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## Founding-Era *Jus Ad Bellum* and the Domestic Law of Treaty Withdrawal

**ABSTRACT.** The Constitution provides no textual guidance for how, as a matter of domestic law, the United States can withdraw from an Article II treaty. The Supreme Court has not clarified matters. In the face of this uncertainty, government officials and scholars alike have long debated whether the President may unilaterally withdraw from a treaty or whether Congress has a role to play. This Note contributes to the debate by examining the relationship between treaty withdrawal and war powers through an originalist lens. Through close assessment of the contemporaneous *jus ad bellum*, the Note concludes that, at the Founding, treaty withdrawal presented a clear justification for war. Treaty withdrawal therefore implicates the War Powers Clause, which assigns primary responsibility for initiating war to Congress. Because the Founders and their contemporaries likely saw treaty withdrawal as a matter of war and peace, and because the Constitution entrusts Congress with the power to commence war, this Note concludes that the original understanding of the Constitution supports a role for Congress in treaty withdrawal.

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## INTRODUCTION

Despite articulating a detailed and arduous process by which the United States can enter into a treaty, the Constitution remains silent on how the country can exit from a treaty under domestic law. Article II, Section 2, which addresses treaty accession, contemplates heavy executive-branch involvement in the negotiation process with one or more foreign nations and requires a two-thirds supermajority of the Senate to approve any accord before a treaty becomes the law of the land.<sup>1</sup> In contrast, the Constitution provides no textual guidance on the process for treaty withdrawal, let alone Congress's role in that process. The Supreme Court has not clarified matters. In *Goldwater v. Carter*,<sup>2</sup> the most recent Supreme Court case on treaty termination, only one Justice reached the merits;<sup>3</sup> six other Justices determined that the case was nonjusticiable.<sup>4</sup>

The lack of textual and judicial guidance regarding treaty withdrawal has serious policy consequences. As numerous examples illustrate, there is little to stop a President from unilaterally withdrawing from a treaty, even though Congress's involvement would have been required to enter the treaty in the first place.<sup>5</sup> Most recently, the Bush Administration unilaterally withdrew from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.<sup>6</sup> As a result, the United States no longer recognizes the jurisdiction of the International Court of Justice to hear disputes arising from the Vienna Convention on Consular Relations,<sup>7</sup>

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1. U.S. CONST. art. II, § 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).
  2. 444 U.S. 996 (1979).
  3. *Id.* at 1006 (Brennan, J., dissenting). Justices Blackmun and White also dissented from the dismissal of the complaint, arguing that the Court should give the case plenary review. *Id.* (Blackmun, J., dissenting).
  4. *Id.* at 996 (Marshall, J., concurring in result without issuing or joining an opinion); *id.* at 997 (Powell, J., concurring) (“I would dismiss the complaint as not ripe for judicial review.”); *id.* at 1002 (Rehnquist, J., concurring) (writing for a four-Justice plurality that was “of the view that the basic question presented by the petitioners . . . [wa]s ‘political’ and therefore nonjusticiable”).
  5. See Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233, 234-35 (describing how the political-question doctrine leads to a “first-mover bias” in foreign affairs that typically benefits the President).
  6. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487.
  7. Letter from Condoleezza Rice, U.S. Sec’y of State, to Kofi A. Annan, Sec’y Gen. of the United Nations (Mar. 7, 2005), <http://www.state.gov/documents/organization/87288.pdf>

following that Court's finding that the United States had violated the rights of death-sentenced Mexican nationals and that the sentences should be reconsidered.<sup>8</sup>

Congress's role in treaty withdrawal also prominently arose in 2001 when President Bush withdrew the United States from the nearly thirty-year-old Anti-Ballistic Missile Treaty (ABM) with Russia.<sup>9</sup> The ABM was negotiated by the Nixon Administration and the Soviet Union and approved by two-thirds of the Senate in 1972. It was viewed as a major development in U.S. nonproliferation policy with the Soviet Union, imposing strict limits on each country's ability to develop anti-ballistic missile technology.<sup>10</sup> At the time of withdrawal, myriad experts, policymakers, and foreign leaders warned that withdrawing from the ABM threatened global nonproliferation policy and risked upsetting a carefully calibrated relationship with Russia.<sup>11</sup> Despite these severe warnings, Congress played no formal role in the decision to withdraw from the treaty that two-thirds of the Senate had approved twenty-nine years earlier.<sup>12</sup> A federal district court dismissed a lawsuit filed by thirty-two members of Congress seeking to prevent unilateral executive-branch withdrawal from the ABM, citing as "instructive and compelling" the *Goldwater* plurality's opinion that treaty withdrawal presented a nonjusticiable political question.<sup>13</sup>

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[<http://perma.cc/23KS-QVAZ>]; see also Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST (Mar. 10, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html> [<http://perma.cc/84ZR-T6LF>] (describing the U.S. withdrawal from the Optional Protocol as the Bush Administration's decision, with no mention of Congress).

8. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12 (Mar. 31).
9. Press Secretary, White House, Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), <http://www.acq.osd.mil/tc/treaties/abm/ABMwithdrawal.htm> [<http://perma.cc/QV5V-MADM>].
10. Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435 [hereinafter ABM Treaty].
11. See, e.g., Dana Milbank, *Criticism Softens on ABM Move*, WASH. POST (May 22, 2002), <http://www.washingtonpost.com/archive/politics/2002/05/22/criticism-softens-on-abm-move/c2f9a27c-95d7-4c9d-8880-7683f07fdebd> [<http://perma.cc/4BN5-FFYW>] (recounting the ABM withdrawal concerns of the French President, German Chancellor, former U.S. National Security Adviser, Senate Majority Leader, House Minority Leader, and others); Steven Mufson & Dana Milbank, *U.S. Sets Missile Treaty Pullout*, WASH. POST (Dec. 14, 2001), <http://www.washingtonpost.com/archive/politics/2001/12/14/us-sets-missile-treaty-pullout/83d006a1-13a7-45cb-bedb-696311a5b047> [<http://perma.cc/T6P2-JCB9>] ("Many experts warned that scrapping the ABM Treaty would spark an arms race in Asia . . .").
12. See Manuel Perez-Rivas, *U.S. Quits ABM Treaty*, CNN (Dec. 14, 2001), <http://www.cnn.com/2001/ALLPOLITICS/12/13/rec.bush.abm> [<http://perma.cc/M2V4-Y7EK>].
13. *Kucinich v. Bush*, 236 F. Supp. 2d 1, 14 (D.D.C. 2002); *id.* at 2 ("And pursuant to *Goldwater v. Carter*, the Court concludes that the treaty termination issue is a nonjusticiable 'political

*Goldwater* itself demonstrates how treaty withdrawal implicates important foreign policy questions. The case arose after President Carter unilaterally withdrew from a mutual defense treaty with Taiwan<sup>14</sup> in an attempt to improve Sino-American diplomatic relations by temporarily ending U.S. obligations to assist Taiwan in the event of an attack. Senator Barry Goldwater, who led the suit against Carter, was a strong opponent of the President's China policy, which he decried as "selling out Taiwan."<sup>15</sup>

Given the serious policy implications of treaty withdrawal, it is perhaps unsurprising that the issue of congressional treaty withdrawal power—and the relative balance of power between the executive and legislative branches—is hotly debated. Politicians,<sup>16</sup> practitioners,<sup>17</sup> judges,<sup>18</sup> and academics<sup>19</sup> have weighed in. Yet for all the attention that treaty withdrawal has received, the

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question' that cannot be resolved by the courts. Accordingly, this action will be dismissed." (citation omitted)).

14. Mutual Defense Treaty Between the United States and the Republic of China, U.S.-Rep. of China, Dec. 2, 1954, 6 U.S.T. 433 [hereinafter U.S.-Taiwan Mutual Defense Treaty]. See generally *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979).
15. Orville Schell, *China Strikes Back!*, N.Y. REV. BOOKS (Oct. 23, 2014), <http://www.nybooks.com/articles/2014/10/23/china-strikes-back> [<http://perma.cc/54KD-KTK7>]; see also *Goldwater Criticizes President as 'Hasty' on Foreign Policy*, WASH. POST (July 30, 1977), <http://www.washingtonpost.com/archive/politics/1977/07/30/goldwater-criticizes-president-as-hasty-on-foreign-policy/0590a5aa-dfae-4399-bd4b-1ae7f130c136> [<http://perma.cc/3XM8-Z2N8>].
16. Compare, e.g., 147 CONG. REC. 25,974 (2001) (statement of Sen. Byrd) ("I believe that it would be a violation of the spirit of our Constitution [for the President to withdraw from the ABM Treaty] without seeking the endorsement of the Senate."), with 147 CONG. REC. 25,976 (2001) (statement of Sen. Warner) ("[S]o far as I know, I do not know of a requirement or precedent with which our President has broken [by unilaterally withdrawing], nor did he do anything that was not in accordance with the law and/or terms of the treaty.").
17. Compare J. Terry Emerson, *The Legislative Role in Treaty Abrogation*, 5 J. LEG. 46, 46 (1978) (arguing that Congress should assert its role in the treaty termination process), with Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat'l Sec. Council (Nov. 15, 2001) (on file with author) (concluding that the President has authority to suspend the ABM).
18. See *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (Powell, J., concurring in the judgment); *Kucinich*, 236 F. Supp. 2d.
19. Compare Louis Henkin, Editorial Comment, *Litigating the President's Power To Terminate Treaties*, 73 AM. J. INT'L L. 647, 651 (1979) (arguing that the President wields the authority to terminate treaties unilaterally), with David Gray Adler, *The Law: Termination of the ABM Treaty and the Political Question Doctrine: Judicial Succor for Presidential Power*, 34 PRESIDENTIAL STUD. Q. 156, 157 (2004) (arguing that the President lacks the power to terminate treaties unilaterally).

debate has largely overlooked a crucial element: the original understanding of the relationship between treaty withdrawal and the international law of war.

This Note seeks to contribute to this debate by highlighting the original understanding of Congress's powers in treaty withdrawal. This Note argues that, at the Founding, treaty withdrawal provided a just cause of war under the law of nations. Because the Founders and their contemporaries likely viewed treaty withdrawal as a matter of war and peace, and because the Constitution assigns Congress the power to declare war, this Note concludes that the original understanding of the Constitution contemplated a congressional treaty withdrawal power.

A few words on the Note's methodology: within originalism, commentators often distinguish between "original intent" and "original public meaning." An "original intent" approach inquires into the meaning that the Constitution's drafters intended.<sup>20</sup> An "original public meaning" analysis asks "what meaning constitutional text would have had to a neutral reader of the English language at the time of the framing."<sup>21</sup> Yet as Gregory Maggs has suggested, these modes of originalism may be to some extent interchangeable.<sup>22</sup> The understanding of the Framers, as expressed in a particular document, is typically a strong indication of the public's understanding.<sup>23</sup> It is safe to assume that the law of nations was familiar to the Framers and to knowledgeable citizens.<sup>24</sup> William Eskridge has explained the relevance of originalism to the search for constitutional meaning:

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20. See generally Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007).
21. William N. Eskridge, Jr., Address, *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1074 (2015). As Justice Antonin Scalia explained, this analysis specifically "requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989); see also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 257 (2005) ("[Originalism's] remarkable survival is due, in part, to originalism itself having morphed in response to these critiques from its previous preoccupation with the original intentions of the framers to an emphasis on the original public meaning of the text at the time of its enactment."); Michael Clemente, Note, *A Reassessment of Common Law Protections for "Idiots,"* 124 YALE L.J. 2746, 2751 (2015) (explaining the methodology of "original meaning" analysis).
22. See generally Maggs, *supra* note 20.
23. *Id.* at 840 ("[T]he Federalist Papers may not have recorded perfectly what the Framers thought, and they may not have influenced many of the ratifiers directly, but scholars can and should see them as a repository of the kinds of arguments that concerned citizens were making and were hearing during the ratification period in 1787–1788.").
24. See *infra* notes 86–90 and accompanying text.

The main reason original meaning is a relevant inquiry is that a strong body of scholarly work and Supreme Court precedent maintain that the most legitimate approach to constitutional interpretation at least starts with original meaning . . . . [A]ll of the [current Supreme Court] Justices find original meaning relevant (and some believe it controlling).<sup>25</sup>

While this Note focuses on the writings of the Framers and the leading international law theorists of the day, these sources provide clues to both the intent of the Framers and the “original public understanding” of treaty withdrawal under international law.

Originalism figures prominently in the debate over the domestic law of treaty withdrawal.<sup>26</sup> Even advocates of presidential power who rely heavily on recent historical practice have found it useful to invoke Founding-era practices.<sup>27</sup> The relationship between war and treaties also surfaces in arguments for greater congressional involvement.<sup>28</sup>

However, despite the Founding generation’s clear conception of the relationship between treaties, war, and peace,<sup>29</sup> there has been surprisingly little assessment of how this relationship might be viewed through an originalist lens.<sup>30</sup> To the extent that the Founders’ original intent and the

25. Eskridge, *supra* note 21, at 1072.

26. A recent, major case in which the Supreme Court considered the President’s and Congress’s relative powers over foreign affairs, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), illustrates the relevance of originalism. Notwithstanding significant disagreement on the final outcome, each opinion that reached the merits of the case relied heavily on originalist analysis. *See id.* at 2076; *id.* at 2096 (Thomas, J., concurring in part and dissenting in part); *id.* at 2113 (Roberts, C.J., dissenting); *id.* at 2116 (Scalia, J., dissenting). The only opinion that did not consider originalism was Justice Breyer’s, which argued that the Court did not have jurisdiction to hear the case. *Id.* at 2096 (Breyer, J., concurring).

27. The Legal Adviser to President Carter’s State Department, for example, pointed (probably incorrectly) to an 1815 incident in which President Madison had construed unilaterally a treaty as annulled. Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 796 (2014) (citing Memorandum from Herbert J. Hansell, Legal Adviser, U.S. Dep’t of State, to Cyrus R. Vance, U.S. Sec’y of State, President’s Power To Give Notice of Termination of U.S.-ROC Mutual Defense Treaty (Dec. 15, 1978), in S. COMM. ON FOREIGN RELATIONS, 95TH CONG., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER 395, 397 (Comm. Print 1978)). Bradley points out that Herbert Hansell’s analysis that the United States had terminated the treaty was “erroneous.” *Id.* at 796–97.

28. *See, e.g.*, S. Res. 15, 96th Cong. (1979) (“Prohibits [treaty] termination or suspension by the President without Congressional approval where: . . . imminent involvement of the United States Armed Forces in hostilities or other danger to national security would result . . .”).

29. *See infra* Part II.

30. Louis Henkin briefly noted this relationship, but did not explore it in depth. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 212–13 (1996) (“In earlier times,

original understanding of their contemporaries is a factor in the withdrawal debate, this Note fills an important gap in the literature.

Since the Founding, much has changed about how the United States concludes agreements with foreign powers. Executive agreements, rather than Article II treaties, have become the dominant domestic mode of international lawmaking since World War II.<sup>31</sup> These agreements take one of three forms. First, in a sole executive agreement, the President alone negotiates a foreign accord that implicates an issue entirely within the Executive's Article II authority. Second, in an *ex ante* congressional-executive agreement, Congress passes legislation authorizing the President to negotiate an international agreement on a specific issue.<sup>32</sup> Finally, in an *ex post* congressional-executive agreement, Congress passes legislation approving an international agreement that the President has already negotiated.<sup>33</sup> Notwithstanding the rise of executive agreements, Article II treaties remain an important form of international lawmaking.<sup>34</sup> While my theory may have implications for other

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Congress purported also to denounce or abrogate treaties for the United States or to direct the President to do so. Those instances, no doubt, reflected the early but recurrent claims of Congress that it has general powers to make foreign policy, supported by arguments that the maintenance or termination of treaties is intimately related to war or peace for which Congress has primary responsibility.”). One of the clearest mentions of the relationship between treaty withdrawal and war powers was in 1829. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 68 (Philadelphia, Philip H. Nicklin 2d ed. 1829) (“Congress alone possesses the right to declare war; and the right to qualify, alter, or annul a treaty being of a tendency to produce war, is an incident to the right of declaring war.”).

31. See generally Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236 (2008).

32. See *id.* at 1329.

33. *Id.*

34. Recent examples of major international agreements given domestic legal force as Article II treaties following Senate approval include the bilateral Strategic Arms Reduction Treaty with Russia and the multilateral Convention on Cybercrime. See Peter Baker, *Senate Passes Arms Control Treaty with Russia*, 71-26, *N.Y. TIMES* (Dec. 22, 2010), <http://www.nytimes.com/2010/12/23/world/europe/23treaty.html> [<http://perma.cc/YAA2-C7WT>]; Declan McCullagh, *Senate Ratifies Controversial Cybercrime Treaty*, *CNET* (Aug. 7, 2006), <http://www.cnet.com/news/senate-ratifies-controversial-cybercrime-treaty> [<http://perma.cc/VA7B-5Y7B>]. Article II treaties will continue to be an important method of lawmaking. If the United Nations Convention on the Law of the Sea is given domestic legal force, it will likely be as an Article II treaty. See, e.g., Stewart M. Patrick, *(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty*, *ATLANTIC* (June 10, 2012), <http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301> [<http://perma.cc/G6EA-7B56>]. Likewise, when President Obama unsuccessfully attempted to gain approval for the United Nations Convention on the Rights of Persons with Disabilities, he sought to do so through the Article II treaty process. See, e.g., Ramsey Cox & Julian Pecquet, *Senate Rejects United Nations Treaty for Disabled Rights in*



categories of foreign agreements, these agreements pose distinct constitutional questions. This Note therefore focuses exclusively on Article II treaties.

Part I surveys the existing legal debate surrounding treaty termination. Part II details Founding-era *jus ad bellum* and congressional war powers. It concludes that, under the law of nations, treaty breach constituted just grounds for war, and at the Founding, treaty withdrawal was tantamount to breach. Additionally, it concludes that the original understanding of war powers was broad. Read together, this Note argues, the Founding-era understanding of treaty termination and the Founding-era conception of war powers suggest an original understanding that granted Congress a role in treaty withdrawal. Part III considers both counterarguments to the proposition and contemporary implications, arguing that the House should have a vote on treaty terminations.

## I. THE DEBATE ON TREATY WITHDRAWAL POWER

Both sides of the debate on treaty withdrawal—those who argue that the Constitution requires a congressional role, and those who argue that the Executive has plenary power—agree on at least one thing: the Constitution is silent on treaty termination. But they differ on what this silence means. The debate centers on two questions. First, what was the historical practice of treaty withdrawal, and what are the legal consequences of this history? Second, what if anything does the structure of the Constitution reveal? On each question, there is sharp disagreement. This Part briefly describes the existing debate<sup>35</sup> to illustrate how commentators on both sides have overlooked the original understanding of Congress's powers in treaty withdrawal.

### A. For Presidential Unilateralism

Presidential unilateralists rely on constitutional structure and historical practice to argue that the President may withdraw from treaties without seeking approval from Congress. The structural argument centers on the

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a 61-38 Vote, HILL (Dec. 4, 2012), <http://thehill.com/policy/international/270831-senate-rejects-un-treaty-for-disabled-rights-in-vote> [<http://perma.cc/248X-GDBG>].

35. This overview of the debate surrounding treaty termination is necessarily limited to the major themes. Detailing every argument and counterargument that has been made by proponents and detractors of presidential unilateralism could form the basis for a Note unto itself. Yet for all of the arguments made about history and structure, there has been virtually no in-depth analysis of the relationship between treaties and war under the Founding-era law of nations.

Constitution's Executive Power Clause.<sup>36</sup> This clause, unilateralists argue, suggests that the Constitution reserves to the President alone the power to terminate treaties. Proponents of this argument cite Supreme Court precedents such as *United States v. Curtiss-Wright Export Corp.*, in which the Court indicated that the President has broad constitutional powers to conduct foreign affairs.<sup>37</sup> Louis Henkin's discussion of treaty termination illustrates this line of argument:

*Curtiss-Wright* . . . recognized the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." . . . [This] implies the authority to make the kind of decision that has to be made for the United States when a treaty no longer serves our interests, when it is out of date, when the other side breached it.<sup>38</sup>

Presidential unilateralists sometimes argue that the placement of the Treaty Clause in Article II of the Constitution indicates that treaty power belongs to the Executive.<sup>39</sup> Such arguments acknowledge that the text contemplates a

36. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").
37. 299 U.S. 304, 319-20 (1936). Louis Henkin, in arguing that Article II gives the President unilateral authority to withdraw from treaties, quoted from this passage directly. See *supra* note 19, at 652; *infra* note 38 and accompanying text. In 1939, President Franklin D. Roosevelt's State Department argued that the President had unilateral authority to terminate a treaty, based on the "general spirit" of *Curtiss-Wright*. See Bradley, *supra* note 27, at 807-08 (citing Letter from Cordell Hull, U.S. Sec'y of State, to Kensuke Horinouchi, Japanese Ambassador (July 26, 1939), in 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1939, at 558, 558-59 (1955)). *Sale v. Haitian Centers Council*, 509 U.S. 155, 188 (1993), and *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), are two more recent cases in which the Court has affirmed the *Curtiss-Wright* holding. The executive-branch defendants in *Kucinich v. Bush* cited all three cases in their motion to dismiss. See Defendants' Reply in Further Support of Their Motion To Dismiss or, in the Alternative, for Summary Judgment, *Kucinich v. Bush*, 236 F. Supp. 2d 1 (2002) (No. 02-1137 (JDB)), 2002 WL 32968629, at \*10 [hereinafter Defendants' Reply in Further Support of Their Motion To Dismiss].
38. Henkin, *supra* note 19, at 652 (quoting *Curtiss-Wright*, 299 U.S. at 320).
39. See, e.g., Defendants' Reply in Further Support of Their Motion To Dismiss, *supra* note 37, at \*11 ("[T]he broad grant of the 'executive power' to the President and the placement of the Treaty Clause in Article 2 (dealing with President's powers) is strong structural evidence that the Framers intended that such a nonenumerated treaty power belong to the President."); see also *Goldwater v. Carter*, 617 F.2d 697, 704 (D.C. Cir. 1979) ("[T]he powers conferred upon Congress in Article I of the Constitution are specific, detailed, and limited, while the powers conferred upon the President by Article II are generalized in a manner that bespeaks

role for the Senate in treaty *accession*, but emphasize that the primary power to “make treaties” is granted to the President, with the Senate’s role of providing “Advice and Consent” a secondary clause that limits this primary power.

A corollary to the textual Treaty Clause argument, according to its proponents, is the practice of appointing ambassadors.<sup>40</sup> Immediately after granting the President the power to make treaties “by and with the Advice and Consent of the Senate,”<sup>41</sup> Article II, Section 2 indicates that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors.”<sup>42</sup> There is little doubt that the President can remove an ambassador without Senate approval, even if the Senate approved that ambassador’s nomination.<sup>43</sup> Accordingly, proponents argue, the President must have corresponding power to withdraw from treaties notwithstanding the lack of the Senate’s “Advice and Consent.”<sup>44</sup>

There is a related structural argument in favor of unilateral presidential power to terminate: because the President has unilateral power to end treaty accession throughout the treaty accession process—including after Senate

no such limitation upon foreign affairs powers.”); Bradley, *supra* note 27, at 780-81 (discussing this line of argument); Henkin, *supra* note 19, at 651-52.

40. See, e.g., *Goldwater*, 617 F.2d at 737 (MacKinnon, J., concurring in part and dissenting in part) (“The majority adopts a Presidential argument and states that if Senate approval were held to be necessary to terminate a treaty then identical approval would be necessary to terminate Ambassadors.”); DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 89 (1986) (“The case for presidential termination of treaties rests [in part] upon . . . the analogy of treaty termination to the removal of executive officers.”).
41. U.S. CONST. art. II, § 2 (“[The President] shall have Power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).
42. *Id.*
43. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 561 n.33 (2010); see also *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (“Once the appointment [of an Officer of the United States] has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. . . . A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.”). The *Bowsher* Court harkened back to original intent and understanding in justifying its decision, citing debates in the First Congress because they provided “contemporaneous and weighty evidence” of the Constitution’s meaning since many of the Members of the First Congress ‘had taken part in framing that instrument.’” *Id.* at 723-24 (internal citations omitted). *Bowsher* is illustrative, but is by no means the first case to guard presidential power to remove unilaterally officers whom the Senate had confirmed pursuant to the Appointments Clause. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926).
44. See sources cited *supra* note 40.

approval but before formal ratification—a logical corollary allows the President to withdraw any time *after* accession.<sup>45</sup>

In addition to structural arguments, presidential unilateralists invoke historical practice. The legal relevance of historical practice was recognized in Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which noted: "In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."<sup>46</sup>

The "historical gloss" argument, as it is sometimes called, suggests that "what's past is prologue"<sup>47</sup> in assessing the legality of a unilateral treaty termination.<sup>48</sup> For example, counsel to President Carter in *Goldwater* noted, "At a minimum, the Congress's passivity with respect to treaty terminations over the past 60 years suggests an acknowledgement that the President has the

45. See, e.g., AMAR, *supra* note 43, at 561-63 n.33. Oona A. Hathaway explains the process for treaty accession following initial negotiation between the United States and its counterparty:

The President has the power to present (or not present) a negotiated treaty to the Senate for approval. Once presented, it cannot be revoked by him without the Senate's concurrence. Yet this is something of a pyrrhic power, for while the Senate is vested with the authority to give its "advice and consent" on the treaty, it is the President who actually ratifies the treaty once the Senate has offered its approval. Hence even if the Senate were to vote to approve the treaty, a President who has turned against it (or who never was for it, the treaty having been submitted to the Senate by a prior administration) might simply refuse to file the papers necessary to give that consent effect—and do so entirely legally.

Hathaway, *supra* note 31, at 1323-24. She further notes that "[s]ome have argued that because the President has the power not to ratify a treaty even after the Senate's consent has been given, the President must have the parallel authority to withdraw that ratification regardless of the Senate's position on withdrawal." *Id.* at 1324. Specifically, she cites Hunter Miller for the proposition that "[a]t any stage in the making of a treaty, until it is internationally complete, the President may, in the exercise of his own discretion, bring the proceedings to an end." *Id.* at 1324 n.260 (quoting Hunter Miller, Historical Adviser, Dep't of State, Address to the Students of Columbus University: Treaties and the Constitution (Jan. 13, 1937), in 16 U.S. DEPT. OF STATE, DEPARTMENT OF STATE PRESS RELEASES 49, 52 (1937)).

46. 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

47. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

48. For an extensive discussion of how presidential unilateralists have used historical practice to support their position, and this line of reasoning's relationship to *Youngstown*, see Bradley, *supra* note 27, at 783-88. But see Jean Galbraith, Response, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. 121, 123 (2014) (arguing that the changing historical practice on treaty termination "reveals a far more dramatic shift than Justice Frankfurter would view as legitimate," and is part of a "foreign affairs exceptionalism").

constitutional authority to act on his own initiative.”<sup>49</sup> Curtis A. Bradley has recently documented myriad other instances in which executive-branch lawyers and scholars have similarly relied on recent practice to suggest that sufficient gloss has formed to augment and protect the President’s prerogative to withdraw unilaterally.<sup>50</sup>

As a factual matter, recent history does offer examples of unilateral termination. The historical precedent of such unilateralism probably began with President William McKinley’s 1899 termination of portions of a commercial treaty with Switzerland. According to Bradley’s historical survey, this was the first instance in which a President terminated treaty obligations without any form of congressional approval;<sup>51</sup> however, because McKinley’s actions were a response to a potential conflict between the treaty and a tariff act that Congress had passed two years earlier, Bradley argues that McKinley’s action might not necessarily be viewed as purely unilateral.<sup>52</sup> The first indisputably unilateral termination occurred in 1927 when President Calvin Coolidge withdrew from an antismuggling convention with Mexico without the *ex ante* or *ex post* approval of either house of Congress.<sup>53</sup> During his presidency, President Franklin D. Roosevelt began to unilaterally withdraw from treaties much more aggressively than his predecessors, which Bradley describes as “[e]stablishing a [p]attern” that his successors would invoke and which led to the modern rise in unilateralism.<sup>54</sup> As noted, this pattern has influenced the most recent instances in which the United States has withdrawn from treaties: President Carter’s termination of the Taiwan Treaty and President Bush’s terminations of the ABM Treaty and the Vienna Protocol on Consular Relations, all of which were undertaken without congressional consent.<sup>55</sup>

### *B. Against Presidential Unilateralism*

Opponents of presidential unilateralism offer their own structural and historical arguments. The structural argument *against* presidential unilateralism emphasizes separation of powers. Its proponents challenge the notion that executive power can be inferred from constitutional silence or from

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49. ADLER, *supra* note 40, at 149.

50. Bradley, *supra* note 27, at 807-21.

51. *Id.* at 798-99.

52. *Id.*

53. *Id.* at 805.

54. *Id.* at 807-08.

55. See *supra* notes 6-15 and accompanying text.

the placement of the Treaty Clause in Article II. For instance, the plaintiffs in *Kucinich v. Bush*<sup>56</sup> argued that constitutional silence should not be read as a grant of power to the Executive because “[t]he history of American jurisprudence is replete, as it should be, with instances of courts, from the lowest to the highest, going beyond the letter of the Constitution to its spirit, its essence, its core values.”<sup>57</sup>

On this view, core values militate against unilateralism and in favor of a role for Congress. Proponents invoke “the . . . system of checks and balances imbued in the Constitution from its very origin.”<sup>58</sup> These checks and balances suggest a role for Congress not just because of its role as a coordinate branch of government, the argument goes, but also because involving Congress respects the nature of a federal system in which each state’s national representatives have a say.<sup>59</sup>

Here lies a closely intertwined argument: once ratified, a treaty takes its place alongside federal legislation as the “supreme Law of the Land.”<sup>60</sup> As such, some have argued that the principle governing repeal of federal legislation mirrors the proper principle for the repeal of treaties. Since the repeal of ordinary legislation passed by both houses of Congress and signed by the President requires both congressional and presidential approval, a logical corollary is that repeal of a treaty adopted by the Senate and President requires approval of both.<sup>61</sup>

56. 236 F. Supp. 2d 1 (D.D.C. 2002).

57. Plaintiffs’ Motion for Summary Judgment at 32, *Kucinich*, 236 F. Supp. 2d 1 (No. 02-1137), 2002 WL 32968625 [hereinafter Plaintiffs’ Motion for Summary Judgment].

58. Complaint for Declaratory Relief at 6, *Kucinich*, 236 F. Supp. 2d 1 (No. 02-1137), 2002 WL 32968622. Raoul Berger made a similar argument, drawing from an article adapted from an amicus brief filed with the *Goldwater* Court by a pair of international law scholars:

The “fundamental principles of a democratic sharing of power, and of checks and balances to protect that sharing,” in the words of McDougal and Reisman, “require that the Congress be accorded a role in the termination of all agreements . . . .” Certainly exclusion of Congress cannot rest on the total silence of the text respecting a power to terminate, for that silence equally affects the President.

Raoul Berger, *The President’s Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577, 585 (1980) (quoting Myres S. McDougal & W. Michael Reisman, *Can the President Unilaterally End Treaties*, NAT’L L.J. (May 28, 1979), quoted in 125 CONG. REC. S7,045 (daily ed. June 6, 1979) (remarks of Sen. Goldwater)).

59. See, e.g., ADLER, *supra* note 40, at 85-88.

60. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

61. See, e.g., ADLER, *supra* note 40, at 101; Berger, *supra* note 58, at 585.

Those who support joint presidential-congressional withdrawal also argue that historical practice supports their position. Senator Goldwater's counsel suggested that "the normal and accepted method by which the United States has terminated treaties or obligations thereunder is by action of the President together with the approval of the Senate or the Congress."<sup>62</sup> More recently, the plaintiffs in *Kucinich* relied heavily on history in asserting that "the case for a mandatory congressional role in termination of any treaty is deeply rooted in . . . the history of joint executive-legislative action in terminating treaties."<sup>63</sup> Some academics echo this argument, positing that any trend towards presidential unilateralism is relatively recent. Raoul Berger, for example, challenged the notion that a historical gloss had formed and argued that "for the Republic's first 130 years treaties were abrogated, with one exception, by Congress or its authorization, not by President and Senate, much less by the President alone."<sup>64</sup>

As a historical matter, Berger's claim appears to be partially correct. Throughout early historical practice, Congress played a role in treaty withdrawal—but the precise nature of its role varied. The first time the United States terminated a treaty, Congress played a direct role. As the country prepared for war with France in 1798, Congress passed legislation declaring that the four treaties the United States had signed with France "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."<sup>65</sup> The congressional debates over whether to enact the statute reflected no "doubt about Congress's constitutional authority to terminate the treaties."<sup>66</sup> As Thomas Jefferson noted in the *Manual of Parliamentary Practice* in light of this precedent, "Treaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded."<sup>67</sup> Subsequently, until at least 1899,<sup>68</sup> Congress played some

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62. ADLER, *supra* note 40, at 149 (citing the plaintiffs' brief in *Goldwater*).

63. Plaintiffs' Motion for Summary Judgment, *supra* note 57, at 37.

64. Berger, *supra* note 58, at 605.

65. Bradley, *supra* note 27, at 789 (citing Act of July 7, 1798, ch. 67, 1 Stat. 578, 578).

66. *Id.*

67. *Id.* (citing THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 52 (Wash., Samuel Harrison Smith 1801)). Justice Iredell made a corollary point regarding congressional power to rescind treaties in the 1796 case *Ware v. Hylton*. His opinion in that case suggested that, under the Constitution, Congress alone could determine that a treaty was void following breach by the United States' counterparty. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (opinion of Iredell, J.) ("If Congress, therefore, (who, I conceive, alone have such authority under our Government) shall make such a declaration, in any case

role in the decision to terminate treaty obligations.<sup>69</sup> The precise nature of this role often varied, sometimes taking the form of *ex post* approval.<sup>70</sup>

The upshot of early historical practice is that, whether through resolutions or statutes, with the full Congress or just the Senate, *ex ante* or *ex post*, at the President's urging or not, the legislative branch played some role in withdrawing from international agreements. To be sure, the process of congressional approval was inconsistent. But it seemed well understood that some role for Congress was necessary, and the early historical period undoubtedly supports the position of those opposed to unilateralism. More recent tradition, which may have begun as early as 1899, and which accelerated under President Franklin D. Roosevelt's administration, cuts the other way.<sup>71</sup> All told, this historical record suggests a mixed bag of evidence. Historical practice alone is unlikely to be dispositive.

## II. THE ORIGINAL UNDERSTANDING OF *JUS AD BELLUM* AND CONGRESSIONAL WAR POWERS IMPLIES A ROLE FOR CONGRESS IN TREATY WITHDRAWAL

This Part seeks to augment the debate between the presidentialists and the congressionalists. It examines evidence that helps contextualize original understanding: the relationship between Founding-era *jus ad bellum*, treaty withdrawal, and congressional war powers. This Part begins by demonstrating that, at the Founding, *jus ad bellum* conferred on parties suffering treaty breach the right to go to war. Next, it shows that, at the Founding, treaty withdrawal was tantamount to breach because treaties were generally expected to exist in perpetuity. Finally, this Part examines the broad scope of congressional war powers. Taking these three elements together, I argue that the original understanding of the Constitution contemplated a role for Congress in treaty withdrawal.

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like the present, I shall deem it my duty to regard the treaty as void, and then to forbear any share in executing it as a Judge.”).

68. See *supra* notes 51-52 and accompanying text.

69. See Bradley, *supra* note 27, at 788-801.

70. For a detailed history of the various forms of congressional consent, see *id.*

71. See *supra* notes 51-55 and accompanying text.



## A. *Treaties and Jus Ad Bellum During the Founding Era*

### 1. *Treaty Breach Presented a Just Cause of War*

The international law principles governing the “right to go to war” are known as *jus ad bellum*. These principles separate “just wars” – those that are legally permissible – from “unjust wars,” which violate the law of nations and are therefore illegal.<sup>72</sup> To comprehend Founding-era conceptions of congressional treaty withdrawal powers, one must examine the *jus ad bellum* of that time. Because of the close relationship between war and treaties in contemporaneous international law, *jus ad bellum* provides critical context for the original understanding of treaty powers.

Founding-era *jus ad bellum* entitled a nation to go to war to secure its rights and redress violations of those rights. “Just war” included virtually any cause that could be litigated in a domestic context because there was no international analogue for redressing grievances. As Hugo Grotius – the influential Dutch jurist whom many consider the “father of international law”<sup>73</sup> – explained, “The grounds of war are as numerous as those of judicial actions. For where the power of law ceases, there war begins.”<sup>74</sup> Under a Grotian conception of *jus ad bellum*, then, virtually any right that might be enforced against an individual in a domestic court would be just grounds for war. Grotius identified three primary just causes of war: the “right to defend, to recover, and the encroachment on which it is right to punish.”<sup>75</sup> He reiterated that “sovereign powers have a right not only to avert, but to punish wrongs.”<sup>76</sup>

Other seminal treatises on the law of nations, including treatises by Emer de Vattel<sup>77</sup> and Jean-Jacques Burlamaqui,<sup>78</sup> reflected the same view. Though they used slightly different terminology, Grotius, Vattel, and Burlamaqui each made the same two key points. First, not all war was just; second, a nation was

72. See *International Humanitarian Law: Answers to Your Questions*, INT’L COMM. RED CROSS 8-9 (2014), <http://www.icrc.org/eng/assets/files/other/icrc-002-0703.pdf> [<http://perma.cc/K5GS-VMNM>].

73. Mark W. Janis, *The Seas and International Law: Rules and Rulers*, 58 ST. JOHN’S L. REV. 306, 306 (1984).

74. 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 75 (A.C. Campbell trans., M. Walter Dunne 1901) (1625).

75. *Id.*

76. *Id.* at 83.

77. 3 EMER DE VATTEL, *THE LAW OF NATIONS* §§ 25-28, at 483-84 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758).

78. 2 JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 454 (Peter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1748).

entitled under *jus ad bellum* standards to use force to prevent the violation of its rights or recover damages from the violation of those rights.

Treaties played a key role in creating rights, violations of which nations could punish. Each of the three aforementioned authors understood that treaties between nations were analogous to domestic contracts between private parties, and that a nation that had entered into a treaty with another nation therefore had the right to expect performance from its counterparty. Burlamaqui's treatise goes so far as to suggest that the obligation of nations to fulfill treaty promises actually exceeded that of private parties in contracts because "were it otherwise, not only public treaties would be useless to states, but moreover, that the violation of these would throw them into a state of dissidence and continual war."<sup>79</sup> Vattel, likewise, explained in a section entitled "Obligation of observing treaties" that "the breach of a perfect promise is a violation of another person's right, and as evidently an act of injustice, as it would be to rob a man of his property."<sup>80</sup> He continued in his next section, entitled "The violation of a treaty is an act of injustice":

As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is therefore a violation of the perfect right of the party with whom we have contracted; and this is an act of injustice against him.<sup>81</sup>

Grotius, too, explained that treaties constituted "the perfect obligation of a promise, and [are] attended with consequences similar to an alienation of property,"<sup>82</sup> and elsewhere referred to the violation of treaties as "an odious act."<sup>83</sup>

Under *jus ad bellum*, treaty breach was a just cause of war. Burlamaqui and Vattel clearly indicate, and Grotius strongly implies, that a functioning treaty system in which countries kept their promises was necessary to avoid chaos and war. In practice, nations were likely to resort to force when another nation violated the treaty promises it had made. Legally, treaty violation legitimated the use of force. Each of these writers' seminal treatises illustrates the legality of force in response to treaty violations by noting that, first, treaties conferred

79. *Id.* at 518.

80. 2 VATTEL, *supra* note 77, § 163, at 342.

81. *Id.* § 164, at 343.

82. 2 GROTIUS, *supra* note 74, at 134. An Editor's Note in the 1814 translation of the document makes clear that "[a]ll the reasonings of Grotius, on this, and on every other point, are intended to apply not only to the transactions of individuals, but to conduct and affairs of nations." *Id.* at 131.

83. *Id.* at 183.

rights, the violation of which constituted injury; and second, *jus ad bellum* permitted nations to use force to punish injury. As Vattel explained, in the instance of treaty breach, a sovereign “is at liberty to ch[oo]se the alternative of either compelling a faithless ally to fulfil[l] his engagements [through force], or of declaring the treaty dissolved by his violation of it.”<sup>84</sup> There can be no doubt, then, that *jus ad bellum* at the time of the Founding—as articulated by some of the most prominent treatise authors<sup>85</sup>—allowed nations to go to war to recover or punish the violations of treaties.

Moreover, the Founders were aware that treaty breach was considered a just cause of war under contemporaneous international law. It is well documented that, when delegates to the Constitutional Convention gathered in Philadelphia in 1787, they were familiar and deeply concerned with the law of nations.<sup>86</sup> Scholars have noted that several constitutional provisions are imbued with the Founders’ concern that the nascent Republic join the family of nations and comport with its international obligations.<sup>87</sup> The Founders knew the work of Grotius, Vattel, and Burlamaqui, among others,<sup>88</sup> and writings by some of the most prominent Convention delegates reflect an understanding that treaty breach presented a just cause for war. John Jay, for example, noted that treaty violation was a preeminent cause of war: “The *just* causes of war for

84. 2 VATTEL, *supra* note 77, § 200, at 367-68.

85. See Stéphane Beaulac, *Vattel’s Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America*, 63 LA. L. REV. 1327, 1327 (2003) (“[T]here can be little doubt that [Vattel’s] contribution [to the development of international law] was seminal.”); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 35 (1952) (noting that treatises by Grotius, Vattel, and Burlamaqui, among others, “were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century”); Janis, *supra* note 73, at 306 (noting Grotius’s reputation as “the father of international law”).

86. Indeed, the Constitution explicitly mentions the law of nations. See U.S. CONST. art. I, § 8 (“The Congress shall have power to . . . define and punish piracies and felonies committed on the high seas, and offenses against the law of nations . . .”). For discussions of the role that the law of nations played in various constitutional debates, see, for example, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 935 (2010); J. Andrew Kent, *Congress’s Under-Appreciated Power To Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 896-900 (2007); and Kathryn L. Einspanier, Note, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L.J. 985, 990-92 (2008).

87. See, e.g., *supra* note 86 and accompanying text.

88. See, e.g., Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 689 (1972); Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT’L L. 283, 293 (2013); Einspanier, *supra* note 86, at 991-92.

the most part arise either from violations of treaties, or from direct violence.”<sup>89</sup> For Jay, this principle presented a real threat that justified a federal treaty-making power because a single federal government was less likely than multiple state governments to commit treaty violations.<sup>90</sup>

Jay and other delegates were aware that treaty breach constituted a just cause of war. During the colonial era, Great Britain twice cited treaty breach as a just cause for war in manifestos against foreign powers.<sup>91</sup> The first few decades of the new Republic also reveal strong evidence that the Founders knew what consequences could follow treaty breach. Supreme Court Justices cited Grotius, Burlamaqui, and Vattel’s writings on treaties in the early case *Ware v. Hylton*, in which the Court held that an article in the Treaty of Paris protecting creditors annulled a Virginia state law nullifying certain debts.<sup>92</sup> George Washington, in assuming command of the military at President John Adams’s request during America’s “Quasi-War” with France, noted France’s “disregard of solemn treaties and the laws of nations.”<sup>93</sup> Moreover, several early treaties included provisions that essentially established a grace period around the default proposition that treaty breach by one party confers upon the other party a right of war.<sup>94</sup> If, however, the concerns were unanswered, war would be just and perhaps expected.

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89. THE FEDERALIST NO. 3, at 14 (John Jay) (Jacob E. Cooke ed., 1961).

90. *Id.*

91. See Kent, *supra* note 86, at 885–86. A forthcoming study demonstrates that a significant proportion of war manifestos from the mid-sixteenth through mid-twentieth centuries cited enforcement of treaty obligations as cause for war. See Oona Hathaway et al., *Just Causes of War: Evidence from War Manifestos* (2016) (unpublished manuscript) (on file with author).

92. 3 U.S. (3 Dall.) 199 (1796). The practice of considering the Founding-era law of nations to determine original understanding and intent continues to this day. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (citing Vattel and Grotius).

93. Letter from George Washington to President John Adams (July 13, 1798), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (James D. Richardson ed., 1902), <http://www.gutenberg.org/files/10894/10894.txt> [<http://perma.cc/YJR5-SP3G>].

94. Treaty of Peace and Friendship Between the United States of America and His Imperial Majesty the Emperor of Morocco, U.S.-Morocco, art. 24, Jan. 1787, 8 Stat. 100. Similar provisions were included in other so-called “Barbary Treaties.” See, e.g., Treaty of Peace and Amity, U.S.-Dey and Regency of Algiers, art. 16, Dec. 22–23, 1816, 8 Stat. 244; Treaty of Peace and Friendship, U.S.-Tunis, art. 23, Aug. 28, 1797, 8 Stat. 157; Treaty of Peace and Friendship, U.S.-Dey and Subjects of Tripoli of Barbary, art. 12, Nov. 4, 1796, 8 Stat. 154; Treaty of Peace and Amity, U.S.-Dey and Regency of Algiers, art. 22, Sept. 5, 1795, 8 Stat. 133. It is important to note that such provisions, to the extent they were used, did not render obsolete treaty breach as a cause of war, as is clear from sources cited throughout this Note. See Kent, *supra* note 86, at 886 (“[I]t was common practice for sovereigns, before resorting

This *jus ad bellum* standard was not a waning quirk of the eighteenth-century law of nations. Nearly a century after the Founders gathered at the Constitutional Convention, treaty breach still created the potential of legally justified war. In 1884, Justice Miller, writing for the Supreme Court, noted,

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.<sup>95</sup>

All of this indicates that the Founders and their contemporaries were keenly aware that, under the *jus ad bellum* standards at the time, treaty breach by one party conferred upon its counterparty a right to go to war. As I will show, this awareness provides important context for understanding the relative powers of Congress and the President.

## 2. *At the Founding, Treaty Withdrawal Was Tantamount to Breach*

This section demonstrates that, at the Founding, treaty *breach* and the domestic law of treaty *withdrawal* were one and the same. This equivalency explains why Founding-era law governing treaty breach might inform contemporary law on treaty withdrawal. Not all treaties resemble those at issue in *Goldwater*<sup>96</sup> and *Kucinich*,<sup>97</sup> which included provisions that govern withdrawal as a matter of international law (which is distinct from the domestic law of treaty withdrawal).<sup>98</sup> Some treaties lack such withdrawal

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to armed force or other methods of coercion, to state their legal justifications, which typically included a breach of treaties or the law of nations by the other side.”).

95. *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 598 (1884).

96. U.S.-Taiwan Mutual Defense Treaty, *supra* note 14, art. X (“Either Party may terminate it one year after notice has been given to the other Party.”).

97. ABM Treaty, *supra* note 10, art. XV(2) (“Each Party shall . . . have the right to withdraw from this Treaty . . . . It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty.”).

98. Statement of the United States, Diplomatic Relations Between the United States and the People’s Republic of China (December 15, 1978) in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER: JUNE 30 TO DECEMBER 31, 1978, 2266 (“[T]he United States of America will notify Taiwan . . . that the Mutual Defense Treaty between the United States and the Republic of China is being terminated in accordance with the provisions of the Treaty.”); *see also* Press Release, Office of the Press Secretary, White House, Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001) (on file with author) (“[T]he United States is today providing formal notification of its withdrawal from

provisions and exist in perpetuity such that any withdrawal is equivalent to breach.<sup>99</sup> Crucially, while treaties today commonly provide for unilateral withdrawal (assuming the withdrawing party gives notice), this was not the case during the Founding era. As Curtis Bradley notes, until 1822, no U.S. treaty contained a unilateral withdrawal provision.<sup>100</sup>

Indeed, important treaties made during the Founding era contemplated perpetual effect. Consider the Model Treaty, which the First Continental Congress passed in 1776 as a prototype for U.S. treaties. The Model Treaty—which was first implemented in accords with France—included “perpetual” terms governing a host of commercial interests.<sup>101</sup> It “served as a template for further commercial treaties that the United States would make in the coming years.”<sup>102</sup> Any attempt to withdraw from these treaties, with their “perpetual” terms, would be tantamount to breach if the counterparty did not consent.

Indeed, Russia risked war when in 1870 it publicly denounced parts of a perpetual treaty. Fourteen years earlier, Russia had entered the Treaty of Paris, which prohibited naval exercises in the Black Sea. When it announced its intent to denounce, Russia’s counterparties to the Treaty expressed their consternation. The United Kingdom and Prussia even broached the subject of war. The powers evaded combat, however, prudently deciding to meet and agree to a new pact, the so-called London Protocols of 1871.<sup>103</sup> The preliminary

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the ABM Treaty. As provided in Article XV of that Treaty, the effective date of withdrawal will be six months from today.”).

99. *Report of the International Law Commission on the Work of Its Eighteenth Session, 4 May-19 July 1966*, 21 U.N. GAOR Supp. No. 9, at 259, U.N. Doc. A/CN.4/191 (1966), reprinted in [1966] 2 Y.B. Int’l L. Comm’n 172, U.N. Doc. A/6309/Rev. 1 (noting “so-called perpetual treaties [as] treaties not making any provision for their termination”); see also Vienna Convention on the Law of Treaties, art. 56, May 23, 1969, 1980 U.N.T.S. 331, 345 (1969) (reflecting customary international law that perpetual treaties may not be unilaterally terminated absent special circumstances). The Vienna Convention is a reflection of customary international law and mirrors the longstanding law and practice at the time of its adoption. See Lea Brilmayer & Isaias Yemane Tesfalidet, *Treaty Denunciation and “Withdrawal” from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 YALE L.J. ONLINE 217 (2011), <http://yalelawjournal.org/forum/treaty-denunciation-and-qwithdrawalq-from-customary-international-law-an-erroneous-analogy-with-dangerous-consequences> [<http://perma.cc/R5SC-WSXB>].
100. Bradley, *supra* note 27, at 779.
101. Plan of the Treaties with France of 1778, pmb1, in JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 (Chauncey Ford et al. eds., 2005) [hereinafter Model Treaty].
102. Off. of the Historian, *The Model Treaty, 1776*, U.S. DEP’T STATE, <http://history.state.gov/milestones/1776-1783/model-treaty> [<http://perma.cc/GEL2-2EZB>].
103. See SIR GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 462-63 (2003); *THE GREAT EUROPEAN TREATIES OF THE NINETEENTH CENTURY* 312-18 (Augustus Oakes & R.B. Mowat eds., 1918); *GUIDE TO INTERNATIONAL RELATIONS AND*

protocol clarified that no signatory could withdraw from or modify its treaty obligations unless all other parties consented, thus reaffirming the inviolability of treaties.<sup>104</sup> Had Russia's counterparties chosen to go to war over the withdrawal, their choice would have been legally justified.

To be sure, there were certain narrow circumstances under which a state could justifiably breach or denounce a treaty. A fundamental change of circumstance (*rebus sic stantibus*) was—and remains today—an acceptable reason to withdraw from a perpetual treaty.<sup>105</sup> For example, an 1815 treaty with Great Britain opened St. Helena to the United States for commercial purposes. When Britain imprisoned Napoleon on the island, it invoked *rebus sic stantibus* to close St. Helena to the United States for commercial purposes, notwithstanding the treaty. Six years later, upon Napoleon's death, Britain reopened St. Helena. While the United States never explicitly acknowledged that Britain had acted appropriately, the move did not seem controversial.<sup>106</sup>

Invoking *rebus sic stantibus* does not always prove uncontroversial, however. In denouncing the Treaty of Paris, Russia invoked *rebus sic stantibus* as well as several other defenses to no avail—its counterparties rejected those invocations. The Russian example illustrates that the mere invocation of *rebus sic stantibus* or other defenses did not automatically absolve the breaching or withdrawing party of potential consequences. Rather, as in the Russian case, a countersigning country could reject the invocation and consider war. Thus, from the perspective of domestic law, principles such as *rebus sic stantibus* might not obviate the need for congressional authorization. Were a U.S. President to act like the Russian sovereign, the possibility of war would be very real. That chance, in turn, might imply a role for Congress—the representative body tasked with deciding whether to go to war.

In the original understanding, then, withdrawal was tantamount to breach. Treaties were expected to be permanent. This explains how the Founding-era law of nations on treaty breach can inform the debate over the original understanding of treaty withdrawal. At the time, absent special circumstances, withdrawal by the United States constituted breach because perpetual treaties could not be terminated without the consent of both (or all) parties.

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DIPLOMACY 138-39 (Michael Graham Fry et al. eds., 2002); IAN ST. JOHN, GLADSTONE AND THE LOGIC OF VICTORIAN POLITICS 220-21 (2010).

104. BUTLER & MACCOBY, *supra* note 103, at 463.

105. Vienna Convention on the Law of Treaties, art. 62, May 23, 1969, 1980 U.N.T.S. 331, 345 (1969); Int'l Law Comm'n, Draft Articles on the Law of Treaties with Commentaries 256-57 (1966).

106. John P. Bullington, *International Treaties and the Clause "Rebus Sic Stantibus,"* 76 U. PA. L. REV. 153, 158-59 (1927).

### B. Congressional War Powers

Section II.A demonstrated that, under Founding-era *jus ad bellum* standards, treaty breach – and, therefore, withdrawal – was a just cause of war, conferring on the aggrieved party a legal right to declare war on the breaching party. This Section discusses the Founding-era understanding of war powers under the Constitution. It shows that the Founding-era Congress was contemporaneously understood to have broad powers to decide issues of war and peace. Because treaty withdrawal constituted treaty breach, and treaty breach implicated issues of war and peace, Congress’s broad war powers suggest that Congress would have been understood to play a role in treaty withdrawal.

#### 1. *The Original Understanding Was that Congress Had Broad War Powers*

The Constitution gives Congress the exclusive power to declare war in the so-called “War Powers Clause.”<sup>107</sup> Many scholars have noted convincing evidence that Congress had robust power under the original understanding of this Clause. The wording of an initial draft of the War Powers Clause vested in the legislature the power to “make war.” James Madison and Elbridge Gerry jointly moved to substitute the word “declare” for “make,” hence the final diction.<sup>108</sup> Madison and Gerry feared that the phrase “‘make’ war, might be understood to ‘conduct’ it which was an Executive function.”<sup>109</sup> No evidence suggests that, in substituting “declare” for “make,” the Framers desired to instill in the Executive the power to commence war or to reduce congressional power to a mere formality. Indeed, only one delegate to either the Philadelphia Constitutional Convention or any of the thirteen original states’ ratifying conventions, Pierce Butler, appears to have suggested vesting plenary authority to start war with the President.<sup>110</sup> There is no evidence to suggest that anyone supported Butler’s idea.<sup>111</sup> Rather, Gerry remarked that he “never expected to hear in a republic a motion to empower the Executive alone to *declare* war,” and Butler eventually disowned the position.<sup>112</sup>

Further arguments support the view that the original understanding of the War Powers Clause allocated broad power to Congress. Scholars note that

107. U.S. CONST. art. 1, § 8 (“The Congress shall have Power . . . [t]o declare War . . .”).

108. Lofgren, *supra* note 88, at 675.

109. *Id.* at 676.

110. *Id.* at 675.

111. *Id.*

112. *Id.* at 680-81 n.31.



involving more actors in the decision to declare war necessarily slows the process. If the President had plenary power to take the country to war—with Congress's role limited to an *ex post* declaration and funding of the war<sup>113</sup>—the decision to go to war could be swift. It would take little more than a presidential directive to military commanders. In contrast, a decision-making process involving Congress would be slower. At bottom, each house of Congress must cast a vote—a process that presumably involves debate and careful consideration. Where Congress has broad war powers, the President must offer the legislature some *ex ante* justification for the proposed war.

Strong evidence supports the insight that the Founders envisioned Congress's role as slowing a decision to let slip the dogs of war. James Madison, for example, described war as “among the greatest of national calamities” and sought a constitutional framework to prevent easy entry into hostilities.<sup>114</sup> Moreover, delegates to the Convention apparently believed that the executive branch was more likely than was the legislative branch to take the country into war. John Hart Ely noted that “[t]here were various statements by influential framers to the effect that executives tended to be more warlike than legislative bodies,”<sup>115</sup> and characterized Madison's following statement as typical: “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”<sup>116</sup>

James Wilson, a delegate to the Constitutional Convention from Pennsylvania, at his state's ratifying debate, made clear that each of these concerns was reflected in the Constitution's structure:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this

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113. The Constitution gives Congress the power to “raise and support Armies” and “provide and maintain a Navy.” U.S. CONST. art. I, § 8.

114. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3 (1993) (quoting 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 316 (Max Farrand ed., 1911)).

115. *Id.* at 3.

116. *Id.* at 4 (quoting Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 *THE WRITINGS OF JAMES MADISON* 312–13 (G. Hunt ed., 1906)).

circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.<sup>117</sup>

Some evidence suggests that even those Founders who were generally amenable to a strong Executive understood that Congress had a crucial role to play in deciding when to bring the country to war. Alexander Hamilton, for example, was a known advocate for a powerful presidency but proposed that the Senate declare wars and that the President “have the direction of war *when authorized or begun*.”<sup>118</sup> The language implies that the President should not be the one to authorize or begin war; moreover, at the time of the proposal, not all wars were formally declared, which suggests that Hamilton’s vision of the Senate’s role should transcend mere formality and affect the substantive decision. Indeed, Hamilton wrote that the President’s war power “would amount to nothing more than the supreme command and direction of the military and naval forces . . . [The power of] *declaring* [] war and . . . *raising* and *regulating* of fleets and armies . . . by the Constitution under consideration would appertain to the Legislature.”<sup>119</sup> Likewise, James Iredell advocated for a strong presidency and strong presidential power to conduct war once it was commenced but used similar language to describe his view of the power to enter war.<sup>120</sup>

Indeed, in the original understanding of war powers, Congress’s role was so sweeping that it extended not only to formally declared wars but also to the decision to use force in less severe circumstances. Charles Lofgren has examined in great detail the debates at both the Constitutional Convention and at each state’s ratifying convention and concludes that the evidence leads to “a reasonable conclusion that the new Congress’ power ‘to declare War’ was not understood [by the contemporary public] in a narrow technical sense but rather as meaning the power to commence war, whether declared or not.”<sup>121</sup>

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117. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 528 (Jonathan Elliot ed., 1836) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS]; see also M. Andrew Campanelli et al., *The Original Understanding of the Declare War Clause*, 24 J.L. & POL. 49, 57 (2008) (quoting Wilson); Lofgren, *supra* note 88, at 685 (quoting Wilson).

118. Lofgren, *supra* note 88, at 680 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION 292 (Max Farrand ed., rev. ed. 1937)).

119. THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also Lofgren, *supra* note 88, at 685 (quoting Hamilton).

120. Lofgren, *supra* note 88, at 686 (citing 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 117, at 107-08).

121. *Id.* at 699.

These underlying normative decisions informed a crucial corollary to the “declare war” clause: Congress should play a role of primary importance in both declared and undeclared wars. Not all wars at the time of the Founding were formally declared.<sup>122</sup> To the extent that formal declarations were still in vogue, they were issued for large-scale public wars (sometimes called “perfect” war<sup>123</sup>). But perfect war was hardly the only type of warlike activity common at the time; rather, countries often authorized partial mobilization of private military resources to target specific foreign entities.<sup>124</sup> This was sometimes called “imperfect” war. Justice Bushrod Washington’s opinion in *Bas v. Tingy* illustrates the distinction: “[H]ostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war* . . . .”<sup>125</sup>

Textual and historical evidence suggests that the Founders intended to reserve to Congress the power to enter an imperfect war. First, Article I vests in Congress the power to grant letters of marque and reprisal.<sup>126</sup> These letters essentially authorized Americans to commit acts of war against the subjects of other nations. Sovereigns issued these letters primarily to ship captains who acted as official pirates for the state. This practice was how nations waged limited naval wars in the late 1700s and how they took reprisal when redressing national grievances. As Michael P. Kelly has noted, “The [Constitutional] [C]onvention record does not reflect any dissent over granting this lesser war power to Congress. Apparently the framers agreed that the nation’s legislature should control these lesser uses of force.”<sup>127</sup> In examining the Convention record and original understanding at the time, Lofgren argues that the best analysis of the provision was that it served “as a kind of shorthand for vesting in Congress the power of *general* reprisal outside the context of declared war. For someone in the late 1780’s, this interpretation . . . would have given the phrase meaning and would have been consistent with history and the treatises.”<sup>128</sup> Consequently, Lofgren concludes, “this interpretation in turn would have given increased plausibility to the view

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122. See Jules Lobel, “Little Wars” and the Constitution, 50 U. MIAMI L. REV. 61, 68-70 (1995).

123. *Id.*

124. *Id.*

125. 4 U.S. (4 Dall.) 37, 40 (1800).

126. U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . .”).

127. Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 116 (1993).

128. Lofgren, *supra* note 88, at 696.

that Congress possessed whatever war-commencing power was not covered by the phrase ‘to declare war.’”<sup>129</sup>

Early case law, too, suggests a significant role for Congress in so-called “imperfect wars.” In *Bas v. Tingy*,<sup>130</sup> *Talbot v. Seeman*,<sup>131</sup> and *Little v. Barreme*,<sup>132</sup> the earliest cases dealing with the matter, the Court asserted Congress’s role in authorizing imperfect as well as perfect war.<sup>133</sup>

Significantly, the same treatises that informed the Founders’ grant of power to Congress to determine the confines of imperfect war also recognized that imperfect war could lead to perfect war.<sup>134</sup> This understanding helps explain why the Founders seemingly granted to Congress, in Lofgren’s words, “whatever war-commencing power was not covered by the phrase ‘to declare war.’”<sup>135</sup> If the Founders designed a regime in which Congress would decide when the country was to go to war but limited that role to the declaration of “perfect” wars, the regime would be necessarily incomplete; only a regime that also accounted for a congressional role in authorizing “imperfect” wars would truly guard Congress’s role as the war-commencing institution, as these imperfect wars might be expected to lead to perfect wars. The decision to reserve this power to Congress demonstrates just how sweepingly the Constitution guarded the legislature’s right to determine when the country would go to war. As Section II.B.2 will argue, under the contemporaneous law of nations, the power to withdraw from treaties – like the power to grant letters

129. *Id.* at 696-97.

130. 4 U.S. (4 Dall.) at 43 (opinion of Chase, J.) (“Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time . . . Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases.”).

131. 5 U.S. (1 Cranch) 1, 8 (1801) (Marshall, C.J., for a unanimous Court) (“Congress have the power of declaring war. They may declare a general war, or a partial war. So it may be a general maritime war, or a partial maritime war.”).

132. 6 U.S. (2 Cranch) 170, 177 (1804) (Marshall, C.J., for a unanimous Court) (holding that a commander following President Adams’s wartime order to intercept a ship sailing from a French port was liable to the ship’s owner because Congress had only authorized interception of ships sailing to French ports).

133. Others have observed that this trio of cases stands for the proposition that Congress has primacy in authorizing hostilities short of “perfect” or declared war. See, e.g., Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 452-57 (2011); Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty To Declare War*, 63 RUTGERS L. REV. 407, 447-53 (2011); John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1386-87 n.27 (1988); Einspanier, *supra* note 86, at 993-95.

134. For an especially detailed discussion of this point, see Einspanier, *supra* note 86.

135. Lofgren, *supra* note 88, at 697.

of *marque* and reprisal—would have been understood as necessarily falling to the legislature in a system designed to empower Congress to determine matters of war and peace.

2. *The Broad Scope of Congressional War Powers Implies a Role for Congress in Treaty Withdrawal*

The Founders envisioned a system in which the legislative branch had control over the decision to use force. Congress was to be responsible for formal declaration of “perfect war” as well as authorization of “imperfect war,” which authorized on behalf of the United States the use of force on a smaller scale than formally declared wars. Its powers extended to “imperfect war” in part because “imperfect war” could spiral into “perfect war.”<sup>136</sup> It is also clear that the Founders knew that, as a legal matter, treaty breach provided nations with a just cause of war and, as a practical matter, that treaty breach often led to war. It seems unlikely that a system that so jealously guarded Congress’s role in leading the nation to war would allow the Executive to act unilaterally in ways that would give other nations the legal right to go to war against the United States. To be meaningful, the congressional prerogative to determine matters of war and peace would have to encompass some control over treaty withdrawal.

For example, take the aforementioned 1778 Treaty of Alliance with France that was based on the Model Treaty.<sup>137</sup> It conveyed to the French a host of economic rights. Each right was “perpetual,” as the treaty included no unilateral withdrawal clause.<sup>138</sup> If the United States had chosen to withdraw unilaterally from the treaty, thereby removing these “perpetual” economic rights, the French would have been legally entitled to declare war to vindicate those rights. To be sure, the French might choose lesser means, but the decision to engage in war would have been out of the United States’ hands. This was true of every U.S. treaty until 1822, since none of these treaties included unilateral withdrawal provisions. Given the original, orthodox

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136. See Lobel, *supra* note 122, at 68–69 (“Joseph Story, citing Blackstone, noted that the power to issue letters of *marque* and reprisal was ‘plainly derived from that of making war,’ being ‘an incomplete state of hostilities,’ often ultimately leading to a formal declaration of war. Albert Gallatin argued that the grant of letters of *marque* and reprisal was ‘an intermediate state between peace and war,’ and generally preceded war, ‘[w]hen it has not been thought proper to come to open war at once.’”) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 573, at 412 (Boston, Hilliard, Gray & Co. 1833) and 8 ANNALS OF CONG. 1511 (1798)).

137. Model Treaty, *supra* note 101.

138. See *supra* note 101 and accompanying text.

understanding that the Constitution jealously guarded congressional war powers, it would seem illogical to deny Congress a role in such an obvious potential cause for war.

The logic of a congressional role in treaty withdrawal comes into sharp relief when one considers peace treaties. At the Founding, while there were myriad just causes of action for commencing war, there was only one true way to end a state of war: through a treaty of the peace. The seminal treatises of the time make clear that a peace treaty was the exclusive means of formally ending war, even when warring nations had minimized or even ceased their use of force for prolonged periods of time. Perhaps the clearest articulation of the importance of peace treaties comes from Burlamaqui: “[T]he enemy himself may retake what he has lost, whenever he finds an opportunity, *till by a treaty of peace he has renounced all his pretensions.*”<sup>139</sup> Burlamaqui’s passage illustrates that even when the sides have laid down arms, they are legally entitled to pick them back up until they renounce all right to use force and hash out remaining disagreements in a peace treaty. In this context, a peace treaty settles the issue that led to war, the status of prisoners, seized property, and myriad other potential sources of tension.

The Founders were aware of this system and, at the Convention, they contemplated that peace treaties would serve as the exclusive means of ending war.<sup>140</sup> In the first post-Convention Supreme Court case implicating war termination, decided less than a decade after the Constitutional Convention, Justice Chase observed that “war between two nations can only be concluded by treaty.”<sup>141</sup> Even the Quasi-War with France—a conflict lacking any formal declaration of war—ended through a peace treaty. As David A. Simon has noted, “The use of a peace treaty to end the Quasi-War is a strong indication

139. 4 BURLAMAQUI, *supra* note 78, at 505 (emphasis added); *see also* 2 GROTIUS, *supra* note 74, at 386 (“Treaties are in general regarded as the principal instrument, by which wars are ended, and the mediation, or decision of a third person or power is deemed a secondary or accessory means.”); 4 VATTTEL, *supra* note 77, at 655 (“When one of the parties is reduced to sue for peace, or both are weary of the war, then thoughts of an accommodation are entertained, and the conditions are agreed on . . . . When the belligerent powers have agreed to lay down their arms, the agreement or contract in which they stipulate the conditions of peace, and regulate the manner in which it is to be restored and supported, is called the *treaty of peace.*”).

140. *See* Mark W. Mosier, *The Power To Declare Peace Unilaterally*, 70 U. CHI. L. REV. 1609, 1613 (2003) (citing JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1173, at 98 (Little, Brown and Co. 3d ed. 1858) for the proposition that a congressional power to make peace was unanimously rejected at the Convention in favor of making peace through treaty).

141. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (opinion of Chase, J.).

that the political branches viewed peace treaties, at the very least, as important processes to ending war with other states.”<sup>142</sup>

The Founders were also clear that breach of a peace treaty was tantamount to a declaration of war. A peace treaty’s only purpose was to settle all outstanding differences between warring nations and return them to a state of peace. Withdrawal from such a treaty could only be understood as an attempt to return to the warring state. James Madison observed, for example, that “to annul a Treaty of Peace, [was] equivalent to a Declaration of War.”<sup>143</sup> Indeed, the first time the United States terminated its treaty obligations was in response to hostilities with France.<sup>144</sup>

All of this to say that the Founders and their contemporaries would have anticipated that the United States would be party to peace treaties whose breach would be tantamount to declaration of war. The Founders knew that withdrawing from a peace treaty was effectively a declaration of war. Consider the Jay Treaty with the British, which established peace and formally ended the Revolutionary War.<sup>145</sup> A withdrawal from this treaty, whose purpose was to settle war debts and establish perpetual peace, could only be understood as a declaration of war. Because of the Founders’ emphasis on congressional war powers, it seems logical that their contemporaries understood that Congress had a voice in such decisions.

Taken together, Congress’s broad war powers combined with the Founding-era *jus ad bellum* suggests that the Founders envisioned that treaty termination would involve at least one house of Congress. No single piece of evidence is conclusive, and this Note does not mean to suggest that the nexus between Founding-era *jus ad bellum*, treaties, and congressional war powers is sufficient to resolve all debate, especially because elements of the debate rely more on recent practice than original intent or understanding. Rather, this Note suggests that the debate thus far has been incomplete. While to some extent originalism infuses every element of the debate over treaty withdrawal, commentators and litigants have largely missed the crucial nexus between treaty withdrawal and war powers during the Founding era. To the extent that each side of the debate relies on certain context clues to make their arguments, this relationship provides important evidence.

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142. See David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV. 685, 699 (2014).

143. Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), reprinted in 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW AS EMBODIED IN DIPLOMATIC DISCUSSION, TREATIES AND OTHER INTERNATIONAL AGREEMENTS 321 (1906) [hereinafter Madison Letter to Pendleton].

144. See Bradley, *supra* note 27, at 789–90.

145. Treaty of Amity, Commerce and Navigation, U.S.–Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

### III. COUNTERARGUMENTS AND IMPLICATIONS

This Part addresses several potential counterarguments to my thesis. Some of these counterarguments consider the constitutional implications of this Note's thesis, while others question its contemporary applicability as a legal or functional matter. This Part also discusses the implications of my argument and my conclusion that the House of Representatives should have a vote in treaty withdrawal.

#### A. *Distinguishing Between the Power To Declare War and the Power To Take Actions Bringing the Country Closer to War*

This Note has argued that because treaty withdrawal was a cause of war at the Founding, Congress should have a role in deciding whether the United States pulls out of a treaty. One might question whether this intuition extends to all scenarios in which presidential action might bring the country closer to war. The Constitution reserves to the President powers that might well bring the country to the brink of conflict. Surely, my thesis cannot mean that *every* decision that *might* bring us closer to war is subject to congressional vote. It would be virtually impossible for the Founders to design a system in which Congress had a say in every decision that might functionally lead the country closer to war if for no other reason than that such decisions are often unpredictable. But few of these decisions could confer on the other country the *legal right* to go to war.

Because treaty withdrawal would create a legal right in a foreign nation to declare war against the United States, treaty breach can be distinguished from other presidential actions that might provoke war. Indeed, the Founders and their contemporaries were keenly aware of this distinction. John Jay indicated as much in the third *Federalist* paper, when he discussed the relative foreign policy powers of the federal government and the states. He observed that although causes of war can be "*real or pretended . . . it becomes useful to inquire whether so many just causes of war are likely to be given by United America as by disunited America.*"<sup>146</sup> Jay's language implicitly acknowledged that America would never be able to guarantee that other nations would not use "pretended" reasons to declare war against America. At the same time, he focused on the actions that create "just causes of war." Jay explained, "The *just* causes of war, for the most part, arise either from violation of treaties or from direct violence."<sup>147</sup>

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146. THE FEDERALIST NO. 3, at 14 (John Jay) (Jacob E. Cooke ed., 1961).

147. *Id.*



Furthermore, Jay implied that Congress should play a role in ensuring adherence to treaties. For example, he defended *federal* (as opposed to state) power to enter treaties, writing that the national government would produce “fewer just causes of war,” and would be “be more in their power to accommodate and settle them amicably. They will be more temperate and cool, and in that respect, as well as in others, will be more in capacity to act advisedly than the offending State.”<sup>148</sup> In another instance he explained that “[w]hen once an efficient national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it.”<sup>149</sup>

The other main cause of just war that Jay identified, direct violence, was constitutionally subject to congressional approval—both in the instances of formal declarations of war and in the context of peripheral war-like acts by the military or private citizens acting under the auspices of letters of marque. Indeed, as has been shown, the law of nations clearly anticipated that small-scale “imperfect” wars could lead to “perfect wars,” and scholars who have closely examined the constitutional debates indicate that Congress was understood to have a role to play in all such actions, at least partially because of this fact.<sup>150</sup> Given that Congress had a clear role to play in any direct violence that might lead to just war, it makes sense that Congress would also have a role in treaty withdrawal.

As a corollary, early practice suggests that where the President’s traditional recognition powers might have presented other nations with a just cause of war, the Executive has involved Congress. Secretary of State John Quincy Adams communicated this point to President James Monroe when recognizing the independence of several South American countries during the Spanish-American Wars of Independence. Adams noted that premature recognition could be (and historically had been) “a cause or pretext for war.”<sup>151</sup> Quincy Wright explains that “Secretary Adams’ distinction seems to indicate the limits of the President’s power. He may recognize a fact [of sovereignty]. To do so is not a just cause of war. A recognition before the fact is, however, intervention and practically war, the declaration of which belongs to Congress.”<sup>152</sup>

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148. *Id.* at 17. Jay’s use of the plural to refer to those making these decisions for the national government is typical of *Federalist No. 3*, reflecting his view that the members of the national legislature would play a role in managing such decisions.

149. *Id.* at 15.

150. See, e.g., Ackerman & Hathaway, *supra* note 133, at 452-53; Lobel, *supra* note 122, at 68-69.

151. Quincy Wright, *The Control of the Foreign Relations of the United States the Relative Rights Duties and Responsibilities of the President of the Senate and the House and of the Judiciary in Theory and in Practice*, 60 PROC. AM. PHIL. SOC’Y 99, 357 (1921) (quoting Secretary Adams).

152. *Id.*

President Andrew Jackson expressed a similar view in 1836. He noted that recognitions traditionally “have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession to enable them not only to decide correctly, but to shield their decisions from every unworthy imputation.”<sup>153</sup> Because recognition of Texas, however, was a break from this policy and because “premature recognition under these circumstances” might be “looked upon as justifiable cause of war,” Jackson determined it was “[c]onsistent with the spirit of the Constitution, and most safe” that the decision, “when probably leading to war,” should be taken by Congress, “that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished.”<sup>154</sup>

To be sure, Jackson made clear that his decision was a question of expediency and he intentionally left unanswered his view of whether the President—with or without the Senate—was empowered to recognize Texas’s independence in these circumstances. Nevertheless, he apparently thought involving the full Congress was “consistent with the spirit of the Constitution” due to the possibility of giving Spain a just cause of war.<sup>155</sup> As Wright notes, “when the line has been close, as in the recognitions of the South American Republics and Texas, the President has invoked the judgment and cooperation of Congress before recognition,”<sup>156</sup> due to distinction between recognition that would create a just cause of war and that which would not.

Recognition power provides a useful parallel to treaty withdrawal. As a general matter, the power rests with the Executive. Nevertheless, in two early instances in which recognition might have led to war, Presidents chose to involve Congress. To be sure, the President in each example might have been motivated by prudential or political concerns rather than constitutional obligation. Nevertheless the President emphasized in each instance that the action might confer on another country a *legal* right to go to war against the United States, and suggested that this implicated congressional war powers. These examples suggest that presidential actions might be distinguishable based on whether they conferred legal rights of war.

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153. Letter from President Andrew Jackson to Congress (Dec. 21, 1836), reprinted in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 265, 266 (James D. Richardson ed., 1901).

154. *Id.*

155. *Id.*

156. Wright, *supra* note 151, at 357 (internal quotation marks omitted).

### B. Unilateral Breach Versus Unilateral Withdrawal

A similar objection to this Note's thesis might be that not all treaty breaches take the form of withdrawal; a President can breach a treaty without terminating it. As a matter of domestic law, must the President seek Congress's consent before violating a treaty in other ways? There is strong evidence to suggest that, as a matter of original understanding, the President was not empowered to unilaterally breach a treaty. To illustrate, consider a slightly fictionalized version of President Grant's 1876 actions regarding an extradition treaty with Great Britain. Responding to Britain's refusal to comply with certain provisions, Grant halted extradition to Great Britain pending congressional action.<sup>157</sup> Imagine that, instead of responding to Britain's breach, Grant had refused to comply with a specific extradition request due to political or prudential concerns about that extradition. This might have breached a specific treaty obligation, though it would not constitute general termination of the treaty. The originalist theory advanced in this Note suggests that, because breach was just grounds for war under Founding-era *jus ad bellum*, Congress should play a role in this decision.

Indeed, some textual and historical evidence bolsters this proposition. The potential textual hook depends on how one views the Take Care Clause, which requires that the President "take Care that the Laws be faithfully executed."<sup>158</sup> A threshold question here is whether the Take Care Clause encompasses treaties. While the issue is debated, several commentators have convincingly argued that it does.<sup>159</sup> They note that the Supremacy Clause counts treaties among the "supreme Law of the Land"<sup>160</sup> and point out that, at the Constitutional Convention, delegates changed the Take Care Clause language in a way that included treaties (although the precise motivation for the change is unknown).<sup>161</sup>

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157. Bradley, *supra* note 27, at 791.

158. U.S. CONST. art. II, § 3.

159. See, e.g., Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 157-59 (2004); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 343-44 (2008). But see MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 203 (1990) (arguing that the Take Care Clause does *not* extend to treaties).

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

161. James Madison initially proposed language that the President was to execute "the National Laws" and the Committee of Detail suggested that the language read "the Laws of the United States." Either of these formulations might be read to exclude treaties, but the eventual adoption by the Committee of Style of "the laws" helped obviate this problem. See Swaine, *supra* note 159, at 343-44.

A second question is what, exactly, the Take Care Clause requires of the President. In the treaty context, strong evidence from the Founding era suggests that the President was expected to carry out all treaty commitments. In 1793, President Washington issued his Proclamation of Neutrality, announcing that America would remain neutral in a war between France and other European nations.<sup>162</sup> Opponents of the Proclamation, including James Madison, expressed consternation that it violated America's obligations under its Treaty of Alliance with France, thus flouting the President's duties under the Take Care Clause.<sup>163</sup> Importantly, supporters of the Proclamation, including Alexander Hamilton, did not argue that violating the treaty fell within Washington's prerogatives under the Take Care Clause. Instead, they asserted that the Proclamation did not constitute a violation of the treaty.<sup>164</sup> Both sides seemed to agree that Washington lacked discretionary authority to breach, for he had a duty to execute the treaty faithfully.<sup>165</sup>

In a similar vein, then-Congressman John Marshall suggested that it was incumbent upon the President to ensure that all treaty provisions were faithfully executed. Marshall was responsible for defending President John Adams from congressional censure following Adams's extradition of Jonathan Robbins to Great Britain. The Jay Treaty with Britain included an extradition provision, but Adams's actions generated significant controversy because no statute had authorized Robbins's extradition. Speaking on the House floor, Marshall argued that while "Congress unquestionably may prescribe the mode [of executing a treaty], and Congress may devolve on others the whole execution of the contract," until it does so, "it seems the duty of the Executive department to execute the [treaty] . . . by any means it possesses."<sup>166</sup>

Of course, not all treaty breaches are created equal. There is a qualitative difference between the United Kingdom's uncontroversial decision to temporarily amend commercial shipping routes in St. Helena and Russia's highly controversial decision to commence naval exercises in the Black Sea. Withdrawal from a perpetual treaty is far more open and controversial than a minor, discretionary interpretation of a treaty clause and thus seems more analogous to the latter example. In this regard, for the purposes of my argument, there is no need to delineate the threshold at which a breach is sufficiently serious as to warrant congressional involvement because

162. Jinks & Sloss, *supra* note 159, at 157-59.

163. *Id.*

164. *Id.* at 158-59.

165. *Id.* at 159-60; see Swaine, *supra* note 159, at 344-45.

166. Jinks & Sloss, *supra* note 159, at 159; see also Swaine, *supra* note 159, at 346 (discussing this history in depth).

withdrawal seems far beyond that line. It is worth highlighting, however, two aspects of Supreme Court jurisprudence that support the notion that executive authority to breach is limited. First, unlike in the contemporary era, the early Supreme Court was not especially deferential to the Executive's interpretation of treaties.<sup>167</sup> Second, courts have generally required clear congressional intent to override treaty provisions. Justice Harlan cited Vattel in articulating the reasons underlying this principle:

[T]he court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country. "There would no longer be any security," says Vattel, "no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to promises."<sup>168</sup>

These two principles, read together, suggest that, in the early days of the Republic, courts were loathe to accept the notion that the President has inherent authority or discretion to breach treaties.

A system that prevented the President from unilaterally breaching a treaty (even without terminating it) would be sensible. Were the President able to breach without the consent of Congress, a whole treaty—which the Senate had played a role in approving—might be voided, even if the nation did not go to war over the breach. It is difficult to imagine that that the Founders and their contemporaries envisioned a system in which, say, President Washington, with two-thirds of the Senate, would ratify a treaty in 1796 but President Adams could unilaterally breach one of its provisions in 1797, thus jeopardizing the whole framework.

### C. *The Changed Law of Nations Should Not Upend Separation of Powers*

A potent counterargument to this Note is that changes in international law have undermined the main rationale for a congressional role in treaty withdrawal. Whatever the law of nations was at the Founding, contemporary international law includes a broad prohibition on the use of force—embedded in Article 2(4) of the U.N. Charter<sup>169</sup>—and contemporary *jus ad bellum*

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167. See generally David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

168. *Chew Heong v. United States*, 112 U.S. 536, 539 (1884) (internal citations omitted).

169. U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

identifies only limited circumstances that can overcome this prohibition.<sup>170</sup> Treaty breach is not one of these circumstances; in contemporary international law, a nation may not resort to force in contravention of Article 2(4) if its rights were violated by treaty breach. Likewise, contemporary treaties, unlike those at the Founding, often include withdrawal provisions that establish a legal basis for withdrawal without breach. In light of these changes, one might question this Note's contemporary application.

The answer to this question depends largely on the extent to which one thinks the Constitution's prescriptions for *domestic* law shift as *international* law does. Some constitutional provisions clearly anticipate changes to international law.<sup>171</sup> For example, Congress has the constitutional power to "define and punish . . . Offences against the Law of Nations."<sup>172</sup> There is little doubt that today's Congress could pass a statute pursuant to these powers that define and punish an act as a violation of the contemporary laws of nations, even if the act did not violate the Founding-era law of nations.<sup>173</sup>

At the same time, it unclear whether shifts in international law can shift every element of constitutional structure. The Supreme Court's opinion in *Zivotofsky v. Kerry* suggests that context clues from Founding-era *jus ad bellum*

170. There are three clear exceptions to this prohibition and one possible additional exception. First, Article 51 of the Charter allows for the use of force pursuant to individual or collective self-defense. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . ."). Second, Article 42 of the Charter permits the United Nations Security Council to vote to approve the use of force. U.N. Charter art. 42 ("[T]he Security Council . . . may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."). Third, force may be used by one state in the territory of a second state when the second state consents. See, e.g., Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 505 n.28 (2013) (listing authorities for this proposition). Finally, many have argued that customary international law allows for the use of force in instances of humanitarian emergency, though this is heavily debated. Compare Hathaway et al., *supra*, at 521 ("Unauthorized humanitarian interventions remain prohibited under Article 2(4). The variant [of scholarship] that focuses on emerging customary international law does not accurately describe state practice."), with Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), <http://justsecurity.org/1506/koh-syria-part2> [<http://perma.cc/CWK2-4HJZ>] ("I believe that international law has evolved sufficiently to permit morally legitimate action to prevent atrocities by responding to the deliberate use of chemical weapons.").

171. See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

172. U.S. CONST. art. I, § 8, cl. 10.

173. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (discussing the Torture Victims Protection Act as "authority that establishes an unambiguous and modern basis for federal claims of torture and extrajudicial killing" (internal quotation marks omitted)).

remain salient.<sup>174</sup> *Zivotofsky* considered whether Congress had power to compel the executive branch to indicate on the passport of a U.S. citizen born in Jerusalem that his birthplace was Israel, in contravention of the executive branch's longstanding position that no country has sovereignty over Jerusalem.<sup>175</sup> The core legal question of the case was whether so-called "recognition powers" (i.e., the powers to recognize a foreign government as the rightful sovereign of a particular territory) are vested exclusively in the executive branch or whether Congress can, through legislation, direct the executive branch to recognize a sovereign. The Court held that Congress cannot recognize a sovereign because recognition power rests exclusively with the executive branch.<sup>176</sup> Notwithstanding the fact that "the Constitution does not use the term 'recognition,'" the Court examined context clues from the Founding-era law of nations, noting that "[a]t the time of the founding . . . prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state."<sup>177</sup> The Court concluded that, because the Constitution confers on the President the exclusive power to "receive Ambassadors and other public Ministers," it "is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations."<sup>178</sup> The Court's reasoning here parallels this Note's analysis that contextual clues from Founding-era *jus ad bellum* and the War Powers Clause lead to an inference that Congress has a role to play in treaty withdrawal.

To be sure, *Zivotofsky* is not a perfect parallel, as international law may not have shifted as significantly in the recognition context as it has in the *jus ad bellum* context.<sup>179</sup> *Zivotofsky* did not rest solely on the Court's inference about the Founding era. The majority also considered historical practices and the current state of international law.<sup>180</sup> Indeed, Justice Thomas's concurrence explicitly noted:

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174. 135 S. Ct. 2076 (2015).

175. *See id.* at 2081-84.

176. *Id.* at 2096.

177. *Id.* at 2084-85.

178. *Id.* at 2085.

179. Some have questioned this point. *See* Jean Galbraith, *International Law and Separation of Powers*, 99 VA. L. REV. 987, 1043-44 (2013) ("The sole organ doctrine that spurred the President's recognition power is no longer as important to international law as it was in the nineteenth century."). *But see* JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW 17-20* (2d ed. 2007).

180. *See Zivotofsky*, 135 S. Ct. at 2084-88.

I assume, as the majority does, that the recognition power conferred on the President by the Constitution is the power to accomplish the act of recognition as that act is defined under international law. *It is possible, of course, that the Framers had a fixed understanding of the act of recognition that is at odds with the definition of that act under international law.* But the majority does not make that argument . . . . Lacking any evidence that the modern practice of recognition deviates in any relevant way from the historical practice, or that the original understanding of the recognition power was something other than the power to take part in that practice, I proceed on the same assumption as the majority.<sup>181</sup>

It seems likely that the means of recognition need not be “fixed” in Founding-era conceptions; for example, if international law acknowledged a new way for the Executive to recognize a sovereign, it is doubtful that this would pose a constitutional problem. It is unclear, however, how the Court would respond if Congress could unilaterally act under international law to recognize a foreign sovereign or to compel the President to do so. The *Zivotofsky* majority held that “[t]he text and structure of the Constitution grant the President the power to recognize foreign nations and governments,”<sup>182</sup> noting that “[t]he Constitution thus assigns the President means to effect recognition on his own initiative.”<sup>183</sup> In contrast, the Court noted, “Congress . . . has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”<sup>184</sup>

If one believes that the Constitution incorporates a dynamic, rather than static, conception of international law, this Note’s argument may have little contemporary relevance. This is a reasonable position and is not obviously inconsistent with *Zivotofsky*.<sup>185</sup> Even one who subscribes to this view, however, will find that this Note offers a distinct and underexplored legal justification for the recent trend in presidential unilateralism. It is worth highlighting again, however, that the practice of presidential unilateralism predates the U.N. Charter, thus preceding Article 2(4)’s change to international *jus ad bellum*.<sup>186</sup>

Moreover, *Zivotofsky* indicates that courts might be somewhat reluctant to accept the view that a shift in international law has altered domestic separation of powers. Jean Galbraith has recently argued that, “while many constitutional

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181. *Id.* at 2111 n.9 (Thomas, J., concurring in part and dissenting in part) (emphasis added).

182. *Id.* at 2086.

183. *Id.*

184. *Id.*

185. For one such perspective, see Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373 (2012).

186. See *supra* notes 51-54 and accompanying text.



actors and commentators today accept international law as a direct principle of constitutional interpretation in certain areas of constitutional law, they do not treat it as similarly relevant to the separation of powers.<sup>187</sup> Indeed, her research suggests that the *Zivotofsky* Court's opinion might have conflated constitutional principles with early practices, to the advantage of the Executive.<sup>188</sup> Her analysis brings to bear two issues. First, separation of powers is treated as distinct from other constitutional issues in terms of how it is affected by international law, which she laments. This suggests that, unlike other constitutional issues, the Court might be loath to subject separation of powers to shifts in international law. Second, to the extent that Galbraith is correct that the Court has conflated historical practices (rooted in contemporaneous international law) with structural constitutional questions, these practices are from the earliest days of the Republic, which would militate towards a protection of congressional withdrawal power.

#### D. Distinguishing Among Treaties

One might argue that a role for Congress is warranted only for treaties that bring us closer to war as a practical matter, even if not as a formal legal matter. A Senate Resolution introduced in response to the *Goldwater* case suggests this view: it “[p]rohibit[ed treaty] termination or suspension by the President without Congressional approval where . . . imminent involvement of the United States Armed Forces in hostilities or other danger to national security would result.”<sup>189</sup> Whereas this Note is rooted in questions about what U.S. actions would give other nations a legal right to go to war, a skeptic might replace the *jus ad bellum* analysis with a more functional approach, asking whether U.S. withdrawal could actually bring the United States closer to a state of war because of the response of other nations, even if their response contravenes international law.

As an initial matter, even on this view, Congress would be entitled to a greater role in treaty withdrawal for certain important agreements. For example, withdrawal from the Strategic Arms Reduction Treaty (New START Treaty) limiting nuclear arsenals would likely meet the criterion of sufficiently implicating war and peace.<sup>190</sup>

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187. Galbraith, *supra* note 179, at 992.

188. See Jean Galbraith, *Zivotofsky v. Kerry and the Balance of Power*, 109 AJIL UNBOUND 16, 20 (2015).

189. See S. Res. 15, 96th Cong. (1979).

190. See Baker, *supra* note 34.

However, there is little historical or textual basis for differentiating among treaties as a matter of constitutional law. The D.C. Circuit acknowledged as much in *Goldwater* (albeit to the benefit of the Executive):

There is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards.<sup>191</sup>

Historically, as a legal matter, breach of a peace treaty or commercial treaty alike could lead to war. Breaching the former was tantamount to an affirmative declaration of war; breaching the latter conferred on the counterparty a *jus ad bellum* right. The Founding-era law of peace treaties sheds light on the legal rejoinder. Recall that the Founders were aware that, at international law, peace treaties were the exclusive means of ending war and, at the Convention, they contemplated that peace treaties would serve as the exclusive domestic legal means of doing so.<sup>192</sup> The Founders and their contemporaries would have anticipated that the United States would be party to peace treaties whose breach would be tantamount to declaration of war. Nevertheless, the Constitution does not distinguish between treaties. As the D.C. Circuit noted in *Goldwater*, “We cannot find an implied role in the Constitution for the Senate in treaty termination for some but not all treaties in terms of their relative importance.”<sup>193</sup> Indeed, scholars on both sides of the withdrawal debate have suggested that the Constitution’s text and structure do not create formal distinctions among types of treaties.<sup>194</sup>

A letter from Madison to Edmund Pendleton provides the strongest evidence in favor of distinguishing between treaties. Writing about *adverse* treaty breach (in other words, instances in which the United States was victimized by breach), Madison pondered which branch of government would

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191. *Goldwater v. Carter*, 617 F.2d 697, 707 (1979).

192. See *supra* notes 139-144 and accompanying text.

193. *Goldwater*, 617 F.2d at 707.

194. See Berger, *supra* note 58, at 584 n.52 (“Professor Lowenfeld correctly observes that we cannot derive from the Constitution a scheme for defense treaties different from that applicable to treaties on the myriad of other subjects . . . .” (internal quotation marks omitted)); Henkin, *supra* note 19, at 654 (noting that while Congress might be especially resistant to unilateral presidential withdrawal from treaties that “implicate our defense posture or otherwise bring us close to war,” this is an argument “to urge that the President should not act to terminate an important treaty without at least meaningful consultation with Congress, congressional committees, congressional leaders. It is not an argument for distorting constitutional doctrine to require a vote of Congress”).

be empowered to make the determination that the United States had suffered such breach:

In case it should be advisable to take advantage of the adverse breach, a question may perhaps be started, whether the power vested by the Constitution with respect to Treaties in the President and Senate makes them competent Judges, or whether, as the Treaty is a law, the whole Legislature are to judge of its annulment, or whether, in case the President and Senate be competent in ordinary Treaties, the Legislative authority be requisite to annul a *Treaty of peace*, as being equivalent to a Declaration of war, to which that authority alone, by our Constitution, is competent.<sup>195</sup>

Notably, Madison did not consider the possibility that the President alone would be positioned to announce an adverse breach (in an early Court case, Justice James Iredell indicated Congress alone had the power to do so<sup>196</sup>).

More importantly for purposes of the question of distinguishing among treaties, the issue in Madison's letter is qualitatively different from that of distinguishing among treaties for purposes of withdrawal. Under Founding-era *ius ad bellum*, once the United States suffered a breach by its counterparty, it would be legally entitled to take action. But it would not be compelled to do so. At the same time, were the United States to breach, the counterparty could legally declare war. As a result, it makes sense to distinguish among treaties when the United States is deciding how to respond to breach (for example, whether to annul a peace treaty, thus causing war, a subject for the full Congress, or whether to annul a commercial treaty, which would not necessarily lead to war unless the United States chose to take that step). If the concern is potential war and its interplay with congressional war powers, it makes significantly less sense under the Founding-era legal framework to distinguish among treaties when deciding whether to withdraw if that withdrawal would confer a legal right on the counterparty regardless of the content of the breached treaty. As a practical matter, it is not clear how easy it would have been to predict which treaty withdrawals would lead to war and which would not. The United States itself went to war with Mexico in 1846 at least partially because of violations of a treaty regarding settlement of debt.<sup>197</sup>

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195. Madison Letter to Pendleton, *supra* note 143.

196. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (opinion of Iredell, J.). *But see* AMAR, *supra* note 43, at 561-63 n.33 (taking the view that the President should be understood to have this authority, based in part on an essay by Alexander Hamilton).

197. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE WORST CRIME OF ALL* (forthcoming 2016).

Additionally, many Founding-era commercial agreements with other nations were tied to peace agreements.<sup>198</sup>

Some commentators have argued for a functional distinction. Louis Henkin, while acknowledging that the Constitution does not distinguish between treaties with regard to formal processes,<sup>199</sup> suggested that the Constitution might require greater consultation with Congress if a proposed withdrawal “seriously . . . implicate[d] our defense posture or otherwise br[ought] us close to war, since that would undercut the constitutional power of Congress to decide for war or peace.”<sup>200</sup> Founding-era treaties often included promises of both peace and commerce,<sup>201</sup> which might explain the lack of constitutional distinction. Today, the ability to distinguish treaties seems more straightforward, but, from a practical perspective, it is not clear that such a distinction is always workable. Some treaties, such as tax agreements, are extremely unlikely to lead to implicate war and peace. Others, like the New START Treaty, seem to implicate it more clearly.<sup>202</sup> Between these ends of the spectrum, however, there is a murky middle. The treaty withdrawal that led to the *Kucinich* litigation reflects the difficulty of distinguishing between treaties that create the risk of war and treaties that do not. In withdrawing from the treaty, President Bush suggested that the move would make America *less* likely to go to war, because the “ABM treaty hinder[ed] our government’s ways to protect our people from future terrorist or rogue state missile attacks. . . . [and the] treaty . . . prevent[ed] us from developing effective defenses.”<sup>203</sup> Several experts disagreed, suggesting that the move would aggravate relations with Russia and China and spell a body blow for the global nuclear nonproliferation movement.<sup>204</sup> Indeed, Russia, the United States’ counterparty, suggested it would aggravate a nuclear arms race.<sup>205</sup>

198. See, e.g., Model Treaty, *supra* note 101.

199. See HENKIN, *supra* note 30, at 170.

200. Henkin, *supra* note 19, at 654.

201. See, e.g., Model Treaty, *supra* note 101.

202. The New START Treaty limits certain U.S. and Russian weaponry. President Obama described the New START Treaty as “the most significant arms control agreement in nearly two decades.” See Baker, *supra* note 34.

203. Terence Neilan, *Bush Pulls Out of ABM Treaty; Putin Calls Move a Mistake*, N.Y. TIMES (Dec. 13, 2001), <http://www.nytimes.com/2001/12/13/international/13CND-BUSH.html> [<http://perma.cc/6STX-PWXK>].

204. See *ABM Treaty Withdrawal Neither Necessary nor Prudent*, ARMS CONTROL ASS’N (Dec. 13, 2001), <http://www.armscontrol.org/node/2515> [<http://perma.cc/JB8Z-KRLM>].

205. See *America Withdraws from ABM Treaty*, BBC NEWS (Dec. 13, 2001), <http://news.bbc.co.uk/2/hi/americas/1707812.stm> [<http://perma.cc/3CLJ-ZSZX>].

The ABM Treaty withdrawal demonstrates that anticipating which treaty withdrawals might bring the United States closer to war is a difficult exercise, especially in a global order in which the United States plays a primary role in international coalitions to deal with myriad problems. What President Bush viewed as a measure that might keep the United States out of war by preventing attacks, others viewed as likely to bring the United States closer to a state of war. Had the United States' withdrawal from the ABM Treaty increased the likelihood of a nonstate actor or rogue nation acquiring a nuclear weapon, it seems as likely as not that the United States would have seriously considered being a part of an international military coalition to address the crisis. In such a situation, if recent history is a guide, the President might act without explicit congressional authorization, leaving Congress out of the picture entirely. Even if Congress were given the chance to vote, it would be acting in a crisis that might force its hand, rather than being given the opportunity to weigh the potential of such a crisis before the initial treaty withdrawal.

The proposed Trans-Pacific Partnership (TPP) offers a concrete example of an international agreement that ostensibly does not implicate defense, but from which withdrawal could conceivably lead to U.S. military engagement. Several Asian countries have suggested that the TPP signals a U.S. "counterweight to China's efforts to expand its influence not just in trade but in other areas, including its island-building in the disputed South China Sea."<sup>206</sup> As one commentator has suggested, "the TPP is not just about economics . . . it has the potential to be a pillar of American grand strategy in the Asia-Pacific for decades to come."<sup>207</sup> Imagine a scenario in which President Obama can convince Congress to approve the TPP but is then replaced by a presidential candidate who has signaled his or her disapproval of the TPP. Unilateral presidential withdrawal from the TPP might embolden China or weaken U.S. allies in the region, making issues such as disputed South China Sea islands more likely to lead to a conflict that entangles the United States. This situation is further complicated by the fact that the United States is committed to mutual defense treaties with fifty-four nations, meaning that it has a legal obligation to assist these nations should they be attacked.<sup>208</sup> Nations involved in the South

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206. Jane Perlez, *U.S. Allies See Trans-Pacific Partnership as a Check on China*, N.Y. TIMES (Oct. 6, 2015), <http://www.nytimes.com/2015/10/07/world/asia/trans-pacific-partnership-china-australia.html> [<http://perma.cc/6NJV-L6RZ>].

207. Sean Mirski, *The Trans-Pacific Partnership: China, America and the Balance of Power*, NAT'L INTEREST (July 6, 2015), <http://nationalinterest.org/feature/the-trans-pacific-partnership-china-america-the-balance-13264> [<http://perma.cc/3TWF-K8BC>].

208. *U.S. Collective Defensive Arrangements*, U.S. DEP'T STATE, <http://www.state.gov/s/l/treaty/collectivedefense> [<http://perma.cc/PBL9-CPPS>].

China Sea dispute are among those with which the United States has mutual defense treaties.<sup>209</sup>

I do not mean to suggest that, if the United States were to accede to and later withdraw from the TPP, it would go to war the next day. The upshot is simply that, in an interdependent world in which the United States plays a primary role in many international uses of force, it is difficult to determine *ex ante* whether treaty withdrawal will functionally make it more likely for the United States to go to war. Notwithstanding platonic ideals on each end, the line between a treaty implicating war and peace and a treaty not implicating war and peace may often be difficult to identify.

This is aggravated by a classic “first-mover advantage” dynamic. If there is disagreement between the executive and legislative branches about whether withdrawal from a particular treaty implicates questions of war and peace (with Congress arguing that it does and the President arguing that it does not), the President has the first-mover advantage and can elect to withdraw from the treaty, forcing Congress to file suit to vindicate its position.<sup>210</sup> Courts are especially ill-positioned to make such a determination, which implicates subtle questions of geopolitics, and might be especially loath to do so if the President has already taken steps to withdraw.<sup>211</sup>

In practice, courts are poorly equipped to apply Henkin’s murky distinction. To the extent that one takes seriously this Note’s historical insights, but espouses the notion that Congress ought to have a say in withdrawal from treaties that implicate functional, if not legal, questions of war and peace, there is a strong argument for a bright-line rule that all treaty withdrawals must be subject to congressional vote.

#### *E. The House Should Have a Vote*

The foregoing analysis raises the question of what congressional involvement in treaty withdrawal should look like. There are several plausible options, including a two-thirds vote of the Senate, a simple Senate majority vote, or the involvement of both houses of Congress. Because of the relationship between war powers and treaty withdrawal, this Note argues that

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209. Bonnie S. Glaser, *Armed Clash in the South China Sea*, COUNCIL ON FOREIGN REL. (Apr. 2012), <http://www.cfr.org/world/armed-clash-south-china-sea/p27883> [<http://perma.cc/2N44-S3QK>]; *U.S. Collective Defensive Arrangements*, *supra* note 208.

210. See Abebe, *supra* note 5, at 235-36.

211. Cf. *Goldwater v. Carter*, 617 F.2d 697, 707 (D.C. Cir. 1979) (“There is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards.”).

a simple majority of each House should be required, mirroring the war declaration process. As this section discusses, adhering to such a procedure would also have certain prudential advantages.

An approach that mirrored treaty accession would suggest that only the Senate must be involved in treaty withdrawal. A treaty takes effect following a two-thirds vote of the Senate, so why not require a two-thirds vote of the Senate to terminate? This would parallel the principle that congressionally enacted legislation requires an equivalent congressional vote for repeal.<sup>212</sup> A strict adherence to this mirroring principle would suggest a two-thirds Senate vote is required to withdraw from a treaty because a two-thirds Senate vote is required to enter a treaty.<sup>213</sup>

Requiring a two-thirds vote of the Senate would also protect a healthy respect for the states and federalism by ensuring that a large majority of the states' representatives in the Senate would have a say. In establishing the two-thirds vote for treaty accession, the Framers wanted to ensure that any treaty would have to clear a high threshold, due to concerns about the potential impact of treaties on certain groups of states (for example, a trade treaty that might negatively impact Southern economic interests).<sup>214</sup> By creating a high threshold, the Treaty Clause anticipated that if a potential accord would negatively impact over one-third of the states, the federal government could not accede to it. A similar principle might apply to treaty withdrawal. One can imagine a situation in which the United States is party to a treaty with strong benefits to a grouping of just over one-third of states, with the corollary consequence of withdrawal being negative economic impact on those states; a system that required a two-thirds Senate vote to withdraw from the treaty would protect the economic interests of that grouping of states.

To be sure, a system that included the Senate could also operate through simple majority voting. A simple majority vote system to withdraw from treaties might be viewed as more democratic. Indeed, if one views entry into a treaty as an aberration from the status quo, there may be a normative difference between situations where representatives of more than one-third of the states are skeptical of entry into a treaty (leaving the status quo) and situations where one-third can block withdrawal from a treaty (returning to

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212. Cf. Berger, *supra* note 58, at 585 (“[T]hough the Constitution is also silent concerning repeal of a statute, the right of the maker, Congress, to repeal is undoubted.”).

213. See ADLER, *supra* note 40, at 84-113 (arguing that treaty termination should require a two-thirds Senate vote).

214. See, e.g., *id.* at 90-91.

the status quo).<sup>215</sup> Moreover, a simple majority vote of the Senate would reflect the principle that it should be easier to disentangle the nation from foreign alliances than to entangle it.

While both of these options have some merit, this Note's analysis of *jus ad bellum* and congressional war powers suggests that the House of Representatives should have a role in deciding whether or not to terminate treaties, alongside a simple majority of the Senate. The Framers anticipated that both houses of Congress would vote to take the country to war by simple majority vote. War authorization specifically included the House of Representatives precisely because it was the more democratically accountable branch of government. Henkin acknowledges this point when he speculates that we might treat differently some treaties that might have the practical effect of causing war.<sup>216</sup> The House was originally the only directly elected body, and each of its Members faces frequent reelection and represents relatively few people when compared to the Senate or President.<sup>217</sup> Similarly, the practice regarding recognition during the Spanish-American wars of independence and Texas's Revolution emphasized that the full Congress should vote on matters that might lead to war. To the extent that one is convinced that the original understanding of treaty withdrawal implicated congressional war powers, the necessary conclusion is that the President may only terminate a treaty with the approval of both houses of Congress. Relatedly, going to war without the consent of the House would be democratically deficient; a similar argument might be made for treaty withdrawal. Whatever the normative underpinnings of the war-declaration framework, the legal consequences of this Note's argument seem apparent: if congressional withdrawal power is properly understood to be, as an originalist matter, tied to war powers, then each House should have a simple majority vote. Requiring a simple majority of the Senate (as opposed to two-thirds) comports with this understanding. Moreover, it might strike a happy medium between making foreign disentanglements too difficult and making them too easy. Senator Goldwater noted the problems of making disentanglement too easy when criticizing unilateral withdrawal in 1978: he argued that unilateral withdrawal means that no treaty counterparty "can be assured that [a treaty] will last any longer than the whim of the single

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215. *Cf. id.* at 89 (discussing the distinction between foreign entanglements and foreign disentanglements).

216. Henkin, *supra* note 19, at 654.

217. U.S. CONST. art. I, § 2.



person who happens to sit in the Oval Office at any given moment of history.”<sup>218</sup>

Beyond the legal argument for involving a simple majority of each House, this approach yields some prudential benefits. Such a procedure would help harmonize treaties and congressional-executive agreements. To be sure, there would still be significant dissonance between the two forms of international lawmaking, since the former requires a two-thirds vote of the Senate and the latter requires a majority vote of the full Congress. Nevertheless, an inability to harmonize the process through which international agreements are made does not devalue parity among the processes through which they are *unmade*. While the law surrounding withdrawal from such congressional-executive agreements is far from settled, Oona Hathaway notes the basic principle that “[t]he President is not able to terminate a statute unilaterally, and hence cannot terminate the statutory enactment that gives rise to a congressional-executive agreement.”<sup>219</sup>

Moreover, involving the House would also create parity *within* Article II treaties due to the self-execution doctrine. In short, the self-execution doctrine has created a system in which some Article II treaties (non-self-executing) require Congress to pass implementing legislation through ordinary processes, while others (self-executing) take legal effect immediately upon ratification.<sup>220</sup> This bifurcated system means that a President can unilaterally obviate the domestic legal consequences of a self-executing Article II treaty through unilateral withdrawal; in contrast, once implementing legislation is passed, both houses of Congress must vote to repeal the legislation to repeal the legal effects of a non-self-executing treaty.

Such parity has important value. Relative to other countries, the United States has one of the more complicated domestic legal frameworks for entering international agreements. In this regard, parity in withdrawal procedures might clarify the process and allay potential concerns of its counterparties.

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218. Kenneth Bredemeier, *Goldwater, Other Lawmakers File Suit over Repeal of Taiwan Defense Pact*, WASH. POST (Dec. 23, 1978), <http://www.washingtonpost.com/archive/politics/1978/12/23/goldwater-other-lawmakers-file-suit-over-repeal-of-taiwan-defense-pact/588ec6e8-e1d6-4300-b598-dc77faf270a9> [<http://perma.cc/8QP6-QA74>].

219. Hathaway, *supra* note 31, at 1334-35.

220. For an in-depth discussion of the distinction between self-executing and non-self-executing treaties, see, for example, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (AM. LAW. INST. 1987); David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 301 (2012); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

On the domestic front, parity would remove a potential disincentive for a President to pursue an Article II treaty. Consider a situation in which a President is equally confident in his ability to pass ordinary legislation pursuant to a congressional-executive agreement and in his ability to get the approval of two-thirds of the Senate to approve an Article II treaty. As the law currently stands, he is disincentivized from pursuing the latter option, because his successor can simply unilaterally withdraw from the Article II treaty. By contrast, ushering through the international accord as a congressional-executive agreement will functionally require his successor to involve Congress in any withdrawal process. If he were concerned about what his successor might do, why, then, would he choose an Article II treaty? This is not too farfetched a concern. Consider, again, the Trans-Pacific Partnership, which President Obama is pursuing as a congressional-executive agreement and which has drawn criticism from candidates who seek to succeed President Obama.<sup>221</sup> Consider, hypothetically, a situation in which President Obama could give the TPP domestic legal effect as either a congressional-executive agreement or an Article II treaty. Under the current regime, it would be potentially destructive to his agenda to pursue the latter rather than the former, as a future President could simply withdraw from the accord, congressional opinion notwithstanding. The historical example of President Bush's unilateral withdrawal from the ABM Treaty further illustrates the point. Had President Nixon pursued the accord as a congressional-executive agreement, Congress would have had to vote to repeal the statute that gave rise to the ABM Treaty for withdrawal to have domestic legal effect. It is unlikely that President Bush would have had the votes to proceed.<sup>222</sup> To the extent that one believes that the majority of international agreements should be conducted through the

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221. See Elaina Plott, *Ted Cruz's Protectionist Gamble*, NAT'L REV. (Nov. 24, 2015), <http://www.nationalreview.com/article/427539/ted-cruz-tpp-opposition-gamble> [<http://perma.cc/7UP4-VVM4>]; Kathryn Robinson, *Hillary Clinton Addresses Trans-Pacific Partnership in Iowa*, NBC NEWS (June 14, 2015), <http://www.nbcnews.com/politics/2016-election/hillary-addresses-trans-pacific-partnership-her-first-major-rally-n375196> [<http://perma.cc/VH7L-S7YJ>]; Bernie Sanders, Opinion, *The TPP Must Be Defeated*, HUFFINGTON POST (May 21, 2015), [http://www.huffingtonpost.com/rep-bernie-sanders/the-tpp-must-be-defeated\\_b\\_7352166.html](http://www.huffingtonpost.com/rep-bernie-sanders/the-tpp-must-be-defeated_b_7352166.html) [<http://perma.cc/HU4G-26G8>]; Jordan Weissmann, *Is It Possible Donald Trump Was Right About China and the TPP?*, SLATE (Nov. 12, 2015), [http://www.slate.com/blogs/moneybox/2015/11/12/is\\_donald\\_trump\\_right\\_about\\_china\\_and\\_the\\_tpp.html](http://www.slate.com/blogs/moneybox/2015/11/12/is_donald_trump_right_about_china_and_the_tpp.html) [<http://perma.cc/7AS5-RK4J>].

222. Democrats controlled the Senate at the time and expressed concern about the withdrawal. Senator Carl Levin, who chaired the relevant Senate Committee, was among those averse to a withdrawal. See James Dao, *Skeptical Senators Question Rumsfeld on Missile Defense*, N.Y. TIMES (June 22, 2001), <http://www.nytimes.com/2001/06/22/us/skeptical-senators-question-rumsfeld-on-missile-defense.html> [<http://perma.cc/NZH5-3X72>].

constitutionally specified Article II process, one might want to remove this disincentive for the President to pursue this process.<sup>223</sup>

## CONCLUSION

The Constitution's text and the Supreme Court's precedents have left a crucial question of foreign relations law to the political branches. Consequently, the executive branch usually has the ability to outmuscle the legislature. Yet the legal debate about the proper role of Congress in these procedures remains unsettled. This Note argues that the original understanding of the relationship between treaty withdrawal and *jus ad bellum* militates in favor of a stronger role for the people's representatives in Congress.

Although the debate over treaty withdrawal has been robust—implicating everything from original understanding to constitutional structure to historical practice—the debate thus far has largely overlooked a crucial point about original intent and understanding. As this Note has shown, the Founders' deep understanding of the law of nations likely means that they anticipated congressional involvement in treaty withdrawal. Treaty withdrawal was tantamount to treaty breach, and treaty breach was perhaps the preeminent cause of just war under Founding-era *jus ad bellum*. Given the Founders' jealous guarding of congressional war powers, it seems likely that they anticipated that treaty withdrawal—an act that so intimately implicated war—would involve Congress. An originalist analysis of congressional war powers and *jus ad bellum* lends significant support to the argument for restoring Congress's role in this important domain of foreign affairs.

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223. For one perspective on the importance of Article II treaties, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). There is some debate as to the relative international value of Article II treaties versus congressional-executive agreements. Compare Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRESIDENTIAL STUD. Q. 440 (2005), with Hathaway, *supra* note 31.

