TOO MUCH GLOSS FOR THE BOSS?

HISTORICAL GLOSS AND FOREIGN AFFAIRS: CONSTITUTIONAL AUTHORITY IN PRACTICE. By Curtis A. Bradley.[1] Harvard University Press. Pp. 288. $49.95 (Hardcover).

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INTRODUCTION

Claiming victory as ever, President Trump has brought a bitter trade war with China to a conclusion and amicably rekindled his friendship with his "good friend" and General Secretary of the Chinese Communist Party, Xi Jinping.[3] As part of the deal, the President agreed to cease and prohibit any form of support for the government on Taiwan as a separate entity. Among other things, the President has directed that a mandated Defense Department review of Taiwan's military needs be ended, that the executive branch will no longer treat U.S. laws applicable to foreign states to include Taiwan, that U.S. courts no longer enforce contracts under U.S. law involving Taiwan, and that all officials working for the Taiwan Trade Office be denied entry into the U.S. All these actions violate the 1980 Taiwan Relations Act,[4] signed by the late President Carter as a price for his recognition of the Peoples' Republic of China and unilateral termination of the 1954 Mutual Defense Treaty with Taiwan.[5] The moves for a

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3. In China's Party-State, in which the former sets policy for the latter, the more important position is General Secretary of the Chinese Communist Party.

4. 22 U.S.C. § 3381.

5. See Warren Weaver Jr., *Treaty Termination May Spur Senators*, N.Y. TIMES (Dec. 18, 1978), https://www.nytimes.com/1978/12/18/archives/treaty-termination-may-spur-senators-carter-action-on-taiwan-pact.html.

time trigger a rare bipartisan uproar in Congress but little more. Likewise passive are the federal courts, which dismiss any attempts to declare the President's actions illegal on justiciability grounds.[6] By the end of 2027, the deadline set by Xi for a plan to invade Taiwan, the People's Liberation Army Navy commences a choking blockade.[7] With the U.S. on the sidelines, the rest of the world sits back and watches.

This, with luck, not-prophetic[8] scenario typifies the long obscure area now known as "foreign relations law," itself a term coined more recently than might be supposed. In broadest terms, the field deals with the ways domestic, especially constitutional, law structures the making of foreign policy. When consequent policymaking results in international obligations, the foreign affairs law further address the applicability and force of those obligations at the federal and state level.

Paradoxically, the field remains understudied almost in direct proportion to its high stakes, which, among other things, include: national security, armed conflict, treaties, immigration, diplomacy, trade, and international human rights, to name a few. Though central at the time of the Founding, as recently as the turn of the millennium this journal could print the observation that,

> U.S. casebooks and law reviews grace the shelves of underfunded law schools in Beijing and are requested from less fortunate institutions in Bosnia, Haiti, and (in exile) Burma. More and more these materials cover not just case law, but history, economics, philosophy and the contributions of the previously voiceless. But, to a one, they have next to nothing to say about how the world's last superpower engages with the law beyond its borders.[9]

Despite the nation's rise to global preeminence after World War II, foreign relations law remained something of an elite backwater. Then came 9/11. With Guantanamo, the Gulf Wars,

6. *Cf.* Goldwater v. Carter, 444 U.S. 996 (1979).

7. Sam Lagrone, *Milley: China Wants Capability to Take Taiwan by 2027, Sees No Near-Term Intent to Invade*, U.S. NAVAL INST. NEWS (June 23, 2021), https://news.usni.org/2021/06/23/milley-china-wants-capability-to-take-taiwan-by-2027-sees-no-near-term-intent-to-invade; Joyu Wang & Austin Ramzy, *China Is Ready to Blockade Taiwan. Here's How*, WALL ST. J. (Mar. 23, 2025), https://www.wsj.com/world/china/china-is-ready-to-blockade-taiwan-heres-how-8cffdeb2.

8. In light of events since this review was first written, this reviewer's powers of dire prophecy were no match for reality.

9. Martin S. Flaherty, *Aim Globally*, 17 CONST. COMMENT. 205, 207 (2000).

and the "Global War on Terror" in general, foreign relations law moved front and center. Domestic concerns in recent years have cut the other way. But with Ukraine, Israel/Palestine, Taiwan, Iran, North Korea, and our own borders, that lull, like Munich in 1938, may simply be calm before fresh storms.

Curtis A. Bradley has long been a major figure in the field, even before it became higher profile. He has been nothing if not prolific, arguably one of the most prolific foreign relations law scholars of his generation. Bradley's productivity reflects a correspondingly broad range of topics covering the field. Among other things, he has authored or co-authored major articles about foreign affairs and federalism, international human rights, treaty law, and original understandings of executive power.[10] Beyond, and perhaps because of, these individual contributions, Bradley has also been a great synthesizer. Several projects, individually and together, have sought nothing less than to provide a comprehensive overview of modern foreign affairs law, including a leading casebook, his *Foreign Affairs and the Constitution*,[11] and his participation as a Reporter for the in-progress *Restatement (Fourth) of the Foreign Relations Law of the United States*.[12]

To this extent, Bradley has laid a claim as successor to the great Louis Henkin, the leading figure in U.S. foreign relations law scholarship post-World War II. For his part, Henkin wrote numerous landmark articles on foreign affairs, often exploring topics no one had addressed previously. His short but comprehensive *Foreign Affairs and the Constitution* remained the standard for generations, and remains relevant.[13] Henkin was also not just a Reporter, but the Chief Reporter for the *Restatement (Third) of the Foreign Relations Law of the United States*.[14] While doing all this, Henkin also effectively founded the study of international human rights law in the United States, and practiced

10. Just a sampling includes: Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Curtis A. Bradley, *Federalism, Treaty Implementation, and Political Process:* Bond v. United States, 108 AM. J. INT'L L. 486 (2014); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

11. CURTIS A. BRADLEY, ASHLEY DEEKS & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (8th ed. 2024).

12. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. (A.L.I., Proposed Official Draft 2018).

13. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2nd ed. 1996).

14. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. (A.L.I. 1987).

what he propounded, with more than a few important initiatives as a human rights advocate. Yet if Bradley is a successor to Henkin in form and output, the same holds less so in substance and orientation. In those regards Henkin's mantle most obviously falls to other leading scholars, such as Harold Koh and Sarah Cleveland. Koh, prolific in his own right, carries forward Henkin's internationalism, pragmatic commitment to human rights, and real world engagement.[15] Cleveland, currently a judge on the International Court of Justice, as a scholar has ably followed in her mentor's footsteps.[16]

Bradley's important new book, *Historical Gloss and Foreign Affairs*, reflects the continuity and contrast. Something of a concise magnum opus, the study tackles head-on the oft-noted central challenge of foreign relations law—how is it that numerous, epic powers, from regulating immigration to terminating treaties to recognizing foreign governments, "have always been exercised by . . . the federal government, but where does the Constitution say that it shall be so?"[17] The book's title gives the answer: "gloss," at least as a descriptive matter. Sampling the term from Justice Frankfurter,[18] Bradley—and the Justice for that matter—really mean the custom or tradition of how the branches have worked out doctrines that the text leaves underdetermined. Bradley makes this case drawing upon both fresh research as well as his all but unrivaled command of foreign affairs law and history. The resulting account, comprehensive, concise, and informative, to this extent echoes the Henkin tradition.

The related prescription, however, less so. As rich as the descriptive account is, what makes *Historical Gloss* even more notable is Bradley's foray into the normative. Typically, Bradley's work does not shy away from taking clear positions on various controversies, usually based on cogent analysis and rigorous

15. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE TWENTY-FIRST CENTURY (2024); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

16. *Sarah H. Cleveland*, COLUMBIA L. SCH., https://www.law.columbia.edu/faculty/sarah-h-cleveland; HUMAN RIGHTS (Louis Henkin, Sarah H. Cleveland, Laurence R. Helfer, Gerald L. Neuman, & Diane F. Orentlicher eds., 2d ed. 2009); THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW (Paul B. Stephan & Sarah H. Cleveland eds., 2020).

17. HENKIN, *supra* note 13, at 15.

18. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

homework. Yet, at the same time, it rarely took a general theoretic position on how best foreign affairs law should be ascertained. *Historical Gloss*'s embrace of, well, gloss, leaves no doubt. Not only has constitutional custom and tradition settled most key questions in foreign affairs law, it rightly should. Whatever its virtues, this focus has at least an equal and opposite share of problems. Not least of which, custom and tradition under the American constitutional framework has been, and remains, the fuel for an expansionist presidency, notwithstanding Bradley's determined efforts to reject this conclusion. In this, Bradley very much departs from Henkin and, for that matter, an often unfairly criticized Koh. Such a theory would be fraught in any circumstances. It is that much more concerning in an age of popular authoritarianism, including its newly returned American representative.

I. THE WHENCE AND WHITHER OF GLOSS

A. GLOSS JUSTIFIED

Historical Gloss offers its solution even before it poses the challenge that it will address. For that answer, one need go no further than the title itself. As Bradley defines it, "[h]istorical gloss arises from the longstanding practice of government institutions" (p. 13). The term itself famously arises from Justice Felix Frankfurter's concurrence in *Youngstown Sheet & Tube Company v. Sawyer*.[19] Departing from the majority's strict textualism, Frankfurter declared that "the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."[20] The Justice coined the term, fittingly as it would turn out, applying this idea to a question of presidential power, stating that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of

19. *Id.*
20. *Id.* at 610.

our government, may be treated as a *gloss* on 'executive Power' vested in the President by § 1 of Art. II."[21]

Bradley attempts to make clear that "gloss" is not typically treated as "a freestanding source of constitutional law," but rather as a supplement when constitutional text and structure "are thought to be unclear" (pp. 12–13). Assuming that these sources are unclear, or at least contested, much of the time, it is difficult to see how gloss so defined does not constitute a discrete source of constitutional meaning, in which text and structure play an attenuated role (assuming that there can also be a "gloss" on structure). Even Frankfurter stated that what he called "gloss" could "supply" meaning.[22] To this extent, "gloss" serves as a somewhat unfortunate banner to Bradley's main prescription. Even under this preliminary definition, what is really doing the work is better thought of as custom, tradition, or practice.

Whatever the term, Bradley defends constitutional "gloss," or custom, as a general matter. Only later will he argue that it is particularly useful for foreign affairs questions, where the Constitution's text and structure is ostensibly less clear. Yet, as a general defense of custom, the book does not acknowledge another area in which custom has played an important role at least as important as the role of the three branches in foreign affairs. By any reckoning, custom and tradition have done most of the work in identifying and updating fundamental rights not specifically in the text, whether parental rights with regard to a child's education,[23] the right to travel,[24] to use contraceptives,[25] to engage in consensual sex with another adult,[26] and to marry a person of a different race,[27] of the same sex,[28] or at all.[29] Custom may or may not rest on the same justifications in these areas as in the allocation of government powers. Either way, some mention of the issue would have been useful. As it is, Bradley's decision to

21. *Id.* at 610–11 (emphasis added).
22. *Id.*
23. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
24. Sáenz v. Roe, 526 U.S. 489 (1999).
25. Griswold v. Connecticut, 381 U.S. 479 (1965).
26. Lawrence v. Texas, 539 U.S. 558 (2003).
27. Loving v. Virginia, 388 U.S. 1 (1967).
28. Obergefell v. Hodges, 576 U.S. 644 (2015).
29. *Loving*, 388 U.S. at 2; *Obergefell*, 576 U.S. at 651–53.

commence with the general appeal of custom makes the need for defending its virtues that much more pressing.

Historical Gloss mounts this defense with several arguments. Confirming the primacy of tradition over "gloss" on text, the first claim echoes the classic position of Edmund Burke, that longstanding practice merits deference as it reflects considered and workable judgments of numerous past actors. A second claim involves institutional competence. Here, the assertion runs, courts often rely on materials that provide scant guidance. How institutions have actually worked out the division and application of authority "may the best option for a reasoned disposition of the case" (p. 14). In addition, reliance on custom permits "constitutional updating" for a 230-year-old framework that is notoriously difficult to formally amend (pp. 14–15).

Having established custom's many ostensible virtues, Bradley turns to its scope and application. Gesturing toward foreign affairs, he first argues that tradition has special purchase in separation of powers cases, in part because standing requirements tend to limit judicial decision-making. Moreover, the Supreme Court has long relied on tradition in this area, creating a sort of custom that itself bolsters the use of custom. Bradley further holds out that custom occupies something of a middle ground between originalism and more dynamic theories of constitutional interpretation and can be consistent with all but the most extreme approaches. Likewise, his conception of custom sits easily with the Constitution's text, an approach that almost justifies his insistence on the term "gloss." Custom, as "gloss," cannot supplant the text; rather, it typically clarifies ambiguous terms or supplies meaning in the numerous instances in which the Constitution's text is silent. It is further especially appropriate to apply in areas in which judicial intervention is infrequent, which otherwise might too readily "freeze" tradition as of a court's judgment (pp. 23–24). *Historical Gloss* states that custom can fulfill its role only when it meets three conditions: "(1) governmental practice (2) that is longstanding and (3) concerning which the affected branch of government has acquiesced" (pp. 25–26). Finally, and significantly, *Historical Gloss* anticipates what it concedes is the "most common" objection to the use of institutional custom—that it tends to favor expansion of executive authority. Among other things, Bradley argues that this fear has been exaggerated, that there is no clear baseline to judge

appropriate executive power, and that much of the presidency's successful assertions have come with the approval of Congress (pp. 30–32).

Having prescribed custom as the solution, *Historical Gloss* finally turns to foreign affairs law as the problem to be solved. Laudably, Bradley does not fall for the too-frequently-parroted false truism that the Constitution should be approached in radically different fashions with respect to foreign versus domestic affairs. Notwithstanding, Bradley does argue that custom is particularly well suited to deal with foreign affairs disputes. One reason has to do with the Constitution's vague and limited text in this area, the point classically stated by Henkin[30] and reiterated by Koh,[31] among others. Add to this, Bradley continued, that various self-imposed judicial constraints on even accepting foreign affairs cases, such as standing and so-called "political question" doctrine, which leave a further gap for institutional tradition. All this Bradley ably illustrates with a concise account of the 1793 Neutrality Controversy, over whether President Washington had the authority, in effect, to declare peace, a matter unaddressed in the text and unclear in the original understanding (pp. 37–39).

That said, *Historical Gloss* rejects the notion that foreign affairs law is so open-ended that more exotic sources can legitimately fill the void. Bradley rightly argues against the idea that U.S. sovereignty as an independent state offers a font of foreign affairs authority (pp. 39–42). Here he joins Henkin in viewing such a vague and broad source as fundamentally inconsistent with the Constitution's idea of limited powers. He also correctly notes that the Supreme Court's flirtations with sovereignty have been inconsistent, dated, and poorly reasoned, including and especially Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corporation*.[32] That opinion also gives Bradley the occasion to reject the idea, often attributed to Sutherland, that labeling the President as the sole organ of foreign affairs authority can serve as an established wellspring of authority (pp. 42–44).[33] These wrong starts out of the way, Bradley brings matters full circle to maintain that practice may apply

30. *See, e.g.*, HENKIN, *supra* note 13.

31. *See, e.g.*, KOH, *supra* note 15.

32. 299 U.S. 304 (1936).

33. *See also* MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS, 92–97 (2019).

throughout constitutional law. In this way, he continues to repudiate "foreign affairs exceptionalism," the idea that this area of the law should be approached in a materially different way than its domestic counterpart (p. 47). Significantly, he nonetheless concedes that custom may play out differently in external matters, in part because of differences in the comparative advantage among the branches, in part because of the often higher stakes (p. 44).

With the theoretical foundations set out, the bulk of *Historical Gloss* recaptures custom itself. Here Bradley draws upon his own encyclopedic knowledge, past scholarship, and fresh research to offer a concise survey of how the branches of government have worked out key foreign affairs issues since the nation's Founding. This survey in many ways stands at the book's signal contribution. Among other things, Bradley's reconstruction of constitutional custom along a range of issues is valuable and illuminating even if one doesn't buy into the great interpretative weight he would have it bear. A slightly condensed list of the topics considered demonstrates its value: the power to recognize other regimes; how international agreements have been made and terminated; the use of military force; and Congress's foreign affairs role (pp. 50–52, 99–103, 120–25, 169–74).

Louis Henkin famously began his list of "missing" constitutional powers asking, "[w]here . . . is the power to recognize other states or governments. . . ?"[34] Bradley makes a powerful case for custom. Constitutional tradition demonstrates first, that the recognition power lies with the President, and second, that this authority is exclusive and cannot be limited by Congress. The Supreme Court had recently reached the same conclusions in *Zivotofsky v. Kerry*,[35] with a refreshingly rigorous opinion. Yet, *Historical Gloss* does the Court one better with a succinct grand tour of relevant U.S. history demonstrating both points, including: the Neutrality Controversy and revolutionary France, Haiti, the new Latin American republics of the early nineteenth century, independent Texas, a range of decision by the Lincoln Administration, Indian Tribes, Cuba, twentieth-century cases, Taiwan and China, as well as Israel and Palestine (pp. 67–70). These case studies are learned, rigorous, and, best of all,

34. HENKIN, *supra* note 13, at 14.
35. 576 U.S. 1 (2015).

nuanced. In contrast to too much historical legal scholarship, Bradley neither over argues, nor tailors the evidence to fit his claim. That said, *Historical Gloss* does underestimate the force of the Receive Ambassadors Clause,[36] which fairly clearly established a textual and even originalist base for the basic grant of the recognition power to the President.[37] To that extent, tradition supplements rather than supplies.

By contrast, the story of treaties and international agreements involves custom supplying a good deal of constitutional meaning outright, as well as a substantial shifts over time. Consider how the U.S. has made international agreements. The Constitution's text specifies only one method: the President shall make treaties with the advice and consent of two-thirds of the Senators present.[38] Yet the Treaty Clause does not say this is the only method, however plausibly it might imply it. Through this opening tradition and practice has driven the equivalent of several amendments. *Historical Gloss* briskly recounts the two centuries of practice in impressive detail. Two-house majority "Congressional-Executive" agreements, while present near the creation, grew steadily and exploded after World War II, concentrating on trade, and dwarfing all other types of instrument (pp. 76–79). "Sole Executive Agreements," concluded by the President alone, by the mid-twentieth century likewise went from a trickle to flood, concentrating mainly on the status of armed forces abroad, the effects of recognizing foreign governments, and claims settlements (pp. 84–90). Bradley rightly argues that these, and more specialized modes of concluding agreements, cannot be understood without resort to custom. Nor, for that matter, can their general acceptance, including occasional and somewhat random endorsements by the Supreme Court. Much, though hardly all, of this story is known. But rarely has it been told more judiciously (pp. 99–118).

Historical Gloss offers a similar account, though one less known, on terminating treaties and international agreements. On this point, the Constitution's text resembles a dating app. It provides at least some guidance on entering into relationships. On splitting up, we are left on our own. Practice therefore becomes even more critical. Bradley traces a distinctive and not surprising

36. U.S. CONST. art. II, § 3.
37. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES *245–49.
38. U.S. CONST. art. II, § 2.

shift. Through the end of the nineteenth century, one or both Houses of Congress typically participated in the termination of classic Article II treaties. As the twentieth century progressed, unliteral presidential treaty termination became more frequent, then the norm, to something close to the conventional wisdom. The last stand of Congress, or at least the Senate, may have come with President Carter's termination of the U.S. defense treaty with Taiwan, which a divided Supreme Court ducked in *Goldwater v. Carter*,[39] effectively handing the victory to the White House (pp. 99–118). Once again, the treatment is rich. Bradley concedes, indeed is quick and correct to point out, that the shift to presidential unilateralism is hard to square with any plausible original understanding. Less clear is whether the relentless increase in presidential foreign affairs power is a good thing (pp. 99–118).

On the use of military force, *Historical Gloss* ventures into the most consequential territory that constitutional, let alone foreign affairs, law has to offer. With Congress's power to declare war on one hand, and the President's position as Commander-in-Chief on the other, text, original understanding, and structural inference left epic questions at least in effect to be supplied by custom, practice, and tradition. Bradley may undersell some of what text and, always more fraught, original understanding, settle. It is more likely than he concedes that the Founders believed that the President would have the power to repel sudden attacks on the U.S., especially on the expectation that it would take about three weeks to convene a Congress that itself would not be in session about eleven months during the year.[40] Likewise less than clear is that a mere congressional authorization of force meets the textual, initial, and functional requirements of a formal declaration.[41] Whatever the departure points, Bradley does make abundantly clear that historical shift in war-making authority to the President. During the nineteenth century, custom reflected

39. 444 U.S. 996 (1979).

40. *See generally* JOHN H. ELY, WAR AND RESPONSIBILITY 6 (1995) (explaining the congressional authorization requirement in the face of sudden attacks); *cf.* William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

41. *Cf.* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) (following the congressional defeat of a War Powers Resolution authorization and declaration of war, congressmen commenced suit against the President who continued airstrikes after the congressional vote).

general agreement that the executive had some independent authority to mount defensive actions, as well as to protect U.S. persons and property abroad.

Yet as *Historical Gloss* convincingly shows, practice began to significantly slip these constraints by the century's end, not coincidentally with the nation's embrace of blue-water imperialism. The overthrow of the Hawaiian monarch, the Spanish-American War, the Boxer Rebellion, innumerable incursions in Central and South America, and the Korean War, among other examples, make the point. Congress, whether boxed in by the President or not, has retained some authority to authorize major military actions, such as the two Gulf Wars and, more problematically, Vietnam. Custom has nonetheless accorded the President enormous power for any number of far-flung actions that could easily escalate (pp. 118–39). Bradley curiously reads the 1976 War Powers Resolution as conceding this dichotomy, even though its clear text and purpose sought congressional authorization "in any case in which United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" (p. 140).[42] Nonetheless, the overall shift custom has wrought is clear enough. As Bradley dryly puts it, "[t]his conclusion is unlikely to be satisfactory to those who think we need greater checks on presidential military actions" (p. 144).

After all this, *Historical Gloss* attempts to show that what has been good for the President has also been good for Congress. Again, the careful, though concededly selective, account of institutional practice over two centuries continues. Among other things, Bradley carefully shows Congress exercising authority to offer conditional consent on international instruments, mandate the content of passports, regulate aspects of diplomacy, such as mandating sanctions, regulate armed conflict, and legislate over the conditions of prisoners of war (pp. 146–67).

Nonetheless, these treatments stand apart on several counts. For one thing, several of the powers asserted, such as the content of passports or grades of diplomatic salaries, appear hardly momentous. Much more importantly, a good many powers have a plausible basis in text, as Bradley generally admits, or as well in original understandings, which for the most part go unmentioned.

42. 50 U.S.C. § 1543(a)(1).

For example, the practice of conditional consent hardly seems far removed from the Senate's power to give "advice and consent."[43] Nor is it obvious that the practice departs from the robust role originally envisioned for the Senate in particular. Finally, Bradley's handling of certain major powers, such as regulating armed conflict and POWs sounds a defensive note (pp. 146–47). It does not so much show how practice supplied answers to constitutional gaps. Rather, it repeatedly juxtaposes the exercise of certain powers with plausible textual or original bases, with objections by the President's Office of Legal Council, which themselves appear less than compelling (p. 153).[44] Despite the book's attempt at balance, its own account makes clear that custom manifestly cuts in favor of the executive.

The same goes for the book's final topic: congressional delegation of foreign affairs authority. In this case, however, *Historical Gloss* describes two differences. First, the custom of Congress delegating important foreign affairs appears to be present at the creation, rather than increasing over time. Far more importantly, a comparatively extensive power to delegate in foreign affairs almost by definition enhances the authority of the branch to which the delegations are made, which of course is the already expanding executive branch.

These takes apply across the board. Often overlooked, Bradley rightly notes, is that the notorious *United States v. Curtiss-Wright Export Corporation*[45] was a delegation case (pp. 168–69). Yet less well known, he asserts, is that Congress made broad grants of authority for presidential actions beyond our borders from the earliest days of the Republic (pp. 122–25). Bradley makes a similar case for the grant of emergency powers (the 1795 militia statute), the exclusion of foreigners (the 1798 Alien and Sedition Acts), and the use of military force (the late eighteenth-century Quasi-War with France). Bradley not unreasonably notes that congressional delegations have been so numerous that the survey here may be particularly selective. Nonetheless, it is hard to escape the notion that the custom of increasing the scope and pace of such delegations has grown exponentially, especially given

43. U.S. CONST. art. II, § 2, cl. 2.

44. *See, e.g.*, p. 153 ("Historical practice suggests, however, that OLC's claims about an exclusive presidential power over diplomacy require substantial qualification.").

45. 299 U.S. 304 (1936).

the book's many citations of Cold War and 9/11 precedents (pp. 169–90).

The book concludes redeploying custom to its central role in U.S. foreign affairs law. Bradley correctly notes the unforeseen and epic changes both in international relations and the position of the United States since the days of the Founding. With perhaps some overstatement, he likewise effectively discounts the potential of text and original understanding, to say nothing of structural inference of other common sources of constitutional interpretation. Vast change and scant guidance have left it for the void to be filled by custom, practice, tradition, and even "gloss." Whether always a good thing, "[i]t has been this way from the very beginning" (p. 195).

II. CUSTOM AND CLIO

Custom can only supply foreign affairs doctrine if one gets custom right. Bradley does. In contrast to all too much legal scholarship, *Historical Gloss* covers some 200 years of inter-branch development with rigor, care, nuance, and balance. It does so, moreover, across an impressive array of major and corollary foreign affairs issues. In large part this reflects Bradley's longstanding approach as a legal scholar. Whatever the conclusion, he typically marshals substantial historical evidence. In part as well, the quality of the book's historical account rises insofar as it is mainly concerned with recovering past practice wherever it leads. This approach stands in stark contrast to much originalism, which often seeks not to recover an often neglected historical development, but rather to spin it via selective quotations, bold assertion, and lack of context.[46] This is not to say the book's account is beyond challenge. In many instances, what nits there are, are simply that. More problematic, when Bradley does offer usually *en passant* assessments of certain developments, certain evaluations can be at best curious and at worst problematic. That said, the main flaw with *Historical Gloss* is that Bradley's account of custom all but ignores across the board one third of the federal government.

46. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Martin S. Flaherty, *Peerless History, Meaningless Origins*, 1 J. AM. CONST. HIST. 671 (2023).

The quality nonetheless far outweighs the quibbles. *Historical Gloss* goes a long way to restore one's lost faith that legal scholarship can produce careful, well-documented, and balanced historical accounts. Sometimes the book consolidates information that is relatively accessible. More often it fills gaps. Bradley achieves both results, moreover, in a clear, user-friendly manner, that should make *Historical Gloss* a go-to first stop for anyone exploring the development of relevant government practice in foreign affairs.

The book's treatment of treaty termination offers a representative illustration. The Treaty Clause of course specifies the process for making treaties. But it is silent on who they may be terminated by. Trees have been felled seeking an answer in textual inference. Forests have disappeared in trying to determine "an" original intent/understanding/meaning/"public" meaning.[47] Yet correspondingly little had been done on getting the nation out of its treaty obligations. *Historical Gloss* fills that gap. As noted, the general pattern reveals surprising congressional involvement through much of the nineteenth century. The account goes as far back as the 1798 termination of a treaty with France pursuant to a two-house congressional delegation, the "only time in history," despite Thomas Jefferson later citing this as the proper method of doing so (pp. 101–02). The book continues with many other long-forgotten instances, including a treaty with the United Kingdom (not Great Britain) about the Oregon Territory, an 1865 treaty with the United Kingdom (not Great Britain) over trade with Canada, and an 1874 pact with Belgium, and various international agreements pursuant to the 1915 Seaman's Act (p. 102). Overlapping these examples, the book traces the rise of presidential unilateralism, with equally overlooked instances as the nineteenth and twentieth century progressed. It was, however, with FDR and the rise of the U.S. as a superpower that unilateralism took off—a development set out with numerous, carefully explained examples. By the time President Carter pulled out of the nation's treaty with Taiwan, sole presidential authority

47. For a sampling, *see* William M. Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 986 (2009); William M. Treanor, *Process Theory, Majoritarianism, and the Original Understanding*, 75 FORDHAM L. REV. 2989, 2990, 2994 (2007); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962 (1999); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 172 (1996); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

to terminate treaties could stake a strong claim to the conventional wisdom. Throughout, Bradley is careful neither to highlight the ambiguities that many of these examples involve. The result is a signal contribution featuring both breadth and depth (pp. 99–118).

Any book that covers so much territory will run into a few bumps, nonetheless. Even these tend to be minor. Bradley, for example, notes that the use of custom predates Frankfurter's *Youngstown* opinion, going back to 1915 (p. 117). The point would have been stronger by pointing to Chief Justice Marshall's opinion in *McCulloch v. Maryland*, which opened with the argument that the question of Congress's power to charter a bank "was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."[48] Bradley, to be fair, does quote other language in *McCulloch* stating that, in cases about the allocation of authority, the custom hammered out by Congress and the President "ought to receive a considerable impression from that practice" (pp. 15–16). Bradley's treatment, however, ignores how Marshall actually derived Congress's power to charter a bank in *McCulloch* itself. In addition to custom, Marshall placed even greater reliance on his understanding of the Founding, structural inference, and text.[49] What Marshall did not do was give custom pride of place.[50]

More problematically, *Historical Gloss* at several points underplays the eighteenth-century understanding of the Receive Ambassadors Clause as the textual source for presidential authority to recognize foreign governments. Among other things, Blackstone earlier so understood the link in the monarch's prerogative power to receive ambassadors, as did the Washington administration in debating whether to receive Ambassador Genet and so validate the French Republic.[51] *Historical Gloss* also sets

48. 17 U.S. (4 Wheat.) 316, 401 (1819).

49. *Id.* at 403–23.

50. Nor did he limit his comprehensive approach to federalism cases, like *McCulloch*, that sought to fix the allocation of power between the federal and state governments. His methodology is no less protean when it came to separation of powers cases resolving disputes between the three branches. *Id.*

51. Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, *in* PRESIDENTIAL POWER STORIES (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

forth Justice Sutherland's originalist case for an extreme version of foreign affairs exceptionalism. But it does not explain the contemporary reasons why the Justice took this tack, and more importantly, the extent to which his history flies in the face of modern scholarship.[52] Moving to modern times, the book repeatedly refers to the executive's maintenance of a "One China" policy with regard to Beijing and Taipei. In so doing, it misses that the government, more often than not, has avoided taking any position, going all the way back to Nixon's visit to China in 1972.[53]

If *Historical Gloss* gets custom wrong in any major way, however, it is by an act of omission. Bradley repeatedly takes as foreordained that the judiciary simply does not have a significant role in foreign affairs, mainly due to gatekeeper doctrines such as standing and the so-called "political question" doctrine (pp. 45–46). The institutional practice that resolves the Constitution's gaps and ambiguities therefore falls all but exclusively to Congress and, based on a tally of the book's own examples, even more often to the President. No surprise then that when it comes to supplying any meaningful gloss, the book portrays the courts as more or less missing in action across its range of topics over the course of two centuries.

To paraphrase Chief Justice Marshall, it would be difficult to sustain this narrative.[54] As I have argued elsewhere, the judiciary as established was intended to play a critical role in the nation's foreign affairs, and, more to the point, did so until well into the twentieth century. To condense a tome into a sketch, the Constitution's text allocation of various foreign affairs grants does not end with the political branches. Among other things, the federal courts have jurisdiction over admiralty and maritime cases, and other cases involving treaties "as the supreme Law of the Land," with the Supreme Court having exclusive authority over actions involving diplomats.[55] These grants, not surprisingly,

52. *See* FLAHERTY, *supra* note 33, at 91–104 (contextualizing Justice Sutherland's stance towards foreign national policy in light of the rising threat of fascist and authoritarian regimes).

53. *See, e.g.*, *Joint Statement Following Discussions with Leaders of the People's Republic of China*, PUB. PAPERS 378 (Feb. 27, 1972) ("The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China.").

54. *McCulloch*, 17 U.S. (4 Wheat.) at 403.

55. FLAHERTY, *supra* note 33, at 60–63.

reflected the views of the framework's architects, supporters, and defenders.[56]

More strikingly, the courts embraced their intended role, and not infrequently drew lines for the states, the executive, and Congress, at times referencing international law to do so. The Supreme Court, in particular, did so in landmark decisions in sensitive areas of armed conflict, starting with the 1798 Quasi-War with France,[57] through the Spanish-American War,[58] the Korean War,[59] and up though the so-called Global War on Terror.[60] This is not to say there was no shift. To the contrary, the judiciary slowly, then more surely, placed itself on the sidelines as the nation grew from regional power, global power, superpower, and for the moment, hegemon. Ironically, this story complements Bradley's, insofar as much of the evidence he adduces shows a comparative rise of executive authority at the expense of both the other branches along the same timeline. In so doing, however, the convergence raises questions about primary reliance on custom as the source for resolving foreign affairs questions.[61]

Those questions would be more informed with highlighting at least one example of the Court's journey from responsibility to abnegation. Consider the doctrine that courts should defer to the executive's interpretation of U.S. treaties, even where they create justiciable individual rights. Nothing in the constitutional text hints at such an idea. If anything, the declaration that treaties, like the Constitution and statutes, are supreme law suggests that the courts should "say what the law is" independent of the views of the other branches. Not surprisingly, leading Founders made clear that reliable enforcement of U.S. treaty obligations was a central goal leading to the Constitution.[62] Structural inference, too, cuts the same way, insofar as the core function of an independent

56. *Id.* at 46–63.

57. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (defining the bounds of presidential powers in military matters);); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains").

58. The Paquete Habana; The Lola, 175 U.S. 677 (1900).

59. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952) (denying the President the power to unilaterally define a wartime era).

60. Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (tempering presidential authority to convene military commissions by requiring that the commissions comply with U.S. military and international laws).

61. *See generally* FLAHERTY, *supra* note 33, at 67–90.

62. THE FEDERALIST No. 64 (John Jay) (Clinton Rossiter ed., 1961).

judiciary is to adjudicate disputes that come before it independently.[63]

Nor was custom an outlier, at least not for well over a century, and arguably longer. Judicial practice in the early Republic was to accord executive interpretations of treaties, in the words of David Sloss, "zero deference."[64] The first case in which the Supreme Court gestured the other way came in 1913, when it stated that executive interpretations were entitled to "much weight," and then only in dicta after it had already interpreted the treaty at issue using conventional legal methods.[65] The idea resurfaced in similar fashion a decade later, and then gained momentum after World War II, with one articulation in 1961 and two more in the 1980s.[66] This shift in custom, such as it is, suffices to make arguing treaty deference de rigueur in the executive branch and surprisingly accepted in scholarly circles.[67] Tracing the judiciary's retreat from its foreign affairs role, among other things, renders the shift in power to the political branches, usually, as here, to the executive, all the more dramatic. The shift becomes the more dramatic still since it occurs almost across the board. Among these, to bring things full circle, including the fairly recent emergence of the very doctrines that *Historical Gloss* takes as a given, including the so-called "political question" doctrine and at least a significantly narrower application of standing. In fairness, Bradley does counter that the Supreme Court actually endorsed an exclusive presidential recognition power in the recent case of *Zivotofsky v. Kerry*, thus showing that judicial review will not

63. *See generally* FLAHERTY, *supra* note 33, at 46–63.

64. David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 521–22 (2007); *see also* Joshua Weiss, Essay, *Defining Executive Deference in Treaty Interpretation Cases*, 79 GEO. WASH. L. REV. 1592, 1593–94 (2011).

65. Charlton v. Kelly, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.").

66. *See* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982); United States v. Stuart, 489 U.S. 353, 369 (1989).

67. John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305 (2002); John C. Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

necessarily be a check on executive power.[68] Yet, amidst the sweep of decades of judicial abdication, *Zivotofsky* is a clear outlier. Citing it is something like pointing to the rare victory of a team that long ago dropped to the bottom of the standings.

One further issue that the book's rendition of gloss raises has less to do with presentation than evaluation. Typical of Bradley's work generally, for the most part *Historical Gloss* is self-consciously evenhanded in noting the various ways a given development may cut. Bradley, for example, takes great care in noting how some early apparent instances of congressionally approved treaty termination must be qualified, and likewise, how later, apparent examples of presidential unilateralism do not technically qualify as such (pp. 99–108).

This care, however, tends to slip when evaluating the comparative benefit that custom has accorded the executive branch. Bradley is not wrong to argue that "there is no clear baseline against which to measure whether the executive branch is acquiring too much authority" (pp. 30–31). But that does not mean that it suffices simply to say, "it is difficult to know how much to be concerned about it" (p. 30). Nor does it help to downplay the phenomenon. Not infrequently, *Historical Gloss* attempts to balance the epic growth of executive power with counterexamples of congressional empowerment, which pale in comparison. The effect of this tendency becomes that much more marked given the failure to recount the judiciary's retreat.

This tendency occurs on several levels, from the ironic to the major. The ironic case involves congressional foreign affairs delegation to the executive. Strictly speaking, increased exercise of that power by definition means an expansion of congressional authority. But, to its credit, *Historical Gloss* concedes that the use of this authority has resulted in an enormous shift in delegated power to the executive in, among other things, the use of military force, emergency powers, embargoes and tariffs, and the control of borders. It is with some understatement that Bradley notes: "In the event of a struggle, Congress can generally prevail. But Congress often does not struggle" (p. 189).

Yet it is the structure of the book itself that most dramatically demonstrates the monumental shift in presidential power over two centuries. Of six chapters dealing with general topics, fully

68. 576 U.S. 1, 21 (2015).

five describe foreign affairs authority slipping from the legislative—and judicial—branches to the executive. These include the recognition power, making international agreements, terminating treaties and executive agreements, using military force, and the effect of increased congressional delegation. Only one chapter pushes back, documenting custom favoring Congress. Yet as noted, the powers at issue either have a fairly solid basis in text and original understanding, such as conditional consent to treaties. Or they do not compare to the President's gains, such as Congress's ability to control addresses in passports.

Rather than undersell this reality, *Historical Gloss* might have more convineingly argued that vast, if not entirely unchecked, presidential power is just what is needed in a dangerous, globalized world of rogue states, terrorists, and weapons of mass destruction. As it is, the book does not fully acknowledge what custom has bequeathed—an executive not simply exponentially more powerful than originally conceived, but so dominant that it threatens the core ideas of separation of powers, checks, and balances. Even that development might have been tolerable when the occupant of the White House would adhere to unwritten traditions of self-restraint and integrity. But as the Founders knew, and have recent events have shown, that may not always be the case.

III. PRACTICE AND POLITICS

Criticisms aside, *Historical Gloss* remains an essential and reliable guide to the sweep of relevant institutional practice in any number of largely understudied areas of foreign affairs law. Whether that practice should bear the weight the book advocates is another matter. As convincing as the volume is on the history is as vulnerable as it is on the theory. Bradley, to his credit, does begin by making the case for practice and tradition as the primary source of foreign affairs doctrine. That case, however, fails to fully address the objections that he fairly raises, and overlooks several others. The many objections may usefully be divided into two categories. One set has to do with the challenge of divining custom in general. The other deals with the special pathologies of applying custom in foreign affairs, almost all of which promote an inexorable and dangerous increase in executive power at the expense of both the other two branches and so, of fundamental liberties.

Bradley's advocacy of custom hardly marks him as a radical. As he points out, under the (somewhat misleading) banner of "gloss," the approach was eloquently championed by Justice Frankfurter in his concurrence in *Youngstown* (p. 17). As far as its landmark opinions go, the Court's reliance on custom is at least as old as *McCulloch v. Maryland*,[69] and as recent as Justices Alito and Sotomayor's dueling accounts in *Dobbs v. Jackson Women's Health Organization*.[70] These examples also reflect the Court's readiness to rely on tradition in dealing with governmental authority, as Bradley does. Yet they also illustrate the relevance of custom in the articulation, or not, of unenumerated[71] or evolving rights.[72] Not surprisingly, all this reliance on custom had generated numerous points of contention that are far from resolved. Here are some of the more obvious, from concrete to abstract.

The most mundane, and potentially fatal, challenge is that tradition and practice are subject to bias, cherry-picking, and manipulation. The fate of originalism offers a sad, cautionary tale. In its modern incarnation, the history of the Founding ostensibly offers clear guidance for constitutional interpretation and judicial decision-making. Among its first prophets, Ed Meese, assured the nation: "A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection."[73] Actual practice would prove that originalism was more like an early, elite, version of post-factcheck Facebook or X. As judges and academics churned out originalist accounts, many but not all politically conservative, early American and legal historians responded to argue that many of these accounts were simplistic or just plain wrong. One popular defense amounted to moving the theoretical goalposts, from "original intent" to "original understanding" to "original meaning" to "original public meaning," the last of which tellingly seeks to relegate the

69. 17 U.S. (4 Wheat.) 316, 401–02 (1819).

70. 597 U.S. 215 (2022). *Compare* Roe v. Wade, 410 U.S. 113, 129–43 (1973) (arguing that custom and practice support a woman's right to choose), *with Dobbs*, 597 U.S. at 234–57 (concluding that custom and practice do not support a woman's right to choose).

71. *See supra* text accompanying notes 23–29.

72. *Trop v. Dulles* 356 U.S. 86 (1958) (analyzing the evolving understanding of "punishment" under the Eighth Amendment).

73. Edwin Meese III, Attorney General, Address at the American Bar Association (July 9, 1985).

work of actual historians to the sidelines.[74] Even historians who once held out hope that the marketplace of historical claims might have produced some agreement have given up.[75] Such has roughly been the story of mining a relatively focused periods such as the Founding or Reconstruction.

All these pathologies multiply when considering decades rather than centuries. Far from being a constraint, in practice reliance on custom promised to usher in another version of dueling history briefs and opinions. That is not to say that one proffered account may not be better supported than another. But if originalism is any guide, the more rigorous historical account will not necessarily, or even frequently, prevail in non-peer-reviewed law journals or judicial opinions. Not many stakeholders will be as thorough nor as balanced as Bradley.

Other problems are more theoretical. Among the most fundamental, any invocation of custom or tradition as authority must wrestle with the question of how long must a practice occur before it counts as binding authority. This challenge may not have been a problem for Edmund Burke, who rightly or wrongly assumed that that centuries of common law and constitutional practice supported the general principles of British government that he praised.[76] Ironically, the issue bedeviled the lawyers and constitutional scholars of Burke's time on many specific points, not least whether the custom supported the British Parliament's claim to tax, legislate and even adjudicate for dependencies such as Ireland and the North American colonies.[77] Bradley's answer is "for a long period," an answer that more or less echoes Frankfurter's "long and unbroken."

But how long is long? An example relating to War Powers illustrates the difficulty. Suppose that neither the Constitution's text nor Founding history clearly marks the distribution of authority between Congress and the President with regard to sending U.S. armed forces into hostilities abroad. Suppose further that for "large" wars—itself a potentially vague distinction—the

74. *See* Flaherty, *Peerless History*, *supra* note 46, at 700–02.

75. *Compare* Flaherty, *History "Lite," supra* note 46, at 590 (arguing that credible originalist history was possible), with Flaherty, *Peerless History, supra* note 46, at 676, 719 (concluding that, after forty years, credible originalist history is less likely than ever).

76. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Oxford 1999) (1790).

77. See Martin S. Flaherty, Note, *The Empire Strikes Back:* Annesley v. Sherlock *and the Triumph of Imperial Parliamentary Supremacy*, 87 COLUM. L. REV. 593 (1987).

practice has usually been to seek formal congressional approval, including the War of 1812, the Mexican-American War, the Spanish American War, World War I, World War II, Vietnam, Afghanistan, and the two Gulf Wars. Now suppose that, say, not later than the turn of the twentieth century, Presidents began to unilaterally invade and even occupy much weaker states in the Western Hemisphere, such as Mexico, the Dominican Republic, Haiti, Nicaragua, and Grenada. Together, these actions would seem to constitute a "long" practice. Has it been long enough to establish the executive's authority under the Constitution? Depending on the answer, a presidential order to invade Canada or Greenland may or may not be constitutional. Or would one or the other of these possible incursions themselves be the thing that tips the balance?

The once fanciful (at least since the early nineteenth century) prospect of invading a northern neighbor illustrates a related problem. Assuming the foregoing events, what exactly is the relevant tradition? Most obviously, all these actions involved non-Anglophone Latin and/or Caribbean states. So characterized, the custom might justify yet another incursion to the south, but not extend to Canada, Greenland, or the French positions of St. Pierre and Miquelon. Perhaps more plausibly, the practice might instead be defined by its purpose. Yet as it turns out, Presidents have invoked defense of U.S. territory (Mexico), more general national security interests in the region (Haiti), and/or protection of U.S. citizens or property (Grenada) (pp. 122–28). Some critics, moreover, would argue that at least some of these justifications were pretextual. Even the general contours of the relevant custom seem far from clear. Since custom cannot define itself, it follows that in many situations, rather than relevant custom constraining political choices, it will be political choices determining the relevant custom.

Even greater theoretical problems lurk. What if other methods of constitutional interpretation do support a baseline from which custom and tradition depart? To stick with the foregoing scenario, suppose with scholars such as John Hart Ely, that text and Founding history lend strong support to the idea that presidential authority to commit troops abroad should be confined: a) for clearly defensive purposes; and b) for no longer than it takes for Congress to convene and deliberate on the

deployment.[78] On this assumption, many, if not most, of presidentially-authorized interventions in Latin American and/or the Caribbean will start off not as filling a constitutional void, but actually violating the Constitution, assuming that there are other valid sources of constitutional meaning other than custom. Fresh difficulties result. For one, should a practice that is initially inconsistent with a position strongly supported by other approaches require a longer period before it acquires sufficient legitimacy to displaces it? For another, should the requisite period vary in proportion to the strength of the initial position or the nature of the interpretive sources on which it rests? In more concrete terms, if the Declare War Clause and Founding history would firmly preclude most of the nation's twentieth-century hemispheric adventurism, should an invasion of Greenland be deferred for another few decades?

The point here is not whether the assumptions on which the foregoing account of "small" U.S. wars imposed on your southern neighbors is itself accurate. It is, however, sufficiently plausible to suggest that in many other areas attempts to invoke custom as the primary answer to many question, foreign affairs or not, will necessarily produce similar questions. Nor do the potential problems end here. Nothing in the foregoing scenarios, for example, considers what to do if a given practice does not tend in the same direction, but instead ebbs, backtracks, moves forward, then backtracks once more.

None of this should be taken as dismissing custom as an important source of constitutional interpretation. As noted, the approach has a well-established pedigree both in the realm of governmental powers as well as unenumerated rights.[79] In Anglophone law, it also long predates the Constitution itself. Yet for custom to bear the substantial weight that *Historical Gloss* would place upon it, the study needs to do significantly more work to address, if not resolve, both its theoretic and practical difficulties.

All that said, the challenges long associated with custom in general pale in comparison to the problems its ensures when applied to foreign relations law. Simply put, in this arena, reliance on practice and tradition necessarily guarantee executive

78. ELY, *supra* note 40, at 6–7.
79. *See supra* text accompanying notes 23–29.

dominance, even hegemony, unless checked by other methods of constitutional law, including such old standbys as text, the history of the Founding, and inference from the structure of government that the first two establish. Bradley is keenly aware of this challenge and attempts to meet it on numerous fronts. One involves his historical account of custom itself. As noted, mainly in one chapter, *Historical Gloss* seeks to show how longstanding practice has augmented congressional foreign affairs authority. Yet, also as noted, this attempt actually tends more to show how much of that authority is also tied to text and, more importantly, does not come close to matching the rise of the executive's customary authority. As for the theoretic front, the book does attempt to deal with a number of objections. That effort, however, tends to fall short, and more importantly, fails to address other factors that promote executive hegemony.

The same case that produced custom's judicial manifesto also prompted among the most eloquent exposures of its presidential tilt. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson's famous concurrence explored many, though not all, of the ways reliance on custom has in practice expanded the power of the executive, and not just in the United States.[80] Probably the most obvious is the collective action problem. As Jackson put it, "Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations."[81] The idea was present at the creation as a check on the legislature, which was initially seen at branch "impetuous vortex."[82] As Hamilton, ever the champion of executive power put it, "Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks[.]"[83] Moreover, he continued, "it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."[84] Yet just because a point is obvious does not mean it is

80. 343 U.S. 579, 635–56 (1952) (Jackson, J., concurring).

81. *Id.* at 653.

82. THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

83. THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. *Id.*

not profound. *Historical Gloss* is nothing if not a testament to foreign affairs power slipping from Congress to the President thanks to executive initiative. Also obvious, as Bradley notes, is that in defending its authority from presidential encroachment, "Congress does not often struggle" (p. 189).

Jackson identified one reason, insufficiently anticipated at the Founding, why Congress has not struggled, and is undermined when it does. As early as the Neutrality Controversy, party tendencies that would later develop into true political parties would dramatically undercut the Founding model of the ambitions of the legislature checking the ambitions of the executive. As Jackson noted:

> [The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.[85]

Jackson's assessment, as with his point on collective action, resonates with a wealth of political science literature. Unfortunately, *Historical Gloss* fails to grapple with how this advantage overdetermines custom in favor of presidential power.

To these assets, add the media. Not for nothing was the term "bully pulpit" attached to the presidency by a media savvy president like Teddy Roosevelt.[86] Jackson explained this comparative advantage as well, observing, "No other personality"—and one might fairly add, institution—"in public life can begin to compete with [the President] in access to the public mind through modern methods of communications."[87] Jackson continued, "[b]y his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness."[88] One wonders how much greater Jackson's concerns would have been had he foreseen a media

85. *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring).

86. *See generally* DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM (2013).

87. *Youngstown*, 343 U.S. at 653.

88. *Id.* at 653–54.

environment that permitted the President to reach millions of Americans directly on a daily basis, on a platform owned by a billionaire supporter, amidst a fragmented press.

Jackson fails to mention a more recent presidential advantage that Bradley does note—executive branch lawyers. Jackson's omission may or may not have been curious, given his own service under FDR as Assistant General Counsel at Treasury, Assistant Attorney General, Solicitor General, and Attorney General.[89] Jackson's tenure witnessed a vast expansion of executive branch legal offices and attorneys prepared to defend presidential prerogatives against challenges of overreach. One was the Office of Legal Advisor at the State Department, established in the waning days of the Hoover Administration.[90] Another was the Office of Legal Counsel, created within two years of Roosevelt taking office.[91] *Historical Gloss* at various points quotes from legal opinions from both sources as presidents pushed the customary envelope on any number of issues. Missing in action, however, are counter-arguments made by congressional lawyers, in part because Congress lacks equivalent institutional legal firepower. To his credit, Bradley does acknowledge that the executive's lawyers can characterize even custom as going further than a less biased account would allow. Yet *Historical Gloss* does not sufficiently consider the extent to which such systemic legal advocacy itself contributes to presidentialist custom, and so becomes a self-fulfilling prophecy.

But by far the greatest customary factor benefiting the executive is war. The insight goes back at least a far as Plato, who noted: "[A tyrant] is always stirring up some war or other, in order that the people may require a leader."[92] Armed conflict enhances executive authority in multiple ways that would be more tedious than difficult to set forth. It produces a "rally 'round the flag" response that lends popular support for ceding authority to the commander. Ostensible military necessity undermines ordinary checks that might come from the courts, much less the legislature. Civil liberties typically give way. To cite another insight from

89. *See* John Q. Barrett, *Attorney General Robert H. Jackson and President Franklin D. Roosevelt*, 44 J. SUP. CT. HIST. 90, 95–96 (2019).

90. Grading and Classification of Foreign Service Clerks Act, Pub. L. No. 71-715, 46 Stat. 1214 (creating the Office of Legal Advisor at the State Department).

91. LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 61 (1967).

92. PLATO, THE REPUBLIC AND OTHER WORKS 212 (Benjamin Jowett trans., Duke Classics 2012).

antiquity, so too does the rule of law itself, as Cicero famously observed in declaring, "*silent enim leges inter arma*" ("in times of war, the law falls silent").[93] Nor do these consequences require a full-scale "hot" war between sovereign states. Perceived national security threats, participation in smaller conflicts by invitation, not to mention an open-ended "cold" war all take a nation down the same pro-executive path.

Such has been precisely the custom of the United States over the course of the last 200 years. In a proto-industrial age, the comparatively weak Republic could rely on the protection of an ocean, play off European superpowers against one another, and turn its attention against far weaker foes on the North American continent. Over time, however, the United States grew stronger and the world effectively became smaller. These and other factors enable the nations to rise from a power that was at best regional, to hemispheric, imperial, global, super, and perhaps still, hegemonic. As Mary Dudziak has shown, with this rise has come not only near-constant involvement with foreign crises, entailing foreign military invention great and small.[94] It has also fundamentally blurred the idea of when America's wars have begun and ended, or more precisely, never quite ended. Dudziak has further demonstrated that legal analysis has tended to lag behind fresh historical accounts. Citing, for example, the Korean War as precedent for unilateral presidential war-making, overlooks substantial scholarship that, among other things, indicates that President Truman misunderstood that the conflict could count as a "war" subject to congressional authorization.[95] As I have sketched elsewhere, the judiciary's abdication of its original checking role in foreign affairs has tracked almost exactly the nation's rise as a major power, its corresponding military commitments, and the resulting empowerment of the executive.

Historical Gloss stands as record of the same process applying more broadly. In chapter after chapter, the book recounts the comparative expansion of presidential authority over the course of the nation's history. Such has been the story with the sharp ascent of congressional-executive, and, even more, Sole

93. CICERO, PRO MILONE, ch. IV, § 11.

94. *See generally* MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012).

95. *See* Mary L. Dudziak, *The Gloss of War: Revisiting the Korean War's Legacy*, 122 MICH. L. REV. 149 (2023).

executive agreements. The same holds true for sole presidential termination of treaties. The phenomenon evidentially repeats with regard to the president's unilateral deployment of the armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,"[96] And, in mirror-like fashion, the executive's systemic advantages have succeeded in winning ever more expansive delegations of authority from Congress, as well as ever more expansive interpretations of those delegations. It is hard to come away from Bradley's exceptionally fine historical account with any conclusion other than that practice, tradition, custom, and gloss have produced an executive branch largely free of meaningful external checks in foreign affairs.

CONCLUSION

Whatever custom's pitfalls, *Historical Gloss* itself is an essential book for anyone interested in the law and development of American foreign affairs. It goes a long way to filling substantial scholarly gaps concerning many of the most consequential areas of U.S. law. It is also comprehensive, yet concise, well-written, and clearly organized. Most of all, it reflects considerable and exacting research. In this last regard, the book refreshing steers clear of eye-catching, provocative claims in favor of rigor. As such, the work is typical of Bradley's considerable body of scholarship. It also stands apart from much current legal scholarship, especially work that purports to rely on history.

But like praise cannot heaped upon the book's central interpretive claim. For all the reasons set forth, relying primarily on constitutional custom to define U.S. foreign affairs doctrine is a blueprint for presidential aggrandizement at the expense of Congress and the courts. Any number of policy arguments might be advanced for executive primacy in foreign affairs, though doubtless just as many might be raised in opposition. The problem for "gloss," however, is as a matter of constitutional law. In that regard, just about every other conventional method of constitutional interpretation powerfully scuts the other way. The text clearly reflects a decision to allocate major foreign affairs responsibility to all three branches, and to do so, moreover, to prevent a tyrannical concentration in any one. These textual

96. War Powers Resolution, 50 U.S.C. § 1543(a)(1).

grants in turn reflect a profound founding commitment to a balance among the branches of the federal government in both domestic and foreign matters. Such a conclusion also would appear compelled by structure inference.[97] Even gloss itself aligned with these approaches for over a century and a half, until the combination of the executive's built-in advantages and the nation's rise as a world power placed increasing pressure on the constitutional framework.[98] None of this is to say that gloss has no place alongside these other approaches. Yet at what point must gloss give way what on numerous bases forms among the Constitution's most fundamental commitments?

That point have already arrived. The second coming of Donald Trump has accelerated the rise of executive authority exponentially. Among other things, this rapidly developing custom threatens a largely unilateral end to U.S. foreign development aid, not to mention the resulting uncounted deaths in the Global South, the corresponding destruction of the nation's soft power, an abandonment of traditional allies, the betrayal of Ukraine, and the abandonment of the U.S.-led post World War II international order. To continue to extol the custom that contributed to this point seems like nothing so much as praising the growth of the Praetorian Guard in the waning days of the Roman Republic. Justice Jackson had in mind both the Constitution and instances of custom gone wrong when he declared that humanity has "discovered no technique for long preserving free government except that the executive be under the law, and that the law be made by parliamentary deliberations."[99] The Justice, perhaps prophetically, continued: "Such institutions may be destined to pass away."[100] To paraphrase his conclusion, it should be the duty of sound constitutional interpretation to be the last, not first, to give them up.

97. *See* FLAHERTY, *supra* note 33, at 56–63 (arguing that the Constitution's structural grants of foreign affairs powers to each of the branches belies the notion that any one branch enjoys unlimited, unchecked authority in foreign affairs).

98. *Id.* at 67–133.

99. *Youngstown*, 353 US, at 655 (Jackson, J., concurring).

100. *Id.*