the courts. Uniting this school of thought still further is the corollary that the President should rightly dominate foreign affairs decision-making, not surprising given that a number in this group served in the Executive Branch.

A deceptively numerous yet dissenting set of scholars plays the part of loyal opposition, distinguished yet out of power, or at least less influential, in the face of ever increasing Executive power. Countering the dominant school include such commentators as Bruce Ackerman, Curtis Bradley, David Golove, Daniel Hulsebosch, Martin Lederman, Thomas Lee, Deborah Pearlstein, David Rudenstine, Gordon Silverstein, David Sloss, and Beth Stephens. Yet even their work tends to emphasize Congress, rather than the Supreme Court, and still less the lower courts, as the key check.

Still other writers fall less clearly on one side or the other, including Justice Breyer in his recent book, The Supreme Court and the World, and Harold Koh, taking his varied career in and out of government and the academy as a whole. It remains at least an impressionistic truth that, based upon the sheer volume of books and articles, skeptics of judicial authority in foreign affairs increasingly prevail. Should the theories they offer truly presage action, the prospect of further judicial retreat in this area appears even more likely. This book seeks to tip the balance in the other

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direction and reorient informed discussion to take the judiciary’s foreign affairs role more seriously.

That task has become only more urgent given the presidency of Donald J. Trump. With a Chief Executive lacking the knowledge, experience, and temperament of even his most “imperial” predecessors, the pressures on the Federal judiciary to abandon the role symbolized by *Youngstown* have grown exponentially. Just the initial litany of controversial presidential actions, taken or proposed, that implicate foreign affairs is staggering: the “Muslim” travel ban(s); reinstatement of torture; withdrawal from the Paris Climate Accord; nuclear retaliation. Not coincidentally, these actions have come hand in hand with unprecedented attacks on Federal courts and individual judges, as well as nominations to the Federal bench of candidates likely to defer to the Executive in foreign affairs especially. Where 9/11 may have illustrated the judiciary in foreign affairs at a crossroads, the Trump presidency has taken the path of unchecked Executive power towards a precipice.

This state of affairs would have shocked, but not surprised, the nation’s Founders. The Constitution they framed and ratified embraced the idea of separation of powers precisely out of the fear that concentrated power could become tyrannical. As they refined it, that doctrine in particular contemplated a judiciary with sufficient independence and power to check the states and the other Federal branches of government. By definition, the exercise of that power would require considering the assertion of some right necessary to create a legal case or controversy.\(^\text{10}\) Neither separation of powers nor judicial authority, finally, applied as fully to foreign as domestic affairs.\(^\text{11}\)

The precedents that the Founding generation established under the Constitution were faithful to this vision. When President Washington sought the interpretation of a critical treaty during a global crisis, he had two brilliant legal advisors, Secretary of State Jefferson and Secretary of the Treasury Hamilton, reach out to Supreme Court rather than try to avoid it. (Chief Justice Jay famously declined, but only because the queries did not arise in the context of a litigated case.) When the captain of the *U.S.S. Constellation*, during an armed conflict with France, attempted the common practice of claiming a captured vessel as a prize for himself and his crew, the Supreme Court rejected the claim, and indirectly checked Congress, by holding that the Federal statute authorizing the capture should not be interpreted to violate international law if at all possible. When another Navy ship during the same hostilities seized a Danish vessel, the Court

\(^{10}\) See Chapter 2.

\(^{11}\) See Chapter 3.
again held against our armed service personnel, this time holding the captain liable for any damages caused on the grounds that he exceeded an Act of Congress limiting when such captures could take place. When a British subject in the United States during the War of 1812 objected to the Executive seizing his property, the Supreme Court similarly voided that action as well, on the grounds that the President did not have the authority to violate international law. These episodes stand in stark contrast to modern calls for the judiciary to defer to the “political branches,” especially the President, in foreign affairs, or better, stay out of such matters altogether.

This book argues that the Founding generation, and for almost a century and a half its successors, had it right. As Youngstown recognized, however, pressure on the original framework had long been building, and has only grown more severe since. Among the reasons why, not least is the nation’s increased engagement in world affairs. After a period of isolation, the United States ascended to the status of global power in the late 19th century with its victory over Spain. The First World War confirmed the nation’s place as a power equal to any other, however much it attempted to withdraw from that role. With the Second World War, the United States rose to the status of superpower, and with the fall of the Soviet Union, sole superpower. As such, it has been engaged in nearly constant armed conflict. These developments have shifted power from the states to the Federal government. As Youngstown warned, within the Federal government they tend to shift power to the Executive given all too frequent Congressional inaction or acquiescence. Fresh insights into modern international relations reveal that the way nation states currently interact only tends to exacerbate the problem of Executive overreach. The result has been precisely the concentration of power in one branch, and the consequent threat to liberty, that the Founders feared.

All the more reason, then, to turn the clock backward to move forward. Modern concerns about the “imperial presidency” date at least, and not insignificantly, to World War II. Yet in foreign affairs, cold wars spiked by hot wars succeeded by a “war on terror,” render the term “imperial” woefully inadequate to capture the presidency today, especially when aided and abetted by a subservient Congress. Ironically, the chaos, bluster, and exaggerated assertions of the Trump Administration may give pause to those who previously advocated the effective supremacy of the Executive as a necessary means to deal with the nation’s challenges in a

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12 See Chapter 4.
13 See Louis Fisher, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS 5 (2017) (“It was not until World War II that we first see American scholars trumpeting the need for bold and unchecked presidential leadership.”).
dangerous world. If so, no shortage of potential reforms exist: electoral reform to lessen party polarization and stalemate in Congress; reform of the Electoral College; checks within the Executive Branch itself.

Yet one more measure is straightforward as it is essential. The judiciary must commit itself to reclaiming its historic role precisely because – rather than despite – a case or controversy involves foreign affairs. That is the goal of this volume.

Toward that end, a few initial clarifications are in order. First, this study views broadly matters that encompass foreign affairs. Youngstown demonstrates that the difficulty in drawing a bright line between the foreign and domestic. On one hand the case involved the seizure of a factory in Ohio. Yet on the other, the seizure was ordered so that the same concern would continue to produce steel to fight a war half a world away. In this light the best that can be said is any dispute that raises significant foreign affairs consequences fairly merits consideration. Second, this work concentrates on the Federal judiciary and still further focuses on the Supreme Court. State court decision can sometimes have important foreign affairs implications. Nonetheless, the conduct of foreign affairs is overwhelmingly concentrated in the Federal government, and as will be argued, apportioned among its three branches. It follows that concentration on the Federal judiciary for better or worse entails highlighting the Supreme Court if only because its decisions establish the framework in which the lower courts must operate. That said, the Court has left open a surprising number of issues that bear upon foreign affairs, which at the very least means the decisions rendered below demand attention. Finally, a restoration of the judiciary to its proper role in foreign affairs in theory demands that it checks both of the so-called political branches, Congress and the Executive alike. The growing power of the presidency that the following pages describe nonetheless ordains that the principal struggle in reestablishing the judicial role will pit the judiciary against the Executive, the Supreme Court against the President.

This book proceeds in four parts. Part I considers the Founding. What comprises “the Founding,” a period that to many offers the promise of settling constitutional controversies, is itself an open question. A narrow definition focuses on the Federal Convention of 1787 and the subsequent ratification debates. Broader treatments not infrequently look further back

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14 Legal casebooks in U.S. Foreign Relations laws typically feature lower court decisions significantly more than their Constitutional Law counterparts, which tend to focus on more obviously domestic matters. See, e.g., FOREIGN RELATIONS LAW (Curtis A. Bradley and Jack L. Goldsmith, eds., 6th ed. 2017).

15 Speech Given by Attorney General Edwin Meese III before the American Bar Association on July 9, 1985.
to explore the legal and political thought of the so-called Glorious Revolution of 1688 or even to the English Civil War of the 1640s.16 Looking to the other direction, many scholars, advocates, and judges view the Founding as not fully concluded until the First Congress or further, to the Jefferson Administration, which sought to undo many of the constitutional practices established by his two Federalist predecessors, George Washington and John Adams.17 This study will navigate a middle course. Appreciating the Constitution’s origins at the very least requires some consideration of the constitutional experiments Americans attempted upon declaring independence in 1776. Conversely, the Founding generation often did not work out an initial understanding of a constitutional issue – or at times a range of understandings – through the new government’s first decade and in some instances well beyond that.

Dealing with the Founding at all raises the perennial question of its relevance to modern constitutional controversies. What purchase do the views of an exclusive, non-diverse elite living in a mainly agricultural society under a weak government buffeted by global superpowers have on a modern multi-racial and multi-cultural population in a post-industrial economy in a nation that is itself a superpower that regularly buffets other countries yet is also strangely vulnerable? Or as I put it more simply to my students: why care about a bunch of dead, white, male slave-owners?

There are at least three sets of reasons to do so. First, no less true for being hackneyed, are the reasons to look to history at all. These have been captured in various phrases which are themselves clichéd: From Santayana’s “The who cannot remember the past are condemned to repeat it” to the folk proverb, “You don’t know where you’re going unless you know where you’ve been” to the more general motto of Faber College,


“Knowledge is Good.” All capture the basic idea that consulting history can confirm solutions to modern problems that have demonstrably worked and help avoid missteps that did not.

A more specific set of reasons has to do with the Founders themselves. To modern eye, to be sure, they are a disturbingly exclusive, racist, sexist, and elitist lot. Still, they enjoyed two advantages denied most modern activists and thinkers thanks to the accident of time and place. For one thing, they lived during a time when a cultivated person could master several fields and so enjoy a more multi-faceted view of human experience. Jefferson, whatever his moral failings – and they were ghastly – could be both a leading political theorist and first-class architect. His great rival Hamilton could himself pioneer political theory, master economics, and in the meantime excel as perhaps New York City’s leading attorney. Franklin of course was Franklin. These men, and lesser contemporaries, arguably enjoyed a breadth of perspective unavailable to today’s law professor, Federal judge, cabinet official or member of Congress.

In addition, the Founding generation further benefited from an unparalleled period of experimentation in the art of government. Consider the career of John Adams. As a lawyer in the Massachusetts Bay Colony, Adams established his credentials as a political thinker through extensive popular essays making the case for the colonies autonomy under the British Constitution, writings that were themselves part of a ten-year colonial struggle to define the American colonies proper constitutional place in the Empire. After independence, in which he played a central role, Adams served as a diplomat, took a leading role in reforming his state’s government with the landmark Massachusetts Constitution of 1780, and collected his ideas on proper governmental structure in his influential Thoughts on Government. While he was abroad during the Federal Convention and ratification, he returned to serve as Vice President and

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President in the new reformed republic. Adams’s own contributions are distinctive, but his general experience is not.\textsuperscript{21} Many of those involved in the making of the Constitution had some background in either the constitutional resistance to Parliament before the Revolution, the creation of the new state constitutions, the dangerous challenges of foreign affairs, and ultimately the framing, ratification, and initial implementation of the new constitutional order. Few generations in history have been presented with so many opportunities to consider how best to constitute government.

Finally, for better or worse, the Founding demands attention in light of constitutional theory. Among constitutional “professionals,” – judges, lawyers, professors, even politicians – nearly everyone holds that the views of the Founders merit some weight in resolving current controversies. Not a few who are especially influential believe that the “original understanding” should be dispositive. Much ink has been spilled over the latter end of the spectrum, otherwise known as “originalism.” Suffice it to say for many if not most of its practitioners, its justification lies in a certain kind of democratic foundation in many ways forged by the Founders themselves. This theory posits that “We the People of the United States . . . ordained and established this Constitution” through processes that required “super”-democratic approval and greater deliberation than ordinary laws. On this basis, since known as “popular sovereignty,” it follows that the best place to resolve any of the numerous ambiguities and gaps in the Constitution’s text is the views of the Founding generation that comprised “the People” who framed and especially who ratified the framework.\textsuperscript{22}

Instances of originalism date back to the Founding era, though so too do other methods of constitutional interpretation. Over the centuries, originalists have adopted both liberal and conservative positions. More recently, various, often competing forms of originalism have been on offer. It used to be fashionable to refer to the “original intent” of the “framers,” that is, the specific expectations of the men in Philadelphia who proposed the Constitution. That view has largely given way to the notion that what matters is the general public understanding of the Constitution once it was submitted for ratification.\textsuperscript{23} Often these distinctions become scholastic. It is


\textsuperscript{22} \textit{The Federalist} No. 78 (Alexander Hamilton); \textit{see also} Bruce Ackerman, \textit{We the People: Foundations} (1991).

hard to see how a common understanding of a term at the Federal Convention would diverge radically from its understandings in the ratification debates, and still less from any projected public understanding. Far more important is an underappreciated historical reality all too familiar to historians familiar with history’s messiness. More often than not, the Founders at best achieved agreement on contentious matters only in the most general terms, only to disagree vigorously on details. Justice Jackson had this in mind when he famously stated that, “Just what our forefathers thought, or would have thought, had they known of modern conditions must be divined from sources almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh . . . . They largely cancel each other.”24 Jackson overstates; sometimes a dominant view even on more specific matters can be discerned. Closer to the mark is Jack Balkin’s latest, if not last, word on originalism. On his view “Constitutional interpretations are not limited to applications specifically intended or expected by the framers and adopters of the constitutional text . . . Adopters use . . . standards or principles because they want to channel politics through certain key concepts but delegate the details to future generations”.25

Whatever its internal debates, originalism exerts an exceptional pull on how Americans approach the Constitution. Yet the truth is that even at the other end of the spectrum that minimizes history, most theories of constitutional interpretation hold that the views of the Founders merit respect even if they don’t compel blind obedience. Conventionally, approaches that emphasize the Constitution’s (super)democratic foundation are juxtaposed with schools of thought that instead find its ultimate legitimacy in the extent to which constitutional law reflects fundamental justice.26 On this view, working out what principles are moral, fair, and just outranks discerning the understandings of the Founding generation. Perhaps the leading proponent of this “justice-seeking” school remains the late Ronald Dworkin. Dworkin, to be sure, rarely made extended historical arguments in his magisterial works. For him, the philosopher John Rawls loomed far more prominently than James Madison or Alexander Hamilton. Yet even Dworkin accepted that some knowledge of the Founding period
could only enhance what he called the project of discovering what best justified and fit our constitutional order.  

All of which goes to Part I’s concentration on the Founding, starting with Chapter Two’s focus on separation of powers. Americans are generally familiar with the idea that the Constitution assumes that there are three types of government power – legislative, executive, and judicial – and assigns these powers to three separate sets of hands or branches – Congress, the President, and the Federal judiciary. Yet even standard historical accounts do not fully appreciate how central these ideas were in the ferment that led to the Constitution. Separation of powers first of all served as a newly central tool in diagnosing perceived failures in the first state constitutions drafted upon the declaration of independence. Previously, Americans had thought primarily in terms of the English Constitution, which keyed to social classes rather than government functions. Independence effectively meant that the new American governments would have to forego institutionalizing monarchy, as in the British Crown, and aristocracy, as in the House of Lords, and make the best of democracy through legislative assemblies. State legislative majorities, however, soon proved capable of violating fundamental rights in a way previously thought the exclusive province of kings and nobles. Separation of powers, hitherto a secondary idea, came to the fore to demonstrate that too much power had been concentrated in the legislatures. The same idea that exposed the problem also pointed to the solution. Separation of powers suggested that both the executive and judicial branches needed to be made sufficiently independent and equipped to check the dominant legislatures. For the judiciary in particular that meant, among other things, salary protection, life tenure, and the emerging idea of constitutional judicial review.

Chapter Three argues that separation of powers was understood to apply to foreign no less than domestic affairs. In so doing, it provides a long overdue corrective for both the history of the Founding and certain Founding myths that later constitutional approaches have projected upon that history. Chapter Three first of all brings together two dominant accounts of the Constitution’s origins that almost always pass one another like ships in the night. One, as will have been seen in the previous chapter, emphasizes the failure of Americans initial experiments in independent government in the states. The other, more familiar generally, stresses that the Constitution came about in response to the national government’s

1. Introduction

weakness under the Article of Confederation, especially in foreign affairs. This chapter weaves together these two still surprisingly separate strands. The Constitution clearly established a framework for a national government strong enough to hold its own in a world of vastly more powerful states. The prospect of an effective army and navy, enforcement of national treaty obligations, and the power to retaliate against foreign commercial sanctions through commercial regulation marked just some of the reforms creating a vastly more powerful national government. Yet concentration of power also meant a corresponding threat to liberty. Precisely for this reason separation of powers mattered more, not less, with regard to the national government’s enhanced powers in foreign affairs. The text and debates together confirm that the Founders sought to divide foreign affairs powers among the three branches in the same original ways they did so for authority seen as ordinarily domestic. As in domestic affairs, moreover, the expectation was for the judiciary to play a critical role, especially in checking the other branches the better to reign in excess power and safeguard fundamental rights.

Part II turns to how well, or poorly, subsequent generations realized the Founding’s commitments. How the original framework has actually been implemented has often been termed constitutional tradition or custom. With regard to separation of powers and foreign affairs, such custom takes shape as the branches work out to what extent their specific powers overlap or are exclusive. For courts, the common law idea that decision should ordinarily stand as binding precedent can render judicial custom especially powerful. Conversely, judicial determinations not to hear certain kinds of cases turn this power on its head and work to entrench previous determinations that courts do not have the authority to settle certain kinds of controversies, an argument made with increasing frequency about cases implicating foreign affairs. Justice Frankfurter captured the idea of constitutional custom when he stated that, “the way the [constitutional] framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”

As such tradition evolves, however, numerous problems can arise. Most importantly, when does custom merely realize the Constitution’s “true nature” and at what point might it diverge so as to “supplant” – and indeed violate – the Constitution? The power to make war provides a vexing illustration. Assume, as does this study, that the Founding’s commitments

29 Youngstown, 343 U.S. at 610 (Frankfurter, J., concurring).
merit some consideration in determining the Constitution’s legitimate meaning. Assume further, as most scholars do, that one such commitment was that the determination to use military force abroad fell primarily to Congress under the power to “Declare War.”

What then to make of a tradition in which Congress has authorized major wars but allowed the President to unilaterally initiate small ones? This problem, in turn, emerges only after solving the threshold problems of what government actions count to determine a tradition, how consistent or unbroken does that tradition have to be, and how to determine the acquiescence of the other branches.

This study again takes a middle position among differing poles. At one end of the spectrum, is the view that tradition must remain subordinate to other sources of constitutional meaning. For an originalist, any tradition that broke away from “the” initial constitutional understanding would be a violation, not an elaboration. Likewise, anyone committed to a “justice-seeking” vision would reject any custom that parted from notions of fairness or right reason.

Conversely, other interpreters believe that evolving custom is constitutional law. Something like this idea is often associated with Edmund Burke’s argument that the virtue of the British Constitution was its measured evolution through evolving tradition, rather than as some

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reflection of justice or periodic adoption of constitutional text.\textsuperscript{33}

This study assumes that neither extreme reflects our constitutional culture. As noted, Founding commitments simply weigh heavily under almost any theory. Yet, as Frankfurter noted, it seems “an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution” – or even to a narrow application of the original understanding even where one exists. To do so would be “to disregard the gloss which life has written upon them.”\textsuperscript{34} This book therefore assumes that the Founders’ commitments, especially their broadly envisioned separation of powers framework, commands fidelity absent a formal constitutional amendment or an equivalent “constitutional moment” in which something approaching a national consensus deliberately endorses major constitutional change. At the same time, it is open to the possibility that a “systematic, unbroken . . . practice, long pursued with the knowledge [of the other branches] and never before questioned” within that framework might work legitimate constitutional chance.

On these bases, Chapter Four contends that for much of our history, constitutional tradition confirmed the Founders’ basic commitments about separation of powers, foreign affairs, and the courts. In particular, the Supreme Court and the Federal judiciary more generally played their part as originally envisioned. That meant, among other things, fulfilling their assigned roles of checking both Congress and the President, not to mention the states, in the service of protecting individual rights under both domestic and international law. These general patterns, moreover, persisted though the mid 20th century. Given the time frame, this account necessarily must be general, especially in light of the other matters this book covers. As such it makes its case mainly though a consideration of landmark controversies and decisions that are nonetheless representative. These cases suffice to confirm the overall fidelity of subsequent constitutional tradition to the Constitution’s initial vision.

Chapter Five serves as an interlude that seeks to establish the symbolic terms of a transition that remains incomplete. By the outset of the 20th century, America’s ascendance as a major power exerted corresponding pressure on the Constitution’s original conception applying meaningful separation of powers to foreign and domestic affairs alike. Increased engagement in world affairs, diplomacy, colonization, imperialism, and wars major and minor inevitably shifted power to the Executive at the expense of Congress and the courts. At the same time, courts had become less equipped to play their still traditional role. The Supreme Court in

\textsuperscript{33} Edmund Burke, \textit{Reflections on the Revolution in France} (1790).

\textsuperscript{34} \textit{Youngstown}, 343 U.S. at 610 (Frankfurter, J., concurring).
particular featured fewer Justices who had had diplomatic experience, as had been the case in its early days. For various reasons, international law had become less central thanks in part to the nation’s previous relative isolation from world affairs. By the mid 20th century, these and other factors pressured the judiciary to retreat from its envisioned role. At least a partial retreat did begin, and would become more marked as the century progressed. It would not, however, become sufficiently systematic, unbroken or unopposed to count as a legitimate customary amendment to the Constitution’s original scheme. Then and now, two iconic cases embody the challenge and its ongoing repudiation. The Supreme Court’s most dramatic retreat came in United States v. Curtiss-Wright Export Corp., which has served as a manifesto for executive supremacy in foreign affairs. With Youngstown Sheet and Tube Co. v. Sawyer, the Court powerfully recommitted to maintaining the historic role of Congress and the judiciary. So frequently do opponents cite each case that what they say, and why they said it, has become obscured. This chapter attempts to recover their deeper significance, the better to understand the as-yet failed constitutional transformation.

Chapter Six brings the survey of custom to the beginning of this century. That survey shows how U.S. foreign policy has continued to pressure the judiciary to go in the direction of Curtiss-Wright, an invitation it has still generally refused in light of the recommitment to the original constitutional framework set out in Youngstown. That the courts, and the Supreme Court in particular, maintained their position as well as they did stands as a testament to the original constitutional design and nearly a century and a half of constitutional custom. Starting roughly mid-century, the Second World War, the Cold War, and the creation of a national security state placed the nation on a type of near-permanent war footing. These developments accelerated the trend toward greater claims of Executive power in particular. In this setting, arguments that the judiciary was ill suited to second-guess executive foreign policy, and to intervene in foreign affairs more generally, were sounded with greater frequency. At times the Court bowed, much to its later regret, not least in the face of Executive assertions. Yet for the most part it still has shown itself capable, sometimes dramatically, to protect individual rights and apply international law in claims made against the several states, Congressional overreach, and above all, Executive aggrandizement. In the end the survey of constitutional custom falls short of showing constitutional demotion of the

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35 299 U.S. 304 (1936).
37 343 U.S. 579 (1952).
judiciary’s role in foreign affairs as originally envisioned and long practiced.

Part III shifts perspective to explore the nature of modern international relations. In contrast to the Founding or later constitutional tradition, modern international relations theory does not offer any direct source for the Constitution’s meaning. Rather, the sometimes strikingly new ways in which nation states interact with one another speaks to the setting in which constitutional principles are applied. As the previous parts have shown, the United States remains committed to a model of separation of powers in foreign affairs that includes a key role for the courts, especially in the protection of fundamental rights under the law. Nor is the United States singular. Many constitutional democracies have adopted the tripartite system pioneered in Philadelphia. Yet even parliamentary systems, which fuse legislative and executive power, still typically establish independent judiciaries, usually with some form of judicial review.\(^{38}\) How does the way that these and other states conduct relations affect these domestic frameworks? International relations experts do not say. But much of their work suggests that the processes they describe spell trouble for any regime committed to some form of separation of powers. Put starkly, modern international relations tends to further empower already dominant executives, leaving judiciaries behind and legislatures even more so. Understanding this development turns recent challenges to judicial participation in foreign affairs upside down. Opponents of an active judicial role typically argue that since courts have little expertise in foreign affairs, they should stay away.\(^{39}\) International relations, to the contrary, suggests that courts should guard their assigned role of maintaining balance among the branches of government precisely because the cases that may properly come before them involve foreign affairs.

Accordingly, Chapter Seven looks to what Anne-Marie Slaughter has termed the real “New World Order.”\(^{40}\) Conventionally, international relations as well as international law concentrated on the interactions of nation states. On this model, the United States, China, Russia, the United Kingdom, Kenya, Mexico, the Bahamas are principally the irreducible units. Recent thinking emphasizes that instead, international relations more and more consists of executive, legislative, and judicial officials directly


\(^{40}\) Ann Marie Slaughter, A NEW WORLD ORDER (2004).
reaching out to their foreign counterparts to share information, forge ongoing networks, coordinate cooperation, and construct new frameworks. The traditional nation state has today become “disaggregated,” dealing with its peers less as monolithic sovereign states than through these more specialized “global networks.” Notably, the counterparts that officials of one state seek out in others tracks the divisions of separation of powers; executives to executives, judges to judges, legislators to legislators.\textsuperscript{41} How such transnational, interdepartmental networking affects each branch of government within a given state is another matter.

International relations theory does not take up that question, but Chapter Eight does. It argues that relations between modern “disaggregated” states empower the different branches within any nation to different degrees. The executive far and away benefits the most. This enhanced primacy in large part results from structural advantages, including the “secrecy and despatch” identified by Hamilton,\textsuperscript{42} meeting modern demands, such as the need for global regulation and meeting the challenge of global terrorism. Perhaps surprisingly, the judiciary follows next as judges share views in meetings face-to-face and mutual citations from abroad. Collective action problems, among other factors, insure that the legislature benefits least. The consequence is a comparatively more powerful Executive, further outstripping its rivals as a direct consequence of new ways to conduct foreign affairs. The resulting imbalance contributes to the precise evils separation of powers is designed to combat. It follows that the need for a judicial check, and for that matter a legislative counter as well, becomes more not less pressing in light of foreign affairs in a world of disaggregated states and global networks.

Part IV shows what a judiciary restored to its proper role in foreign affairs would mean. To do this it reviews contemporary controversies implicating foreign affairs in which judicial intervention has been sought, especially those invoking fundamental rights or international law. This increasingly large group usefully breaks down into cases that require determining whether some aspect of foreign affairs precludes the courts from hearing them in the first place; if admitted, how and to what extent the courts should assert their authority on the merits; and finally, claims based upon international human rights law. Across these categories, this Part offers additional support for decisions in which the judiciary has remained


\textsuperscript{42} The Federalist No. 70 (Alexander Hamilton).
faithful to its role, pointed critique for judgments that signal retreat, and
direction in areas where it appears wavering at the crossroads.

Chapter Nine therefore begins with areas presenting threshold
questions of effectively getting cases into court in the first instance. It notes
the emergence of an array of doctrines to shut the courthouse doors that has
formed a part of the custom as yet insufficient to undo entrenched
constitutional understandings. Among these are standing requirements, the
state secret privilege, and the so-called political question doctrine, among
others.\footnote{Erwin Chemerinsky, \textit{Closing the Courthouse Door: How Your
Constitutional Rights Became Unenforceable} 114-36 (2017); Rudenstine, \textit{Age of
Deference}, at 4-8; Kent Greenawalt, \textit{Interpreting the Constitution} 146-50 (2015).} Not surprisingly, they have been asserted by the Executive;
unfortunately, they have been accorded increasingly serious consideration
by the courts. This chapter aims to counter this trend by showing how such
backsliding is inconsistent with the Founders’ vision, the bulk of our
constitutional tradition, and the effects of modern international relations.

Chapter Ten undertakes much the same task regarding foreign
affairs matters once a case has been accepted for review. Here easily the
most threatening potential wrong turn has concerned potential judicial
deferece to the executive’s interpretations of agency regulations,
international law, statutes, and the Constitution itself. In each of these
areas, the pressures have grown only stronger for courts to cede their
responsibility to say “what the law is” to executive officials on the grounds
of their supposed superior grasp of foreign affairs over judges. At times the
Supreme Court, and courts below it, have bowed to such arguments. Yet in
a series of landmark cases in the wake of 9/11 the Court has remained true
to its constitutional role. Throughout this chapter relies on the trilogy of
Founding pledge, overall tradition, and international relations context to
commend the Justices’ fidelity and contend that, if anything, they have not
been steadfast enough.

Chapter Eleven concludes the survey of contemporary issues with a
consideration one that has consistently been among the most contentious—
the application by American courts of international human rights. Recent
years have witnessed high-profile conflicts over international human rights
law. One major battle involves whether, when, and how U.S. courts should
recognize rights set out in the nation’s treaty obligations. Another heated
area of contention has arisen under an Act of Congress, the Alien Tort
Statute, which has for decades served as a means for foreign victims of
human rights abuses to seek redress for violations of their rights under
customary international law in Federal court. Perhaps most heated of all
have been debates over the use of foreign legal materials, including
customary international law, to interpret the Constitution of the United

1. \textit{Introduction}
States. In these areas as well, the Supreme Court, and the judiciary generally, has wavered. Yet once more, a fresh appreciation of the principles the Founders entrenched, the subsequent custom that on balance confirms that original vision, and the consequences of the way nations interact in a globalized age – all these imperatives point away from the path that the judiciary appears more and more to be considering, and back to the course first established.

The book concludes, as it began, with *Youngstown*. It concedes that in many of the areas considered – whether getting into court, interpreting the law once there, and implementing international human rights – on certain issues the Federal judiciary has already proceeded perilously far in the wrong direction. Justice Jackson’s opinion helps explain why, citing the distinct advantages of the Executive in particular in asserting foreign affairs powers in a dangerous world, especially given a subservient Congress. Yet Jackson also sounded a note of guarded hope. Central to that hope was the judiciary holding fast to its duty to apply the law, regardless of its source, against encroachments by the other branches. This volume aims to keep that hope not merely alive and well, but formidable.
Chapter Two: Inventing Separation of Powers

Eighteenth-century Americans believed that they knew as much— or more— about the art of government as any people on earth. Not only did they inherit rich and varied learning of the Old World, Britain above all. They also benefited from unparalleled practical experience in establishing, adapting, and implementing governmental frameworks, first for colonies and then for states. Still unappreciated, however, especially by legal scholars dabbling in history, is that Americans were late in appreciating one doctrine that would become central to all these efforts and culminate in the Constitution of the United States. That doctrine was separation of powers. Ironically, Americans would not fully embrace separation of powers until the end of the century precisely because they were so well versed in constitutional law and thought. The only problem was that the constitution they had mastered was not American, but English.

Mixed Government

The American commitment to constitutional government did not begin with the Constitution. Nor did it begin with the constitutions of the several states. Colonists in what would become the United States thought, debated, and wrote about how government ought to be framed from the founding of their first settlements. Americans could, and did, also draw upon an array of sources to guide their thinking: Enlightenment thinkers such as Locke, Montesquieu, and Hutcheson; English common law; and the “Radical Whig” or “Commonwealth” tradition forged by Harrington, Sidney, Trenchard, Gordon, and Bolingbroke. What these sources all

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tended to confirm was that, of all the governments on the globe, easily the best was formed by the English Constitution – what a young John Adams called “the most perfect combination of human powers in society which finite wisdom has yet contrived and reduced to practice for the preservation of liberty and the production of happiness.”46 One of the many things that made it so was its devotion, not to separation of powers, but to the more old-fashioned ideal called “mixed government.”

The English Constitution reconciled power with liberty as successfully as it did by embracing the theory of mixed government. Mixed government reflected the idea that the balance between power and liberty could be struck through governmental structure. This idea, an ancient one, gained renewed vigor during the Renaissance. Yet the mixed government approach did not attempt to structure government based on governmental functions. It instead sought to frame government in order to balance the basic social forces within any given society. Those forces consisted of three orders, “each embodying within it the principles of a certain form of government: royalty, whose natural form was monarchy; the nobility, whose natural form was aristocracy; and the commons, whose form was democracy.”47 Experience unhappily showed that each of these “pure” forms would almost always degenerate into either an excess of power – monarchy to tyranny; aristocracy to oligarchy – or into an excess of liberty, or at least of licentiousness – democracy to anarchy.

The English Constitution escaped these fates in two ways. First, it developed institutions – the Crown, the House of Lords, and the House of Commons – that embodied each social estate. Next, it structured these institutions in such a way as to insure that they would direct power not just to preserve order, nor only provide essential services, but also to check each other. American Whigs saw their own colonial frameworks as replicating mixed government in miniature. Each of the North American colonies would come to have a royal governor as well as an upper and lower house of the legislature, striking a similar balance as did the King, Lords, and Commons. Through this balance, both the English state and its colonial offspring could rule efficiently enough to satisfy the dictates of power, but protect traditional rights sufficiently to satisfy the demands of liberty.48

Whigs on both sides of the Atlantic were all but unanimous in celebrating England’s brand of mixed government as “a system of consummate wisdom and policy.”49 So powerful was support for this

47 Bailyn, IDEOLOGICAL ORIGINS, at 70.
48 Id. at 76.
49 Id. at 71.
system that when American Whigs became American patriots – when, that is, Americans in the 1760s begin to resist perceived parliamentary encroachment on their rights as Englishmen – the furthest thing from their minds was repudiating the English Constitution as they understood it. To the contrary, the patriots opposed Parliament not because the English Constitution oppressed them but because Parliament violated the English Constitution. Adams, for example, argued exactly this on the very eve of Lexington and Concord.\textsuperscript{50} Not even did the shooting change matters, at least not at first. Even after independence appeared on the horizon as a genuine possibility, few Americans realized the profound implications that the break with Great Britain would have on their understandings of government.

They could not evade these implications for long. Thomas Paine, with typical gusto, was among the first to explore what independence would mean for mixed government. In \textit{Common Sense}, the best-selling tract of the era, Paine lampooned what had been seen as the consummately wise and politic system, proclaiming as “farcical” the notion of the English government as a “union of three powers, reciprocally checking each other.”\textsuperscript{51} Thanks in part to this onslaught, Americans began to question their allegiance to mixed government.\textsuperscript{52} But Paine’s onslaught was not the only reason. More fundamentally, it was independence itself that led to the ultimate abandonment of mixed government. Breaking the link with Britain in the first instance presented Americans with the problem of framing their own governments on the state level. Yet independence also deprived them of exactly those societal foundations on which the most successful framework that had ever been seen was built. Gone was royalty. There were no plausible candidates – or desire – for a King of Massachusetts, Queen of Virginia, or royal family of New Jersey. Gone was the nobility. While different colonies boasted leading families, colonists retained a deep-seated aversion to the kind of titled, landed class required to sustain mixed government outside the Empire. Gone, therefore, was the chance of replicating the mixed government that American patriots so prized.\textsuperscript{53}

\textit{Republican Experiments}

With mixed government no longer a plausible option, Americans turned to the one possibility that their classical education left – democracy.

\begin{footnotes}
\item[51] McDonald, \textit{Novus Ordo}, at 83.
\item[52] Bailyn, \textit{Ideological Origins}, at 274-82.
\end{footnotes}
For any but the smallest polity, this choice meant experimenting not with democracy in its pure form, on the model of Athens, but with democracy in the form of representative republics. Ominously, the same Whig political theory that taught Americans that republics were all they could realistically hope to establish also taught that republics had little realistic chance for success. Without the checks of monarch and aristocracy, republics almost always fell prey to the excess of liberty known as anarchy. But just as American society presented the problem, it also afforded a solution. America’s lack of royal families or titled nobility – in fact, its comparative lack of very rich and very poor compared to Europe (not, as few did, taking into account the enslaved) – helped insure an abundance of civic “virtue,” the critical quality that made republican experiments feasible at all. Seen as a selfless, participatory commitment to the public good, civic virtue kept liberty in check from within the hearts of citizens themselves. A virtuous sense of public spirit worked to prevent individuals from seeking self-interested goals based on religious, class, or local commitments at the expense of the whole. Europe suffered from too many of these types of factional divisions for republics to succeed for very long. But Americans, at least white male Americans, prided themselves on their relative homogeneity, what Franklin called, “a general happy Mediocrity.” Especially in the even more homogeneous context of each state, American republicans believed that they could cheat the received political wisdom and establish thirteen versions of what Samuel Adams described as a virtuous and republican “Christian Sparta.”

It followed that republics in America would have to emphasize certain political principles and downplay others. With respect to liberty, American republicans to a significant extent felt free to sacrifice the balance so critical to the English mixed constitution in favor of accountability to the democratic commons. In light of American virtue, this emphasis on democratic accountability no longer seemed fated to descend into chaos. One reason the English Constitution required balance as a means of turning power against itself was because it needed power to prevent anarchy. Sufficient virtue, however, could do much of the work traditionally set aside for power itself for checking factionalism and disorder.

Better still, reliance on virtue could avert anarchy without posing a

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54 Wood, CREATION, at 65-70.
55 Benjamin Franklin, “Information to Those Who Would Remove to America,” in Benjamin Franklin, WRITINGS 975, 975 (J.A. Leo Lemay ed. 1987).
56 Id.
57 Samuel Adams, 4 WRITINGS OF SAMUEL ADAMS 238 (Harry Cushing ed. 1908).
58 Wood, CREATION, at 150-58.
59 Id. at 65-70, 118-24.
threat to liberty in the way that trusting in power did. Americans could therefore promote liberty government as responsive to the general public as possible. As they knew better than anyone, self-government was at once a right in itself and the best means for safeguarding other rights. Power overawed liberty in their own lifetimes when a distant, unrepresentative, oligarchic Parliament, at the same time and often in the same measures, denied Americans both the right to control their own destinies and infringed on their individual rights. A virtuous self-governing people, in short, could foster only liberty, not tyranny. A New Jersey commentator voiced the common wisdom in saying, “a virtuous legislature will not, cannot, listen to any proposition, however popular, that come within the description of being unjust, impolitic, or unnecessary.” When it came to liberty, the title of a New England pamphlet put it best: “The People the Best Governors.”

American republicans also had to reconsider the role of power. They acknowledged that insuring liberty though representative government came at the expense of government power. Unable and unwilling to replicate either the monarchical or aristocratic features of the English constitution in any straightforward way, republicans realized that their own state governments would be more modest, limited, and small. Accordingly, those governments might well deliver many services and preserve order less effectively. But this was a price that republicans were willing to pay. Their own experience of energetic government as England had practiced it made Americans even more leery of government than they ordinarily might have been. Better to have a less powerful government than one capable of suspending the New York legislature, closing the port of Boston, and employing standing armies, as had the King and Parliament.

These principles became concrete in the early state constitutions, most of which in some way featured legislative supremacy with radical

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62 “Curtius,” The Political Intelligencer and New Jersey Advertiser, Jan. 4, 1786.
64 Reid, 3 CONSTITUTIONAL HISTORY at 276-81.
65 Id. at 26-27.
representativeness, magisterial impotence, and judicial enfeeblement.\textsuperscript{67}

Consider first those devices, both abandoned and embraced, that English Whig constitutionalism viewed as fostering liberty. American republicans manifested their retreat from the idea of balance by concentrating power in the legislatures. As Gordon Wood writes, “The American legislatures, in particular the lower houses of the assemblies, were no longer to be merely adjunct or checks to magisterial power, but were in fact to be the government – a revolutionary transformation of political authority . . . .”\textsuperscript{68} Virginia’s Constitution of 1776, in many ways typical of the first-generation state frameworks, provided that all legislation must arise in the lower house, empowered both houses to appoint most judges, and tacitly permitted the legislature to change the constitution by statute. Pennsylvania’s first constitution, generally seen as the most radically republican ever produced,\textsuperscript{69} went further and concentrated these and other powers in the lower house of the assembly, abolishing the upper house altogether. Not only did these initial constitutions concentrate power in the assemblies, they prevented the other branches of government, both governors and courts, from checking the legislatures.

The first constitutions consequently sought to prohibit the executive from corrupting the legislature through informal influence, commonly prohibiting any person holding government office or receiving government patronage from sitting in the assembly. More dramatically, they also removed formal checks on the legislature that the magistracy had traditionally wielded both in Parliament and in the colonial legislatures. In most states the republican governor, unlike his royal predecessor,\textsuperscript{70} could neither adjourn nor prorogue the assembly.\textsuperscript{71} Nor, more dramatically still, could he veto legislation.\textsuperscript{72}

These early constitutions also shackled the courts. They did so in large part because most American republicans at this time still viewed the judiciary with either suspicion or skepticism. Some constitutional thinkers still associated courts with the executive, the view for centuries before Montesquieu first proposed that judicial power be seen as distinct. Others did see an independent judiciary as a check on government abuse, but

\begin{itemize}
\item[\textsuperscript{67}] One important exception, to be discussed, was the New York Constitution of 1777.
\item[\textsuperscript{68}] Wood, \textit{Creation}, at 163.
\item[\textsuperscript{69}] Willi Paul Adams, \textit{The First American Constitutions} 178-80 (1980).
\item[\textsuperscript{71}] Del. Const. of 1776, art. 10; Pa. Const. of 1776, sec. 20; Vt. Const. of 1777, ch. II, sec. XVIII; Va. Const. of 1776, para. 9.
\item[\textsuperscript{72}] Del. Const. of 1776, art. 7; Pa. Const. of 1776; sec. 20; Vt. Const. of 1777, ch. II, sec. XVIII; Va. Const. of 1776, para. 9.
\end{itemize}
believed that abuse would come not from legislatures but kings or governors, which had been the dominant experience on both sides of the Atlantic during the colonial era. Accordingly, early state constitutions typically vested the appointment of judges in the assembly, as well as the power to impeach them on such elastic grounds as “mal-administration.”

No less significant were provisions bearing upon the judiciary which were not there. Most of the first generation of state constitutions failed to accord state judges either salary protection or tenure on good behavior, the 18th century term of art for life tenure. Like the early state executives, the early judiciaries effectively were subservient to the more accountable and republican legislatures.

The early state frameworks in short rejected the idea that the various government institutions that they created should check and balance one another. Instead, American republicans embraced civic accountability, which in practice meant that the democratic part of government, the lower house of the legislature in particular, should represent the people as closely as possible. American republicans therefore employed an array of constitutional mechanisms long championed by their Whig predecessors. Among these were annual elections, term limits to guarantee rotation in office, a relatively broad franchise, and even a right of localities to issue nonbinding instructions to their representatives. Not surprisingly, nowhere did the rage for representation go further than in Pennsylvania. In addition to all the other devices, that state’s first constitution did its best to make the people part of the legislative process, providing that, “[t]he doors of the house in which the representatives of. . . this state shall sit in general assembly, shall be and remain open for the admission of all persons,” that “[t]he votes and proceedings of the general assembly shall be printed weekly during their sitting,” and that “all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly.”

74 N.Y. Const. of 1777, art. XXXIII; N.C. Const. of 1776, art. XXIII; Vt. Const. of 1777, art. XXVII.
75 Ga. Const. of 1777; N.H. Const. of 1776; N.J. Const. of 1776.
76 Morgan, INVENTING THE PEOPLE, at 245-54; Wood, CREATION, at 162-73, 209-14.
78 Del. Const. of 1776, art. 15; Ga. Const. of 1777, art. XXIII; Md Const. of 1776, art. XXVII; N.Y. Const. of 1777, arts. XXIII, XXVI; Pa. Const. of 1776, secs. 8, 11; Vt. Const. of 1777, ch. II, sec. X; Va. Const. of 1776, para. 5.
79 Adams, FIRST AMERICAN CONSTITUTIONS, at 293-307.
80 Id. At 248; N.C. Const. of 1776, Declaration of Rights, art. XVIII.
Where the early constitutions traded one libertarian strategy for another, they sacrificed the traditional devices meant to assure state power. Nowhere was this clearer than in the treatment accorded the magistracy, the body that for better and often for worse wielded power most efficiently. Not only did the early constitutions prevent the governors from checking the legislature, but time and again they empowered the legislatures to check the governors. The Virginia Constitution, once more reflecting the national trend, permitted the legislature to choose the secretary of state, the attorney general, the governor’s cabinet (styled the “Privy Council”), and finally, the governor himself. Virginia republicans further sought to limit magisterial power by prohibiting the governor “under any presence, [from] exercise[ing] any power or prerogative, by virtue of any law, statute, or custom of England,” specifying a three-year gubernatorial term limit, and subjecting the governor to impeachment for “mal-administration.” Pennsylvania, again pushing the limits, simply got rid of a unitary governor altogether. In its place, Pennsylvania’s republicans created an unwieldy “supreme executive council” consisting of twelve persons directly elected by the people, but headed by a president and vice president chosen by the unicameral assembly.

In similar fashion, finally, many of the same devices that undermined judicial independence from the legislature necessarily undermined the judiciary’s effectiveness as well. Legislative appointment of judges had the natural effect of making them think twice about robustly enforcing unpopular measures. Impeachment on such vague grounds as “mal-administration” would inevitably have a similar effect. Add to this another typical grant of legislative power at this time – the ability to restrict or eliminate the jurisdiction of different courts – and the groundwork for cautious judicial branches was laid.

Enter Separation of Powers

Americans quickly discovered that their republican solutions did not work as well as they hoped. To many observers, the governments that operated under the first state constitutions had ushered in what John Quincy Adams called a “critical period,” and what others simply referred to as a
“crisis.” Of the many evils that had arisen, perhaps the most dismaying was the behavior of the legislatures. In state after state, self-interested and rapacious factions, it seemed, had managed to seize the assemblies and enact ill-advised laws that confiscated property, transferred wealth through schemes of calculated inflation, eliminated existing contractual obligations, and even limited the sacred right of trial by jury.

Most observers agreed that these and other ills arose because the American people were not so virtuous after all. In addition, many commentators predictably viewed these developments in classical republican terms and decried what appeared to be an inevitable popular degeneration into “anarchy and confusion.” Others, however, diagnosed a novel and far more troubling malady. To these individuals, the problem was not an excess of liberty, but rather that the people, through the legislatures, were doing what English constitutional theory posited as a solecism: the people were tyrannizing themselves. As Forrest McDonald observes, the reason for the crisis facing the nation, “in the eyes of many Americans, was that governments were now committing unprecedented excesses, even though – or precisely because – governments now derived their powers from compacts amongst the people.” Americans, in short, began to consider that representative self-government and rights did not always go hand in hand.

With the republican model exposed as inadequate, a number of prominent thinkers groped toward new solutions, a search that included rethinking the hitherto “relatively minor eighteenth-century maxim” of “separation of powers.” Americans had long been familiar with the doctrine through the writings of ancient Greek and Roman philosophers, English Commonwealth radicals, Locke, and above all Montesquieu. Still, the development of the doctrine in seventeenth- and eighteenth-century Europe, to say nothing of its reception in America, is an enormous, complex, and often counterintuitive topic. The often-invoked Locke, for example, wrote of legislative, executive, and “federative” power. The


87 Wood, CREATION, at 393.
88 Id. at 405-09.
89 Moses Hemmenway, A SERMON, PREACHED BEFORE HIS EXCELLENCY JOHN HANCOCK 40 (1784).
90 McDonald, NOVUS ORDO, at 154; Wood, CREATION, 409-29.
91 Wood, CREATION, at 449.
92 M.J.C. Vile, CONSTITUTIONALISM, at 120-22.
idea of a discrete “judicial power” came relatively late in the doctrine’s development.\(^{94}\)

Perhaps the best that can be said is that by the 1770s, Americans who invoked separation of powers generally agreed that the doctrine turned on three now-familiar types of governmental power: legislative, executive, and judicial. According to Montesquieu, to whom Americans usually turned, legislative power comprised the enactment, amendment, or abrogation of permanent or temporary laws; executive authority included the power to implement laws, to make peace or war, and to ensure public security; judicial power entailed punishing criminals and resolving disputes between individuals.\(^{95}\) Even here, at the core of the doctrine, these definitions did not command universal assent. Most often, discussion of governmental structure assumed rather than explicated such definitions.\(^{96}\) And beyond this imprecise core, the rest remained up for grabs – including most issues that generate modern controversy. Despite superficial similarities, separation of powers was distinct from mixed government and long overshadowed by it. In mixed government, institutions reflected different orders of society. In separation of powers, government departments were differentiated by function.

American constitutionalists nonetheless employed separation of powers early on, though mainly rhetorically. Four of the early state constitutions even included separation of powers clauses. Virginia’s was typical, providing that “[t]he legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”\(^{97}\) Perhaps the most concrete manifestation of the doctrine is one taken for granted today. In general, early republican constitutions expressly prohibited members of the legislature from holding any remunerative position elsewhere in government. They did this, as the New Jersey Constitution declared, so that “the legislative department of this government may, as much as possible, be preserved from all suspicion of corruption.”\(^{98}\)

Given their commitment to legislative supremacy, however, the states at best honored their commitment to these declarations in the breach. “What more than anything else makes use of Montesquieu’s maxim in 1776 perplexing” writes Gordon Wood, “is the great discrepancy between the


\(^{95}\) Baron de Montesquieu, THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans. 1949).

\(^{96}\) Wood, CREATION, 150-61.

\(^{97}\) Ga. Const. of 1777, art. I.

\(^{98}\) N.J. Const. of 1776, art. XX.
affirmations of the need to separate the several governmental departments and the actual political practice the state governments followed. It seems, as historians have noted, that Americans in 1776 gave only verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions."

Taking separation of powers more seriously pointed to ways of explaining where the states had gone wrong. The critique in turn sharpened many Americans’ apparently hazy conception of the doctrine. From this process a number of leading critics realized that they had placed too little faith in balance, had devoted too much attention to democratic accountability, and had given insufficient concern to the need for government power.

The most insistent critique of the early state constitutions was lack of balance among the branches. Time and again, critics of state constitutions decried their asymmetry and proposed separation of powers as a means to restore balance and preserve liberty. One early critic, Benjamin Rush, complained that the Pennsylvania Constitution insured that “the supreme, absolute, and uncontrolled power of the whole State is lodged in the hands of one body of men.” Jefferson famously sounded the same theme when criticizing his state’s constitution in Notes on the State of Virginia:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one . . . . [Government] should not only be founded on free principles, . . . the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

Despite occasional rhetorical excess, advocates of separation of powers rarely argued for keeping the three government departments absolutely distinct. Even when they did, it is doubtful whether they meant it.

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99 Wood, CREATION, at 153-54; see also Bruce P. Frohnen & George W. Carey, CONSTITUTIONAL MORALITY AND THE RISE OF QUASI LAW 96-97 (2016).
100 Id. at 441 (quoting Benjamin Rush).
with much more clarity than did the men who drafted Virginia’s original—
and effectively ignored—separation of powers clause. As Willi Paul
Adams notes, “Montesquieu, the authority used by critics, had not
advocated a separation of powers pure and simple.” 102 Likewise,
Montesquieu’s “much praised model, the British Constitution permitted
several functions to be exercised jointly or in a partially overlapping manner
by the several branches.” 103 The more sophisticated commentators
understood that governmental power needed to be separated sufficiently to
ensure that no one branch would ever again become as powerful as the state
legislatures had. 104

As it promised balance, separation of powers also reflected a
reconceptualization of accountability. Simple accountability had proven to
be too dangerous. As the Critical Period progressed, many thinkers could
agree with Aedanus Burke when he observed that “[a] popular assembly,”
framed to respond to unmediated popular will and “not governed by
fundamental laws, but under the biass [sic] of anger, malice, or a thirst for
revenge, will commit more excess [sic] than an arbitrary monarch.” 105 This
followed, others concluded, because simple accountability had also resulted
in government that was paradoxically unaccountable. Recent experience
demonstrated that radically representative legislatures fell easy prey to
demagogues, to localism, and—perhaps most importantly—to factions. It
was for these reasons that state legislatures could pass too many laws too
quickly in ways that threatened liberty. As Madison wrote in Vices,
“The short period of independency has filled as many pages as the century which
proceeded it” with ill-considered, unjust, and unrepresentative laws. 106

Separation of powers was the key to addressing these unhappy
discoveries. It could do so not by abandoning the idea of democratic
accountability, but by recasting it in such a way as to render it less
dangerous and more truly representative, or at least representative of the
people’s more virtuous selves. Proponents of the doctrine therefore tended
to worry less about attempting to replicate the populace as nearly as
possible in the halls of the legislature. Attempting this, it was declared,
would ensure that “[a]ll power residing originally in the people, and being
derived from them, the several magistrates and officers of government
vested with authority, whether legislative, executive, or judicial, are the

102 Adams, First American Constitutions, at 275.
103 Id.
104 For example, The Federalist No. 47, at 302-04 (James Madison) (Clinton
105 Aedanus Burke, An Address to the Freeman of the State of South-
Carolina 23 (1783).
106 James Madison, Vices of the Political Systems of the United States (1787).
substitutes and agents, and are at all times accountable to them.”¹⁰⁷ This more complex view of accountability meant shifting attention from such republican strategies as annual elections, local instructions, and requirements that “all bills of a public nature, shall . . . be printed for the consideration of the people.”¹⁰⁸ In their stead, it yielded such devices as direct election of the governor and upper houses of the assemblies, as well as selection of judges by some combination of elected executives and legislators.

For all that separation of powers promised as a safeguard of liberty, it also held out ways for making government power more effective, republican government’s more traditional problem. Mostly those ways pointed toward rehabilitating those offices that executed and adjudicated the laws. Here, however, the concern was not so much for achieving balance or spreading representation, but for ensuring that the government could promote order. Many Americans viewed the vices of the Critical Period as the inevitable degeneration of republics into anarchy. Some events, however, were best seen as just that. Most spectacular in this regard was Shays’s Rebellion, during which farmers in western Massachusetts rioted against state authority in 1786. The famous revolt, as Wood notes, was received with excited consternation mingled with relief by many Americans precisely because it was an anticipated and understandable abuse of republican liberty. “Liberty had been carried into anarchy and the throwing off of all government – a more comprehensible phenomenon to most American political thinkers than legislative tyranny.”¹⁰⁹

Seen this way, as anarchy, Shays’s Rebellion suggested the solution. Happily, state government had been able to restore order to western Massachusetts thanks in part to that state’s reformed and more vigorous executive. As Charles Thach puts it, concern about authority in part meant “meant a corresponding change of emphasis” and confirmed the wisdom that – contrary to the Pennsylvania approach – “the one-[person] executive is best.” It also suggested “the necessity of executive appointments, civil and military; the futility of legislative military control . . . [and the] value of a fixed executive salary which the legislatures could not reduce.”¹¹⁰ Moreover, the immediate consequence of the Rebellion led to a renewed appreciation of a vigorous judiciary. The Shaysites sent shockwaves straight to Boston in part because the object of their wrath was the local courts, which upheld the claims of creditors over rural debtors. It was to

¹⁰⁷ Mass. Const. of 1780, pt. I, art. V.
¹⁰⁸ Vt. Const. of 1777, ch. II, sec. XIV.
¹⁰⁹ Wood, CREATION, at 412.
reopen these courts that the recently empowered Governor of Massachusetts effectively marshaled the local military.

A new spate of state constitutions, most notably, the Massachusetts Constitution of 1780, put developing separation of powers principles into practice. So too, however, did New York’s earlier Constitution of 1777, a document that was ahead of its time, anticipated or even exceeded the approach later taken in other states, and, with the Massachusetts framework, is often cited as a precursor of the Federal Constitution. Both state documents, among others, displayed a profound commitment to a functional balance that was nonetheless short of a rigid, formal division.

The Massachusetts instrument, the work of such notable reformers as John Adams, stated – or to be more accurate, overstated – the new commitment in the most ostensibly formalist separation of powers clause written to that point:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and, not of men.113

This prescription meant strengthening the governor and the courts at the expense of the assembly, the lower house in particular. Unlike fellow Chief Magistrates, the governor of Massachusetts – to be styled “His Excellency” – was therefore accorded an array of protections against despotic legislative power, including express salary protection, the ability to prorogue and adjourn the legislature, and a provisional veto that could be overridden by two thirds of each house. Along similar lines, the New York governor had the authority to convene (on extraordinary occasions) and prorogue the assembly, along with a complex power to “revise” bills in conjunction with the state chancellor and judges of the supreme court to prevent laws that are “hastily and unadvisedly passed.”

In both states the judiciary also benefited. Massachusetts vested the power to appoint judges in the governor (with the advice and consent of the

111 Id. at 34-41; Prakash, IMPERIAL FROM THE BEGINNING, at 33.
112 For example, the New Hampshire Constitution of 1784.
113 Mass. Const. of 1780, pt. I, art. XXX.
114 Id. at pt. II, ch. II, sec. 1, art. I.
115 Id. at pt. II, ch. II, sec. 1, art. XIII & pt. II, ch. 1, sec. 1, art. II.
116 N.Y. Const. of 1777, arts. XVII, III.
upper house of an executive council) and granted judges life tenure.\textsuperscript{117} New York, though more modest in its protections, also accorded the governor a qualified power to appoint judges, and guaranteed that judges would serve during good behavior until the age of sixty.\textsuperscript{118}

Critically, in states both with and without newer reform frameworks, courts began to develop the doctrine of constitutional judicial review as a check on legislative excess. Virginia, Rhode Island, Connecticut, North Carolina, and New Jersey\textsuperscript{119} all played host to cases that in some way anticipated or established the idea that a court could declare a legislative act void that conflicted with a given constitutional framework. And though Massachusetts did not take part in this trend, New York did. In \textit{Rutgers v. Waddington},\textsuperscript{120} a New York City court engaged in what today would be termed constitutional avoidance by construing a state statute in a manner that conflicted with the law of nations, as incorporated into New York law by the 1777 Constitution. Successfully putting forward this position was a young New York commercial lawyer named Alexander Hamilton.\textsuperscript{121}

Among other things, \textit{Rutgers} foreshadowed not just an important new judicial power, but also a readiness to employ that power to vindicate claims under international law.

Beyond balance, separation of powers meant adopting devices that reflected a more complex conception of accountability. New York and Massachusetts did this most dramatically by rejecting legislative selection of the governor in favor of direct election by the people. The constitutions also diffused accountability within the assemblies themselves. Where a number of earlier constitutions had gone so far as either to empower the lower house to elect the upper houses,\textsuperscript{122} or to get rid of the upper houses completely,\textsuperscript{123} New York and Massachusetts confirmed the majority view by specifying that this body too would be directly elected by the people.\textsuperscript{124}

\textsuperscript{117} Mass. Const. of 1780, pt. II, ch. II, sec. 1, art. IX & ch. III, art. I.
\textsuperscript{118} N.Y. Const. of 1777, arts. XXIII, XXIV.
\textsuperscript{119} Austin Scott, \textit{Holmes v. Walton: The New Jersey Precedent}, 4 AMERICAN HISTORICAL REVIEW 456 (1899); Commonwealth v. Caton 8 Va. (4 Call) 5 (1782); Symmsbury Case, 1 Kirby 444 (Conn. Superior Ct., 1785); Trevett v. Weeden (R.I. 1786); Bayard v. Singleton 1 N.C. (Mart.) 5 (1787).
\textsuperscript{120} (N.Y. Mayor’s Ct. 1784).
\textsuperscript{121} Julius Goebel, Jr., 1 \textit{THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY} (1964).
\textsuperscript{122} N.H. Const. of 1776, para. 3; S.C. Const. of 1776, art. II; Mass. Const. of 1780, pt. II, ch. II, sec. 1, art. III.
\textsuperscript{123} Ga. Const. of 1777, art. II; Pa. Const. of 1776, sec. 2; Vt. Const. of 1777, ch. II, sec. 1.
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judges, a strategy with which state constitutions generally would not experiment for at least a generation and the Federal Constitution would reject outright.

Finally, both the Massachusetts and New York frameworks also reflected a comparative concern for efficient administration of state affairs. Given the Pennsylvania option, it is significant that these and other systems chose to retain a single person as “supreme executive magistrate” or “governor.” As noted, Massachusetts in particular greatly circumscribed the governor’s executive supremacy, especially with regard to appointments. Nonetheless, the state’s retention of a “unitary” governor reflected a fresh appreciation throughout the Republic that a single Chief Executive promoted energetic enforcement of the laws in a way that a plural executive could not. Likewise, Massachusetts, as well as New York, also provided that the governor would be “the commander in chief of the army and navy . . . and shall have full power . . . to train, instruct, exercise, and govern the militia and navy” to defend the commonwealth. If anything, New York enunciated its commitment to energy even more plainly in stating that it was the duty of the governor “to transact all necessary business with the officers of government, civil and military; to care that the laws are faithfully executed, to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature.”

Separation of Powers Realized

The developments of the previous two decades of trial and error culminated in the Federal Constitution. The document that emerged from the Philadelphia Convention lacked a separation of powers clause of the sort that many of the state constitutions had. The omission, however, could not possibly be more misleading. The gap in part probably resulted from the Constitution’s overall economy of text. Also a possible factor, the Constitution expressly “mixed” powers, which would have made the type of absolute language seen in state separation of clauses inaccurate. Whatever the reason, the background, text, structure, and discussions of the new framework make clear that separation of powers would be a – if not the – cornerstone of the new system. The lessons painfully learned on the state level would now be elaborated on a national scale. Here, too, the

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127 N.Y. Const. of 1777, art. XVIII.
129 N.Y. Const. of 1777, art. XIX.
Inventing Separation of Powers

Constitution reflected a basic concern to further balance, extend accountability throughout all the government, and ensure its effectiveness. The means toward these ends would again be a more constrained legislature, an enhanced executive, and not least, an independent and robust “supreme Court, and [ ] such inferior Courts as the Congress may from time to time ordain and establish.”

The embrace of balance, evident at the state level, again remained paramount. The Constitution, following its New York and Massachusetts predecessors, achieved this goal first and foremost by making the executive and judiciary worthy counterparts of the legislature.

One result was a “supreme magistrate [that] was truly awesome.” The Constitution accomplished this strategy by assigning to the top of each branch a range of specific, core powers. The president’s specific powers included the power to grant pardons and reprieves, to make treaties and appoint ambassadors and judges of the Supreme Court (with the advice and consent of the Senate), to fill vacancies during the recess of the Senate, to recommend measures for congressional consideration, to convene Congress upon extraordinary occasions, to receive ambassadors, to take care that the laws be faithfully executed, and to appoint and commission federal officers.

Likewise, impressive was the national judiciary, especially as none had existed before. The Constitution provided for the Supreme Court and assumed a lower Federal judiciary. It also specified a limited yet broad Federal court jurisdiction, including: cases arising under the Constitution, laws, and treaties; cases affecting diplomats; admiralty and maritime cases; controversies in which the United States is a party; controversies between two states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants from different States; and between a state and foreign citizens.

Finally, the framework assumed the power of constitutional judicial review.

The Constitution pursued balance even more directly when it provided the top of each branch with specific means of self-defense. Often, this came at the expense of accomplishing a clean division of powers. Most dramatically, the President could exercise a qualified veto over

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130 U.S. Const., art. III, sec. 1.
131 Wood, CREATION, at 521.
132 U.S. Const. art. II, sec. 2, cls. 1-3; art. II, sec. 3.
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While delegates supported the veto on a number of grounds, James Wilson stated the dominant rationale when he stated, “[w]ithout such a Self-defense the Legislature can at any moment sink [the executive] into non-existence.” Another defense mechanism that is now taken for granted is the Constitution’s express protection of the President’s salary from congressional diminution or increase. In the same manner, the Federal Convention included express salary protection for Federal judges, providing as well that they “shall hold their Offices during good Behaviour.” Further provisions specified additional protection for the President and judiciary alike in providing for impeachment as the only method of removal.

No less important, the idea of extending accountability promoted separation of powers still further. As in the states, the Constitution reflected a suspicion of simple electoral mandates as demagogic. Under the new understanding, both the executive and judiciary were able to stake their own claims as representative bodies, the better to check even the national legislature from rushing through ill-considered laws on the strength of a self-serving and distorted reliance on the popular will.

The Constitution’s strategy with the President is as well known as it is confused. As in Massachusetts, the Chief Executive would not be selected by the legislature. Yet by contrast, the Constitution rejected the option of direct popular election in favor of the elaborate and convoluted Electoral College. The Convention opted for this indirect method partly to placate the advocates of state sovereignty and partly to insure that only the most virtuous, disinterested individuals – in James Wilson’s phrase “Continental Characters” – would gain the office. As a direct function of the President’s newly enhanced accountability, the delegates also decided to give the President a hand in several powers, several dealing with foreign relations, that had originally been slated for the Senate alone. Among these included the power to make treaties and appoint ambassadors and “judges” of the Supreme Court.

Less appreciated, those Supreme Court “judges” and their lower Federal counterparts would also have an enhanced democratic pedigree, though one that would help insure that selection would not be the result of mere popular whim. The judges first of all would be nominated by the

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135 U.S. Const. art I, sec. 7, cl. 2.
136 1 RECORDS OF THE FEDERAL CONVENTION at 98 (June 4).
137 U.S. Const. art. III, sec. 1.
139 U.S. Const. art. II, sec. 1, cls. 2-3, amended by U.S. Const. amend. XII.
140 2 RECORDS OF THE FEDERAL CONVENTION at 501 (Sept. 4).
141 Id. at 498-99.
President, the one figure who could claim at least indirect election by the entire nation. Yet the Senate, the house expected to have a higher proportion of “Continental Characters,” would also have to sign off. In this way, the Federal judiciary could now claim democratic accountability through two elected branches. But precisely for that reason, it would not be beholden to either branch given that they would not necessarily have identical views on what types of jurists should sit on the Federal bench. Beyond independence, the complex nature of the Federal courts’ democratic pedigree would greatly reduce the chances that the popular will reflected in judicial selection would reflect demagoguery as opposed to deliberation.142

The Constitution’s version of separation of powers again insured that the government would respect liberty and nonetheless discharge its duties with energy. Most important here was the creation of a unitary presidency. Advocates for this position prevailed over noisy opposition, primarily with arguments that a single chief magistrate would provide the executive branch with the most “vigor[1]” and “dispatch.”143 For just these reasons, the Constitution went even beyond the Massachusetts model in granting the President further – but by no means complete – control of the military. Toward this end, the document made the President commander in chief, provided that he “shall Commission all the Officers of the United States,”144 yet kept an array of powers concerning military finance and regulation vested in Congress.145

Finally, the Constitution set the stage for a vigorous judiciary. In the main, the decisions that facilitated balance likewise furthered judicial energy. A mandated Supreme Court, an expected lower Federal judiciary, life tenure, salary protection, and implicit judicial review all militated for a court system that would efficiently meet whatever challenges it would have to face. Given the finite yet broad jurisdictional grants the Constitution allowed for the judicial branch, a robust court system would prove critical. Nowhere would those challenges be greater than in the judiciary’s authority to adjudicate cases involving international law and foreign affairs.

143 1 RECORDS OF THE FEDERAL CONVENTION at 65 (Charles Pinkney) (June 1); id. (James Wilson) (June 1).
144 U.S. Const. art. II, sec. 3.
145 U.S. Const. art. I, sec. 8, cls. 11-18.
Chapter Three: Separation of Powers in Foreign Affairs

Domestic concerns may have fostered constitutional innovation, above all, the Founding generation’s commitment to separation of powers. But it was the vices of the national system in foreign affairs that spurred the true sense of crises. Most modern writing about the Constitution overlooks the role that the nation’s failures abroad played in the lead up to the Philadelphia Convention. Still less does scholarship attempt to relate the Founders’ foreign affairs worries to their fears of majoritarian tyranny in the states. This disconnect would have stunned Madison and many of his future Federalist reformers. To them, the incapacity of the United States to conduct foreign affairs in a dangerous world made imperative the creation of a vastly stronger national government.

Yet with the prospect of enhanced national power came the threat of a truly epic tyranny on a continental scale. Fortunately, the Founders’ encounter with democratic despotism in the states gave them the tools to check power. Chief among these was separation of powers. Faith in precisely this doctrine enabled those advocating a new constitution to believe that a more powerful national government could establish not just an empire, but also an “Empire of liberty.”146 Contrary to current misunderstandings, separation of powers would apply as fully, if not more fully, to foreign affairs as to domestic matters. And as in domestic matters, a key to the system would be a robust role for an independent and vigorous national judiciary in foreign affairs.

The Disunited States

Americans learn the truths that the Declaration of Independence held to be self-evident. They do not have as firm as grasp on what it actually declared:

That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES . . . and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all the other Acts and things which INDEPENDENT STATES may of right do.147

146 Thomas Jefferson to George Rogers Clark (Dec. 25, 1780) in 4 PAPERS OF THOMAS JEFFERSON 237-38 (James P. McClure & J. Jefferson Looney eds.).
147 The Declaration of Independence para. 32 (John Dunlop Printing, Philadelphia, July 4, 1776)
The Declaration in other words announced the establishment of (at least one) new nation state as defined under the law of nations. Of the many attributes of international statehood, the Continental Congress significantly specified three. Armed with the powers to make war, peace, and alliance, the United States would be able to safeguard its national security. The nation would also be able to engage in international commerce, critical for an economy that rose or fell with trans-Atlantic trade. Finally, though less tangible, statehood would bring the pride, honor, and respect of assuming an independent and equal place among the world’s nations.

From the first, however, the new nation’s government fell short of its ends. The Declaration points the way here as well. As scholars have long pointed out, the document maintains almost a studied ambiguity as to whether it is declaring the independence of one state or thirteen. The Declaration claims to issue from “the thirteen united States of America.” Yet elsewhere it refers “one People.” Nor does the operative clause help. It proclaims that the “United Colonies” are free and independent states. But what does it mean to say that as free and independent states they may engage in foreign affairs? The phrase might mean that the new nation can do whatever other independent states can do. Or it may mean that the thirteen states will deal with the rest of the world as a unit. It might even be taken to say that the thirteen states are just that under the law of nations – thirteen entities that each may conduct foreign affairs separately.

Unfortunately, this ambiguity would prove to be more than just rhetorical. So long as the United States faced its common British enemy, the United States mustered enough cohesion to keep up the fight. With peace, the Declaration’s ambiguity manifested itself in often crippling disunity through the structure of a national government in which the domestic states that composed it gave up limited authority. This weakness notoriously crippled the nation’s foreign commerce. It so compromised national security to create a genuine threat of dismemberment. Not least, the disunity threatened the sense of pride and honor that Americans forged during the Revolution. These foreign affairs crises, far more than majoritarian tyranny at home, led nationalists to seek a genuine national

151 Morgan, INVENTING THE PEOPLE, at 54-67.
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constitution. As a leading foreign affairs scholar put it, “More than anything else, [Americans’] inability to effectively address crucial foreign policy problems persuaded many leaders that a stronger national government was essential to the nation’s survival.”

The United States acted more effectively without a formal framework during war than it would with a formal framework during peace. Few things bind a nation together more strongly than an external threat, and the new, compound republic was no exception. Confronting Great Britain enabled the Continental Congress to manage, often just barely, to keep the Continental Army in the field. That achievement in turn helped the Congress to obtain loans and conclude commercial treaties with European states, and above all conclude a treaty of alliance with France. Not least, the war helped further forge a national identity. Yet even the war was not enough to prompt the states to agree on an actual national framework until the fighting had nearly concluded. Mindful of the urgent need for such a blueprint, Congress adopted Articles of Confederation on November 15, 1777. They would not formally go into effect until March 1, 1781, with the ratification of Maryland, the last state to approve.

Often overlooked are the Articles’ genuine steps toward creating a working national government, especially in foreign affairs. Among other things, the document prohibited any state from entering into any treaty without Congress’s approval, prevented the states from levying imposts or duties in violation of treaties, and prohibited making war without Congressional approval. Affirmatively, the Articles gave Congress the power to make war and peace, receive ambassadors, make treaties, prescribe the rules relating to the taking of prizes, and grant letters of marque and reprisals, and regulate the Army and Navy. Likewise overlooked, the Articles echoed the state constitutions in concentrating power in a legislature. Of course in theory any collective body might be slower to act. Conversely, the Confederation Congress could act with even more dispatch than its state counterparts, since the Articles provided for no executive or standing judiciary to provide even a weak check.

The one nod the Articles did make to separation of powers was toward both judicial power and international law. Article IX, by far the most relevant provision, among other things set out detailed procedures for

154 Herring, From Colony to Superpower, at 102-07.
156 Articles of Confederation art. VI.
157 Articles of Confederation art. IX.
the creation of an ad hoc court to adjudicate individual boundary disputes between the states. After petitioning Congress, state parties would first “be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question.” If they could not agree, judges would be drawn by lot from a list provided by Congress, who would then “hear and finally determine the controversy . . . and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive.”

With less detail, Article IX also gave Congress the power to establish ad hoc national courts to determine “controversies concerning the private right of soil claimed under different grants of two or more States.” The Articles made no mention of the law that would resolve these controversies. Yet the principal, and in border disputes the only, rules of decision could come only from the law of nations.

But overall, the substance of the Articles reflected the states’ long hesitation in delegating powers to a national government. The first substantive provision made clear that any such delegations would be narrow, stating, “Each state retains its sovereignty, freedom, and independence, and every power, and jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” More crucial were the delegations that the states did not make. The Articles failed to grant Congress the power to pass legislation that directly bound anyone in the nation it purported to represent. Nor did Congress have the authority to levy direct taxes. Perhaps most striking, the Articles did not grant Congress the power to regulate commerce with foreign nations or among the states. David Golove and Daniel Hulsebosch aptly summarize the resulting constitutional half-way house: “Under the Articles, Congress had no taxing power. This reveals two key assumptions behind revolutionary-era notions of sovereignty: Taxation and commercial regulation were essential markers of sovereignty, but foreign policy could be coordinated without violating state independence.”

Absent the authority to legislate, tax, and regulate commerce, the best Congress could do was request that the states employ these powers themselves to promote specified national ends. As Madison would later point out, the “[f]ailure of the States to comply with the Constitutional

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158 Articles of Confederation art. IX.
159 Id.
160 Id.
162 Articles of Confederation art. II.
163 Golove & Hulsebosch, A Civilized Nation, at 954.
requisitions . . . [has been an] evil . . . so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System."\(^{164}\) As a result, the new United States proved to be incapable of safeguarding its security, its economy, and its national honor.

National security involved the highest stakes and the greatest failure. As Frederick Marks writes, "[t]he most elemental duty of the Confederation government, its very raison d’être, was the protection of the country against foreign attack."\(^{165}\) It was a duty, however, that the new government could not fulfill for two fundamental reasons. First, Congress had the authority to make treaties, but could not insure that the nation would hold up its end of any international bargain. Second, should resulting U.S. treaty violations invite foreign intervention, the national government had no means to raise a credible military force for the nation’s defense. What the system invited, events confirmed.

Despite its potential, the United States began life as an exceptionally weak nation, operating under what at the time was by definition unstable republican government, vulnerable by land and sea to such European superpowers as Britain, France, and Spain. New states susceptible to foreign encroachment, then and now, seek refuge in international law,\(^{166}\) and the United States was no exception. During the Revolution, Congress made treaties, most notably with France, to insure military victory. It also agreed to the 1783 Treaty of Paris with Britain to secure the fruits of that victory, above all British recognition of American independence. The nation’s leaders further looked to treaties and the law of nations – which today mainly refers to customary international law – to safeguard free trade across the Atlantic that was vital to the U.S. economy.

Peace, ironically, would demonstrate how the flaws of the national framework would transform essential international commitments from safeguards to threats. Nowhere was the problem more evident, or dire, than in the implementation of the Treaty of Paris ending the Revolution. The Treaty, which Congress approved while in session at Princeton, contained several favorable terms. Beyond independence itself, the United Kingdom among other things agreed to fairly expansive American land claims in the West, fishing rights off Newfoundland, navigation rights on the Mississippi

\(^{164}\) James Madison, *Vices of the Political System of the United States No. 1* (1787).
\(^{166}\) See Lee, *Making Sense of the Eleventh Amendment*, at 1033-45.
River (which nonetheless was controlled by Spain), and “withdraw all [the King’s] armies, Garrisons, and Fleets from the said United States, and from every Post, Place, and Harbour within the same.” But the British also negotiated important concessions. Though phrased in reciprocal terms, Article 4 aimed primarily to protect British interests, stating it “is agreed that Creditors on either Side shall meet with no lawful impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.” Even more pointedly, Article 5 sought to protect Americans who had remained loyal to the Crown, calling for “Restitution of all Estates, Rights, and Properties, which have been confiscated belonging to real British Subjects; and also of the Estates, Rights, and Properties of Persons resident in Districts in the possession on [sic] his Majesty's Arms and who have not borne Arms against the said United States.”

Yet insuring payment of British creditors, and still less, providing compensation for confiscated loyalist property, remained beyond the powers of the Congress that had made these commitments. As Jack Rakove notes, “Freed from the patriotic constraints that had always operated, although unevenly, during the war, the states were no longer obliged to defer to the wisdom of Congress and the overriding demands of the common cause.” Few groups, moreover, could be less popular among the constituents of state legislators than those the Treaty sought to protect. Not surprisingly, the states refused to enact laws making good on the nation’s obligations. No less surprisingly, the British cited these failures as a justification for keeping their garrisons along the nation’s northwest border, including forts at Michilimackinac, Detroit, Niagara, Point du Fer, Dutchman’s Point, Oswego, Oswegatchie, Sandusky, and Presque Isle. Not only did the British military presence remain, it increased, and included attempts to foment anti-U.S. hostility among Native Americans. In the meantime, American settlers continued to push north and west. The combination was toxic, resulted in several border confrontations, and to some observers threatened outright war.

A “Canadian Friend of the United States” captured the situation, alerting his American audience that:

Your pusillanimity in suffering Britain to retain the frontier posts –

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167 Treaty of Paris (1783) arts. 1, 2, 3, 7, 8.
168 Id. at art. 4.
169 Id. at art. 6.
the want of energy in your federal head – the contracted state of your commerce – the British reinforcing the garrisons of Canada – the many thousands of troops which were disbanded and became settlers in this province at the end of the war, and who are ready to fly to arms at a moment’s warning being tired of cutting down trees and endeavoring to cultivate unfruitful land – are circumstances which unless guarded against will rend America in pieces.¹⁷²

Such warnings were not lost on the government. No American official railed against the situation more sharply or consistently than the Ambassador to the Court of St. James. John Adams made it known that state laws preventing payment to British creditors or compensation to loyalists insured the United Kingdom’s intransigence on a host of issues, including withdrawal from the northwestern forts. “It is my Duty,” he railed to Foreign Minister John Jay, “to be explicit with my Country, and, therefore I hope it will not be taken amiss by any of my fellow Citizens, when they are told that it is in vain to expect the Evacuation of Posts, or Payment for the Negroes [i.e. slaves freed by the British without compensation to American slaveowners], a Treaty of Commerce, or Restoration of Prizes, Payment of the Maryland or Rhode Island Demand, Compensation to the Boston Merchants, or any other relief of any kind, until these Laws are all repealed.”¹⁷³

Congress, moreover, did try to respond. Significantly, one solution was a federal court that would resolve disputes under treaties and the law of nations. In one of the last Congressional attempts to propose amendments to the Articles, a “Grand Committee” among other things proposed that Congress have “the power to institute a federal judicial court . . . to which court an appeal shall be allowed from the judicial courts of the several states, in all causes wherein questions shall arise on the meaning and construction of treaties entered into by the United States with any foreign power, or on the law of nations.”¹⁷⁴ As with previous efforts, the idea went nowhere.

Greater progress along these lines paradoxically took place at the

¹⁷² *Gazette of the State of Georgia* (Sept. 6, 1787).
¹⁷³ John Adams to John Jay (May 25, 1786) in 8 WORKS OF JOHN ADAMS 394-95 (Charles F. Adams ed. 1850-1856).
¹⁷⁴ “The Grand Committee, consisting of Mr. Livermore, Mr. Dante, Mr. Manning, Mr. Johnson, Mr. Smith, Mr. Symmes, Mr. Pettit, Mr. Henry, Mr. Lee, Mr. Bloodworth, Mr. Pinckney and Mr. Houstoun, appointed to report such Amendments to the Confederation, and such Resolutions as it may be necessary to recommend to the several States, for the Purpose of obtaining from them such Powers as will render the Federal Government adequate to the Ends for which it was instituted,” art. XIX (Aug. 7, 1786), http://cdn.loc.gov/service/rbc/bdsdcc/19701/19701.pdf.
state level. Just as certain states pioneered separation of powers reforms generally, including judicial review in particular, New York – and Alexander Hamilton – demonstrated how courts could play a critical role in holding the new nation to controversial commitments under the law of nations.\textsuperscript{175} Rutgers vs. Waddington involved a claim by a patriot whose New York City brewery had been occupied by a British merchant with military authorization after she fled as the city fell to British forces in 1776. The displaced patriot owner brought suit under New York’s recent Trespass Act. Which not only allowed such a claim, but denied any defense based upon British military orders.\textsuperscript{176}

Hamilton, who represented the British merchant, argued that the law of nations permitted such a defense. He further contended that the local court had to apply the law of nations over the state statute on two grounds. First, the Articles of Confederation transferred all foreign affairs matters to the national government, what today might be called a dormant foreign affairs power argument. As he put it, “Congress have the exclusive direction of our foreign affairs, & of all matters relating to the Laws of Nations.”\textsuperscript{177} Second, the 1783 Treaty of Paris ending the Revolution implicitly adopted the relevant law of nations defense, and that treaty was supreme over state law. Finally, Hamilton asserted that the New York Constitution’s adoption of the common law included the law of nations, and that at least the latter could not be altered by statute.\textsuperscript{178}

The Mayor’s Court sided with Hamilton. Mayor James Duane’s opinion “most clearly embraced Hamilton’s argument that the law of nations operated directly on the legislature by way of Confederation law, referring repeatedly to the ‘foederal compact.’”\textsuperscript{179} For this reason, he refused to read the Trespass Act as violating the law of nations absent an express abrogation, since it would be unthinkable the legislators would knowingly violated the law of nations without some more clear indication. Again in modern terms, Duane engaged in a form of constitutional avoidance in light of a dormant foreign relations power. More importantly, Hamilton, Duane, and the widely known Rutgers illustrated how courts could usefully apply international law to vindicate individual rights even in


\textsuperscript{177} Alexander Hamilton, “The Rutgers Briefs, Brief No. 6” in 1 \textit{THE LAW PRACTICE OF HAMILTON}, at 378-79.

\textsuperscript{178} Golove & Hulesbosch, \textit{A Civilized Nation}, at 962-67.

\textsuperscript{179} Golove & Hulesbosch, \textit{A Civilized Nation}, at 963 (quoting “Opinion of the Mayor’s Court” in 1 \textit{THE LAW PRACTICE OF ALEXANDER HAMILTON}, at 413.)
the most sensitive foreign affairs cases, notwithstanding popular opinion as expressed in political branches.

American treaty and more general international law violations might not have mattered were it not for the national government’s other fundamental flaw – its inability to muster a credible army or navy. As Marks plausibly speculates, the British “might well have withdrawn in spite of American violations had they been confronted with substantial military power.”\(^{180}\) The prospect of such power, however, fell prey to other gaps in the national framework. Congress could not itself raise an army or establish a navy. Nor could it directly raise money to pay troops or sailors even if it could. Once more, the states neither deferred to Congress nor the demands of the common national cause. By 1787, the United States lacked the means to mount any credible defense. The number of troops under national control had withered to a token establishment of 700. The lack of funds and troops forced Secretary of War Knox to eliminate the departments of the quartermaster, commissary, hospital, marine, and clothier.

As a result, the nation faced containment, defeat, even dismemberment. As with Britain in the Northwest, Spain in the Southwest determined to check American expansion to the Southwest. In particular, the Spanish Ambassador Gardoqui strung along U.S. Foreign Minister John Jay concerning possible U.S. navigation rights on the Mississippi, determined all the while never to yield given American weakness. Spain and Britain augmented their efforts by encouraging Native American forces to check U.S. expansion, not that much encouragement was needed. Native efforts led to numerous deadly setbacks. Leaders such as the Six Nations’ Joseph Brant and the Creek’s Alexander McGillivray directed numerous successful raids against settler populations, with U.S. forces too thin and poorly equipped to either counter or prevent casualties that numbered in the thousands. No less dire, military weakness combined with the nation’s inability to credibly negotiate treaties to threaten the Union itself. Here Jay’s repeated failed attempts to secure American navigation rights to the Mississippi River from Spain fueled dark sectional suspicions, as Southerners accused Northerners of bargaining away the interests of settlers pushing westward from Kentucky and Tennessee in favor of the commercial needs of New England fisherman and New York merchants. These divisions, in turn, further encouraged both Spain and Britain in pursuing policies of “dividing and conquering” the increasingly disunited States in the hope that the fragile new nation would break apart.\(^{181}\)

Grave as was the state of national security, most Americans more

\(^{180}\) Marks, \textit{INDEPENDENCE ON TRIAL}, at 14.

\(^{181}\) Id. at 19-24; see also Joseph J. Ellis, \textit{THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION}, 1783-1789 84-93 (2015).
directly felt the Articles’ failure to deal with foreign commerce. As Chief Justice Marshall would later note, “[i]t may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress.”

Echoing the challenges to national security, parallel institutional deficiencies regarding commerce guaranteed corresponding economic crises.

The structural flaws soon became glaring. Congress could regulate neither foreign trade nor commercial relations among the states. This weakness first and foremost meant that the national government could not retaliate against, and still less deter, foreign trade restrictions. Lack of national trade regulation further meant that the enforcement of any commercial treaties was left to the state legislatures and state courts, features that could only make foreign governments think twice about the value of trade agreements with the United States. Finally, the Confederation’s inability to raise an effective military affected both potential retaliation and prospective treaties. As the British occupation of the Northwest forts suggested, military action could counter hostile economic measures, such as American failure to pay debts to British creditors. Likewise, a navy in particular could be an effective tool in preventing smugglers from evading duties or tariffs set out in commercial agreements. As Marks has written, “The great question, though, was how could Congress prevail upon unwilling states since it lacked both judicial and military power under the Articles of Confederation?”

Put another way, the absence of just one of the foregoing powers would be enough to prevent a nation from countering hostile trade practices. Without any, an already weak, disunited nation, heavily dependent on blue water shipping, positively invited them.

The power that took up this invitation to the most devastating effect was the United Kingdom. For all the grievances leading to the Revolution, the British Empire nurtured American prosperity. American ships dominated trade routes in which American agricultural goods would go first to other British colonies, above all the West Indies, then to Britain and back to North America. Notorious, and profitable, was the “triangle trade” in which New England would ship rum to West Africa for slaves, which would then go to the West Indies for molasses, then back to New England where it would be made into more rum. For a time, newly independent Americans thought they would remain in the imperial system. That dream

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183 Marks, INDEPENDENCE ON TRIAL, at 13.
came crashing down on July 2, 1783, when the Privy Council ordered the closing of American ships, sailors, and most profitable goods to the British West Indies. Other Orders in Council added injuries to injury. One restriction banned American ships from Newfoundland and Nova Scotia. Another imposed high duties on certain U.S. products and banned others entirely. Still one more laid open the possibility that ships from one state could not carry goods from another state to the U.K. itself.\footnote{Id. at 55-60.}

The results bordered on economic depression. American merchants, ship owners, ship builders, riggers, chandlers, rope makers, sail makers, blacksmiths, and even many farmers all endured significant decline. More generally, the U.S. balance of trade with Britain remained woefully one-sided, holding to a ratio of four to one, British imports to U.S. exports. Keeping matters bad, if not making them worse, American trade to nations such as France and the Netherlands never grew enough to offset expulsion from the Empire. American trade with Spain actually fell, thanks in large part to North African Barbary Pirates who controlled the Mediterranean.\footnote{Id. at 60-66.}

U.S. diplomats decried the situation and for good reason. As Golove and Hulesbosch point out, the new nation was often the object of diplomatic contempt from friend and foe, none more so that the British.\footnote{Golove & Hulesbosch, A Civilized Nation, at 952-62.} At the Court of St. James, Ambassador John Adams notably failed to secure a commercial treaty, which might have restored the U.S. to some aspects of imperial trade. Lord Grenville speaking in Parliament noted one of the reasons for Britain's stance, observing, "we do not know whether they are under one head, directed by many, or whether they have any head at all."\footnote{William Smith to John Jay (April 1, 1787) in 3 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 1783-89 67 (1837).} Lord Sheffield elaborated the point, declaring that:

\begin{quote}
No treaty can be made with the American States that can be binding on the whole of them. The act of Confederation does not enable Congress to form more than general treaties: at the moment of the highest authority of Congress, the power in question was withheld by the several States. ... When treaties are necessary, they must be made with the States separately. Each State has reserved every power relative to imports, exports, prohibitions, duties, &c. to itself.\footnote{John Lord Sheffield, OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES 199-200 (Sentry Press 1970) (1784).}
\end{quote}
Adams did attempt to rally the individual states to enact retaliatory trade restrictions against Britain. The collective action problem, however, always undermined any possible united front.

For just this reason, American officials and national figures also saw opportunity. Once more Adams led the way, suggesting that Congress be given the power to regulate foreign and national commerce. He soon would be joined by the likes of John Jay, Rufus King, Gouverneur Morris, and George Washington.\(^{189}\) In Congress, James Monroe pushed for reform through the Articles’ near impossible amendment process.\(^{190}\) This resulted in a report of the “Grand Committee,” the same one that proposed a national court, devoting eight out of its ten amendments to national commercial regulation.\(^{191}\) These reforms went nowhere as well. Richard Henry Lee, among others, opposed them on the ground that they simply and dangerously shifted too much power to the national government, however dire the country’s foreign trade problems. Better Congress remain, he declared, “a rope of sand than a rod of iron.”\(^{192}\) Bowed but not defeated, others decided to push outside Congress. Foreign commerce issues led directly to the Annapolis Convention, which was to propose more trade amendments yet failed to reach a quorum. From that failure came the Federal Convention in Philadelphia, which would produce a framework that went far beyond what Lee feared, but which addressed those concerns with the same doctrine – separation of powers – that emerged to counter the rise of majoritarian tyranny domestically.

\textit{Separation of Powers Abroad}

With the prospect of greater central power came the possibility of continental tyranny. And it is just here – and vastly underappreciated – that the value of separation of powers learned on the domestic front became a key to taming the stronger national government required to insure the new republic’s survival both as a viable nation and a free republic.

This connection belies at least three persistent misconceptions, one historical and two legal. The historical misunderstanding errs in treating the Founders’ commitment to separation of powers as purely a domestic story. The doctrine, to be sure, came into its own first to diagnose, and then cure, the vices of democratic despotism in the states. The idea nonetheless transcended its origins to serve as a device both to check tyrannical power and promote efficiency. As such, it was ideally suited to insuring that the

\(^{189}\) Marks, \textit{INDEPENDENCE ON TRIAL}, at 69-72
\(^{190}\) Ellis, \textit{THE QUARTET}, at 98-99.
\(^{191}\) \textit{Id.} at 86-90.
\(^{192}\) Klarman, \textit{THE FRAMERS’ COUP}, at 29.
I. The Supreme Court, Foreign Affairs, and the Founding

concentration of foreign affairs authority in a stronger national government not threaten liberty, while yet leveraging the expertise of each branch for effective foreign policy.

Not surprisingly, the two legal myths perpetuate error in direct proportion to their greater impact in the world. Both come from Justice Sutherland’s majority opinion in *United States v. Curtiss-Wright Export Corp.* 193 The first holds that the Founding demonstrates that a blob of authority understood as “foreign affairs authority” originated in the British Crown, settled by default in the Confederation Congress, then migrated to the Federal government.” While domestic powers are a careful grant from “We the People,” to be carefully construed, foreign affairs authority simply exists, either as an implicit grant from the Constitution or no sovereign nation could exist without such power. 194 The second myth flows from the first. There Sutherland asserted, or came to be understood as asserting, that the foreign affairs authority that lodged in the Federal government more specifically nested in the Executive branch unless some constitutional text made an exception.195 As federalism addresses domestic powers only, the same holds for separation of powers. Together these assertions foster a school sometimes known as “foreign affairs exceptionalism,”196 that is, the ordinary rules of interpretation that constrain constitutional powers elsewhere don’t apply when the Federal government, and more powerfully still, the President, engage in foreign affairs.

The views of the Founders are at odds with Sutherland’s assertion.197 Rather, they demonstrate that those engaged in constitutional reform simply drew no distinction between domestic and foreign affairs authority. Typical in this regard is Madison’s classic analysis of separation of powers in *The Federalist No. 48*. There he famously sets out to demonstrate that “unless the [legislative, executive, and judicial departments], though separate, be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim [of separation of powers] requires, as essential to a free government, can never in practice be duly maintained.”198 At no point, however, does he exempt powers related to foreign affairs from his consideration. To the contrary, one of the other faces of Publius, Hamilton, affirmatively discussed the propriety of combining the President and two-

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193 299 U.S. 304 (1938).
194 *Id.* at 315-19.
195 *Id.* at 319-28.
197 *But see* James P. Terry, *The Commander in Chief* 10-11 (2015) (arguing that Hamilton’s view of a strong president was used by Justice Sutherland in *Curtiss-Wright*).
198 *The Federalist No. 48* (James Madison)
thirds of the Senate in creating treaties, stressing that the virtues of the combination outweigh any concerns about concentrating the treaty power in a combination of two departments.\textsuperscript{199}

This is not to say separation of powers concerns applied exactly the same way in foreign as domestic matters. As noted, the “most dangerous branch” on the state level was clearly the legislatures, which, in Madison’s phrase, “[were] everywhere extending the sphere of [their] activity and drawing all power into [their] impetuous vortex.”\textsuperscript{200} Accordingly, the Constitution enhanced the Executive and judicial branches to curb this evil. In foreign affairs the Founders clearly thought that the chief threat to liberty would come from the Executive. That said, certain Federalists such as the Hamiltonian incarnation of Publius did famously stress the “secrecy, energy, and despatch” that the President would bring to foreign affairs in particular. Yet just for this reason, the dominant theme discussing the proposed President stressed the need to hold the new office in check. Toward that end, the new Constitution took innovative tack in here strengthening, rather than weakening, the legislature. No less important, it further enhanced the judiciary against foreign affairs encroachments by either or both.

The Constitution’s text confirms that separation of powers flourished as fully in foreign affairs as in domestic. As is almost a ritual to note, the document does not deal with the new government’s powers abroad as fully as it does at home. But contrary to advocates of foreign affairs exceptionalism, the difference is of degree and not kind. Instead, all three branches receive foreign affairs grants in rough proportion to their internal counterparts.

Article I grants Congress the following powers: to tax, among other things, for the “common Defense;” “To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;” “To constitute Tribunals inferior to the supreme Court;” “To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;” “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;” to raise “Armies;” “To provide and maintain a Navy;” to call forth “the Militia;” and to regulate the Militia.\textsuperscript{201}

These grants did not just fortify Congress in external relations; they took authority previously deemed executive and with these strengthened Congress still further. Then as now, the power to regulate national and international commerce made for a vastly more powerful central

\textsuperscript{199} THE FEDERALIST NO. 67 (James Madison).
\textsuperscript{200} THE FEDERALIST NO. 48 (James Madison).
\textsuperscript{201} U.S. Const. art. I, sec. 8.
government. But perhaps even more striking, where the Constitution generally moved domestic power to the executive, the better to check the legislature, in foreign relations important powers went in the other direction. Of these, none was more important than the Declare War Clause. Under the British and many of the state constitutions, the authority to commit soldiers or sailors to hostilities fell to the Crown or governor. The Federal Convention rejected this assignment in favor of Congress. One reason was the desire to slow the path to conflict by granting the decision to authorize entry to a collective body. Yet the Declare War Clause was also understood to be a specific separation of powers check on a Chief Executive who would also hold the title Commander in Chief. The Founding generation especially feared individuals who would rush armies into the field in pursuit of personal glory in the manner of a Caesar or Cromwell. The handling of this power demonstrated the Constitution’s application of separation of powers to allay this concern.

More terse, Article II provides that the “executive Power” be vested in a president, that the President be “Commander in Chief” of the Army, Navy, and Militia when called into national service, shall have “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;” shall appoint, with the advice and consent of the Senate, “Ambassadors, other public Ministers, and Consuls;” “receive Ambassadors and other public Ministers; and “shall take Care that the Laws be faithfully executed.”

The mere creation of a Federal Executive where none had existed before necessarily addressed many of the weaknesses that had plagued the Articles. That said, the Executive that the Constitution created was itself limited and subject to separation of powers constraints, even in foreign relations. Of the many factors that compel this conclusion, three in particular are worthy of note. First, several of the President’s foreign affairs powers were last minute additions. Through August, for example, the Federal Convention had lodged treaty-making authority exclusively in the Senate. Only after the means of selecting the president became better defined was the President given the principal role of negotiating treaties subject to Senate advice and consent. This eleventh hour shift suggests that the Founders did not view Executive power as either plenary or unconstrained unless otherwise indicated when it came to foreign affairs. Second, the actual list of granted powers fell short of the most obvious model for a robust foreign affairs executive, the British Crown. Not only

203 William Michael Treanor, Fame, the Founding, and the Power to Declare War, 82 CORNELL LAW REVIEW 695 (1997).
204 U.S. Const. art. II.
Separation of Powers in Foreign Affairs

The President share the treaty-making power, but also, as noted, the American Chief Executive was stripped of the power to make war other than to respond to attacks when Congress was not in session.

Finally, and most important, whatever else Article II’s grant of Executive power meant, it did not imply plenary foreign affairs authority unless otherwise indicated. Sometimes called the “Vesting Clause Thesis,” this idea simply had no basis in the Constitution’s text, structure, or original understanding. In the eighteenth century as today, the core meaning of “executive” meant implementing laws; beyond that agreement broke down utterly. The Constitution’s structural grants of foreign affairs powers to each of the branches belies the notion that any one enjoys an unlimited well of authority when it comes to the nation’s external relations. Most importantly, in the thousands of statements about the role of the executive in foreign affairs from independence through the Washington Administration, exactly two speakers expressly stated that a grant of executive power conveys foreign affairs power – Alexander Hamilton and New York Congressman Egbert Benson. For his part, the notably pro-executive Hamilton made the argument only in passing after defending the President’s assertions of authority in foreign affairs with respect to specific textual grants.205

Properly read, in short, Article II – including the vesting of “executive Power” in a “President of the united States” – confirms the application of separation of powers to all of the Constitution’s grants of authority, domestic and foreign.

The Judiciary

Finally, Article III vests “the judicial Power” in the “supreme Court;” extends the judicial power to Federal laws and treaties; to “all Cases affecting Ambassadors, other public Ministers, and Consuls;” “to all Cases of admiralty and maritime Jurisdiction;” and to suits between a state, “or Citizens thereof, and foreign States, Citizens or Subjects.” Notably, the Supreme Court receives original jurisdiction in “all Cases affecting Ambassadors, other public Ministers and Consuls.”206

And again, as with domestic affairs, the new Constitution assigned the anticipated new Federal judiciary a vital role, including and especially the protection of individual rights under international law. As noted, that role could have been fulfilled by state courts and state legislatures. When President of Congress Charles Thomson argued that “every state in the

205 Curtis A. Bradley & Martin S. Flaherty, Executive Essentialism in Foreign Affairs, 102 MICHIGAN LAW REVIEW 545, 679-82 (2004).
206 U.S. Const. art. III, secs. 1,2.
confederacy & every individual in every state is bound to observe it. It is a law paramount in the state so long as the state continues a member of the confederacy. The legislature have no right to interfere with it. . . . On the contrary it is their duty to remove every obstacle (if any there be) within their state to the faithful performance and observance of the treaty.  But interfere the state legislatures did, resulting in U.S. treaty violations that compromised national security.

The Constitution solved this problem simply and directly. It made all previous and future treaties “the supreme Law of the Land.” It created a “supreme Court” and anticipated a Federal judiciary. It also extended the “judicial Power” to cases involving laws and treaties as supreme Federal law. Less obviously, the Constitution also extended the courts’ authority to customary international law. Among other things, Article III’s vesting of the judicial power was understood to include the authority of judges to apply the common law. In the late eighteenth century, as in the United Kingdom today, this authority included not only the ability of courts to recognize domestic doctrines, but also rules from the law of nations and even natural law. On this view, the extension of Federal jurisdiction to “Laws” of the United States would mean not just statutes, but Federal common law, including the law of nations.

But the judicial role in foreign affairs did not end there. Article III’s other grants of Federal jurisdiction anticipated that courts would rely on the law of nations in significant part. These included admiralty and maritime jurisdiction, controversies involving one or more states, and cases involving diplomats. Of these particularly salient was admiralty jurisdiction, for several reasons. First and most important, admiralty involved prize cases – the liquidation and sale of captured vessels during hostilities under the law of nations. Few areas touched upon more delicate matters of foreign affairs and national security, as numerous early landmark decisions of the Supreme Court would illustrate. Hamilton rightly observed that such cases “so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.”

Second, the Constitution’s structure confirms the early understanding that the Federal courts were to apply the law of nations even without direct incorporation by Federal statute. This understanding follows from Article III’s grant of admiralty jurisdiction without a parallel grant to Congress to legislate in the field in Article I. In addition, the Constitution

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207 Rakove, BEGINNINGS OF NATIONAL POLITICS, at 344: Thomson, Memorandum [n.d. probably 1784 or 1785, in II CHARLES THOMSON PAPERS LC; See Alexander Hamilton to George Clinton (June 1, 1783), in 3 PAPERS OF ALEXANDER HAMILTON 367-72 (Harold C. Syrett ed.)

208 THE FEDERALIST NO. 81 (Alexander Hamilton).
in a further attempt to depoliticize prize cases declines to extend the right of jury trials to admiralty disputes. As Golove and Hulesbosch note, “the grant of admiralty jurisdiction to the federal courts--with their constitutionally guaranteed independence from the legislative and executive branches--was an important signal to European powers of the willingness and capacity of the new nation to uphold its legal obligations.”

Judicializing the enforcement of such obligations – particularly in the high stakes area of prize and admiralty – insured not only that the states would no longer undermine those obligations. It further added an initial check against the Congress and the Executive violating those obligations.

So significant were other categories that they were reserved for the Supreme Court’s original jurisdiction. States merited the honor in part because it would “ill suit [their] dignity to be turned over to an inferior tribunal,” but also because controversies between states involving rival land or border claims would require the highest command of the international law principles used to resolve disputes between sovereigns. Likewise worthy of the Court’s original jurisdiction were cases involving “Ambassadors, Consuls, and other public Ministers.” As Hamilton explained, “[a]ll questions in which they are concerned are so directly connected with the public peace, that as well for the preservation of this, and out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.”

Matters involving diplomats, once taken away from the states, might have been thought better handled by the executive on the ground of its ostensibly greater sensitivity to possible foreign affairs consequences. As in other areas, the shift to the national government reflected not just federalism concerns, but the application of separation of powers as well. Once more that meant that, where the Federal courts were properly seized of an actual case or controversy that implicated foreign affairs or international law, resolving the matter would fall to it alone rather than Congress or the President.

It fell to John Jay, the nation’s premier diplomat and soon to be first Chief Justice to capture the expected role that the Federal courts would play in the nation’s external relations. Sounding the importance of a strong central government, Jay wrote that it is “of high importance to the peace of America that she observe the laws of nations towards all [powers with whom she has treaties and other relations], and to me it appears evident that this will be more perfectly and punctually done by one national government

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209 Golove & Hulesbosch, A Civilized Nation, at 1004, 1001-10.
210 THE FEDERALIST NO. 81 (Alexander Hamilton).
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than it could be either by thirteen separate States or by three or four distinct confederacies.”212 Yet he also suggested the importance of the judiciary in separation of powers terms. “Under the national government,” he wrote, “treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner.”213 Given the Constitution’s structural assignments, the task of expounding would fall to the courts; that of executing, to the President. On this basis, Jay concluded, “[t]he wisdom of the convention, in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended.”214

212 The Federalist No. 3 (John Jay).
213 Id.
214 Id.