AN INDIRECT ARGUMENT FOR LIMITING PRESIDENTIAL POWER

THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11. BY JOHN YOO. THE UNIVERSITY OF CHICAGO PRESS, 2005.

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During his confirmation hearings before the Senate Judiciary Committee, then-Judge Samuel Alito was asked by Senator Joseph Biden whether he agreed with the central claims in Professor John Yoo's book *The Powers of War and Peace*.[1] Biden, after quoting excerpts from the book and saying that "informed, intelligent" people were familiar with Yoo's argument, asked Alito, "Do you think the President has the authority to invade Iran tomorrow without getting permission from the people, from the United States Congress, absent him being able to show there is an immediate threat to our national security?"[2]

Judge Alito, when pressed, answered, "I have not read Professor Yoo's book . . . ."[3] Later, on the Senate floor, Biden stated:

> I will vote no on the nomination of Judge Alito to the Supreme Court for three reasons: first, his expansive view of executive power . . . .
>
> I asked Judge Alito whether he agreed with Professor Yoo's reasoning that would allow the President under his absolute power—even in the absence of an emergency or imminent threat—to invade another country, to invade Iran tomorrow, no matter what Congress says.

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

2. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 598 (2006) [hereinafter *Hearing*] (statement of Sen. Joseph Biden).

3. *Id.* at 599 (statement of Hon. Samuel A. Alito, Jr.).

> Judge Alito declined to answer this basic, fundamental question.[4]

Few books can reasonably be used to justify voting against a potential Supreme Court Justice's confirmation. Yoo's book, however, is not ordinary. Its claims of broad presidential powers are, to put it mildly, provocative. Moreover, its timeliness contributes significantly to its divisiveness. The United States is engaged in military action across the globe. "Enemy combatants" have been captured and are being held in executive detention. Allegations of "domestic spying" by the National Security Agency are featured on the front pages of the nation's most widely circulated newspapers, with some in Congress even calling for President Bush's impeachment.[5] These factors make *The Powers of War and Peace* so politically toxic that Alito's failure to reject its premises out of hand was, for many, "radical."[6]

The jury is still out on Yoo's version of constitutional history. The historical underpinnings for his claims of broad executive power have been and will continue to be vigorously debated.[7] At the very least, one must acknowledge, as Senator Biden did, that Yoo "is a very bright guy."[8] However, to focus solely on the foreign affairs implications of Yoo's book would be a mistake. Implicit in *The Powers of War and Peace* is an indirect argument for more limits on domestic presidential power. Moreover, since the President's domestic powers are intertwined with the powers of Congress and those of the judiciary, this

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4. 152 CONG. REC. S337 (daily ed. Jan. 31, 2006) (statement of Sen. Joseph Biden).

5. *See, e.g.*, Jim Puzzanghera, *Fueled by Warrantless Wiretapping, Impeachment Talk Is Getting Louder*, SAN JOSE MERCURY NEWS, Jan. 22, 2006, at 6A (noting that Rep. John Conyers and Sen. Barbara Boxer were openly discussing the possibility of impeachment).

6. *Cf., e.g.*, Nat Hentoff, *The Imperial President: Bush's Assault on Our Freedoms*, WASH. TIMES, Jan. 30, 2006, at A19 ("[D]oes the President agree with . . . Yoo [that] . . . 'The centralization of authority in the President alone is particularly crucial in matters of national defense, war and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch[?]' This radical revision of the Constitution is echoed to this day by this administration." (quoting a Sept. 25, 2001 Department of Justice memo authored by John Yoo)).

7. For recent examples of scholarship that disagrees with Yoo's positions, see Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005). As Yoo has been making these arguments in academic journals for many years now, a plethora of articles have been published that touch upon his views.

8. *Hearing*, *supra* note 2, at 597 (statement of Sen. Joseph Biden).

indirect argument for a more restricted domestic President, if accepted, would necessarily require limiting a great deal of the federal government's power over domestic issues.

In this book review, I begin by setting out Yoo's presidential foreign affairs powers argument, and then I briefly explain why his historical observations might not be accurate. I then present a counterargument that, even if Yoo's history is right, that history might not be sufficiently relevant to support his presidential foreign affairs powers argument given the massive expansion of federal power since the Founding. The Framers might have only entrusted the President with broad foreign affairs authority on the condition that the President's domestic powers would be carefully limited, but subsequent events may have undermined that necessary predicate. If one views the Constitution as a contract, then the modern expansion of the President's domestic powers may require greater limits on the President's foreign affairs authority. However, I will show that this counterargument against Yoo's originalism is critically flawed because, even if the President's domestic powers have increased in ways that the Framers could not have foreseen, it does not follow *a priori* that the President's foreign affairs powers should be limited in response to these developments.

Finally, I will demonstrate that, in addition to making a direct argument for robust presidential foreign affairs authority, *The Powers of War and Peace* makes an indirect argument for narrowing the President's domestic powers. If Yoo's historical claims are accurate and the counterargument about the relevancy of his claims is flawed, then in order to avoid an overly powerful President, it might be necessary to cut back on the President's domestic powers. To do that, however, would require dramatically rethinking a great deal of modern constitutional law. Nonetheless, suggesting such a dramatic rethinking might be precisely what Yoo intends.

I. YOO'S PRESIDENTIAL FOREIGN AFFAIRS POWERS ARGUMENT

The Powers of War and Peace is about more than just war. It is an attempt to comprehensively explain, as a matter of original understanding, the Constitution's entire foreign affairs apparatus. Yoo tackles issues such as whether the founding generation understood treaties to have direct domestic effect, whether international law was understood to be binding, the process by which the nation was supposed to withdraw from treaties, and

the role Congress was to play in beginning, regulating, and ending international conflicts. Based on his assessment of the historical record, Yoo argues that the presidency ought to have broad foreign affairs powers today.

Yoo's central claim is that, as originally understood, there was a common thematic element in how the Constitution was to direct the complex drama of American international involvement. As he explains, this commonality was the notion that flexibility is needed in foreign affairs:

> While the bulk of the foreign affairs power was vested in the executive, the legislature retained control over the domestic effects of these decisions through its control over legislation and funding. Courts did not play a significant role. This was a flexible system for making foreign policy in which the political branches could opt to cooperate or compete. The Constitution did not intend to institute a fixed, legalistic process for the making of war or treaties. [9]

Yoo contends that because of the unitary nature of the executive office, the Framers believed that the President could most easily adapt to quick changes in the international landscape. Thus, the President was given the bulk of the government's foreign affairs authority. However, where decisions about foreign affairs melt into domestic decision making, it was understood that Congress must have the final say.

Yoo makes a number of bold claims in elaborating on this central argument. First, he contends that "flexibility means there is no one constitutionally correct way for waging war. The President need not receive a declaration of war before engaging the U.S. armed forces in hostilities."[10] Second, "[a]s to treaties, the President, not Congress or the courts, has the primary initiative to make, interpret, and terminate international agreements . . . ."[11] Third, "[t]reaties may not automatically regulate matters within the authority of the Congress or the states under our constitutional framework."[12] Fourth, "congressional–executive agreement[s], as applied to subjects under Congress's exclusive constitutional authority, tend to preserve Congress's role in regulating

9. YOO, *supra* note 1, at 8.
10. *Id.*
11. *Id*. at 8–9.
12. *Id*. at 9.

those areas, rather than ceding them to the executive branch."[13] Fifth, "Article I . . . gives [Congress] a blocking role in treatymaking. By withholding . . . legislation or funding, Congress can prevent a treaty from taking domestic effect."[14] Sixth—and this list is not exhaustive—the President can "violate international law in the national interest."[15]

In order to support such controversial contentions, Yoo focuses on an originalist view of the Constitution, with extensive assessment of the Constitution's text, its primarily British roots, its structure, and the practices since the time of the Founding. Yoo also points to more modern examples as evidence that the flexible scheme that the founding generation purportedly intended is still alive and well. Frequently, Presidents authorize military actions without preceding acts of Congress.[16] Presidents interpret and disregard treaties relatively regularly,[17] and the Supreme Court almost never gets involved in foreign affairs.[18] Yoo writes: "the unsettled nature of foreign affairs does not arise from a systematic defect in the constitutional regime . . . but instead is its conscious product. . . . The deepest questions of . . . foreign relations law remain open because the Constitution wants it that way."[19]

Consider Yoo's assertion that the President was originally understood to be able to freely deploy the military, subject only to congressional power to raise and fund the army. To support this position, Yoo focuses on the British model of foreign affairs that existed at the time of the founding.[20] He argues that under the British approach, the executive initiated and conducted conflicts, while "the legislature primarily played a role by funding the wars . . . and impeaching ministers."[21] As one would expect, "a dense network of 'subconstitutional' understandings" between the branches developed.[22] This is the political model that Yoo believes the United States has adopted.

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13. *Id*.
14. YOO, *supra* note 1, at 167.
15. *Id*. at 164.
16. *See id*. at 12.
17. *See id*. at 14.
18. *See id*. at 9.
19. YOO, *supra* note 1, at 11-12.
20. *See id*. at 31.
21. *Id*. at 32.
22. *Id*.

For additional evidence, Yoo looks to the pre-1789 practices of the states and the Continental Congress. "[T]he common practice of the states either assumed that the governors had broad warmaking authority, or explicitly gave them such power in terms reminiscent of the British constitution . . . ."[23] Only South Carolina "decided to rein in the warmaking powers of the executive . . . . Unlike her sister states, South Carolina required formal legislative approval of the executive's decisions on war . . . ."[24] However, this is the exception that proves the rule because "if the revolutionary Americans commonly believed that a legislative endorsement was necessary for war, then South Carolina's constitution would simply have remained silent . . . ."[25] Moreover, "[i]f the Framers had wanted to prevent the President from commencing war without . . . approval . . . they could have adopted a provision [like] South Carolina's . . . . [They] did not."[26]

Yoo also contends that the Articles of Confederation support his view because they explicitly "prohibited state military action without a declaration of war. . . . If the [Founders] had wanted to prohibit the President from initiating hostilities . . . they could have borrowed" that language from the Articles and included it in the Constitution.[27] Further, the Articles permitted the national government to initiate hostilities without a declaration of war.[28]

Next, Yoo turns his attention to the Constitutional Convention and the state ratifying conventions (and the accompanying press debates, including both the Federalist Papers and leading anti–federalist publications). Yoo notes that, "[w]hen discussing both the Declare War Clause and the treaty power, delegates expressed skepticism concerning the ability of a popular body [i.e. Congress] to represent . . . the best interests of the nation."[29] From his analysis of the ratification process, he concludes:

> The Framers were not dupes; they remained fully aware of the dangerous possibility that a President might prolong war in order to expand his own political power. Nonethe-

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23. *Id*. at 65.
24. YOO, *supra* note 1,at 72.
25. *Id*.
26. *Id*.
27. *Id*. at 77.
28. *Id*.
29. YOO, *supra* note 1, at 77.

> less, the Framers maintained that if Congress wished to challenge presidential warmaking, it has to turn to "the more disagreeable mode, of negativing the supplies for the war."[30]

Yoo also looks to the nation's post-ratification practices to support his argument for broad presidential foreign affairs power. There are no coherent patterns or clear rules for when a declaration of war is necessary, and the courts tend to stay out of the way. He marshals similar originalist arguments to support many of his other foreign affairs claims.

Yoo openly concedes that his presidential foreign affairs powers argument is at odds with some of the nation's leading academics. He notes that the "dominant" understanding of the original foreign affairs powers would require a declaration of war before the President could send troops into conflict, absent some immediate threat to national security, and that the courts should have an active role in policing the boundaries between Congress and the President.[31] Based on the foregoing analysis, he believes that this "dominant" view is incorrect. No clear answer has emerged as to who is right, but a strong argument can be made that Yoo is wrong. As the recent debate between Professors Michael Ramsey and Martin Flaherty demonstrates, the historical question is a difficult one.[32] It is, in fact, quite likely that the founding generation had conflicting conceptions of executive power, with no single commonly held view of what powers Article II granted. This lack of historical consensus would complicate matters even further.[33]

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30. *Id*. (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 548 (Max Farrand ed., 1911)).

31. *Id*. at 5–7.

32. *See* Martin Flaherty, *The Most Dangerous Branch Abroad*, 30 HARV. J. L. & PUB. POL'Y 153 (2006); Michael D. Ramsey, *The Textual Basis of the President's Foreign Affairs Power*, 30 HARV. J. L. & PUB. POL'Y 141 (2006). Both of these articles are derived from the talks given at the 2006 Federalist Society National Student Symposium.

33. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057–62 (2005) (noting that there is "significant debate" and conflicting evidence on this question and that although "it seems clear that Congress need not issue a formal declaration of war in order to provide its full authorization for the President to prosecute a war . . . one could argue, based on political branch practice since the Founding, that a force authorization is *necessary* to so authorize the President").

II. THE "ORIGINALISM IS IRRELEVANT" COUNTERARGUMENT

However, assume for the sake of argument that Yoo's historical claims are right. What if the President, as originally understood, could unilaterally withdraw the United States from treaties and ignore international law? Or, hearkening back to Senator Biden's comments, what if the original understanding was that "the President [could] invade [a country] without getting permission from . . . Congress, [even if he or she is unable] to show . . . an immediate threat," subject only to Congress's cutting appropriations or exercising its powers of impeachment?[34] If Yoo's historical claims are correct, what are the implications for us today?

It is tempting to assert that, regardless of how the Constitution was originally understood, it cannot mean that anymore. But this reaction may not be viable. After all, "[t]he difference among academics, for the most part, has been over how much deference to provide the Framers, not whether to provide any deference at all."[35] It is possible to "lie"[36] about the original understanding of these clauses, but that lie will face scrutiny as foreign affairs questions arise ever more frequently in an increasingly global society. If Yoo's historical claims are correct, a constitutionally legitimate reason must be given to completely set aside his presidential foreign affairs powers argument, and bare postulation is not enough.

However, it may be entirely appropriate to disregard Yoo's presidential foreign affairs powers argument, even if he is factually correct about the original understanding. To understand why, it is necessary to reexamine constitutional first principles. If we consider the Constitution to be a contract,[37] complete with

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34. *Hearing*, *supra* note 2, at 598 (statement of Sen. Joseph Biden).

35. *Id*. at 25.

36. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) ("But in the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing . . . .").

37. *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998) ("The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist, if not necessarily textualist, interpretation by the judicial branch. Otherwise a pack of lawyers is changing the terms of the deal, reneging on behalf of a society that did not appoint them for that purpose. This is not a controversial proposition. . . . [T]he Constitution was designed and approved like a contract. It is sound dispositionally: it is the political theory the man in the street supplies when he appeals to the Constitution . . . .").

the give and take that contractual compromises normally entail, one could argue that the Framers—ever attentive to the allocation of powers—only gave the President this expansive foreign affairs authority because the scope of the presidency's domestic powers would be limited. Subsequent and unforeseeable changes, however, have undermined that predicate. Therefore, the broad foreign affairs powers granted to the President should be withdrawn because the initial allocation of power was premised on a carefully configured conception of the aggregate powers of the presidency that is simply no longer apt.

Yoo's historical discussion amply demonstrates that the Constitution was a compromise, or, more precisely, a collection of many compromises. There were bargains between large and small states, between slave and free states, and between manufacturing and agricultural states. Some states were more concerned about security than others, particularly those that bordered on foreign holdings.[38] In short, the Constitution was a series of deals.

A common theme for the Framers, however, was suspicion about granting both too much power to the federal government vis–à–vis the States (the vertical allocation of powers) and granting too much power to any one branch of the federal government (the horizontal allocation of powers). The Constitution set up enumerated powers and checks and balances to protect both of these great interests. Power was not given to the federal government without a strong showing of need, and that granted power was generally divided among the three branches.[39] In light of these fundamental concerns, it seems likely that the Framers would only have allocated such broad foreign affairs powers to the President if, after careful consideration, they had concluded that the marginal benefits of that

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38. YOO, *supra* note 1, at 88–106.

39. As Judge Luttig wrote of the founding generation: "We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves." Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 825–26 (4th Cir. 1999) (en banc), *aff'd. sub nom.* United States v. Morrison, 529 U.S. 598 (2000). This statement illustrates the Constitution's contractual nature, the Framers' fears of central authority, and the Framers' attention to divided federal powers.

particular allocation of power substantially outweighed its marginal costs.

Why might the Framers have concluded that the marginal utility of this allocation was substantial? There were obvious benefits to be realized by interacting with other nations. For the nation's security, it was possible to enter into treaties with other nations for mutual defense. After all, without the aid of France, the American Revolutionary War may well have turned out differently. In terms of commercial advantage, the benefits of international trade were plain.

The only way to realize these gains, however, was to be able to interact credibly with the rest of the world, either by agreement (which requires the power to effectively enter into treaties) or threat (which requires the power to effectively wage war). Yoo shows that an important impetus for writing and ratifying the Constitution was to remedy defects in the Articles of Confederation's foreign affairs scheme. For instance, "[c]ontroversy over the Jay-Gardoqui negotiations threatened the dissolution of the Union . . . [by] reveal[ing] . . . shortcomings in the way that the Articles of Confederation distributed the treatymaking power."[40] Thus, it was sensible to give exclusive foreign affairs power to the federal government.

At the same time, the marginal costs of exclusive federal foreign affairs powers were relatively low because, by their very nature, foreign affairs powers initially and most directly affect those outside the domestic sphere. For instance, although a presidential order to seize foreign merchant ships may have indirect domestic effects, such as retaliation by foreign states, abusing that power would be less dangerous than giving the President unilateral power to seize domestic property. Both are risky, but the impact of the former on the citizenry is more attenuated.[41] Thus, the vertical allocation of power may have been of relatively little concern.

Although the potential benefits of an exclusively federal foreign affairs regime were apparent, questions likely remained over how such powers should be allocated between branches

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40. YOO, *supra* note 1, at 78.

41. *See* Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1824–25 (2006) (noting that the Framers were especially wary of potential internal threats, hence the Constitution's two year appropriations limitation for the army, but that, for things that were primarily external, like the navy, the Constitution afforded the President more latitude because there was less danger to domestic liberty).

of the federal government. Should the powers be given broadly to the President, or, as in the domestic context, should the power be shared with Congress and subject to judicial involvement? There is a reasonably good case for the former option. Yoo observes that in the field of foreign affairs, there is great advantage to empowering a single decision maker. The President has a "functional superiority in acting swiftly, secretly, and with unity."[42] As Alexander Hamilton noted, "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[43] Such attributes might have been deemed necessary for effective interaction in the topsy-turvy world of international relations.

But would the marginal harm of giving such broad foreign affairs powers to the President outweigh the marginal benefit? Not necessarily. As the federal government would be one of limited, enumerated, and internally checked powers, and as the President would execute, rather than create, domestic law, the risk of a President misusing this foreign affairs aspect of the executive office might have been thought to be relatively small because the federal government's range of permissible activities was relatively narrow. Since domestic issues make up the bulk of all government action, giving the President broad foreign affairs authority would not risk creating an overly powerful President: the aggregate of presidential power would still fall within an acceptable range.

Yoo also notes that the Framers may have been wary about giving Congress too much authority over foreign affairs. Their concern was that, in an emergency, the Senate, made up of state-appointed individuals, might sacrifice the interests of the nation in favor of regional interests. The presidency, however, was designed to be office that would represent the nation as a whole.[44] This might also have affected the Framers' marginal cost analysis.

Finally, Congress was empowered with limited checks on this presidential power, though these checks would be politically difficult to exercise. Congress could decide whether to

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42. YOO, *supra* note 1, at 15.

43. THE FEDERALIST No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

44. YOO, *supra* note 1, at 96.

raise an army at all, and, if such an army was raised, whether to fund it and to what degree. If the President still would not yield to the will of Congress, the awesome power of impeachment always lurked in the background. Though these checks were less powerful than those in the domestic context, they would still have been relevant to the calculation of marginal costs. Therefore, in 1789, it might have made sense for the Framers to grant these foreign affairs powers primarily to the presidency.

As discussed below, however, the President's domestic powers have grown dramatically since the constitutional bargain was struck. Thus, one might argue that because the founding generation's understanding of the total package of presidential powers no longer fits the facts, the original deal may no longer apply. If expansive foreign affairs powers were entrusted to the President on the condition that the President's domestic powers would be carefully limited, the failure of that condition may mean that the broad foreign affairs powers should be limited or withdrawn. Under this theory, Yoo's scholarship would be historically interesting, but doctrinally irrelevant.

A. The Growth of Domestic Presidential Power

Before one can begin to accept this "originalism is irrelevant" counterargument, one must analyze whether the President's domestic powers have, in fact, qualitatively increased since the founding. First, the President's 'pure' executive powers have expanded. The President is more powerful now than at the time of the Founding in part because there is more federal law to enforce.[45] The President, charged with executing the law, simply has more to do. The federal government is also much larger, providing the President with more tools to use. Moreover, execution of the law, by its very nature, involves discretion, as the President decides how to most effectively allocate the finite resources available to the executive branch.[46] More

45. *See, e.g.*, Lynn N. Hughes, *Don't Make a Federal Case Out of It: The Constitution and the Nationalization of Crime*, 25 AM. J. CRIM. L. 151 (1997) (noting increasing number of federal criminal laws); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 631 (1989) (observing that increases in the amount of federal law have caused that "the proportion of state supreme court decisions involving federal law more than three-fold between 1959 and 1979").

46. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2003) ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial

federal law, with more federal employees and more money, means more presidential discretion,[47] and hence more presidential power. However, this increase in the domestic presidential power would probably not have surprised the Framers. As long as the laws to be executed are within the sphere of federal power that the Constitution was understood to allocate, such growth of executive authority would have been foreseeable.

But there have been unexpected developments along the way too, such as the "rise and rise" of the administrative state,[48] the demise of the non-delegation doctrine,[49] and the related emergence of the *Chevron* doctrine.[50] These changes have expanded the President's power over domestic policy.[51] For our purposes, whether these developments are good or bad is beside the point; they evidence arguably unforeseeable increases in domestic presidential power.

This increase in domestic presidential power has also been complimented by increases in congressional power. In a world where the Commerce Clause provides very little substantive

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action." (quoting Mistretta v. United States, 488 U.S. 361, 417 (Scalia, J., dissenting) (1989))).

47. For an example of how the executive's spending permits policy choices, see Debra A. Millenson, *Whither Affirmative Action: The Future of Executive Order 11,246*, 29 U. MEM. L. REV. 679 (1999).

48. *See* Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

49. *See id*. at 1240 ("The . . . Court has not invalidated a . . . statute on nondelegation grounds since 1935. This has not been for lack of opportunity. The United States Code is filled with statutes that create little Goodness and Niceness Commissions—each confined to a limited subject area such as securities, broadcast licenses, or (my personal favorite) imported tea. These statutes are easy kills under any plausible interpretation of the Constitution's nondelegation principle. The Supreme Court, however, has rejected so many delegation challenges to so many utterly vacuous statutes that modern nondelegation decisions now simply recite these past holdings and wearily move on.").

50. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). It should be noted that *Chevron* creates disincentives for delegation: "*Chevron* serves as a market mechanism that puts a price on delegation, thereby deterring Congress from [delegating too much authority]." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 864–65 (2001).

51. *See, e.g.,* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) ("Faced . . . with a hostile Congress . . . [President] Clinton . . . turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals . . . . Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central object of the White House was to devise, direct, and/or finally announce administrative actions . . . to . . . advance presidential policies.").

restraint on Congress,[52] the President can significantly affect matters that were traditionally left to the States. For example, in *Gonzales v. Oregon*, the Supreme Court decided that the Bush Administration overstepped its bounds by construing and enforcing a federal law to prohibit Oregon from allowing doctor–assisted suicide, an issue that the Framers presumably would have considered to be within the States' domain of power.[53] But the *Gonzales* Court was far from unanimous, with the dissenters making *at least* a credible argument that, under current constitutional doctrine, the executive is empowered to act as the Bush Administration did.[54] Since the issue was one of statutory interpretation and not constitutional principle, the Court accepted that Congress could give the President that power, particularly given the outcome of another case, *Gonzales v. Raich*, decided in the previous Term.[55] The Court's only concern was whether Congress actually had made such a grant of power to the President in this instance.[56] Whether an expansive reading of the Commerce Clause coupled with *Chevron* deference is good or bad is also not at issue here; the point is that the Presi-

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52. *See* Gonzales v. Raich, 545 U.S. 1 (2005).

53. *See* Gonzales v. Oregon, 126 S. Ct. 904 (2006).

54. *See id.* at 926 (Scalia, J., dissenting joined by Roberts, C.J., and Thomas, J.) ("[T]his case involves not one but *three* . . . sufficient grounds for reversing . . . . First, the Attorney General's interpretation of 'legitimate medical purpose' . . . is clearly valid, given the substantial deference we must accord it . . . . Second, even if this interpretation . . . is entitled . . . no deference at all, it is . . . the most natural interpretation of the Regulation . . . . This interpretation is thus correct even upon *de novo* review . . . . Third, even if that interpretation of the Regulation were incorrect, the Attorney General's independent interpretation of the *statutory* phrase 'public interest' . . . and his implicit interpretation of the statutory phrase 'public health and safety' . . . are entitled to deference under *Chevron* . . . .").

55. *Raich*, 545 U.S. 1.

56. *Compare Oregon*, 126 S. Ct. at 925 ("The text and structure of the [Act] show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it."), *with id.* at 939 (Scalia, J., dissenting) ("The Court's decision today is perhaps driven by a feeling that the subject of assisted suicide is none of the Federal Government's business. It is easy to sympathize with that position . . . . [But] the question before us is not whether Congress *can* do this, or even whether Congress *should* do this; but simply whether Congress *has* done this in the CSA."), *and id.* at 941 (Thomas, J., dissenting) ("The relevance of [federalism] was at its zenith in *Raich* . . . . [H]ere, we are merely presented with a question of statutory interpretation . . . broad, straightforward language within a statutory framework that . . . this Court has concluded [in *Raich*] is so comprehensive that it necessarily nullifies the States' 'traditional . . . powers . . . to protect the health, safety, and welfare of their citizens.'").

dent now has powers that arguably were not originally understood to be within the presidency's bundle of allocated powers.

The increase in presidential power becomes even more pronounced when one examines less traditional executive powers. Consider the veto. As mentioned above, the Commerce Clause now provides only a minimal restraint on congressional power. Thus, Congress can act in areas that were traditionally considered within the States' retained jurisdiction. If Congress has such power, then the President's ability to check that power through veto is more significant because the veto power is co–extensive with congressional lawmaking authority.[57]

Likewise, one of the most important presidential powers in today's world is that of appointment, especially of the federal judiciary. Judicial power has also increased since the founding, for many reasons, such as the ratification of the Bill of Rights and the Civil War amendments. More judicially enforceable rights mean greater judicial power. Because the Article V amendment process was used in these instances, such increases of judicial power are uncontroversial.

However, the doctrine of incorporation, which applies most of the Bill of Rights to the States, is more controversial. For example, when the Supreme Court ruled that the Eighth Amendment prohibits execution of those under the age of eighteen,[58] that holding applied to crimes in violation of both federal and state law. This is a considerable shift in the vertical allocation of powers, and it is not clear that the Fourteenth Amendment compels such incorporation.[59]

Third, and more controversial still, the doctrine of substantive due process has also increased judicial power, and arguably was not intended by the Framers. Leaving aside the debat-

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57. *See* Lawson, *supra* note 48, at 1236–37 ("The courts . . . are not the only . . . interpreters of the Constitution. . . . [As] it is emphatically the province and duty of the President to say what the law is—and hence to veto bills that contravene constitutional limits. . . . [H]owever, the Reagan and Bush administrations made no serious attempt to resuscitate the doctrine of enumerated powers. I do not know of a single instance in which [they] vetoed or even opposed legislation on the ground that it exceeded Congress's enumerated powers. Furthermore, I am aware of only one instance in the Reagan-Bush era in which the Justice Department formally opposed legislation on such grounds; a 1986 opinion from the Office of Legal Counsel stated that Congress did not have . . . power to enact a national lottery.").

58. *See* Roper v. Simmons, 543 U.S. 551 (2005).

59. *See, e.g.* Rochin v. California, 342 U.S. 165 (1953); Wolf v. Colorado, 338 U.S. 25 (1949).

able legal conclusion, Justice Scalia's words, as simply a description of public reaction, are difficult to argue with:

> [T]he fact that our retaining control, through *Roe,* of what I believe to be, and many of our citizens recognize to be, a political issue . . . . [means] [w]e can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.[60]

Such "carts full of mail" also go to the White House, urging the President to appoint judges who will decide these "political issues" in a certain way. The voters know where the power lies.

The power to appoint federal judges, especially Supreme Court justices, plays a role in myriad aspects of citizens' lives; the judicial power sets forth the dimensions of protected speech,[61] defines religious freedoms,[62] and determines the legality of abortion.[63] These are sensitive issues. Again, whether the Court's expanded powers are good or bad, or whether any of the cases cited above were rightly or wrongly decided is not at issue here. The point is that, as Article III powers grow, the importance of Article II's Appointments Clause grows with them.

B. The Increased Domestic Presidential Power Has Altered the Constitutional Bargain

The next step in this "originalism is irrelevant" counterargument is to acknowledge that these increased domestic presidential powers have fundamentally altered the nature of our government. Modern Presidents can affect almost every

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60. Webster v. Reprod. Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., concurring). It should be noted, of course, that such a "political" response occurs for many decisions that nearly all believe are required by the Constitution; the popular response to Brown v. Board of Education, 347 U.S. 483 (1954), provides such an example. *See* Ruth Bader Ginsburg, Brown v. Board of Education *in International Context*, 36 COLUM. HUM. RTS. L. REV. 493, 498 (2005) ("As . . . resistance to *Brown* mounted . . . foreign publications took note. Despite, or perhaps because of, the . . . defiance, the world recognized that the Supreme Court had stepped ahead of the country's political branches and various communities in pursuit of equal justice under law.").

61. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

62. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990).

63. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

decision a citizen makes, at least indirectly. Because the Commerce Clause provides almost no restraint on Congress, a question that naturally arises when Congress legislates on matters traditionally within the purview of the States is whether the President will veto. If not, and where applicable, how will the President direct executive agencies to use their *Chevron* powers under that legislation? Judicial appointments, especially to the Supreme Court, are also extremely significant.

As would be expected, these expansive domestic presidential powers have had profound consequences on national politics. In the run-up to the 2004 presidential election, a common mantra heard on both the left and right was that "[i]t's the most important presidential election of my lifetime."[64] That mantra was probably correct—that is until 2008, and then 2012. The truth is that all presidential elections have an enormous impact on almost every contested issue of domestic policy, and thus on the life of every citizen.[65]

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64. *See, e.g.*, *Politics and Abortion* (NPR radio broadcast Aug. 9, 2004) ("Ms. KATE MICHELMAN: It's the most important presidential election of my lifetime, and I want to bring to bear everything I've ever done in my life to helping John Kerry become the next President."); Peggy Noonan, *Now Is the Time*, OPINIONJOURNAL.COM, Aug. 5, 2004, http://www.opinionjournal.com/columnists/pnoonan/?id=110005442 ("I am going to take three months' unpaid leave from The Wall Street Journal and attempt to support the Republican Party in the coming and crucial election. Every four years everyone says 'this is the most important election of my lifetime,' but this year I believe it is true.") (internal parentheses removed).

65. This may also have an impact on presidential effectiveness. For example, Judge Posner has argued that the federal government is one of limited resources, so time spent on issues once considered local but which have now been nationalized, is time not spent on matters that are more clearly national in scope:

> Underlying the systemic problems that I have identified is the overextension of the federal government. . . . In the face of formidable challenges to the safety of the nation . . . the latest being the threat of a lethal flu epidemic with which we apparently are not prepared to cope[,] the government has entangled itself in contentious, emotional, and (it seems to me) distinctly secondary issues. Matters such as abortion, fertility treatments, homosexual rights, affirmative action, religious displays on public property, capital punishment, voluntary euthanasia, and the proper treatment of people in vegetative states are not appropriate issues to engage the federal judiciary, or the other branches of the federal government. (All three branches managed to get involved in the Schiavo affair.) They are not worthy problems for *national* government . . . . The regulation of abortion only became a subject of heated contention when it was nationalized by the Supreme Court in *Roe* v. *Wade*.
>
> Judicial confirmation hearings become distended and absurd. . . . The proper business of a national government is none of those things. It is

The result of these increased domestic presidential powers is a very different system than the one envisioned by the Framers. It is against this backdrop that we must assess Yoo's presidential foreign affairs powers argument, which, if accepted, would make the choice of President all the more important. A proponent of the counterargument that originalism is irrelevant would argue that the constitutional contract only empowered the President with broad foreign affairs authority because the President's domestic powers were carefully limited. If those domestic powers are no longer so limited, then the President's foreign affairs powers should be restricted in order to realign the horizontal balance of power and avoid the risk of a President with too much aggregate authority.

III. CRITICAL FAILURES IN THE COUNTERARGUMENT THAT ORIGINALISM IS IRRELEVANT

The problem with the counterargument that originalism is irrelevant is that it is not an argument for ignoring Yoo's position on presidential foreign affairs power. Even if all the postulates of this counterargument are true, it does not necessarily follow that Yoo's argument should be disregarded. The Constitution, if this counterargument is to be accepted, is a contract replete with numerous interconnected compromises. Some power is given here, some power is withheld there. To accept that the present allocation of authority invalidates the President's broad foreign affairs powers which, if Yoo is correct, the Framers intended that office to have, then one must also accept that the predicates for a great many federal powers have also been undermined. To buy the counterargument that originalism is irrelevant, one would also have to conclude that Congress has too much power, that the courts have too much power, and that the President's domestic powers are well beyond what the founding generation originally understood them to be. If so, then cherry picking only the President's foreign affairs power for limitation seems arbitrary, at best.

> public safety, which is gravely endangered, and which our government, and our political system, excited and distracted by a bewildering variety of second-order concerns, seems incapable of taking rational measures to protect.

Richard A. Posner, *Our Incompetent Government*, NEW REPUBLIC, Nov. 14, 2005, at 23, 26–67.

One defense for the originalism is irrelevant counterargument is that legitimacy claims can be made in favor of most or all expansions of federal power that have taken place in the last 217 years. For instance, there is a compelling academic discussion in favor of the doctrine of incorporation as a manifestation of "the People's" will. After all, it was "the People" who ratified the Fourteenth Amendment, and there are reasons to infer from the language they ratified that they favored broad incorporation of constitutional rights to the States.[66] A similar argument can be made for substantive due process.[67] The courts have also offered good reasons for the demise of the nondelegation doctrine[68] and for giving Congress broad powers under the Commerce Clause.[69] Thus, the defense of the originalism is irrelevant counterargument is that the legitimacy of these increases in domestic presidential power have not been undermined because either the particular exercise of the power in question was necessarily implied by the original constitutional scheme or because subsequent generations have legitimately amended the Constitution in ways that have expanded domestic presidential power.

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66. *See, e.g.*, Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

67. *See e.g.*, Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1082 (2005) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)) ("Barnett argues that [the Privileges or Immunities Clause of the Fourteenth Amendment] authorizes all that the Supreme Court has done under its substantive due process case law and then some. Barnett is thus a fan of both *Lochner v. New York* and *Roe v. Wade*, decisions that other leading sophisticated originalists like Bork and Scalia have described as abominations. Thus, Barnett's book poses a direct challenge to Bork and Scalia by arguing that their methodology of originalism, in fact, leads to results they abhor.").

68. Since all execution involves some discretion and hence policymaking, the line between what is an acceptable delegation and what is not is perhaps too difficult for the Court to police. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

69. *See e.g.*, United States v. Morrison, 529 U.S. 598, 655–60 (2000) (Breyer, J., dissenting) ("No one denies the importance of the Constitution's federalist principles. . . . The question is how the judiciary can best implement that original federalist understanding where the Commerce Clause is at issue. . . . The 'economic/noneconomic' distinction is not easy to apply. Does the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money? . . . [V]irtually every kind of activity, no matter how local . . . can affect commerce . . . . Since judges cannot change the world . . . Congress . . . must remain primarily responsible for striking the appropriate state/federal balance.").

However, the next step in making the counterargument that originalism is irrelevant persuasive is more difficult to accept. It proposes that as the nation was rearranging its allocation of power, it implicitly limited the President's foreign affairs powers to compensate for increases in presidential power elsewhere. The problem is that such a counter-balancing modification was never made explicit. Article V's process for amending the Constitution was not followed (or perhaps even considered) on the issue of restricting the President's Article II foreign affairs powers. If there has been no express or implied amendment to Article II, then this counterargument, even if its assumptions are valid, merely makes problematic the present state of affairs. It does not support the rejection of Yoo's presidential foreign affairs argument.

Moreover it is unclear how one could sidestep Yoo's presidential foreign affairs argument and still effectively interpret the Constitution. There are simply too many unanswered questions in the field of foreign affairs to sweep his argument under the rug. For instance, consider the constitutionally 'proper' way to terminate treaties. Yoo notes, "[of] the few treaties the United States has terminated . . . half were terminated by the President acting alone . . . Congress has sometimes forced the termination by enacting legislation inconsistent with the international obligation, and on a few occasions the President and Senate acting together have terminated treaties."[70] In a rapidly changing world, this question will come up again.[71] It is difficult to imagine how it can be answered without at least considering Yoo's scholarship.

Similar questions can be asked about the constitutionality of congressional-executive agreements. Prominent scholars such as Bruce Ackerman and Laurence Tribe have vigorously debated the constitutionality of such agreements.[72] How can that debate be resolved without at least considering Yoo's originalist assessment of the Treaty Clause? Also, was the "war" in Kosovo legal? As Yoo notes, it was not authorized by Congress and cannot be credibly classified as a war of self-defense.[73]

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70. YOO, *supra* note 1, at 14–15.

71. Consider the European Union's expansion, the former Soviet Union's evolution, the economic and military growth of China, India, and Brazil, and that growth's impact on the relevant regions.

72. *See* YOO, *supra* note 1, at 284.

73. *See id*. at 157–64.

Similar military interventions will likely occur in the future. Yoo's presidential foreign affairs argument, if its historical claims are true, provides at least a starting point for answering these difficult constitutional questions.

If Yoo's historical claims are correct, then there may be no good way to limit the President's foreign affairs authority, except by constitutional amendment, which is no easy feat. How then can we constrain the immense powers of modern Presidents? Although Yoo does not spell it out explicitly in *The Powers of War and Peace*, his presidential foreign affairs powers argument implies an indirect argument for limiting the President's domestic powers. If, as originally understood, the President had broad foreign affairs powers, and if the President's foreign affairs powers have not been subsequently reduced, then, in order to avoid an overly powerful President, we should consider anew whether each of the President's expanded domestic powers is legitimate. Because the President's domestic powers are closely connected with nearly every component of federal power, the implications of this indirect argument perhaps are even more far–reaching than Yoo's explicit position on presidential foreign affairs powers.

IV. THE INDIRECT ARGUMENT FOR LIMITING DOMESTIC PRESIDENTIAL POWER

This indirect argument for limiting domestic presidential powers is found in *The Powers of War and Peace*'s short and likely to be overlooked conclusion that deals with President Franklin Roosevelt's "court packing" plan that led to the "switch in time that saved nine."[74] Yoo's book is by no means a direct attack on the administrative state. However, in its summation, Yoo considers the implications of changes in the Court's jurisprudence that have permitted the federal government to expand. He then goes a step further and uncharacteristically offers the polemic that "[t]his resulted in a bloodless constitutional revolution without amendments."[75] Yoo's strong language here is all the more surprising given that the book's focus is not the administrative state. Yet, he continues the charge: "Because of what many have seen as the Court's bla-

74. *See id*. at 300–01.
75. *Id*. at 301.

tantly political switch, the legitimacy of elements of the New Deal revolution remain open to question . . . by those who wish to restrict the Commerce Clause or . . . believe that elements of the administrative state are unconstitutional."[76]

Why does Yoo write this? Ostensibly, he makes this point about the New Deal as a plea to scholars to carefully analyze the Constitution's foreign affairs regime before the rapidly increasing economic globalization and global government trends—by which the Constitution will face immense strains—provoke a crisis: "This book has sought to identify the general outlines of an answer in the hopes that the American constitutional system need not undergo the same disruption in adapting to globalization that it experienced during the New Deal eighty years ago."[77]

However, Yoo's reference to the New Deal and rise of the administrative state can be read as much more than an analogy or example; it is also an implied reference to an argument for a smaller domestic federal government, with less domestic presidential power. If one accepts that the framers were wary of expansive federal power, yet nonetheless gave the President such broad foreign affairs authority, then one is likely to question whether the President's current powers are in accord with what would have been the Framers' predicate understanding of the President's domestic role, and whether "the People" are comfortable with a President who has such extensive foreign *and* domestic powers. Such questions, in turn, should prompt readers to ask whether a number of today's domestic federal features, all of which strongly require or reinforce domestic presidential power, are appropriate. Should the nondelegation doctrine be revived? Was *Raich* rightly decided? Was *Roe*? Yoo does not evaluate the correctness of the Court's substantive due process or Commerce Clause jurisprudence, but his book invites a reexamination of such matters.

If, in addition to directly advocating an expansive foreign affairs role for the President, *The Powers of War and Peace* also offers an indirect argument for limiting the President's domestic powers, then it is could be even more controversial than Senator Biden suspected.

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76. *Id.*

77. *See* YOO, *supra* note 1, at 303.