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International Law and Institutions and the American Constitution in War and Peace*

Thomas H. Lee**

INTRODUCTION

Professors Julian Ku and John Yoo have written a thought-provoking book about the challenges globalization presents to the United States and its Constitution.[1] Their basic claim is that we need to renew and update American national institutions, most importantly our understandings of the Constitution, in the face of an unprecedented globalization that promises material benefits but at the same time threatens the surrendering of American popular sovereignty to international institutions. Whether one agrees or disagrees with their thesis, Professors Ku and Yoo have done an admirable job of describing the puzzle and asserting their solution in a clear, thoughtful, and comprehensive manner.

The basic theme of my response to their book in this article is continuity, in contrast to Professors Ku's and Yoo's fundamental presumption of discontinuity. My postulation of continuity exists along two dimensions: (1) today's globalization may be remarkable but it is not, in functional terms, a new puzzle to the American Constitution; and (2) international law and institutions are not, as Professors Ku and Yoo presume, inherently vehicles for progressive sovereignty-killing agendas antithetical to American popular sovereignty. Active participation of the United States in the formulation of international law and international institutions may increase their potential to be consistent with U.S. national interests. Indeed, with respect to the second point, the historical record reveals that international law and institutions have more often than not reinforced and advanced American sovereignty and national interests, and it is

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1. JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER (2012).

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not unreasonable to believe that they might continue to do so in the future, despite evolution in the character of international law norms.

This article has two parts. The first part addresses the most exigent question relating to the interaction between international law and the American national constitution in the war context: what do international law or international institutions have to do with the authority of the President of the United States under the Constitution to deploy American armed forces in foreign conflicts without congressional approval? Can international law and institutions authorize the President to engage in military operations that he or she could not have done on his or her own authority in the absence of congressional approval? The question has been brought to center stage by President Barack Obama's intervention in the Libyan civil war on the heels of a United Nations Security Council Resolution, although, as we shall see, the Obama Administration did not rely directly on international law or institutions in its justification of American military action.

The second part of the article focuses on my claim of continuity with respect to globalization in peacetime. The scale of globalization today may seem unprecedented, and in theory a national constitution is concerned with solving national problems, creating the sorts of blind spots that Professors Ku and Yoo urge need to be updated to confront globalization. But the U.S. Constitution is different. It was created by a revolutionary state that craved acceptance by the world community and needed international trade and finance to survive as a nation. As a result, the original U.S. Constitution contemplates globalization and even encourages reliance on international law and institutions because it addresses globalization from the perspective of a materially dependent and militarily weak state. This point should not matter much to non-originalists who do not value the original meaning of the Constitution, but it should matter to originalists in constitutional interpretation—a group that is often the most critical of international law and institutions today.

I.
INTERNATIONAL LAW AND THE PRESIDENT'S WAR POWERS

In spring 2011, President Barack Obama authorized U.S. air strikes in Libya in the aftermath of U.N. Security Council Resolution 1973 (UNSC Resolution).[2] President Obama's initial report to congressional leaders on March 21, 2011 explicitly invoked the UNSC Resolution:

> As part of the multilateral response authorized under U.N. Security Council Resolution 1973, U.S. military forces. . . began a series of strikes against air defense systems and military airfields . . . . Their purpose is to support an international coalition as it takes all necessary measures to enforce the terms

2. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

of U.N. Security Council Resolution 1973.[3]

However, the Obama Administration's ultimate formal defense of the legality of the Libya intervention under U.S. law was much coyer about reliance on the U.N. Security Council's authorization.[4] International institutions were invoked indirectly through the politically more palatable prism of American national security interests:

> In our view, the combination of at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the UNSC's credibility and effectiveness—provided a sufficient basis for the President's exercise of his constitutional authority to order the use of military force.[5]

In other words, it was U.S. national security and foreign policy interests—not international institutions or international law—that ultimately justified intervention. The President did not argue that he could intervene in Libya because the UNSC Resolution was a document that gave him legal permission or that the U.N. Security Council's vote authorized action on his part.

The role of international law and institutions in President Obama's justification for intervention in the Libyan civil war contrasts starkly with the prominent reliance on international institutions in the factually most analogous precedent, the Korean civil war in 1950. American military operations in Korea, as in Libya, involved a unilateral presidential decision to intervene in a foreign civil war pursuant to a UNSC Resolution without congressional authorization.[6] In both instances the executive branch had compelling national interests in regional stability and in supporting the credibility of the U.N. Security Council. The latter interest was credibly greater in the Korean case, since the U.N. Security Council was an infant institution at the time—only one year old. But when President Harry Truman sent U.S. combat troops to Korea in June 1950, he and his defenders emphasized the authorizing feature of the U.N. Security Council resolutions and the U.N. at large.[7] International law and institutions were front and center.

What explains the difference in emphasis on international law and institutions between the Korean and Libyan cases? Part of the difference inheres in the fact that the Korean war was viewed at the time as an international war,

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3. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, 2011 Daily Comp. Pres. Doc. 193 (Mar. 21, 2011).

4. *See* O.L.C. Opinion, Authority to Use Military Force in Libya, 2011 WL 1459998 (Apr. 1 2011).

5. *Id.* at *10. *See also* Address to the Nation on the Situation in Libya, 2011 Daily Comp. Pres. Doc. 206 (Mar. 28, 2011) ("The writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security.").

6. S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950). *See also* S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950).

7. *See, e.g.*, Act of Aggression in Korea: Review of U.N. and U.S. Action to Restore Peace, Address by Secretary Acheson, 23 Dep't St. Bull. 43 (1950).

not a civil war; the crossing of the thirty-eighth parallel by North Korean troops was portrayed as an "act of aggression" by one country against another, despite the fact that Korea had been one country for centuries until the aftermath of the Second World War.[8] Arguably, the interdiction of "an act of aggression" was, and remains, a more broadly accepted norm of international legal justification for war than intervention in an internal conflict to stop human suffering because it poses a "threat to the peace" or a "breach of the peace." Article 39 of the U.N. Charter is not usually interpreted to create a hierarchy among the three as triggers for U.N. Security Council authorizations of military force or other means to restore peace, although one could infer such a hierarchy from word order.[9]

A second reason for the difference is that sixty years ago, most Americans, including officials in every branch of the government, did not question that international law was really "law" to be enforced.[10] Americans were more positive about the benefits of international institutions like the U.N. toward achieving international peace and prosperity from which Americans would benefit, and less suspicious about the costs of compromising American democratic norms.[11] The reasons for the erosion of this American faith in international law and institutions are too complicated to explain in detail here, what is important for present purposes is to flag the dramatic growth of American skepticism about international law and institutions, even among those perceived to be their fans, like the Obama Administration.

The upshot of the difference between the Truman and Obama administration positions is greater flexibility for today's President to depart from guidance given by international law or institutions in the commitment of U.S. armed forces. Since a prerequisite to a U.N. Security Council authorization of force would be an act of aggression, or a threat or breach of world peace, it seems likely that a U.N. Security Council resolution would coincide with a reasonable presidential determination of a threat to regional stability. However, in a case where there is a UNSC Resolution but it is clear that the U.N. has sufficient resources to enforce the Resolution *without* U.S. participation, the

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8. *See generally* BRUCE CUMINGS, 1 THE ORIGINS OF THE KOREAN WAR: LIBERATION AND THE EMERGENCE OF SEPARATE REGIMES (1981); CARTER J. ECKERT et al., KOREA OLD AND NEW: A HISTORY (1991).

9. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decided what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39.

10. In a message to Congress on the United States' role in the United Nations, President Truman stated, "We cannot have lasting peace unless a genuine rule of world law is established and enforced." Message to the Congress Transmitting the First Annual Report on U.S. Participation in the United Nations, 1947 Pub. Papers 118, 121-22 (Feb. 5, 1947).

11. Later in the same message, President Truman stated, "Our policy of supporting the United Nations 'with all the resources that we possess' must be given effective practical application on a genuinely national, bipartisan basis in every activity of the United Nations." *Id.* at 122.

President could choose not to commit U.S. armed forces, in the Obama Administration's view. In the Truman Administration's view, the UNSC Resolution would constitute legal authorization for the commitment of American troops without regard to how a failure to commit might affect the credibility of the U.N. Security Council as an institution.

Thus, notwithstanding the theoretical fears of Professors Ku and Yoo, the case of the Obama Administration's legal defense of the Libya intervention based on national interests appears to afford a very considerable buffer for American sovereignty, with international law and institutions relegated to a secondary role. (Of course, the move gives no comfort to critics of an all-powerful "unitary executive" since the buffer for American sovereignty *vis-à-vis* the world expands presidential discretion over warmaking.) And the evolving American skepticism about international law and institutions has degraded the ability of an American president to generate domestic support for unilateral warmaking from the backing of international institutions. Indeed, the Obama Administration's moves to distance itself from the U.N. by invoking the rhetoric of "national interests" reveals the extent to which there is at present a cost, and not just a benefit, to resorting to international law and institutions to justify the use of American military force abroad.

Furthermore, international law and institutions have proved to be a useful means for the Obama Administration *not* to get involved in certain humanitarian operations blessed by the international human rights movement but arguably contrary to the will of the American people. The Syrian civil war surely poses a similar—if not greater—threat to stability in a region of high priority for U.S. national interests, particularly as deaths multiply. And the growing strength of the opposition movement in Syria has solidified the possibility that intervention might be justified on the grounds of the international law doctrine of invitation by the rebel regime. Of course, in the Syria case, there is no U.N. Security Council resolution like UNSC Resolution 1973 because of Russia's and China's vetoes.[12] The absence of a UNSC Resolution thus makes it an easy case for non-intervention on the Truman Administration view, but it also enables non-intervention on the Obama Administration's rationale. Namely, because there is no UNSC Resolution, the U.N. Security Council's "credibility" and "effectiveness" would not be put at issue by the United States' decision to refrain from military operations. In this way, international law and institutions provide a bright-line rule to manage presidential discretion and distinguish prior cases.

The preceding discussion has demonstrated that the Obama Administration, by invoking the filter of national interests, subtly ducked the question we posed

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12. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. Times (July 19, 2012), http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html?_r=0.

at the start of this article: "Can international law and institutions authorize the President to engage in military operations that he or she could not have done on his or her own authority in the absence of congressional approval?" For the rest of the first part of this article, I would like to attempt an answer to this hard question based on historical practice.[13] My answer, in sum, is that the Constitution does authorize the President to use armed force in foreign countries for "protective" missions permitted by international law even if Congress has not pre-approved such missions.

It is worth remembering at the start that the majority of sizeable U.S. military interventions abroad after World War II lacked specific congressional authorization. From 1950 through the 1970s, this would include the substantial U.S. military interventions in Korea, Vietnam before the Tonkin Gulf resolution, Cambodia, and Laos. In the 1980s and 1990s, this would include the invasions of Grenada and Panama by Republican Presidents Ronald Reagan and George H.W. Bush, respectively; and military strikes in Bosnia and Kosovo by Democratic President William Clinton. Thus, however much the idea that the President needs congressional approval (rather than mere notification) to engage in significant military operations abroad is appealing from a normative and commonsensical standpoint, it is belied by reality.

All of these interventions were controversial to some degree, but one category of military intervention abroad by the President without congressional authorization has been around and accepted for a very long time. The category appears to be a version of what Professor Henry Monaghan called the President's "protective power,"[14] namely, the power of the President to use force to protect American persons or property in imminent danger. The heartland of the protective power is the domestic protection of U.S. officials, properties, and "instrumentalities," but it has been extended as a justification for the use of force to protect U.S. civilians abroad.[15] This power seems unproblematic when applied to the rescue or evacuation of U.S. citizens from a foreign country on the brink of systemic violence, but the problem with this use, which Monaghan identifies, is the ease with which it might be used as a pretext to justify military interventions for other reasons. For instance, President Ronald Reagan's 1983 invasion of Grenada was justified in part by what may be the most aggressive articulation of a U.S. civilian-protection mission, with respect to U.S. medical-school students believed to be at risk given political turmoil in the country.[16]

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13. Curtis Bradley and Trevor Morrison have written a helpful article discussing the executive branch's practices toward historical glosses on the President's war powers. *See* Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

14. Henry Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

15. *See id.* at 70-71.

16. *See* Ronald H. Cole, *Operation Urgent Fury: The Planning and Execution of Joint Operations in Grenada, 12 October – 2 November 1983*, Joint History Office, Office of the Chairman of the Joint Chiefs of Staff (1997), *available at*

Coming back to the case of Libya, the U.N. Security Council's justification for military intervention was framed as civilian protection at American insistence,[17] thereby invoking the burgeoning international law norm of "responsibility to protect" shorthanded as "R2P".[18] UNSC Resolution 1973 authorized military operations short of occupation in order to "protect civilians and civilian populated areas under threat of attack" and to enforce a no-fly zone over Libyan airspace.[19] Ten members of the U.N. Security Council, including permanent members France, the United Kingdom, and the United States, voted in favor of Resolution 1973. The remaining five U.N. Security Council members abstained, including the other two permanent members—China and Russia.[20] Under a 72-year old customary gloss on the relevant provision of the United Nations Charter, nine affirmative votes coupled with the absence of any negative votes by permanent members constitute U.N. Security Council authorization of military actions.[21]

Although R2P is a relatively new term, there is an undeniably conceptual affinity between the civilian protection mission in international law and the protective-power mission of the President under U.S. constitutional law that has not been explored. At an ideational level, both represent attempts to frame military operations that could be perceived as offensive or aggressive in nature as defensive or reactive. Thus, "humanitarian intervention" or "police action" has become "civilian protection."[22] Some may think the difference is merely semantic, intended for marketing purposes. But I think that the shift in framing captures a meaningful difference as well, related to the differing intents of the military actor. Words like "intervention" or "suppression" or "policing" more strongly imply confidence in the actor's moral and material superiority than "protection." This relative humility mirrors the Obama Administration's sensitivity to other nations' dread of American superiority.

Doctrinally speaking, the civilian protection mission articulated in the Libya intervention can be understood as a gloss on the American constitutional doctrine of the protective power in a straightforward way. The Constitution

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http://www.dtic.mil/doctrine/doctrine/history/urgfury.pdf.

17. According to reporter Michael Lewis, President Obama believed the no-fly zone that France and Great Britain had initially proposed would have been ineffective in stopping Qadaffi's slaughter of civilians in Benghazi. Michael Lewis, *Obama's Way*, VANITY FAIR (Oct. 5, 2012), http://www.vanityfair.com/politics/2012/10/michael-lewis-profile-barack-obama.

18. For a short history of the genesis and evolution of the norm, *see* William W. Burke-White, *Adoption of the Responsibility to Protect* (University of Pennsylvania Law School, Public Law Research Paper No. 11-40, July 30, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960086.

19. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 7, 2011).

20. *Id.*

21. U.N. Charter art. 27(3). *See* Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 507 (1995).

22. *See, e.g.*, *Libya and War Powers: Hearing Before the Senate Committee on Foreign Relations*, 112th Cong. 7-40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep't of State).

authorizes the President's unilateral protective power to use U.S. military forces abroad to protect American civilians to the extent that international law permits. Thus, for example, if American civilians are in imminent danger in a foreign country, the President may send military forces to protect or evacuate them without the host country's consent.[23] But international law would prohibit the United States from invading the entire country or remaining there on a permanent basis, which would be inconsistent with the self-defense rationale of protecting one's citizens' lives. Importantly, this civilian protection mission has extended in practice to the protection or evacuation of *foreign* civilians who are citizens or subjects of third countries who are also in the danger zone.[24] It could be argued that if international law has evolved to authorize countries to use military force abroad to protect foreign civilians who are citizens of the target country with U.N. Security Council authorization (*i.e.*, R2P), then the President's protective power similarly extends to those own-country aliens as a matter of U.S. law. True, any protective power the President has to use military force abroad for civilians is strongest with respect to U.S. persons and property, but there is nothing in the Constitution foreclosing the President's power to send U.S. troops abroad on a foreign civilian protection mission blessed by international law.

It is important to make clear the limited nature of my claim. I am not asserting that the President was *compelled* to act once the U.N. Security Council authorized military action by member states. Rather, my more limited claim is that neither the text of the Constitution nor historical precedents foreclose the

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23. Under international law, the protective power presumably falls under the rubric of self-defense, although there is no armed attack *per se*. U.N. Charter art. 51. There are a number of instances of a state using armed force to defend or evacuate its own nationals from a foreign country: the United States in the Dominican Republic in 1965, Iran in 1980, and Panama in 1989, the United States and Belgium in the Congo in 1964, Israel at Entebbe in 1976, France in C.A.R., Cote d'Ivoire, and Liberia in 2002-03 and Chad in 2006—but there is some doubt as to whether this is a sovereign right under customary international law. *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 755 (8th ed. 2012).

24. American military forces protected and evacuated almost a hundred foreign nationals during the Liberian civil war of 1990-91. *See U.S. Marines Evacuate 97 Foreign Nationals*, AP, Aug. 14, 1990, http://www.apnewsarchive.com/1990/U-S-Marines-Evacuate-97-Foreign-Nationals-from-Liberia/id-52b7d54eef18b38b4b6630216090ccc3. The British evacuated numerous foreign nationals (hailing from twenty-five other countries) from Libya in 2011. *See* Nicholas Watt & James Meikle, *Libya officials bribed by Britain to help evacuate UK citizens,* THE GUARDIAN, Feb. 25, 2011, http://www.guardian.co.uk/world/2011/feb/25/britain-libya-bribes-evacuation. In both instances the intervenor implicitly asserted a legal right to use armed force despite the absence of formal consent or invitation by the host sovereign. These cases suggest that whatever the contours of a state's power to rescue its own citizens as a right under customary international law, it extends to rescuing third-country foreign nationals. This idea is further supported by Article 45(c) of the Vienna Convention on Diplomatic Relations, which allows a state that has recalled its mission to entrust "the protection . . . of its nationals to a third State." April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. In Libya in 2011, the U.S. suspended its embassy operations, with Turkey and later Hungary acting as the protecting power for the United States. Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, 2011 DIGEST § 9, at 271.

constitutionality of the President's *discretion* to deploy U.S. military forces in a foreign-civilian-protection mission outside of the United States without the express approval of Congress, in a case where such deployment is reasonably justified by international law. Whether such a deployment is prudent—as in the Libya case—is a policy matter, and surely would have stood on a firmer political and legal basis if the President had obtained congressional approval. But it is wrong to say that the President's acts were unconstitutional if they were plausibly grounded in international law.

In general, the Constitution evinces a concern with the danger of unilateral warmaking by the President, but the constraint it places upon this danger is the requirement of authorization by law.[25] Throughout the history of the Republic, statesmen and constitutionalists have believed that such authorization can be satisfied not just by domestic law (*e.g.*, congressional declarations of war or their equivalents) but also by international law under certain limited circumstances. To demonstrate this, I will discuss the *Prize Cases*,[26] the most prominent instance in which international law was used as principal justification for the president's power to order sustained military operations outside of the United States without express congressional authorization.[27]

In fact, the *Prize Cases* are the *one and only instance* in which the U.S. Supreme Court has decided on the constitutionality of the President's use of armed force outside the territory and waters of the United States. In 1863, at the height of the Civil War, the Supreme Court was asked to decide on the constitutionality of President Abraham Lincoln's executive proclamations to the U.S. Navy to blockade Southern ports in April 1861, before Congress authorized wartime measures in July 1861. A naval blockade was an act of war under international law: the Navy was permitted to stop—by force if necessary—ships in international waters that were bound for or out of ports in seceded or soon-to-secede states. Naval commanders could condemn any ships and cargoes as "enemy property" after a judicial proceeding in a federal district court; officers and crew shared the proceeds of a successful condemnation as "prize money." Naval ships were authorized to fire upon any ship refusing to stop to be boarded.[28]

The blockade was a belligerent measure with respect to both foreign neutrals (*e.g.*, British merchants trading manufactures for Southern agricultural products) and noncombatant U.S. citizens in seceded or soon-to-secede states like Virginia. Indeed, in some of the *Prize* cases, Virginia merchants argued that

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25. *Cf.* Paul W. Khan, *War Powers at the Millennium*, 34 LOY. L.A. L. REV. 11 (2000).

26. 67 U.S. (2 Black) 635 (1863).

27. *See* Thomas H. Lee & Michael Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, *in* PRESIDENTIAL POWER STORIES (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

28. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE 349-50 (1836).

they were loyal U.S. citizens with constitutional rights that could not be displaced by international law,[29] presumptively the Fifth Amendment right against the taking of property (their ships and cargoes) without due process of law.

The Supreme Court ignored such claims of constitutional rights for allegedly loyal U.S. citizens, not even bothering to assert that the condemnation proceedings in an Article III court satisfied whatever due process the Constitution required. Rather, the Supreme Court framed the principal question as "[h]ad the President a right to institute a blockade of ports in possession of persons in armed rebellions against the Government, on the principles of international law, as known and acknowledged among civilized States?"[30] The answer to that question, according to the majority, was yes. That raised the question of whether the seizure of the ships and cargoes of the litigants, including foreign neutrals and allegedly loyal U.S. citizens resident in Virginia, was justifiable under the international laws of maritime conflict, specifically, the doctrine of "capture on the sea as 'enemies' property."[31] The Court answered that question in the affirmative as well.

The majority's opinion inspired a fierce dissent by four justices.[32] The dissenters rejected the idea that international law could justify the President's unilateral proclamation of a naval blockade against foreign neutral merchants and U.S. citizens who lived in Virginia, arguing that "[i]t [was] the exercise of a power under the municipal laws of the country and not under the law of nations."[33] Instead, they argued that the Constitution required congressional authorization, which was lacking in these cases.[34]

There were congressional enactments that might have justified the President's unilateral power to blockade before congressional approval was given in a statute enacted on July 13, 1861,[35] but the dissent denied that they supplied adequate authorization.[36] The majority opinion referred to these

29. *Prize Cases*, 67 U.S. at 671-74. *See also id.* at 637 ("The claimants in their several answers denied any hostility on their part to the Government or Laws of the United States") (court reporter's summary of facts).

30. *Id.* at 665.

31. *Id.*

32. *Id.* at 682. Justice Nelson wrote the dissenting opinion and was joined by Chief Justice Taney, Justice Catron, and Justice Clifford.

33. *Id.* at 692.

34. *See id.* at 688-89 ("[B]efore this insurrection against the established Government can be dealt with on a footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government.").

35. An Act further to provide for the Collection of Duties on Imports, and for other Purposes, ch. 3, § 5, 12 Stat. 255, 257 (July 13, 1861).

36. *Prize Cases*, 67 U.S. at 691-98.

statutes as well, but in a supplemental fashion.[37] First, there were some statutes from 1795 and 1807 preauthorizing the President to call out the militia and assume command of them as Commander-in-Chief.[38] But, as the dissent noted, these statutes authorized emergency response to invasions and insurrections, not a full-blown war power like the power to blockade against foreign neutral and noncombatant U.S. citizens behind enemy lines.

> The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters.[39]

Second, Congress, which was not in session when President Lincoln ordered the blockade, ended up enacting a statute once it came into session, stipulating that "all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States . . . are hereby approved and in all respects legalized."[40] The majority cited this August 6, 1861 statute along with the July 13, 1861 statute setting the country on a war footing, but was reluctant to make them the principal basis of the decision. "*If* it were necessary to the technical existence of a war, that it *should* have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861. . ."[41] With specific respect to the August 6, 1861 statute, the Court noted it was done out of an abundance of caution ("*ex majore cautela*")[42] and "[w]ithout admitting that such an act was necessary under the circumstances."[43] The problem with the August statute was a concern that it was a constitutionally proscribed "ex post facto Law"[44] because it authorized the taking of property after the fact. Unlike the Fifth Amendment, there was a good argument that the constitutional provision prohibiting bills of attainder and *ex post facto* laws applied in wartime because it was a reaction to bills of attainders and confiscations of private property state legislatures had passed during the War of Revolution.[45] The *ex post facto* clause has generally been thought to apply only

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37. *See id.* at 668, 670-71.

38. *Id.* at 668. *See also* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L. J. 149 (2004).

39. *Prize Cases*, 67 U.S. at 693.

40. An Act to increase the Pay of the Privates in the Regular Army and in the Volunteers in the Service of the United States, and for other Purposes, ch. 63, § 3, 12 Stat. 326 (Aug. 6, 1861).

41. *Prize Cases*, 67 U.S. at 670 (emphasis added).

42. *Id.*

43. *Id.* at 671.

44. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

45. Bills of attainder were legislative or executive acts naming enemies and authorizing their non-judicial punishment to include killing. Despite the contempt early Americans had for heavy-handed English attainders and condemnations of rebel property, several states passed attainders and after-the-fact confiscation acts during the war. The most famous attainder, drafted by Thomas Jefferson, was passed in 1779 by the Virginia legislature against the Loyalist guerrilla Josiah

to criminal proceedings, but prize condemnations appeared functionally similar as applied to U.S. citizens, as the dissent pointed out:

> Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words, trade and commerce authorized at the time by acts of Congress and treaties may, by *ex post facto* legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced.[46]

To summarize, the Supreme Court in the *Prize Cases* relied principally on international law to justify President Lincoln's unilateral order to the Navy to seize ships and cargoes belonging to foreign neutrals and U.S. citizens in international waters at the start of the Civil War. One could argue that his power to give the order flowed from his constitutional authority as "Commander in Chief of the Army and Navy." But what are the limits of this authority? It was the contemporaneous international laws of war that gave content to what he could and could not do outside of the United States as Commander in Chief. The Court also mentioned congressional acts that supported Lincoln's orders (which the dissent rejected), but the domestic sub-constitutional sources were secondary to the international laws of war.

What are we to make of the *Prize Cases* as applied to Libya today? The Supreme Court presumed that as long as it was permissible for President Lincoln to take extraterritorial military actions under international law, that was all the Constitution required. The military actions in Lincoln's case involved the threat and use of armed force against U.S. citizens and friendly or neutral aliens. It does not seem a stretch to say that this precedent permits President Obama to order air strikes against non-U.S. citizen, non-friendly aliens in the service of an oppressive regime that is killing its own people when authorized by international law. Of course, as we have seen, President Obama did not invoke international law directly but rather through the prism of national interests, but that was a matter of policy choice and not constitutional compulsion.

Phillips, while Patrick Henry was Governor. There was universal support for prohibiting bills of attainder at the federal constitutional convention when the measures were introduced on August 22, 1787 by Elbridge Gerry and James McHenry (the *ex post facto* prohibition drew some fire), and the Phillips case was explicitly mentioned by Edmund Randolph during the Virginia ratification debates. *See* W.P. Trent, *The Case of Josiah Phillips*, 1 AM. HIST. REV. 444, 453 (1896). *See also* Note, *The Bill of Attainder Clauses and Legislative and Administrative Suppression of "Subversives,"* 67 COLUM. L. REV. 1492 (1967); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 147 (1908). The federal bill-of-attainder clause is again in the news because of its deployment in a lawsuit brought by the ACLU alleging the unconstitutionality of the drone-killing of American citizens. *See* Complaint, Al-Aulaqi v. Panetta (D.D.C. filed July 18, 2012), *available at* http://www.aclu.org/files/assets/tk_complaint_to_file.pdf.

46. *Prize Cases*, 67 U.S. 635, 698 (Nelson, J. dissenting).

II.
IMPLEMENTING THE U.S. CONSTITUTION IN AN ERA OF GLOBALIZATION

So far the focus has been on the interaction of the U.S. Constitution and international law and institutions in war, but what about the more routine peacetime context? A premise of Professors Ku and Yoo's book is that fidelity to the Constitution and American values requires us to "tame" globalization and to exercise caution about delegating to the international institutions that globalization has spawned.[47] The basic aim of this part of the article is to question this premise as a matter of American constitutional interpretation.

My argument presumes originalism as the mode of constitutional interpretation. By originalism I mean the view that the original meaning of a constitutional provision controls its present meaning. I make this presumption for two reasons. First, it seems that a majority of Justices on the Supreme Court are sympathetic to originalism in constitutional interpretation. Second, many of the same constitutionalists who are hostile to globalization and international institutions are originalists in constitutional interpretation. Accordingly, if a case can be made that the original Constitution tells us to welcome globalization rather than "tame" it, then it is a powerful argument against the thesis of Professors Ku and Yoo's book. The fact that I make the presumption does not mean that I personally think that originalism is the best mode of constitutional interpretation on these questions.

If we are to be originalists, then what happened from 1787 to 1789, the years in which the Constitution was drafted, debated, and ratified, is incredibly important. This seems particularly true because provisions of the Constitution dealing with foreign affairs and parties were not amended after the Civil War like the constitutional provisions dealing with internal governance and the rights of U.S. persons.[48]

From 1787 to 1789, the United States was a militarily weak, revolutionary state—a "tobacco republic."[49] The United States as tobacco republic would have had very different preferences in international relations and considered international law in a fundamentally different way than a superpower or an empire. The interest in survival was logically paramount: if the nation could not endure, the individual liberties Americans had fought for would disappear.[50]

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47. KU & YOO, *supra* note 1, at 2.

48. *But see* Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U.L.J. 53 (2008) (explaining how the Civil War forced the United States to adapt its foreign affairs Constitution).

49. *See* Thomas H. Lee, *International Law, the Constitution, and the Tobacco Republic* (unpublished manuscript) (on file with the *Berkeley Journal of International Law*).

50. *See, e.g.,* THE FEDERALIST NO. 3, at 13-14 (John Jay) (Cooke ed., 1961) ("Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first. . . . I mean only to consider it as it respects security for the preservation of peace and tranquility . . . from *foreign arms and influence* [which] comes first

Survival inspired an embrace of international law and institutions by the constitutional founding group for several reasons. First, it was imperative that the national government prevent the states from breaching the 1783 Treaty of Peace with Great Britain to avoid renewed war. The most obvious indication of this priority is the Supremacy Clause of the Constitution, which states in part that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[51] Second, the capacity to make treaties validated the Revolution—only full-fledged, bona-fide countries could sign treaties. Signing a treaty meant that the new United States had personality under international law and were entitled to co-equal sovereign status. This was an important reason why the United States, in its tobacco republic stage, was so very interested in signing as many treaties as it could. Indeed, the founding group drafted a "model" treaty that they shopped around to other countries,[52] starting with the top-tier European powers, then to second-tier powers, and finally to the Barbary republics.[53] Third, these treaties were not only important as affirmations of America's sovereign status, they enabled the international flow of goods and credit essential for the survival and growth of the agrarian United States.

Professors Ku and Yoo fret that globalization and its evil handmaidens of international law and institutions poses a threat to popular sovereignty as it was enshrined in the Constitution. By way of conclusion, I would like to discuss two specific founding-era examples that illustrate just how much the Americans who made the original Constitution were willing to sacrifice popular sovereignty in the service of participating in the global economy. They are both examples taken from the design and operation of the early national courts.

The first example concerns the Alien Tort Statute (ATS), a part of the Judiciary Act of 1789, which has been a vehicle for international human rights litigation in the U.S. federal district courts since 1980.[54] I have argued elsewhere that the ATS had nothing to do with international human rights law

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in order.").

51. U.S. CONST. art. VI, cl. 2.

52. John Ferling, *John Adams, Diplomat*, 51 WM. & MARY Q. 227, 228 (1994).

53. Treaty of Amity and Commerce, U.S-Fr., Feb. 6, 1778, 8 Stat. 12; Treaty of Amity and Commerce, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32; Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60; Treaty of Amity and Commerce, U.S.-Prussia, July-Sept. 1785, 8 Stat. 84; Treaty of Peace and Friendship, U.S.-Morocco, Jan. 1, 1787, 8 Stat. 100; Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., at art. VI, Nov. 19, 1794, 8 Stat. 116.

54. *See, e.g.,* Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428 (1989); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). The U. S. Supreme Court recently heard arguments in a case where it may revisit the reasons why the ATS was enacted. *See* Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Mar. 5, 2012), 2012 WL 687061 (memorandum restoring case to calendar for reargument).

and international law violations around the world.[55] Rather, the ATS was a simple piece of legislation that gave aliens special rights of access to sue for torts in the newly established national courts that U.S. citizens did not have. In 1789, the First Congress wanted to make sure that English and other European merchants and creditors came back to the United States to carry on business and make loans. So they enacted a statute that said if any friendly or neutral alien (they were specifically thinking of European merchants in America) suffered a non-contract injury to his person or property—an "alien tort"—he could sue in federal district court, and did not have to be stuck in the state courts with their notoriously partisan juries.[56] Out-of-state U.S. citizens were stuck with a $500 amount in controversy requirement,[57] which effectively denied them this right to sue in federal court.

The second case from the founding era concerns state sovereign debt to foreign bankers. The very first case that was put on the U.S. Supreme Court docket was *Van Staphorst v. Maryland*.[58] The case involved a line-of-credit for Maryland negotiated by Matthew Ridley, a Baltimore merchant, with the Van Staphorst brothers, who were two private Dutch bankers during the War of Revolution.[59]

Ridley had negotiated ruinous terms, which Maryland wanted to reform. Their first attempt at dispute resolution was an "international" arbitration in New York.[60] When the arbitration fell through, lawyers for the Dutch bankers filed suit in the U.S. Supreme Court, implicating the biggest constitutional issue of the day: the sovereign immunity of states in suits brought against them by private parties under the U.S. Supreme Court's original jurisdiction. [61]

When we call the issue state sovereign immunity, it sounds like a U.S. domestic constitutional law issue, but, practically speaking, *Van Staphorst* was a sovereign debt case just like we see in developing countries today.[62] Sovereign debt cases infringe upon the fiscal autonomy of debtor states: a tribunal may decide that a foreign loan takes precedence over domestic creditors and spending priorities.[63] This was exactly what the issue was in *Van Staphorst*,

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55. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

56. *See* Alien's Action for Tort, 28 U.S.C. § 1350 (2006).

57. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 78.

58. Van Staphorst v. Maryland, 2 U.S. 401 (1791). For a summary of the events surrounding the case, see 5 The Documentary History of the Supreme Court of the United States, 1789-1800 7-54 (Maeva Marcus ed., 1994) [hereinafter 5 DHSC].

59. 5 DHSC, *supra* note 58, at 7-8.

60. *Id.* at 14.

61. *Id.* at 7.

62. *See, e.g.*, NML Capital v. Argentina, 680 F.3d 254 (2012).

63. *See, e.g.*, *id.*

which was why state sovereign immunity was such a momentous controversy in the early republic.

Van Staphorst was ultimately settled before litigation, but its facts give us a sense of just how much globalization was present at the founding of the United States. At the time, the agrarian focus of the American economy made trans-Atlantic maritime trade and commerce essential to the survival of the country. Many manufactured goods had to be imported, paid for by cash crops. In business, merchants used English pounds, Spanish coins, French coins, even Chinese coins—so long as they had gold or silver in them. The Van Staphorsts were Dutch bankers. As important as the reality of economic globalization, the Americans of the founding shared an intellectual heritage with their English, French, and Dutch counterparts. Educated Americans had a classical education and could read Latin; many also commanded a smattering of Greek and French. The revolution itself was inspired by continental European thinkers. [64]

In summary, on an originalist view, the Constitution seems permissive of delegation to international institutions with respect to the adjudication of trade and commercial matters,[65] even those that were highly sensitive and constitutional in stature, like state sovereign debt.[66] Another way to think about it, which puts me in conflict with Professor Ku and Yoo's book, however much we may agree on the open-endedness of the Constitution on questions of interactions with the outside world, is that the Constitution as originally made does not see globalization as a bad and wild thing to be "tamed" but rather as something good to be encouraged and fed, even at the expense of popular sovereignty.

64. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (rev. ed. 1992); CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994).

65. *See* Henry Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007).

66. I think it is fair to say that delegation with respect to lawmaking or legislation was a different matter.