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Recommended Citation

Paul Horwitz, *Foreign Affairs and the United States Constitution, by Louis Henkin Book Review*, 35 Colum. J. Transnat'l L. 723 (1997).

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Book Review

Foreign Affairs and the United States Constitution,

by Louis Henkin.

Second Edition, Oxford University Press, 1996.

Pp. 582, lxxii.

Paul Horwitz*

This is a propitious time for Professor Henkin to release a second, much-revised version of his treatise.¹ When the first edition of *Foreign Affairs and the Constitution* appeared in 1972,² the United States was still embroiled in a conflict which was but one especially heated branch of a long-running Cold War. Foreign policy could and did capture public attention. At the same time, while the Supreme Court had seen the passing of the Warren Court and the ascendance of the Burger Court, few of the Court's basic premises had changed; the Court continued to accept the virtually unlimited federal power that characterized the post-New Deal era, while intervening where a claim could be framed to invoke the equally substantial power of the Bill of Rights.

In many respects, the opposite condition prevails today: we now exist in a state of relative calm in the conduct of American foreign affairs, and relative flux in American constitutional law. To be sure, the fractionation of the post-Cold War world, the revival or continuation of bitter ethnic and nationalist conflicts, and the growth of global trade have made the foreign affairs agenda more crowded than ever. Some of these issues may touch us more directly than did the overarching issues of the nuclear age.³ But if there are more (and more complex) problems to be faced, they are also smaller. No single issue of ultimate

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1. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996).

2. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

3. See William D. Rogers, *Epilogue*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 190, 193 (Louis Henkin et al. eds., 1990) [hereinafter *FOREIGN AFFAIRS*].

consequence shapes our foreign affairs or captivates the public as the Cold War once could.⁴

By contrast, the tumult in the field of constitutional law is becoming ever more significant. The reasonably settled picture of the extent and division of federal and state powers that stood for decades is now in some doubt. The breadth of Congress' ability to legislate under the Commerce Clause⁵ or rely on the negative Commerce Clause,⁶ its ability to compel state cooperation with federal schemes⁷ or impose remedies on the states under the Fourteenth Amendment,⁸ the ability to offer federal judicial relief against the states despite the tangled jurisprudence of the Eleventh Amendment⁹—new trends in all these areas have unsettled our assumptions about the balance of American governmental power. It is right that we should take this time to assess where things stand in this particular outpost of constitutional law, and flag the legal issues that may come to trouble us at home or abroad.

The new edition, now entitled *Foreign Affairs and the United States Constitution*, performs this useful task admirably, as admirers of Professor Henkin and the first edition of his treatise will not be surprised to discover. It is a clear and careful guide to the field. Though Henkin has enriched his study with “nuances in analysis and refinement in exposition”¹⁰ occasioned by a quarter-century's developments, this edition follows largely from the first. With the vast array of endnotes that update and buttress the main text, the treatise seems almost to be two books. One wishes, in fact, that the two halves of the book—the main text and the extensive notes that follow—could have been better integrated, and that the whole could have been indexed more fully.

As with the first edition, Professor Henkin is quick to recognize that much of the law of foreign affairs under the Constitution is not

4. See Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 911 (1996) (book review) (noting the cooling of the “sense of crisis and emergency that pervaded the Cold War years” and the rise of more complex and varied security issues facing the United States).

5. See *United States v. Lopez*, 514 U.S. 549 (1995).

6. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1614 (1997) (Thomas, J., dissenting).

7. See *New York v. United States*, 504 U.S. 144 (1992); *Printz v. United States*, 117 S. Ct. 2365 (1997).

8. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

9. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997).

10. HENKIN, *supra* note 1, at x.

settled in the courts,¹¹ but in the conflicts and compromises that characterize Congressional and Executive Branch relations. Moreover, despite the importance of foreign affairs to the Framers of the Constitution, whose efforts were impelled in great measure by the inadequacy of the Articles of Confederation to provide for effective control over foreign affairs by the Continental Congress,¹² the Constitution “seems a strange, laconic document”¹³ with respect to foreign affairs, offering relatively little guidance on how and whether the power over this area is to be divided. Accordingly, Henkin offers more than a tour of the sparse case law, drawing instead on two centuries of disputed practice by the political branches.

Under the circumstances, Henkin must often provide somewhat inconclusive discussions of continuing controversies, while gently advancing his own view on each matter. Of the War Powers Resolution, for example, which emerged in the wake of his first edition, Henkin writes that the Resolution, though poorly drafted, is constitutional “in principle” as a restriction on Executive action, but in practice has been evaded by Presidents seeking to engage in military action that constitutes war or acts short of war.¹⁴ At the same time, Henkin notes that despite the legislation’s apparent ineffectiveness,¹⁵ Congress has not acted to shore up its war powers, as it could,¹⁶ and Presidents have at least “attend[ed] to” the Resolution despite their claims that they were free to disregard it.¹⁷

Similarly, of the constitutionality of recent military incursions launched by the President without the clear prior sanction of Congress, Henkin notes that “the realities of national life have rendered constitutional issues hypothetical, for it is increasingly difficult to make an authentic case that the President had taken the country into war without Congressional authorization in advance or ratification soon after.”¹⁸ And while Henkin concedes that the United States has the power (if not the right) to violate treaties, the United Nations Charter, and other sources of international law,¹⁹ he makes a strong argument

11. *See, e.g., id.* at 3-4.

12. *See id.* at vii; Jack N. Rakove, *Making Foreign Policy—The View From 1787*, in *FOREIGN POLICY AND THE CONSTITUTION 1* (Robert A. Goldwin & Robert A. Licht eds., 1990).

13. HENKIN, *supra* note 1, at 13.

14. *See id.* at 107-08.

15. *See id.* at 110.

16. *See id.*

17. *Id.* at 320 n.*.

18. *Id.* at 99.

19. *See id.* at 196, 251.

that only those actions of the President or his delegates that are pursuant to an exercise of some specific Presidential power may constitute a "controlling executive act"²⁰ sufficient to override international law,²¹ and concludes that the courts must "revisit[] the reverence of the Framers for the Law of Nations" and establish the "clear and honorable place [of customary international law] in our constitutional life."²² In these and other areas, Henkin threads his way carefully through the "issues of conflict and cooperation in a 'twilight zone' of uncertain or perhaps concurrent power"²³ shared by the political branches and largely immune from judicial intervention.

Foreign Affairs and the United States Constitution is, as I have suggested, a careful and measured analysis of the constitutional law of foreign affairs. But for all its caution, there is underneath a striking sense of optimism that the Constitution, this "unique, home-built contraption"²⁴ that has governed our conduct of foreign affairs for 200 years, can work successfully.²⁵ "[I]mproved operation and cooperation"²⁶ by the political branches, not a diminution of federal foreign affairs power, should be the watchwords, Henkin argues. There is a strong faith throughout this treatise that the Constitution need not act as a "straitjacket,"²⁷ hobbling national efforts to participate fully in international organizations such as the United Nations, or to conclude treaties that expand the reach of international human rights.

Rather, Henkin advances his belief that "creative legal imagination can find ways and suggest means to bring such arrangements largely within a dynamic, flexible, hospitable Constitution."²⁸ A proselytizer's spirit is evident here, barely concealed beneath layers of careful analysis. That faith in the promise of international law is evident in his development of arguments on the importance and binding nature of treaties and customary international law,²⁹ his encouragement of

20. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

21. See HENKIN, *supra* note 1, at 244-45 (criticizing *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986)).

22. *Id.* at 246.

23. *Id.* at 68 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

24. *Id.* at 319.

25. It is not an untempered optimism, however. See, e.g., *id.* at 314, 316.

26. *Id.* at 321.

27. *Id.* at 254.

28. *Id.* at 273.

29. See generally *id.* chs. 7-8.

cooperation rather than conflict between Congress and the President,³⁰ his arguments for the appeal and constitutionality of Congressional-Executive agreements,³¹ and in any number of other discussions in this work.

How might the major premises and positions of *Foreign Affairs and the United States Constitution* begin to differ or diverge from current developments in the field of constitutional law, if not specifically that of foreign affairs? That is, if the appearance of a second edition of Henkin's treatise consolidates developments in the last quarter-century of constitutional law as they touch on foreign affairs, how might it differ from those trends we now see emerging, which might reshape an eventual third edition of the book? One change might be in methodology. Henkin shifts with ease among the most popular canonical methods of constitutional interpretation, deriving as much meaning as possible from the text and structure of the Constitution despite the relative sparsity of its references to foreign affairs, turning here and there to the debates of the Framers, and mostly relying on two centuries of actual practice. But as originalist arguments continue to find favor in the courts and space in the academic literature, and as the canons of "text, history, structure, traditions"³² are applied with an air of dogmatic confidence in their ability to ferret out the right answer,³³ a more rigid and less fluid approach to interpretation of the foreign affairs powers may prevail. In particular, if the courts become more inclined to speak to foreign affairs issues, one might expect them to pay greater attention to the early history of foreign affairs than does Henkin, who is more concerned with subsequent practice.³⁴

More significant, however, is the recent resurgence in the courts, particularly the Supreme Court, of a focus on the boundedness of government, on the limits on the power of the political institutions that make up the United States. Most of these recent developments have centered on the balance of federal-state power rather than the balance of

30. See, e.g., *id.* at 321.

31. See *id.* at 217-18.

32. See, e.g., Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1723 (1995).

33. See, e.g., *Printz*, 117 S. Ct. at 2370 (Scalia, J.) ("Because there is no constitutional text speaking to this precise question, the answer to the [petitioners'] challenge must be sought in historical understanding and practice, in the structure of this Constitution, and in the jurisprudence of this Court.").

34. Certainly the current scholarly literature often shows such a focus. See generally Stromseth, *supra* note 4, at 852-53 (collecting recent sources); William Michael Treanor, *Fame, the Founders, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

power within the federal government. As Henkin points out, “the constitutional law of foreign affairs is principally the law of allocation of authority within the federal government.”³⁵ Within the federal government itself, whether one relies on Justice Sutherland’s opinion in *United States v. Curtiss-Wright Export Corporation*³⁶ or on the simple fact of the post-New Deal expansion of federal power, there is little doubt that the political branches have substantial power to act in the field of foreign affairs, even if which branch has that power is not always clear.³⁷ Thus, at first blush it may seem that the growth of the “dual sovereignty” approach to federalism³⁸ does not much affect the overall sovereign power of the United States to act in foreign affairs. But the themes sounded by these cases—the importance of preserving the constitutional plan that made lawmaking difficult and multi-voiced,³⁹ of setting branches of government in opposition to one another while guarding the power of each against intrusion,⁴⁰ and of the boundedness of power in general⁴¹—may yet insinuate themselves into the courts’ treatment of foreign affairs and introduce greater limits on the federal ability to act in this arena.

Despite Henkin’s exhortations in favor of a cooperative and active federal involvement in foreign affairs, these developments may have some appeal of their own. In this as in many other works over the course of his career, Henkin emphasizes the importance of human rights, both under the Constitution and under international law.⁴² As he notes, in the original conception of the Constitution one of the central bulwarks of rights protection was the separation and limitation of powers.⁴³ The resurgent interest in the limitations imposed by

35. HENKIN, *supra* note 1, at 7. See also *id.* at 134, 149; Andreas F. Lowenfeld, Book Review, 87 HARV. L. REV. 494, 508 (1973) (reviewing the first edition of FOREIGN AFFAIRS AND THE CONSTITUTION).

36. 299 U.S. 304 (1936).

37. See HENKIN, *supra* note 1, at 20-22.

38. See, e.g., *Printz*, 117 S. Ct. at 2365.

39. See HENKIN, *supra* note 1, at 175 (noting that the foreign affairs power has long been an area of such concern, and that the Framers wished to make it difficult to “conclude treaties lightly or widely”).

40. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983); *Plaut v. Spendthrift Farms, Inc.*, 115 S. Ct. 1447 (1995).

41. See, e.g., *Flores*, 117 S. Ct. at 2157; *Printz*, 117 S. Ct. at 2365; *Lopez*, 514 U.S. at 549.

42. See HENKIN, *supra* note 1, ch. 9. See also LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS, ch. 4 (1990). See generally LOUIS HENKIN, THE AGE OF RIGHTS (1990).

43. See HENKIN, *supra* note 1, at 278.

federalism, if applied in the foreign affairs arena, might yet serve as a supplement to the protections offered by the Bill of Rights. Alternatively, it might simply suggest that in an era of splintered goals and views about how the United States ought to conduct itself abroad, it makes sense to emphasize those aspects of the Constitutional structure that make state action difficult. Similarly, the revival of interest in state power, if it eventually finds an echo in foreign affairs law, may simply reflect the greater role presently played by states, cities, and other internal political entities on the world stage.⁴⁴

This renewed emphasis on some of the limits of power might, if applied to the foreign affairs arena, require some additional ground rules. Some of these are suggested by Henkin: an overarching supremacy of federal foreign affairs laws over state law; a respect for human rights; and a greater awareness of and respect for international law, both treaty-made and customary.⁴⁵ Beyond this, one might hope that courts would become less reluctant arbiters of structural constitutional issues involving foreign affairs, not just issues involving individual rights. Though he favors judicial involvement where individual rights are at stake, Henkin calls efforts to use the courts to police the boundaries between the President and Congress "misguided," at least where there are no clear objections from either branch.⁴⁶ As long as the courts take the limits of constitutional power seriously and view it as another method of protecting rights, however, they ought to play a more active role here. Though foreign affairs issues have frequently seen the employment of all the courts' tools of avoidance,⁴⁷ it would be consistent with their renewed interest in policing the powers of government actors to grasp some of the nettlesome issues in this field, too.

Of course, there is excellent reason to believe that the courts will continue to avoid the fray as much as possible in the future, leaving the continuing play of conflict and compromise between the political branches that Henkin describes. Where the courts refuse to draw a clear map of how much power is held—and by whom—in the field of foreign

44. See Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, in FOREIGN AFFAIRS, *supra* note 3, at 115.

45. Cf. Patrick D. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4 (1995).

46. See HENKIN, *supra* note 1, at 316.

47. See Lowenfeld, *supra* note 35, at 506 ("All the doctrines that lead courts not to decide cases find a home in the field of foreign affairs."). Such doctrines include rules of standing and ripeness, the political question doctrine, and sovereign immunity. See Norman Dorsen, *Foreign Affairs and Civil Liberties*, in FOREIGN AFFAIRS, *supra* note 3, at 134, 137.

affairs, we will continue to need an experienced guide. The second edition of *Foreign Affairs and the United States Constitution* certainly fills that role superbly.