The Historical Turn in the Constitutional Law of Foreign Relations

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This essay analyzes the historical turn in the constitutional law of foreign relations. As background, I begin with some assertions about the historical turn in constitutional law scholarship generally. These introductory comments deserve more extensive discussion and support, but are being telescoped for reasons of space.

Contemporary constitutional law scholarship has undergone a decisive historical turn, resulting in the subject matter and methodologies of history occupying a more prominent place in the legal academy than they have held since the 1920s. An important reason for this turn is the peculiar fragility of constitutional law scholarship, which has manifested itself in the extremely limited shelf-life of monographs in the field. The fragility of constitutional law scholarship has been a function of its orientation toward "resolving" contemporary issues in constitutional law. At bottom, the average constitutional law monograph consists of a series of theoretical justifications for deciding given cases in a given fashion; when those cases, and their issues, cease to be of central focus, the case-dependency of the theory becomes revealed. From this perspective, the historical turn in constitutional scholarship can be seen as an effort in extending the time frame, and scope, of constitutional inquiry, and in so doing extending the shelf-life of scholarly work.

The rise of historical inquiry in constitutional scholarship has unavoidably been accompanied by the infiltration of historical methodologies. Here two problems immediately surface. One involves the relationship of historical inquiry to the purposive character of legal scholarship. To be influential, legal scholarship must have a "payoff"—contemporary normative implications that resonate. Traditional canons of historical writing de-emphasize such pragmatic concerns, maintaining that purposive historical inquiry results in a "presentist" bias that distorts the meaning of sources. One difficulty, therefore, is how to restrain purposivism in historically grounded constitutional scholarship. A second difficulty is how to sustain a "payoff" for such work if purposivism is constrained—how to prevent historical inquiry from being simply an antiquarian exercise.

Elsewhere I have outlined a methodological approach to these sets of problems, one which concedes the contemporary dimensions of any historical inquiry but seeks

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1. Compare the relatively extensive shelf-life of John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard 1980), with that of the numerous other monographs in constitutional theory which appeared at the same time but are no longer timely. Even Ely's work is now generally treated as having been centered on a problem—the "counter-majoritarian difficulty"—which some current scholarship seeks to "dissolve" or "get beyond."
to constrain purposivism through a posture of "detachment" that requires the historian to avoid rushing toward contemporary payoffs in evaluating the actions of historical actors with necessarily different sensibilities. I will not elaborate upon this approach here, except to say that an especially important "payoff" of historical inquiry, one that has direct implications for constitutional law scholarship, is the subversive effect on contemporary conventional wisdom of forays into the starting assumptions of past generations. Often a recreation of those assumptions reveals an intellectual universe quite foreign to our own, and has the effect of reminding us that other educated and sensible people, living at a different point in time, operated within a radically different epistemological framework. This can teach us about the contingency of our own belief structures, and contribute to efforts to detach ourselves from conventional legal wisdom or to revise intellectual precepts we take for granted.

My focus in this essay is on one set of conventional wisdom, animated by one set of starting precepts, in the area of constitutional foreign relations law. The set of starting precepts assumes a separation of the constitutional law of foreign relations from domestic constitutional law. And the conventional wisdom is that this separation has always existed in American constitutional jurisprudence. The topic provides us with a notorious example of purposive historical inquiry, of historical analysis overwhelmed by contemporary payoffs. It also provides a locus for the sort of historical inquiry which might yield the quite different payoffs of detachment from conventional wisdom: revisionist, historically grounded scholarship with possibly greater scholarly shelf-life.

I

The period between 1920 and the close of the Second World War witnessed a transformation in constitutional foreign relations jurisprudence. Three features of this transformation are salient for present purposes. First, there was a sharp separation of the internal and external affairs of the United States. Second, there was a claim that the foreign affairs powers of the federal government rested to an important extent on the government's status as an international sovereign, and were thus "extra-constitutional" in origin and not limited by traditional constitutional doctrines like separation of powers and federalism. Third, there was a related claim that the appropriate constitutional model of foreign affairs policymaking should be one centered on the discretionary powers of the national executive, including the power of executive suggestion to federal courts and the power to make executive agreements that trump state law.

This transformation was also characterized by the purposive interpretation of historical sources by the Court and legal commentators. Judges and scholars claimed

that the federal government possessed "inherent" foreign affairs powers since the Articles of Confederation; that the Constitution's allocation of power to the federal government assumed no involvement by the states in foreign affairs; that the federal government possessed plenary and exclusive "extra-constitutional" foreign relations powers; and that the federal executive had far more discretionary power in the realm of foreign relations than it did in the domestic realm, both with respect to potential competing powers in Congress or the Senate and with respect to competing powers in the states. There was almost no historical basis for these claims.

The posited separation of constitutional foreign relations issues from domestic issues nonetheless became accepted conventional wisdom after the Second World War, with some notable effects in the scholarly community. One was the general withdrawal of late twentieth-century constitutional scholars from the field of constitutional foreign relations, leaving the discipline primarily to scholars whose principal interests have been in international law. Another was the creation of what I have called "a myth of continuity" in constitutional foreign relations jurisprudence. That myth, primarily the product of work originating in the 1970s, takes the sharp separation of domestic from foreign relations constitutional jurisprudence as a given, relates it to the Constitution's assignment of diplomatic and ambassadorial powers to the Executive, and proceeds as if plenary and exclusive federal power to conduct foreign affairs has always been the norm. Whereas as late as 1922 Quincy Wright published a treatise, The Control of American Foreign Relations, that was largely faithful to the historical development of constitutional foreign relations law and emphasized the intimate connections between the international and domestic dimensions of American foreign policymaking, recent works on constitutional foreign relations jurisprudence have been notable for their relatively attenuated, simplistic history and for their indiscriminate acceptance of a bright-line separation between the domestic and foreign relations realms of American constitutional law.

It is not hard to see why these developments occurred. A theory of the constitutional limits on the foreign relations powers of the federal government that treats those limits as comparable to the limits on the United States' exercise of domestic powers is extremely inconvenient in an international arena in which flexibility, swiftness, and decisiveness are thought to be necessary for foreign policymakers. In this context, traditional constitutional jurisprudence, which largely equates foreign policymaking with federal treaties and assumes the existence of separation of powers and federalism checks on foreign relations lawmaking, becomes

4. The key decisions were: United States v Curtiss-Wright Export Corp, 299 US 304 (1936); United States v Belmont, 301 US 324 (1937); and United States v Pink, 315 US 203 (1942).
5. For a historical criticism of these claims, see White, 85 Va L Rev at 106-08 (cited in note 3).
6. Since the 1950s, scholarship on constitutional foreign relations issues has primarily been engaged in by legal scholars whose primary interest is international law, or by historians. The two most noteworthy examples are the legal scholar Louis Henkin and the historian Charles Lofgren. The coverage of foreign relations issues in most constitutional law casebooks, for the same time period, has been extremely attenuated.
awkward.

Since the close of World War II, the tendency to separate the foreign affairs and domestic realms of constitutional jurisprudence has only increased among both courts and commentators. Beginning in the 1940s, the decision-making powers of the federal executive became the basis of a developing federal common law of foreign relations in federal courts. Initially, this law was predicated on explicit executive “suggestions” about the treatment of foreign nationals or sovereigns in those courts. Some commentators considered these suggestions controversial, for they represented an abdication of judicial power. 7 By applying federal common law, judges avoided the potential difficulty posed by Erie—that the “law declared in the federal courts was to track that of the states in which they sat.” By the 1960s, however, the federal courts began to make independent determinations of the “foreign relations” character of issues, and declare them to be uniquely the province of the federal government, even where the executive branch had expressed no position on their resolution. 8 By the 1990s, federal courts routinely declared that the resolution of private law cases had “foreign affairs effects,” and thus were governed by a judge-made federal common law of foreign relations that preempted competing state law. 9 Appeals to history justified these developments, but in fact, like the original transformation, they lacked any historical basis.

The most significant recent illustration of the severance of constitutional foreign relations law from constitutional domestic law has been the tendency of some federal courts, and several scholars, to look to unratified or non-self-executing treaties or the resolutions of international organizations, such as the United Nations General Assembly, as sources of federal customary international law that preempt state law in the federal courts. The most common examples of such pronouncements are in the human rights area. Scholars claim that the declarations of international bodies on torture, capital punishment and hate speech should be included in the body of customary international law to be applied as federal law by federal courts in cases

8. See, for example, Philip Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am J Intl L 168 (1946); Note, Judicial Deference to the State Department on International Legal Issues, 97 U Pa L Rev 79 (1948).
10. The leading cases are Banco Nacional de Cuba v Sabbatino, 376 US 398 (1964) and Zschering v Miller, 389 US 429 (1968).
12. The most prominent case is Filartiga v Pena-Irala, 630 F2d 876 (2d Cir 1980) (holding that Paraguayan citizens could sue a Paraguayan official in federal court for acts, committed in Paraguay, that violated human rights principles as declared by international bodies).
having "foreign relations effects."  

This development has extended the constitutional transformation that took place between the world wars, and perhaps constitutes a separate transformation in itself. Early twentieth-century American constitutional jurisprudence recognized that foreign relations were "different," requiring a more extensive exercise of discretionary federal power, trumping state power where conflicts existed. Even after Erie's mandate requiring the federal courts to follow the common law of the states in which they sat, foreign relations cases remained "different," as witnessed by the instances in which the Executive stated that the interests of the United States required the particular resolution of any case involving a foreign sovereign or foreign national to be in a federal court. Building on the assumption that in such instances the executive suggestion trumped competing state law, federal courts took it upon themselves to determine when a case had "foreign affairs effects" and thus stood in a "different" realm. In such instances, a version of court-declared federal law, customary international law as understood by the federal courts, trumped state law. Now, the argument goes, since the declarations made in multilateral treaties or international organizations are regarded as customary international law, they should properly become part of the federal law to be applied in cases with "foreign affairs effects" in the federal courts.  

Like related earlier developments, scholarly appeals to purposive history marked the judicial incorporation of customary international law into federal law. Commentators have equated the "general common law" that federal courts declared prior to Erie, which did include strands of customary international law, with a post-Erie "federal law" based on superficially comparable sources. But there is no historical basis for merging those two types of law. Pre-Erie general common law was not conceived of as federal law, although it was handed down by federal courts. It was a product of the understood power of the judiciary to ascertain, declare, and apply sources of law, wherever those sources might appear. A critique of that jurisprudential proposition predicated the Erie decision. It suggested that such "law," when applied to disputes involving citizens of states, was illusory, being simply the product of judicial inclinations. After Erie, the only non-state law federal courts could declare was positively enacted federal law, the product of the Constitution, federal laws, or self-executing treaties. Such law preempted competing state law by virtue of the Supremacy Clause, but only where an actual conflict existed.  

Customary international law norms derived from international pronouncements  

15. This despite the fact that since the 1980s, the President and the Senate have consistently, as a condition of ratifying multilateral human rights treaties, attached "reservations, understandings, and declarations" that ensure the treaties shall have no domestic effect.  
and from unratified or non-self-executing treaties can hardly be described as positive federal law in the *Erie* sense. Thus, for such norms to be considered to have legal effect, particularly when they collide with state law, it is necessary for scholars to claim that the foreign affairs powers of the federal government are in an important sense not limited by the same set of constitutional constraints as federal domestic powers. This was, of course, one of the arguments propounded by original proponents of the separation between domestic and foreign affairs in constitutional law. But, if anything, *Erie* jurisprudence has made that argument even less plausible. If federal courts cannot declare "general" law from a variety of sources because they have no authority to do so, they should not be able to declare that international human rights norms which the federal political branches have not absorbed into domestic law are nonetheless "federal" law.

Even if we assume that the foreign relations powers of the federal government are "different" from those of its domestic powers—different because of the historical sources of the federal foreign relations power and the exigencies of international policymaking—it would seem to be because of the Constitution's expectation that the Executive (subject to Senate consent) would be the principal organ of foreign policymaking, and because (if one accepts one version of history) every international sovereign has some inherent power to conduct foreign relations. Neither of these grounds justify foreign relations lawmaking by the federal courts, especially in the absence of Executive suggestions and in light of the constitutional concerns raised by *Erie* about the legitimacy of federal judge-declared law not grounded in any positive edict of the federal government.

The disengagement of constitutional foreign relations jurisprudence from its domestic counterpart has been, from its inception, driven by particularistic responses to the perceived exigencies of international policymaking. The disengagement never rested on any historical or theoretical basis that survives even mild scrutiny. Rather, it rested on a series of intuitions—that foreign and domestic affairs are "different," that foreign affairs are peculiarly the province of the federal government, that all cases involving foreign nationals or foreign sovereigns implicate "foreign affairs," and that as part of its role as a sovereign in the international community the United States has an obligation to ensure that its human rights practices are on the cutting edge of enlightened international opinion—which may or may not be sound, but which are surely neither constitutionally compelled nor historically grounded.

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17. This argument was anticipated in Richard B. Lillich, *The Constitution and International Human Rights*, 83 Am J Intl L 851 (1989). Notice an ironic sidelight of this argument: The disengagement of constitutional foreign relations jurisprudence from its domestic counterpart proceeded on the assumption that external and internal affairs were different; now, as a result of corollaries drawn from that assumption, it is claimed that power in the federal courts to declare that the rules of international conventions and those of American federal courts shall be the same. In the human rights area, international declarations become incorporated into the federal law as declared by American federal courts, notwithstanding specific efforts on the part of the political branches to resist that incorporation.
Is this tendency to produce purposive, externally driven, constitutional history peculiar to the field of foreign relations law? I began this essay suggesting that the tendency of constitutional law to reflect shifting social and political attitudes raises a problem for the shelf-life of constitutional scholarship that may not exist to the same degree in other fields. Constitutional law does not seem to have a “core” subject matter; instead, its core is changing interpretations of the provisions of the Constitution’s text. The easiest generalization to advance about constitutional law is that interpretations of such provisions will inevitably change with time. Thus it seems peculiarly difficult to write constitutional commentaries with a long shelf-life. They appear to be fated to address problems whose centrality is evanescent.

Thus one might well expect constitutional foreign relations scholarship, at any point in time, to be concerned with issues thought to be central because of the regular pressure exerted on exercises in interpreting the provisions of the Constitution by external events. That pressure, in fact, was a major stimulus in producing the initial separation of domestic constitutional jurisprudence from its foreign relations counterpart, and has been a major stimulus in reinforcing that separation despite its problematic theoretical and historical status. In fact, a principal argument animating the separation of foreign relations from domestic constitutional jurisprudence was that the foreign affairs of the United States were different from its domestic affairs: different in kind, involving the acts of a sovereign nation in the international community, and different in degree, requiring a much more flexible and swift decision-making apparatus than the tripartite, federalist republican governmental structure designed by the Constitution for domestic policymaking.

So it should be no surprise that of all the areas of constitutional jurisprudence, that of foreign relations should be the most affected by the changing external context of constitutional law decisions. Nor is it surprising that scholarship in the area should exhibit a recurrent interest in tailoring constitutional principles to the perceived demands of contemporary American diplomacy. But this also suggests that scholarship in the realm of constitutional foreign relations law is peculiarly susceptible to the problem of obsolescence.

The question is not then, at the end, whether many of those currently engaged in constitutional foreign relations scholarship are incapable of writing good history. Rather, the question is whether they are doing themselves a service by assuming that in their particular arena, history and interpretive fidelity can be ignored in the service of contemporary normative agendas. The twentieth-century evolution of constitutional foreign relations scholarship suggests such a ploy worked once before. But as the lines between domestic and international law blur, those inclined to extend the logic of foreign affairs exceptionalism too far might find themselves in the position of fighting skirmishes on the frontier, only to see the center collapsing. Those concerned with globalizing federal law should consider that once one examines the assumed distinction between foreign relations and domestic constitutional jurisprudence, it has the awkward quality of being created out of whole cloth.
The preoccupation of twentieth-century constitutional foreign affairs scholars with the external consequences of foreign relations policymaking made constitutional foreign affairs law particularly vulnerable to revisionist analysis. The straightforward strategies of going back to history, and to the structure of powers in the original constitutional design, exposed the highly purposive quality of the two major transformations in twentieth-century constitutional foreign relations jurisprudence. But it would seem that, given tendencies in the field, the revisionists themselves should worry about excessive purposivism. If the domestic and foreign affairs realms of American constitutional jurisprudence are to be integrated, there is something to be said for integrating them on a sound theoretical and historical basis. Historical methodology can set us free, as Holmes once said, by furnishing us with some distance from contemporary obsessions. But, properly utilized, it should also constrain us. Sometimes, the design and meaning of the Constitution create awkward barriers to the pragmatic “solution” of contemporary legal issues. We need to recognize what is lost, as well as what might be gained, in ingenious avoidance of those barriers.