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CHAPTER ONE

Introduction

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 turn of 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 then 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. For its part, the Chinese Constitution, or *xianfa*, could not be raised in court. Nor were courts independent, in any case. Undaunted, however, several brave reformers would soon try, with indirect success, to defend the rights of Chinese citizens by raising the *xianfa* before judges in specific cases.¹ *Fada*, whose previous dean had defended student involvement in the 1989 Tiananmen Square demonstrations, presumably knew just what it was doing by inviting an American to share a very different constitutional tradition, one that commanded respect around the world.

After some thought, I decided *not* to start with *Marbury v. Madison*,² the great Supreme Court decision with which almost every American constitutional law course begins. Instead I selected *Youngstown Sheet & Tube Co. v. Sawyer*, the "Steel Seizure case."³ 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 lead off with *Youngstown* had in part to do with several iconic opinions. Justice Hugo Black wrote a majority opinion that is a model of what is sometimes known as "strict construction." Justice Felix Frankfurter's concurrence remains frequently cited for the idea that how the various parts of the federal government have operated over time serves as a "gloss" on the Constitution's text. Most importantly of all, Justice Robert

Jackson wrote a typically eloquent opinion that has ever since served as a classic framework for thinking about how the judiciary should resolve rival claims of authority between the president and Congress. But starting with *Youngstown* also had to do 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. 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 George W. Bush notoriously ordered the use of “enhanced interrogation techniques” on suspected terrorists, including hooding, sleep deprivation, subjection 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 antitorture 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, John Yoo, head of the Office of Legal Counsel, and Assistant Attorney General Jay Bybee (now a federal judge). 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 federal law.

Youngstown may have been eclipsed 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.⁴ 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 within the executive branch was nonetheless remarkable. Even more striking, the case was nowhere to be found in key lower court decisions after 9/11; this omission helped to uphold the executive's actions.

This conflicting picture reflected a trend that long predated *Youngstown*, a trend 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 proexecutive of the Founders, enumerated several of these in articulating what a body such as the Senate lacked: "accurate 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 either Congress or the courts, much less to marginalize them. Those attempts were made consistently only as the United States took its place as a global power, then as a superpower, and finally (for now) as a hegemon. By the early twenty-first 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 an occasional check at best, the task of reigning in what had long since become the most powerful branch of government would fall to the branch that Hamilton characterized as "the least dangerous"⁶—the judiciary. Yet decades of presidential advocacy and pressure, along with 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. Conversely, and 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 often provides those with a measure of power a theory or theories that can be transformed 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 and the Environmental Protection Agency—all with minimal control by Congress and the courts. More relevant for this study is the corollary that almost inevitably results. The president should rightly and all but unilaterally dominate decision-making in foreign affairs. These views are perhaps not surprising given that a number of these scholars 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, Heidi Kitrosser, Martin Lederman, Thomas Lee, Julian Mortenson, Deborah Pearlstein, David Rudenstine, Gordon Silverstein, David Sloss, and Beth Stephens.⁸ 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 evade easy categorization. No less prominent a figure than Justice Stephen Breyer, in his recent book, *The Supreme Court and the World*, argues forcefully but incorrectly that the judiciary over time has become a more active constraint in foreign affairs, while at the same time conceding various institutional limitations.⁹ Harold Hongju Koh, drawing on his varied career in and out of government and the academy, argues for the political branches' capacity for more principled foreign policy-making, while preserving the judiciary's capacity to serve as a check when they fall short. On one hand, the executive in particular can and has taken constitutional and international legal constraints more seriously than has been typical of late. In such cases, the need for judicial intervention correspondingly diminishes. Yet, on the other hand, courts can and should step in when the executive flouts those limitations that, among other things, are meant to preserve constitutional balance.¹⁰

It remains at least an impressionistic truth that, based upon the sheer volume of books and articles on the question, 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 direction and reorient informed discussion to take the judiciary's foreign affairs role more seriously.

That task has become painfully and obviously 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, the proclamation of an emergency on the nation’s southern border. 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, especially in foreign affairs. 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 toward a precipice.

This state of affairs would have shocked, but not surprised, the nation’s Founders. They did anticipate at least some of the forces that brought things to this point. That those forces resulted in the executive dominance we see today they would nonetheless find shocking. This is because 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 as well as 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.¹¹ In the end, neither separation of powers nor judicial authority came to be applied as fully to foreign as to domestic affairs.¹²

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 the Supreme Court rather than try to avoid it. (Chief Justice John Jay famously declined, but only because the queries did not arise in the context of a litigated case.) When the captain of the USS *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 interpretation of the federal statute authorizing the capture should not lead to the violation of international law if at all possible. When, during the same hostilities, another navy ship seized a Danish vessel, the Court again held against the nation’s armed services

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, on the grounds that the president did not have the authority to violate international law.¹³ These episodes stand in stark contrast to modern calls for the judiciary to defer to the “political branches,” and especially the president, in foreign affairs, or better, to 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 it has only grown more severe since that decision. Among the reasons for this, 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 nineteenth century with its military victory over Spain. World War I confirmed the nation’s place as a power equal to any other, however much it attempted to withdraw from that role. With World War II, the United States rose to the status of superpower, and with the fall of the Soviet Union, it became the 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, actors within the federal government 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.

We have all the more reason, then, to turn the clock backward in order to move forward. Modern concerns about the “imperial presidency” date at least, and not insignificantly, to World War II.¹⁴ Yet in foreign affairs, cold wars spiked by hot wars and succeeded by a “war on terror” have rendered the term “imperial” woefully inadequate to capture the presidency today, especially when the executive is 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 dangerous world. If so, no shortage of potential reforms exist, including electoral reform to lessen party polarization and

stalemate in Congress, reform of the Electoral College, and checks within the executive branch itself.

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

Toward that end, some initial clarifications are in order. First, this study views broadly matters that encompass foreign affairs. *Youngstown* demonstrates 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 that any dispute that raises significant foreign affairs consequences fairly merits consideration. Second, this work concentrates on the federal judiciary, with a particular focus on the Supreme Court. State court decisions 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, is apportioned among its three branches. It follows that concentration on the federal judiciary entails, for better or worse, highlighting the Supreme Court, if only because its decisions establish the framework in which the lower courts must operate. The Court has left open a surprising number of issues that bear upon foreign affairs, which means, at the very least, that the decisions rendered below demand attention.¹⁵ 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 describes 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 constitutes “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.¹⁶ Broader treatments not infrequently look further back 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.¹⁷ Looking in the other direction, many scholars, advocates, and judges view the Founding as not fully concluded until the First Congress, while

others point even later to the Jefferson administration, which sought to undo many of the constitutional practices established by his two Federalist predecessors, George Washington and John Adams.¹⁸ This study will navigate a middle course. Appreciating the Constitution's origins requires, at the very least, 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 even leave behind a particular range of understandings—through the new government's first decade and (in some instances) well beyond.

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, nondiverse elite living in a mainly agricultural society under a weak government buffeted by global superpowers have on a modern, multiracial and multicultural population in the postindustrial economy of a nation that is itself a superpower, one 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 same reasons we look to history at all. These have been captured in various phrases which are themselves clichéd: from Santayana's "Those 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."¹⁹ All capture the basic idea that consulting history can confirm solutions to modern problems that have demonstrably worked and help avoid missteps that have not.

A more specific set of reasons has to do with the Founders themselves. To the 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 accidents 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 multifaceted view of human experience. Jefferson, whatever his moral failings—and they were ghastly—could be both a leading political theorist and first-class architect.²⁰ 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.²¹

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 president in the newly reformed republic. Adams's own contributions are distinctive, but his general experience is not.²² 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, or the ultimate 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 this 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—"the People" who framed, and especially those who ratified, the framework.²³

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.²⁴ Often these distinctions become scholastic. It is 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 acquainted 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.”²⁵ 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.”²⁶

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, where history is minimized, 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.²⁷ 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.²⁸

All of which goes to part I's concentration on the Founding, starting with chapter 2's focus on separation of powers. Americans are, theoretically, 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 following the issuing of the Declaration of Independence. Previously, Americans had thought primarily in terms of the British constitution,²⁹ 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 3 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. The chapter first of all brings together two dominant accounts of the Constitution's origins that almost always pass one another like eighteenth-century frigates 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

weakness under the Articles of Confederation, especially in foreign affairs.³⁰ 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 prospects of an effective army and navy, enforcement of national treaty obligations, and the power to retaliate against foreign commercial sanctions through commercial regulation motivated just some of the reforms that created 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 constitutional text and debates together confirm that the Founders sought to divide foreign affairs powers among the three branches in the same original ways they had 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. The manner in which 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 a 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."³¹

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 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.”³² 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 that tradition has to be, and how to determine the acquiescence of the other branches.³³

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.³⁴ 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 that it developed by way of measured evolution through evolving tradition, rather than as some reflection of justice or periodic adoption of constitutional text.³⁵

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 confine it in such a way would be “to disregard the gloss which life has written upon [the text].”³⁶ 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”³⁷ within that framework might work legitimate constitutional change.

On these bases, chapter 4 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-twentieth century. Given the time frame, this account necessarily must be general, especially in light of the other matters this book covers. It therefore makes its case mainly through a consideration of certain 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 5 serves as an interlude that seeks to establish the symbolic terms of a transition that remains incomplete. By the outset of the twentieth century, America's ascendance as a major power exerted corresponding pressure on the Constitution's original conception of meaningful separation of powers applied 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. In a change of course from its early days, the Supreme Court, in particular, now featured fewer justices with diplomatic experience. 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-twentieth century, these and other factors pressured the judiciary to retreat from its envisioned role. At least a partial retreat did begin, and this 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 in best determining the Court's role in foreign affairs and its ongoing repudiation. The Supreme Court's most dramatic retreat came in *United States v. Curtiss-Wright Export Corp.*,³⁸ which has served as a manifesto for executive supremacy in foreign affairs.³⁹ With *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁰ the Court powerfully recommitted to maintaining the historic role of Congress and the judiciary. So frequently do opponents cite each case that what the decisions say, and why they say it, has become obscured. This chapter attempts to recover their deeper significance, the better to understand the as-yet failed constitutional transformation.

Chapter 6 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 midcentury, World War II, 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 (not least in the face of executive assertions), much to its later regret. Yet, for the most part, it has shown itself capable, sometimes dramatically so, of protecting individual rights, applying international law in claims made against the several states, resisting congressional overreach, and, above all, checking executive aggrandizement. In the end, the survey of constitutional custom falls short of showing constitutional demotion of the 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 will 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 in this regard. 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.⁴¹ How does the way that these and other states conduct foreign affairs 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 (while legislatures are even more dramatically marginalized). 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.⁴² 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 7 looks to what Anne-Marie Slaughter has termed the real “New World Order.”⁴³ 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, and the Bahamas, for example, are principally the irreducible units. Recent thinking emphasizes that instead, international relations more and more consists of executive, legislative, and judicial officials directly 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.⁴⁴ 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 8 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, meeting modern demands, such as the need for global regulation and the challenge of global terrorism. Perhaps surprisingly, the judiciary follows next, as judges share views in face-to-face meetings and in mutual citations from abroad. Collective-action problems, among other factors, ensure 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 several broad categories: cases that require determining whether some aspect of foreign affairs precludes the courts from hearing them in the first place; cases for which (if they are in fact admitted) it must be determined 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, part IV offers additional support for decisions in which the judiciary has remained faithful to its role, pointed critique for judgments that signal its retreat, and direction in areas where it appears wavering at the crossroads.

Chapter 9 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 that remains insufficient to undo entrenched constitutional understandings. Among these are standing requirements, the “state secrets privilege,” and the so-called political question doctrine, among others.⁴⁵ 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 10 undertakes much the same task regarding foreign affairs matters that arise once a case has been accepted for review. Here, easily the most threatening potential wrong turn has concerned potential judicial deference 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. This chapter relies throughout 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 11 concludes the survey of contemporary issues by considering a phenomenon that has consistently been among the most contentious of modern legal controversies—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 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—including 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 legislative branch. The executive's advantages, moreover, may be even more ominously robust than Jackson supposed, and not just because of the nature of modern international relations. The combination of aggressive executive and supine Congress has for some time reached into the composition of the Supreme Court itself. Typical among recent appointments are candidates with executive branch experience and an ensuing commitment to judicial deference to the president, especially in foreign affairs. Thanks to the Trump administration pressing the Senate's own deference to the full, Justices Neil Gorsuch and Brett Kavanaugh have become only the most recent and obvious examples. In this light, reliance on a revived judiciary to restore any balance seems no less forlorn as relying on 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. So pressing could the foreign affairs assertions of the president become, especially when backed by Congress, that even Jackson could elsewhere argue that sometimes it might be better for the Court to stand aside rather than ratify an unconstitutional action. Exactly that fear was realized when a majority of the

justices effectively approved Japanese-American internment. This volume ends with the argument that several powerful factors mitigate this concern. The life tenure that justices enjoy can lead to a measure of independence. Serving in the judiciary can likewise inspire institutional loyalty. Turning to the courts domestically can lead to complementary proceedings in international institutions, what Harold Hongju Koh calls “transnational legal process.”⁴⁶ Finally, the prospect of some constraint is, at the end of the day, better than the certainty of no constraint at all. In part for these reasons, the modern Court has shown itself capable of keeping alive the hope that it can reclaim its historic role as a check even and especially in foreign affairs. So too did *Youngstown* itself advance this aspiration by providing later justices a framework and example.

This volume aims to keep that hope not merely alive and well but compelling. To the extent that the hope is realized, the judiciary will do more than regain its role within the United States. It will also again serve as an inspiration beyond the nation’s borders, wherever lawyers, judges, and citizens struggle to defend fundamental rights through the rule of law, whether in Venezuela, Turkey, Russia, Hungary, Egypt, Cuba, or, indeed, in China.

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