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Taking War Seriously

A MODEL FOR CONSTITUTIONAL CONSTRAINTS ON THE USE OF FORCE IN COMPLIANCE WITH INTERNATIONAL LAW

Craig Martin[†]

I. INTRODUCTION

*A universal and perpetual peace, it is to be feared, is in the catalogue of events, which will never exist but in the imaginations of visionary philosophers, or in the breasts of benevolent enthusiasts. It is still however true, that war contains so much folly, as well as wickedness, that much is to be hoped from the progress of reason; and if any thing is to be hoped, every thing ought to be tried.*¹

War. Few phenomena have caused as much human pain, suffering, and death through the ages than the organized armed conflict between tribes, realms, peoples, nations, and nation-states. And unlike natural disasters, this misery is of course attributable entirely to people and the systems we have created. We have struggled with the problem of trying to limit war from almost as far back as the beginning of recorded history. We have come up with theories about the causes of war, and we have developed legal systems to both constrain the recourse to war (*jus ad bellum*) and govern the conduct of

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¹ James Madison, *Universal Peace*, NAT'L GAZETTE (Phila.), Feb. 2, 1792.

hostilities when armed forces clash (*jus in bello*).² In the twentieth century we developed an international legal framework for the central purpose of promoting greater peace and security in the world.³ This, combined with the spread of constitutional democracy, and the observation that democracies virtually never wage war among themselves, has bolstered the once unlikely idea that we might achieve a more sustained peace in the world.⁴ Yet, despite these developments the world remains wracked by the scourge of war, and liberal democracies themselves continue to wage war. And notwithstanding the horrors and costs that attend this human practice, recourse to war is subject to less legal constraint than most other forms of collective activity.

This study, in the spirit of James Madison's plea that we ought to try everything to reduce the incidence of war, advances an argument for how liberal democracies might develop more effective legal constraints on the recourse to war. More specifically, it develops a constitutional model (the "Model")⁵ for improved control over the decision to use armed force, with the aims of enhancing compliance with the international law regime governing the recourse to war, and of engaging the core functions of democratic institutions for the purposes of making the domestic decision-making process less prone to the failures that can lead to irrational or illegitimate use of force. It does so based on the well-established understanding that the causes of war are to be found not only in the structure and operation of the international system, but also at the domestic level, in both the structure of states and in

² The laws of war are separated into two quite separate regimes. The first, *jus ad bellum*, comprises the laws that govern the resort to war or initiation of the use of armed force—*when* a state can legally go to war. The second, *jus in bello* (now often referred to as the laws of international armed conflict, or international humanitarian law), comprises the laws that govern the conduct of armed forces in the course of armed conflict—*how* armed forces may legitimately wage war. These two regimes are distinct, such that a state may commence an illegal war but its forces may nonetheless conduct themselves legally throughout the war. Conversely, the forces of a state may commence fighting for legitimate reasons but engage in acts that are in violation of the *jus in bello*.

³ The central purpose of the United Nations system is the maintenance of peace and security. U.N. Charter art. 1. For a discussion of the historical development of the modern *jus ad bellum* system, see *infra* Part III.C.

⁴ An idea developed most famously by Kant in the eighteenth century: IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), *reprinted in* KANT: POLITICAL WRITINGS 93 (H.S. Reiss ed., H.B. Nisbett trans., 2d ed. 1991). The ideas of Kant in *Perpetual Peace* are discussed *infra* Parts II.B-C.

⁵ See *infra* Part V.

the systematic failures in the decision-making process of both individuals and small-groups. If the causes of war operate at both the domestic and the international level, it follows that the legal constraints designed to limit the use of force should engage those causes at both levels.

The Model also builds on the insight that until the end of the eighteenth century there was a clearer understanding that legal limits had to operate at both the international and domestic levels; and the observation that in the spread and development of constitutional democracy over the last half-century, there has been a tendency to ignore the need for domestic legal constraints on war and overlook the relationship between the domestic and the international systems when it comes to governing armed conflict. Few democracies have constitutional controls over the decision to use force that effectively constrain unilateral executive authority, and fewer still have any constitutional incorporation of international law principles on the use of force. What is more, this failure to implement the international law on the use of force within domestic legal systems is anomalous, in stark contrast to the increasing trend towards domestic implementation of other international law regimes, from human rights to international trade and intellectual property rights.

The Model is designed to achieve its objectives through the operation of three separate but mutually reinforcing elements—three aspects of a constitutional provision. The first is a process-based constitutional incorporation of the prevailing principles of international law that limit the use of armed force (that is, the principles of the *jus ad bellum* regime). It is process-based in the sense that it only requires decision makers to sufficiently and demonstrably *consider* the legality of proposed action under the international law principles, in contrast to a substantive incorporation model which would oblige decision makers to *comply* with those provisions. This aspect of the Model does aim to increase compliance with the international law directly, though it will do so in part by also engaging domestic causes of war. The second element is a provision that requires legislative approval of decisions to use armed force rising above a specified *de minimis* level, thereby increasing the separation of powers with respect to the crucial decision to engage in armed conflict. This element would bring the key functions of representative parliaments to bear on that decision-making process, not only engaging the domestic causes of war, but reinforcing the traction of the first element in

enhancing compliance with international law. The third element establishes jurisdiction and standing for a limited power of judicial review over the decision-making process, to extend the separation of powers to the third branch of government, and to help ensure greater adherence to the overall process. All three elements of the Model are designed to engage, in a mutually reinforcing manner, the causes of war that operate at all three levels, within the international system and the domestic structures and institutions of states.

The case for this Model is made by employing a range of perspectives on the causes of war from international relations theory and political philosophy, a review of the historical development of legal constraints on war, international law compliance theory, and constitutional law ideas about the operation of constitutions, the rule of law, and the role of legislatures and the judiciary in democratic states. The article thus engages current debates in a range of areas, including international law and the use of force, constitutional war powers, the effectiveness of constitutions in times of emergency, and the role of courts in national security issues. The article advances the argument that liberal democracies ought to develop constitutional constraints on the decision to engage in armed conflict in order to better comply with international law, and to improve the level of democratic accountability and deliberation in the constitutional process of deciding on the use of force. Ultimately, the Model aims to extend the reach of the “democratic peace,”⁶ and reduce the incidence of illegitimate armed conflict.⁷ For while going to war is one of the most important decisions a government can make, and preventing war is the most central purpose of our international law regime, liberal democracies have few constitutional controls on the decision to engage in armed conflict, and have made almost no use of their domestic legal systems to implement and reinforce the international law regime. If liberal democracies are to take war seriously, or more precisely, if they are to take the constraint of war

⁶ The “democratic peace” is the term used to refer to the theory in international relations that democracies do not wage war among themselves. *See infra* Parts II.B-C.

⁷ The term “illegitimate” is used here deliberately to capture both (1) uses of force in violation of established principles of international law and (2) decisions to use force that involve deception of the public or some other characteristic that could be construed as running counter to democratic accountability and the fundamental features of deliberative democracy.

seriously,⁸ then they must begin to develop the legal systems necessary to engage the recognized causes of war, bringing the powerful advantages of democratic institutions to bear on the issue just as they have done in so many other realms.

Part II of this article examines the current theories on the causes of war. It explains how the causes of war are understood to operate at the level of the individual, the structure of the state, and the international system, and argues that the causes at all three levels thus have to be considered in any attempt to reduce the prevalence of war. Part III provides a brief review of the modern development of the law and legal thinking on controlling the resort to war. This examination suggests that historically there was some understanding of the need for legal limits to engage the causes of war at all three levels, but in the last century we have come to rely almost exclusively on the international law system to control the recourse to war, and have ignored domestic mechanisms for limiting the use of armed force.

Part IV of the article sets out the theoretical support for the development of the Model, explaining how elements of different theories of international law compliance, constitutional law, and democratic theory ground the argument that the proposed elements of the Model would operate to better engage the causes of war at all three levels, and thus reduce the incidence of illegitimate armed conflict. Finally, Part V provides draft language for the three elements of the Model, explaining how they would operate in practice, and—drawing upon the experiences of other nations—why certain choices were made in their design.

It should also be noted at the outset that while the analysis in this study draws upon the American experience and addresses aspects of the U.S. “war powers” debate, it is not a proposal for amendment to the U.S. Constitution. While a constitutional amendment might be unrealistic any time soon in the U.S., there are several other countries—Japan, the United Kingdom, Australia, and Spain, to name just a few—in which there have been serious steps taken towards altering the legal control over the decision to use armed force. Several are contemplating either constitutional amendments or new legislative regimes, and even the U.S. has had a formal

⁸ To borrow a concept from RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 204 (1977); *see also infra* note 297 and accompanying text (discussing the concept in more detail).

commission examining ways to resolve some of the war powers issues.⁹ This study seeks to address such developments in liberal democracies broadly construed, and to contribute to the deliberations wherever there is serious consideration of enhancing the domestic legal constraints on the use of armed force.

II. THE CAUSES OF WAR

In beginning to think about how to improve the legal constraints on the resort to war, it is essential to consider the causes of international armed conflict.¹⁰ The question of what causes war is the subject of a massive amount of research and debate, stretching back literally thousands of years.¹¹ The focus of the various theories on the causes of war range from the individual decision makers, through small-group dynamics, the structure of the state itself, all the way to the structure and operation of the international system of states.¹² Thucydides, whose analysis of the Peloponnesian War is one of the earliest studies of the subject known to us, set the stage with a complex explanation for the causes of that war that included the individual attributes of decision makers, the nature and structure of the leading city-states, and the nature of the interstate system itself.¹³ Kenneth Waltz continues this classification by defining the three levels as “Images”: the individual or human level (“Image I”), the level of the state structure or organization (“Image II”), and the level of the international system (“Image III”).¹⁴ And despite the differing theories, disagreements, and areas of emphasis, there is a widely shared acceptance that all three Images play a role in explaining the causes of war, albeit to varying degrees

⁹ These developments are explored *infra* Part III.D.

¹⁰ Ryan Goodman, *International Institution and the Mechanisms of War*, 99 AM. J. INT'L L. 507, 507 (2005) [hereinafter Goodman, *International Institution*] (review essay of John Norton Moore, *Solving the War Puzzle: Beyond the Democratic Peace*).

¹¹ Thucydides, who produced one of the first known analyses of the issue, wrote *History of the Peloponnesian War* in the waning years of the fifth century BCE. See M.I. Finley, *Introduction to THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR* 9 (Rex Warner trans., rev. ed. 1972).

¹² For a good survey of the entire field, see GREG CASHMAN, *WHAT CAUSES WAR? AN INTRODUCTION TO THEORIES OF INTERNATIONAL CONFLICT* (1993).

¹³ THUCYDIDES, *supra* note 11; see also MICHAEL DOYLE, *WAYS OF WAR AND PEACE* 49-53 (1997) (offering an excellent account of Thucydides' “complex realism,” in the context of a comparative analysis of the varying approaches to war).

¹⁴ KENNETH WALTZ, *MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS* (2001).

depending on one's theoretical perspective.¹⁵ While it is not necessary for us to examine the various theories in detail, it will be helpful to get a flavor for some of the more important ideas as they relate to each of the three Images, as I will refer back to these ideas to support the argument for the proposed Model.

A. *Image I—The Level of the Individual*

There are a wide variety of theories, and indeed a number of different sublevels within the Image I—the individual level—perspective on the causes of war. Some of these focus on aspects such as human nature itself and the inherent aggression of man.¹⁶ But the theories that relate to both the psychology of decision makers, and a number of systemic problems in small-group decision making are of greatest significance for the argument being advanced here. Beginning with individual psychology, one set of theories focus on the personality traits that are common among those who tend to reach the highest offices of government as factors that contribute to unsound judgments regarding the use of armed force. Empirical studies suggest that a number of traits that tend to be overrepresented in national leaders—such as authoritarian and domineering tendencies, introversion (which is perhaps counter-intuitive, but Hitler and Nixon are both prime examples of this trait), narcissism, and high-risk tolerance—also tend to correlate with much higher levels of confrontation and the use of force to resolve conflicts.¹⁷

Psychological theories also focus on problems of misperception. There is powerful evidence that people are prone to systematic patterns of misperception, and that such misperception in government leaders contributes significantly to irrational decisions.¹⁸ In particular, decision makers frequently form strong hypotheses regarding the intentions

¹⁵ See, e.g., *id.*; DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13.

¹⁶ CASHMAN, *supra* note 12, at chs. 2-3; WALTZ, *supra* note 14, at ch. 2.

¹⁷ CASHMAN, *supra* note 12, at 40-42; see also Lloyd Etheredge, *Personality Effects on American Foreign Policy, 1898-1968*, 72 AM. POL. SCI. REV. 434 (1978).

¹⁸ Jervis's *Perception and Misperception in International Politics* is the seminal and fascinating study of this phenomenon, which focuses on a cognitive theoretical explanation of misperception. ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS* (1976). Janis and Mann's *Decision Making* provides a different approach that focuses on motivational factors in explaining misperception, particularly within conflict situations. IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* (1977). For a discussion of the differences, see CASHMAN, *supra* note 12, at 70-73.

and capabilities of potential adversaries, and there is a strong tendency to then dismiss or discount information that is inconsistent with the hypothesis, and to interpret ambiguous information in a manner that is consistent with and reinforces the hypothesis.¹⁹ Such misperception often constitutes a significant factor in the path to war.²⁰

Another set of theories that relate to the Image I causes of war focus not on the individual alone, but on how decisions are made within groups and organizations. Contrary to the expectation that government agencies generally operate in accordance with rational choice theory, studies suggest that group decision making is often characterized by dynamics that can lead to irrational and suboptimal decisions. One such characteristic is excessive “incrementalism” and “satisficing”—the tendency to make small incremental policy shifts, coupled with the sequential analysis of options and adoption of the first acceptable alternative, a process captured in the aphorism “the good is the enemy of the best.”²¹ A second theory suggests that the dynamic of competing bureaucratic and departmental interests—interests which are often inconsistent with the larger national interest, but which nonetheless command greater loyalty and mobilize greater effort among department or division members—subvert the decision-making process.²² Moreover, each department will itself approach the decision making within the constraints of its own perspectives and mindsets, standard operating procedures, and capabilities. This is the famous “where you stand is where you sit” explanation of internal government politics,²³ often referred to as the

¹⁹ JERVIS, *supra* note 18, at chs. 4-5, 7.

²⁰ See generally *id.* ch. 3 (analysis of the effects of misperception in the context of spiral theory and deterrence).

²¹ CASHMAN, *supra* note 12, at 79-81. Herbert Simon earned the Nobel Prize in economics for this insight. It should be noted that from some perspectives, incrementalism and satisficing are indeed rational approaches to decision making generally, since the cost, time, and effort of exhaustive examination of all options and thorough cost-benefit analysis of each would be prohibitive and often counterproductive. *Id.* at 81. But it will also frequently lead to dangerously suboptimal decisions, and, in foreign policy, incremental policy shifts tend to feed into the misperception problems of one’s counterparts. See JERVIS, *supra* note 18, at 77-78, 191-92.

²² The seminal work on this model is Allison and Zelikow’s *Essence of Decision*. GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (2d ed. 1999). See, in particular, chapter 5. For a short version of his original argument, see Graham T. Allison, *Conceptual Models and the Cuban Missile Crisis*, 63 AM. POL. SCI. REV. 689 (1969); see also MORTON H. HALPERIN ET AL., *BUREAUCRATIC POLITICS & FOREIGN POLICY* (1974).

²³ Rufus E. Miles, *The Origin and Meaning of Miles’ Law*, 38 PUB. ADMIN. REV. 399, 399 (1978).

“bureaucratic politics model.”²⁴ For example, the senior representatives of the U.S. Air Force, with obviously vested interests, strongly argued in favor of the continued strategic bombing of North Vietnam in 1967, even though the Secretary of Defense and others in the Nixon administration had determined that it was at best pointless and at worst counterproductive.²⁵

Finally, there is the phenomenon known as “groupthink.”²⁶ This theory suggests that some decision-making groups—particularly those characterized by a strong leader, considerable internal cohesion, internal loyalty, overconfidence, and a shared world view or value system—suffer from a deterioration in their capacity to engage in critical analysis during the decision-making process.²⁷ Decision-making groups that suffer from groupthink are particularly vulnerable to the kind of systemic misperception discussed above, but they suffer from other weaknesses as well, all stemming from a failure to challenge received wisdom, consider alternate perspectives, or bring to bear exogenous criteria or modalities in assessing policy options.²⁸

These theories do not, of course, explain all of the problems in decision making in all situations. Groupthink and the bureaucratic politics model generally do not operate at the same time in the same groups. But the studies of each of these phenomena suggest that these systemic patterns can be a significant factor in the less-than-rational and suboptimal decision making about the use of armed force. And these theories together show the importance of introducing exogenous criteria for assessing the merit of competing policy options, and the kinds of checks and balances that might lessen the probability that these tendencies could affect the decision to go to war.

²⁴ ALLISON & ZELIKOW, *supra* note 22. Originally, Allison had formulated two separate models, the “organizational behavior model” and the “governmental politics model,” but later combined them in the “bureaucratic politics model.” See Graham T. Allison & Morton Halperin, *Bureaucratic Politics: A Paradigm and Some Policy Implications*, in *THEORY AND POLICY IN INTERNATIONAL RELATIONS* (Raymond Tanter & Richard H. Ullman eds., 1972).

²⁵ BARBRA W. TUCHMAN, *THE MARCH OF FOLLY: FROM TROY TO VIETNAM* 345 (1984).

²⁶ The foundational study on groupthink is Janis’s *Groupthink*. IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1982).

²⁷ *Id.*

²⁸ CASHMAN, *supra* note 12, at 112-20; JANIS, *supra* note 26. In particular, see *id.* at ch. 8 for discussion of theoretical implications of groupthink.

B. *Image II—The Level of the State*

The causes of war also operate at the level of the state itself. Again, there is an extensive range of theoretical explanations for the causes of war that focus on factors at the state level, but those that are central to Image II relate to the actual structure or form of the government of the state.²⁹ The essential idea is that some forms of government are inherently less prone to wage war than others. This idea has been central to liberal theories of the state and international relations since the beginning of the eighteenth century, with the argument that liberal democratic states are less inclined to initiate wars than autocratic or other nondemocratic states. These arguments were founded upon a number of strands of liberal political theory, including the nature of individual rights within democracies and the manner in which respect for such rights would influence how the state would behave within the international society.³⁰ They also drew upon liberal ideas about the influence of capitalist economies, arguing that laissez-faire capitalist systems would operate to reduce the incentives for war in liberal democratic states.³¹ But perhaps the most important argument among these liberal claims, is that the very structure of government, both in terms of its leaders being representative of and directly accountable to an electorate, and the separation of political power between the executive and a more broadly representative legislature, would operate to reduce the likelihood that such governments would embark on military adventures.³²

Rousseau and Madison both wrote about the ramifications of the democratic structure of the state on the propensity for war.³³ But it was Immanuel Kant who developed the argument most fully in the eighteenth century with his

²⁹ See CASHMAN, *supra* note 12, at ch. 5 for a review of these other theories.

³⁰ See generally DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13, at ch. 6.

³¹ These arguments were founded upon the ideas of John Locke, Jeremy Bentham, Adam Smith, and, later, Joseph Schumpeter, respectively. See DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13, at chs. 6-7.

³² KANT, *supra* note 4; Madison, *Universal Peace*, *supra* note 1. This argument is discussed in greater detail *infra* Parts III-IV.

³³ THE FEDERALIST NO. 41, at 251-60 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST NO. 41 (Madison)]; JEAN-JACQUES ROUSSEAU, *STATE OF WAR* (1756), *reprinted in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 162-77 (Victor Gourevitch ed., 1997); Madison, *Universal Peace*, *supra* note 1. For an analysis, see DOYLE, *THE WAYS OF WAR AND PEACE*, *supra* note 13, at ch. 4.

short work *Perpetual Peace: A Philosophical Sketch*.³⁴ Writing at a time when there were less than a handful of fledgling democratic “republics” in the world,³⁵ Kant argued that a perpetual peace would result from the spread of the republican form of government among the nations of the world and the development of a form of pacific federation among these free states.³⁶ His argument thus straddled the second and third images, and I will return to discuss his overall theory more fully below when we turn to consider Image III. But one of his arguments for why republics would be inherently less likely to wage war is still very much at the heart of current liberal theories relating to Image II. His point was that, in the kind of republic he envisioned, the consent of citizens would be required for decisions to go to war. Those who would “call[] down on themselves all the miseries of war,” not only fighting and dying in the conflict but also paying for it and suffering the resulting debt, would be much less likely to agree to such an adventure than the heads of state in other kinds of political systems such as monarchies, who can “decide on war, without any significant reason.”³⁷

As we will see, Kant himself did not argue that the development of democratic structures within any given state would be sufficient to prevent it from going to war, and his theory of perpetual peace also rested on the requirement that the republican form of government be also spread throughout the international system. Indeed, one of the problems with liberal theories that rely upon governmental structure as an explanation for the cause of war is that the extensive empirical research and analysis on the subject suggest that liberal democracies are almost as prone to engaging in war as nondemocratic states, at least as against nondemocratic countries.³⁸ Some have tried to argue that liberal democracies nonetheless do not *initiate* wars to the same degree, and thus

³⁴ KANT, *supra* note 4.

³⁵ By “republican” he meant a representative form of government in which there is a separation of powers between the executive and the legislature. Depending on how precisely one defines “republic,” at the time the U.S. and France were generally considered republics, and the Netherlands also fit most definitions. Less clear was Poland. See George Athan Billias, *American Constitutionalism and Europe, 1776-1848*, in *AMERICAN CONSTITUTIONALISM ABROAD 21-26* (George Athan Billias ed., 1990).

³⁶ KANT, *supra* note 4, at 100-01.

³⁷ *Id.* at 100.

³⁸ The most exhaustive empirical study of the incidence of wars is the so-called Correlates of War Project. See J. DAVID SINGER & MELVIN SMALL, *RESORT TO ARMS: INTERNATIONAL AND CIVIL WARS, 1816-1980* (1982).

are inherently less aggressive than other forms of government, but even that claim is very difficult to sustain from the perspective of traditional international law conceptions of aggression and self-defense.³⁹

What has emerged from this line of research, however, is the widely accepted proposition that liberal democracies do not commence wars against other liberal democracies. The so-called "democratic peace" encompasses both this empirical fact and the principle said to explain it.⁴⁰ While there remains some residual debate over the validity of the principle,⁴¹ persuasive evidence suggests that, with the possible exception of two instances of armed conflict between what might be considered democratic states, there have been no wars between liberal democracies during the period between 1816 and 1965.⁴² The assertion has been made, and often cited, that the democratic peace is close to being an empirical law in international relations.⁴³

There is less agreement over the best explanation for the democratic peace. There are two main theoretical positions: (1) normative and cultural explanations, and (2) institutional and structural constraints.⁴⁴ The normative-cultural explanations argue that the shared norms of democracies, and particularly the shared adherence to the rule of law and commitment to peaceful dispute resolution internally, inform and influence the approach of democratic governments to

³⁹ See, for example, JOHN NORTON MOORE, SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE (2004), and the critique of this argument by Ryan Goodman in Goodman, *International Institution*, *supra* note 10, at 508; see also MELVIN SMALL & J. DAVID SINGER, INTERNATIONAL WAR: AN ANTHOLOGY VI (2d ed. 1989). For a discussion of this in the context of constitutional control of the decision to use force, see Lori Fisler Damrosch, *Use of Force and Constitutionalism*, 36 COLUM. J. TRANS'L L. 449, 454-60 (1998).

⁴⁰ The literature on the democratic peace is huge. See generally 4 R.J. RUMMEL, UNDERSTANDING CONFLICT AND WAR (1979); BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993).

⁴¹ See, for example, DEBATING THE DEMOCRATIC PEACE (Michael E. Brown et al. eds., 1996), particularly Part II for the essays criticizing the democratic peace theories.

⁴² CASHMAN, *supra* note 12, at 129 (citing R.J. Rummel, *Libertarianism and International Violence*, 27 J. CONFLICT RESOL. 27, 40-47 (1983); Melvin Small & J. David Singer, *The War-Proneness of Democratic Regimes, 1816-1965*, 1 JERUSALEM J. INT'L REL. 50, 67 (1976)).

⁴³ CASHMAN, *supra* note 12, at 129 (citing Jack S. Levy, *Domestic Politics and War*, in THE ORIGIN AND PREVENTION OF MAJOR WARS 88 (R. Rothberg & T. Rabb eds., 1988)); Goodman, *International Institution*, *supra* note 10, at 507 (citing Jack S. Levy, *The Causes of War and the Conditions of Peace*, 1 ANN. REV. POL. SCI. 139, 160 (1998)); see also Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 1*, 12 PHIL. & PUB. AFF. 205, 213, 224 (1983).

⁴⁴ LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979); Damrosch, *Use of Force and Constitutionalism*, *supra* note 39, at 456.

resolving disputes that may arise as between democracies. Moreover, there is a shared respect for the rights of other people who live in a similar system of self-government. These shared beliefs, norms and expectations tip the cost-benefit analysis toward peaceful resolution of disputes when they arise as among democracies.⁴⁵

The structural-institutional advocates argue that the elements of the liberal democratic legal and political system operate to constrain the government from commencing armed conflicts. This is entirely in line with the insights of earlier writers such as Madison, Kant, and Cobden, regarding the lower likelihood of war when representatives of those who will pay and die for the war are deciding, since it is more politically risky for democratic leaders to gamble the blood and treasure of the nation in war unless it is clearly viewed by the public as being necessary.⁴⁶ The arguments are also based in part on the broader idea that structural checks and balances typical of democratic systems, and the operation of certain other institutional features of deliberative democracy, will reduce the incidence of war.⁴⁷ We will return to some of these arguments in more detail below.

The initial insight in this structural argument was based in part on the understanding that there would be a significant separation of powers on the decision to go to war in liberal democracies, which, as will be discussed below, has not materialized fully in the practice of most modern democracies. Nonetheless, it continues to be argued that the greater accountability for decisions and the higher political risk domestically of initiating war, makes democratic leaders less likely to wage war.⁴⁸ While these mechanisms do not seem

⁴⁵ Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946-1986*, 87 AM. POL. SCI. REV. 624, 625 (1993); see also HENKIN, *HOW NATIONS BEHAVE*, *supra* note 44, at 60-68; Damrosch, *Use of Force and Constitutionalism*, *supra* note 39, at 456; Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 1*, *supra* note 43, at 230 (explaining how this is an aspect of the second definitive article in Kant's Pacific Union).

⁴⁶ See generally FEDERALIST NO. 41 (Madison), *supra* note 33; KANT, *supra* note 4; Madison, *Universal Peace*, *supra* note 1. On Richard Cobden, see generally 2 RICHARD COBDEN, *SPEECHES ON QUESTIONS OF PUBLIC POLICY* (John Bright & J.E. Thorold Rogers eds., 1908), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=931&Itemid=27.

⁴⁷ Madison, *Universal Peace*, *supra* note 1; see also *infra* Parts III-IV.

⁴⁸ See generally, e.g., Damrosch, *Use of Force and Constitutionalism*, *supra* note 39, at 456-57; Maoz & Russett, *supra* note 45; John R. Oneal et al., *The Liberal Peace: Interdependence, Democracy and International Conflict, 1950-85*, 33 J. PEACE RES. 11 (1996). A recent work suggests that democratic governments will only initiate

sufficient to have prevented democracies from initiating wars as against nondemocratic states, they are understood to be part of the explanation for the democratic peace. One reason for this is that these mechanisms tend to effectively signal information to the democracy on the other side, preventing the escalation of disputes with other democracies, while such signals may be misunderstood or missed entirely by nondemocratic states.⁴⁹

These structural reasons are of course not mutually exclusive of the normative-cultural explanations for the democratic peace. Michael Doyle has argued that Kant's theories provide insight into why liberal democracies might be less peaceful in their relations with nondemocratic states. Part of Kant's theory relied upon the operation of the law of nations, which in his view would facilitate peace because it would require a degree of respect for and accommodation of the peoples of other republics who are similarly self-governing, enjoy the same rights, and thus share a comparable world view.⁵⁰ Doyle argued that in their approach to nondemocratic counterparts, on the other hand, the behavior of liberal democracies is characterized by what Hume called an "imprudent vehemence."⁵¹ The rights and interests of illiberal states and their people are excessively discounted, and conflicts tend to take on an ideological flavor that can escalate into crusades. In dealing with strong illiberal states, this translates into systemic failures to negotiate and missed opportunities for accommodation, while with weaker illiberal states it can manifest itself in military interventions and imperialistic policies.⁵² These failures flow from an inherent mistrust and suspicion of the governments of illiberal states, the more limited commercial and cultural intercourse with them, and the lack of any sense of shared values at all levels of interaction

wars when there is a substantial probability of winning, or, put another way, the cost-benefit analysis is weighted heavily in favor of the benefits. DAN REITER & ALLAN C. STAM, *DEMOCRACIES AT WAR* ch. 2 (2002). It is argued that this is the reason that democracies tend to "win" most of the wars that they initiate. *Id.*

⁴⁹ Damrosch, *Use of Force and Constitutionalism*, *supra* note 39, at 456-57. For a detailed analysis of the signaling value of democratic institutions, albeit in the context of a war-powers argument against legislative involvement in the decision to use force, see Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 *YALE L.J.* 2512 (2006).

⁵⁰ Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 1*, *supra* note 43, at 230. For an explanation of the actual structure of Kant's theory, and the three definitive articles, see *infra* text accompanying notes 79-83.

⁵¹ Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, 12 *PHIL. & PUB. AFF.* 323, 324 (1983) (citing David Hume, *Of the Balance of Power*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 346-47 (Oxford Univ. Press 1963)).

⁵² *Id.* at 324.

between the liberal democracies and the illiberal states. Moreover, these tendencies are exacerbated by the vulnerabilities of liberal democratic government to pressure from special interest groups internally, which can tend to fan the flames of conflict when mistrust and suspicion is running high.⁵³

These explanations are borne out by more recent research, grounded in social identity theory in psychology. One model, referred to as the “identification model,” validates the insight that the propensity of states to initiate armed conflict depends to a significant degree on the content of the relations between the states, and the extent to which the government and people of the initiating state can “identify” with those of the counterpart with which a dispute has arisen.⁵⁴ Moreover, there is a tendency to ascribe malicious intent to “outsiders” (non-democracies), and conversely to interpret the actions of other democracies in a favorable fashion.⁵⁵

A second model, referred to here as the “emulation model,” suggests that the tendency to go to war is influenced in part by the extent to which important states within the international system have institutionalized and legitimized the use of force in particular circumstances.⁵⁶ The examples these states provide tend to create norms that over time become internalized within other states, encouraging more aggressive behavior when similar circumstances arise, even to the point of acting in a manner that is objectively inconsistent with the functional and strategic imperatives of the situation.⁵⁷ It is analogous to how the individual employment of violence to defend “honor” has been historically normalized in some macho cultures.⁵⁸

These two explanations are complementary, and both help explain why democracies are more peaceful in their

⁵³ *Id.* at 326.

⁵⁴ Goodman, *International Institution*, *supra* note 10, at 510-11 (citing Margaret G. Herann & Charles W. Kegley Jr., *Rethinking Democracy and International Peace: Perspectives from Political Psychology*, 39 INT'L STUD. Q. 511, 515-17 (1995)).

⁵⁵ *Id.* at 510. Goodman notes that there is empirical evidence that this tendency is common to all states, in that autocracies will “identify” with other autocracies, and that conflict among like states is lower generally. *Id.* at 511. Doyle has argued that, while this is true to some extent, the empirical evidence demonstrates that the effect is far stronger among democracies. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 1*, *supra* note 43, at 222.

⁵⁶ Goodman, *International Institution*, *supra* note 10, at 511-12 (citing JOHN A. VASQUEZ, *THE WAR PUZZLE* 161 (1993)).

⁵⁷ *Id.* at 511; Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1765-80 (2003).

⁵⁸ Goodman, *International Institution*, *supra* note 10, at 511.

relations among themselves but not necessarily in their relations with illiberal regimes. These explanations dovetail with the older cultural-normative arguments, which center on the influence of such democratic institutions as the rule of law, and on the identification of people in democracies with those in other states with similar values and systems. And these new explanations help to further reconcile the broader debate over the issue of which explanation for the democratic peace—the structural-institutional or the normative-cultural—is the most accurate; for it is likely that they are both valid to varying degrees in any particular circumstance, and that they operate together in a mutually-reinforcing manner. And both have implications for constitutional models aspiring to develop increased institutional constraints on the use of armed force.

There is something of a dilemma created by this difference in the propensity of democracies to wage war, depending upon the nature of its counterparty in any given circumstance, such that they can be quite aggressive in their relations with illiberal states. This is because some of the characteristics that tend to make democracies more prone to use force in their relations with illiberal states are also the very characteristics of liberal democracy that give rise to the democratic peace.⁵⁹ So how does one address the causes of war with illiberal states without also undermining factors that contribute to the democratic peace? I will refer to this as the “Kantian dilemma,” and it will be an important consideration in this study of how best to design a constitutional model to constrain the use of force. For the dilemma requires the development of mechanisms that will operate to address the factors that give rise to the “imprudent vehemence” that facilitates war with illiberal states, while at the same time ensuring that the mechanisms do not undermine or weaken the

⁵⁹ Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 1*, *supra* note 43, at 235, in particular identifies this as the key challenge in trying to reduce democratic tendencies to wage war. The characteristics that help explain the democratic peace, but which may be factors in the tendency to engage in war with illiberal states, include (1) the extent to which popular perceptions regarding the political systems and fundamental values of potential adversaries influence foreign policy, resulting in respect for and identification with the rights of other democratic peoples, but suspicion, mistrust, and discounting of the rights of those governed by authoritarian regimes; and (2) structurally, the manner in which the formation of foreign policy is vulnerable to undue influence by special interests. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, *supra* note 51, at 324-27. These ideas also tie in nicely with the liberal theories of international law compliance, discussed *infra* Part IV.

very features of liberal democracy that operate to produce the democratic peace.⁶⁰

C. *Image III—The Level of the International System*

Turning to the last level, that of the international system itself, there is again a wide range of theories about the causes of war that focus on the nature and operation of the international system.⁶¹ Of the relevant theories, the proposition that the permissiveness of the international system is a primary cause of war is the most significant, and is central to our analysis here. It is this explanation that is at the heart of Waltz' Image III causes of war.

The Image III explanations focus on the anarchical structure of the international system of states as the primary explanation for armed conflict between states.⁶² The emphasis on the nature of the interstate system goes back as far as Thucydides, who argued that one of the central reasons for the Peloponnesian War was the dynamics of—and responses to—shifting power among the city-states.⁶³ In the modern era, Thomas Hobbes provided the most influential argument for the idea that the anarchy within the interstate system is key to understanding the reasons for armed conflict.⁶⁴ As is well known, Hobbes argued that man in the state of nature is in a perpetual state of fear and insecurity, not knowing who to trust and therefore, quite rationally, trusting no one and treating all as potential enemies. The state of nature is thus a state of war of all against all. And while man in civil society has been able to escape from this state of nature by surrendering some sovereignty to a central authority, a Leviathan with a

⁶⁰ Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, *supra* note 51, at 344 (“[T]he goal of concerned liberals must be to reduce the harmful impact of the dilemmas without undermining the successes.”).

⁶¹ Some of these theories are not germane to the argument here, for instance, focus on long-term economic cycles and other systemic explanations that are not susceptible to law and policy prescriptions. See CASHMAN, *supra* note 12, at ch. 9.

⁶² WALTZ, *supra* note 14, at ch. 6.

⁶³ THUCYDIDES, *supra* note 11. Michael Doyle described Thucydides as a “complex realist” for contemplating causes in all three images. DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13, at ch. 1.

⁶⁴ See generally THOMAS HOBBS, *LEVIATHAN* (C.B. Macpherson ed., Penguin Classics 1985) (1651).

monopoly over the legitimate use of force to impose law and order upon society, the same is not true of states.⁶⁵

According to the Hobbesian view, states similarly exist in a state of nature, but they have not emerged into any form of civil society, and there is no Leviathan to impose law and order upon the system.⁶⁶ Thus, the anarchical system of states continues to be in a perpetual state of war of all against all—not in the sense of a continuous and perpetual armed conflict of course, but in the sense of perpetual enmity and tension that can at any moment blossom into open hostilities.⁶⁷ Fear and self-preservation govern the rational behavior of states, each of which confronts a profound security dilemma. In a system characterized by anarchy and comprised of fearful states that are entirely reliant upon their own use of force for their survival, the occurrence of armed conflict is virtually inevitable.⁶⁸ Given these assumptions, a rational approach to international relations requires one to focus on the capabilities of states rather than professed intentions, and the internal dynamics of states are seen as being much less significant than the external pressures and security dilemmas created by the international system itself. This conceptualization of the international system had a profound impact on thinking within political philosophy and international relations, and it continues to be one of the foundational ideas in modern realist international relations theory, a school to which such influential modern scholars and practitioners as Hans Morgenthau, George Kennan, and Henry Kissinger subscribed.⁶⁹

A somewhat more attenuated view of the nature of the international system is advanced by what some refer to as the “liberal realist” school, or the British school of international relations. Hedley Bull, one of the most important advocates for this perspective, himself calls it the “Grotian” or “internationalist” idea of international relations.⁷⁰ This

⁶⁵ *Id.* There is a massive literature on Hobbes, but for the analysis of Hobbes in the context of the development of legal thinking about war, I have relied upon Doyle's *Ways of War and Peace*, *supra* note 13, at ch. 3, and Tuck's *The Rights of War and Peace*. RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* ch. 4 (1999).

⁶⁶ DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13, at 116-17.

⁶⁷ *Id.* at 114.

⁶⁸ *Id.* at 114-17, 128.

⁶⁹ *See, e.g.*, GEORGE F. KENNAN, *REALITIES OF AMERICAN FOREIGN POLICY* (1966); HENRY A. KISSINGER, *AMERICAN FOREIGN POLICY* (expanded ed. 1974); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1973).

⁷⁰ HEDLEY BULL, *THE ANARCHICAL SOCIETY* 23 (2d ed. 1995).

perspective accepts the Hobbesian idea that the international system is characterized by a certain degree of anarchy. But rather than complete anarchy, in which there is perpetual conflict and a total absence of what Hobbes called “sociability,” Bull argues that there is a *society* of states within this somewhat anarchical system. This “anarchical society” is characterized by a certain degree of order, in which the conflicts between states are limited and governed by certain rules and institutions.⁷¹

International law is the source of many of these rules and is one of the fundamental institutions which functions to create order. In contrast to some realists who dismiss entirely the effectiveness of international law, or question whether it is really law properly so called,⁷² the liberal-realist perspective accepts that international law operates most fundamentally to give shape to the system itself. In particular, it does so as the source of the concept of the sovereign state, which is the primary constitutive principle of world politics. But it also provides the corpus of rules of coexistence for those sovereign states within the anarchical society, and it helps to mobilize compliance with those rules. The problem, according to this school of thought, is that while it is generally recognized that there is a very substantial degree of conformity with international law generally, that compliance is not necessarily motivated by respect for the law or because international law exercises a powerful force over state action.⁷³ When state interest diverges from compliance, particularly on issues relating to national security and self-preservation, international law is not always by itself capable of restraining state action.⁷⁴ Thus, in this respect, the internationalist school shares to some degree the Hobbesian realist view that the permissiveness of the international system constitutes one of the causes of war.

⁷¹ *Id.* at 25.

⁷² *See, e.g.,* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that the behavior of states in international society is a function of self-interest, and that international law does not shape such behavior as much as it merely reflects and results from coordination and cooperation aspects of state interaction); MORGENTHAU, *supra* note 69, at ch. 18 (arguing that while international law exists, and plays a role in international relations, it is largely and necessarily decentralized, which makes it ineffective as enforceable law); *see also* HENKIN, *HOW NATIONS BEHAVE*, *supra* note 44, at Introduction, ch. 1 (discussing the realist skepticism towards international law).

⁷³ BULL, *THE ANARCHICAL SOCIETY*, *supra* note 70, at 135.

⁷⁴ *Id.* at 137.

Moreover, Bull argues that war itself continues to be one of the institutions that operates within the international society to maintain order. He concedes that this function is much attenuated relative to its role up to the end of the nineteenth century, largely due to the introduction of nuclear weapons into the dynamic of balance of power politics.⁷⁵ Nonetheless, the internationalist perspective emphasizes that war has two aspects: first, as a manifestation of disorder and a threat to the continued structure of the society, for which reason international society seeks to restrain it and keep it within the bounds of limiting rules; and second, as a means by which the international society sometimes enforces international law.⁷⁶ This point will be returned to in both the discussion of the history of the laws of war and in the examination of the modern system, but it may be noted that collective security operations as authorized by the U.N. Security Council constitute the use of force for the purposes of imposing peace and security, and enforcing international law norms.

Turning to the liberal view of the causes of war at the international level, it was mentioned earlier that Kant's own theory on perpetual peace straddled Image II and Image III, but was rooted primarily in the latter.⁷⁷ The establishment of a constitutional republican system at the domestic level was necessary, but not sufficient. Kant also accepted the Hobbesian idea of states being in a perpetual state of war, and he thus argued that the state of peace must be formally instituted through the development of a form of federal system among republics.⁷⁸ This federal system would be founded on a multi-level constitutional order, involving three kinds of rights operating on both the domestic and the international levels. These three rights were given form in three "definitive articles" of the perpetual peace, which have been described as "articles in a metaphorical 'treaty'" that would be the foundation of the federation.⁷⁹

The first article related to the "rights of man," the protection of which required the embrace of the republican form of constitutional government at the domestic level, which

⁷⁵ *Id.* at 181-83, 187-88.

⁷⁶ *Id.* at 181-83.

⁷⁷ DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13, at ch. 8.

⁷⁸ KANT, *supra* note 4, at 98, 102. In this sense, some have argued that Kant was very much in the humanist school. *See, e.g.*, TUCK, *supra* note 65, at 207-08.

⁷⁹ Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 1*, *supra* note 43, at 225. For Kant's articulation of the three definitive articles, see KANT, *supra* note 4, at 99-108.

we discussed above in the Image II analysis. The second definitive article related to the “right of nations,” which required the creation of a federation of free states in which these rights could be adequately secured without recourse to war.⁸⁰ The idea was that while states existing in the state of nature would typically seek to enforce their rights by war, this could be avoided by binding states in a federation and thereby protecting their rights, just as the rights of man were secured by entry into the constitutional order of the republican form of government.⁸¹ Finally, the third definitive article similarly related to the international level, but required that a “cosmopolitan right” be enforced through the requirement that foreigners be accepted without hostility, thereby facilitating interstate relations and commercial relationships.⁸² The underlying idea here was that increased interconnection and the development of bonds of various kinds between states would operate to further constrain the tendency towards conflict, an idea that was more systematically developed by the liberal economic theorist Adam Smith and his followers.⁸³

What is striking about Kant’s theory, in the context of the argument being advanced here, is that it clearly understood the need to implement a system of interlocking constitutional orders at both the domestic and the international level, as part of a coherent and systematic design to reduce the incidence of war. It recognized that any ambition to limit warfare must target the state, interstate, and the transnational legal structures if it is to maximize its chances of success.

Kenneth Waltz—the modern realist who developed this very three-image framework—also embraced the idea that the causes of war must be understood in terms of all three levels simultaneously. He concluded his classic study by arguing that no single image is ever adequate to explain the prevalence of war, or sufficient for the purposes of developing prescriptions to reduce the incidence of war.⁸⁴ To be sure, Waltz—like most realists—emphasized the importance of Image III explanations, but he also cautioned that overemphasis of any one image will

⁸⁰ KANT, *supra* note 4, at 102-05.

⁸¹ The other alternative, rather than war or federation, was a form of world government or super-state, along the lines suggested by Rousseau, which Kant rejected as likely to lead to tyranny. *Id.* at 102-05.

⁸² *Id.* at 105-08.

⁸³ On the liberal economic theories as they relate to the causes of war, see DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13, at ch. 7.

⁸⁴ WALTZ, *supra* note 14, at 227.

cause a distorted understanding of the problem. All causes, he argued, are interrelated in vital ways. In particular, he suggested that factors relating to Images I and II, such as individual motives and misperceptions, the structures of the states involved, and their specific histories, cultures, and traditions, will be the immediate or “efficient cause” of any given war. But it is the permissive nature of the international system itself, together with the security dilemmas that it creates, that will allow such wars to occur without restraint. As he put it most succinctly:

That state A wants certain things that it can get only by war does not explain war. Such a desire may or may not lead to war. My wanting a million dollars does not cause me to rob a bank, but if it were easier to rob banks, such desires would lead to much more bank robbing. This does not alter the fact that some people will and some will not attempt to rob banks no matter what the law enforcement situation is. We still have to look to motivation and circumstance in order to explain individual acts. Nevertheless one can predict that other things being equal, a weakening of law enforcement agencies will lead to an increase in crime. From this point of view it is social structure—institutionalized restraints and institutionalized methods of altering and adjusting interests—that count.⁸⁵

The argument being developed in this article thus begins with the premise that while international law plays an important role in constraining the use of force, it is not sufficient. At the same time, while the permissiveness of the international legal system is an important cause of war generally, the absence of legal constraints and structural mechanisms at the domestic level, which could operate to restrain the immediate or efficient cause of war in any particular instance, is also significant.

A review of the historical development of the law and legal theory on constraining the resort to war suggests that up until the nineteenth century there was some understanding of this requirement to address the causes of war at all three levels. However, despite broad agreement in modern international relations theory that factors at all three levels are significant causes of war, in the twentieth century we have increasingly placed our reliance solely upon the international law system to limit armed conflict, and have ignored the domestic mechanisms of legal constraint. In the next Part, I explore those developments in more detail.

⁸⁵ *Id.* at 231.

III. THE DEVELOPMENT OF LEGAL CONSTRAINTS ON WAR

The history of the laws of war, and of legal thinking about war and peace, is obviously very long and quite complicated,⁸⁶ and there is no need to review the entire history here. There are several reasons, however, why we need to examine some aspects of at least the modern history of these developments, including a review of the current state of legal constraints on the use of armed force. First, in order to suggest that the current systems are inadequate, we need to be sure we understand the contours and operation of those systems—hence the discussion of the current state of both international and constitutional law constraints. Second, the examination of the developments of the twentieth century and the operation of the current systems more specifically illustrate that there is an almost exclusive reliance upon international law, and disregard for constitutional law and other domestic mechanisms for limiting the use of armed force. Third, the review of the earlier history, in addition to helping us understand the origins of important elements of the current system, suggests that this narrow reliance on legal constraints at the international level is historically anomalous, which is yet another reason to reconsider whether it is optimal to disregard the domestic levels of control.

A. *Just War Theory—From Early Origins to the Nineteenth Century*

As with so much else, we can trace the seeds of modern thinking about constraints on war back to Greek and Roman history. While what we would call *jus ad bellum* was not well developed in classical Greece, Thucydides wrote of legal norms and peace treaties operating as potential constraints on the

⁸⁶ For a recent work that does a magnificent job of providing a detailed examination of the history of the legal constraints on war, upon which I have relied extensively, see STEPHEN NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* (2005). Also, for an ambitious and sweeping exploration of the historical relationship among strategy, law, and history in the evolution of war and constitutional forms, see PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002); DOUGLAS M. JOHNSTON, *THE HISTORICAL FOUNDATIONS OF WORLD ORDER* (2002). This treatment of the development of the laws on war is focused almost exclusively on Western legal systems. As Neff points out, there were important developments in both Islamic law and Chinese thinking regarding legal constraints on war, but neither of these systems ultimately had much influence on the later development of modern international law or on the origins of Western constitutional democracy, which are the two legal systems that I am most concerned with here. NEFF, *supra*, at 39-45.

recourse to war,⁸⁷ and the Romans had a fairly elaborate legal code, the *jus fetiales*, which governed how and on what basis the Republic could use force against other peoples.⁸⁸ Of greatest significance for our purposes, however, was the Greek philosophers' development of the idea of "natural law," the concept that there was a set of universal norms that applied to all peoples at all times. Originating with Aristotle, the concept was more fully elaborated and refined by the Stoics in the third century BCE.⁸⁹ Cicero, in the later period of the Roman republic, combined these ideas of natural law with the basic principle within the *jus fetiale* that Rome required some legally sanctioned justification to commence armed conflict.⁹⁰ Cicero elaborated a universal principle according to which there were two specific natural law justifications for the resort to war: the punishment of an enemy for wrongdoing, and repelling an attack. The overarching purpose of the universal principle—that the aim of war should be to achieve peace—also served as a limitation.⁹¹

Built upon these origins, Christian theologians developed the moral and legal framework for thinking about war, what would come to be called "just war theory." It was the dominant legal paradigm on recourse to war well into the eighteenth century, and vestiges of it inform the current legal system.⁹² St. Augustine (354-430 CE) wove together Stoic ideas of natural law, Christian theology on pacifism and nonviolence, and Cicero's arguments regarding war being waged justly for the purposes of establishing peace, and developed the principle that war could be waged so long as it was: (i) "waged for a 'just cause'"; (ii) "waged [for the] 'right intention,' [meaning] to do

⁸⁷ See DOYLE, *WAYS OF WAR AND PEACE*, *supra* note 13, at 58-59. Thucydides recounts how the Corinthians appealed to the Athenian Assembly just prior to the outbreak of the war, attempting to persuade the Athenians not to become involved in the likely hostilities between Corinth and Corcyra. The Corinthians explicitly grounded their arguments against any Athenian use of force in legal and moral terms. The appeal was unsuccessful, Corcyra having successfully played upon Athenian fears and insecurities so as to obtain Athenian support, but the account nonetheless suggests the existence of widely understood and acknowledged legal and moral norms governing recourse to war. THUCYDIDES, *supra* note 11, at 53-62; see also Adriaan Lanni, *The Laws of War in Ancient Greece*, 26 *LAW & HIST. REV.* 469, 471 (2008).

⁸⁸ G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas About War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177-79 (Hedley Bull et al. eds., 1990) [hereinafter Draper, *Grotius*]; G.I.A.D. Draper, *The Origins of the Just War Tradition*, 46 *NEW BLACKFRIARS* 82, 82-83 (2007); see also NEFF, *supra* note 86, at 27-29.

⁸⁹ NEFF, *supra* note 86, at 32-34.

⁹⁰ Draper, *Grotius*, *supra* note 88, at 178-79.

⁹¹ NEFF, *supra* note 86, at 37-38.

⁹² See generally *id.*

good or to avoid evil”; and (iii) “waged on the authority of a [P]rince.”⁹³ Implicit in this, of course, was the notion that only one side in a war could legitimately claim to have a just cause.⁹⁴ From this foundation, just war theory became increasingly elaborate and sophisticated over the next several centuries, with St. Thomas Aquinas (1226-74) refining the doctrine and greatly increasing its influence.⁹⁵

It is important to recall, however, that prior to the establishment of the Westphalian system in 1648 there was not an international system of sovereign states, and there was no separate body of law governing the relations among the princely realms that did exist.⁹⁶ Moreover, “war” was not a legal state, but rather was simply a term used to describe organized violence, whether it involved conflict between or among clans, regions, princely states, nonstate entities such as the papacy, bandits, or rebellious peasants.⁹⁷ The key point is that there was only one overarching body of law, derived from natural law, which governed all aspects of war on an individual level.⁹⁸ The state did not yet have legal identity, and was not the subject of the law as we now understand it to be in international law.⁹⁹ The only subject of natural law was the individual, and thus the single system of law operated to constrain all entities that might be involved in the activity of war through the individuals directing it or engaging in the conflict. As such, the single system of natural law operated to

⁹³ Draper, *Grotius*, *supra* note 88, at 180.

⁹⁴ NEFF, *supra* note 86, at 47; Draper, *Grotius*, *supra* note 88, at 180; *see also* WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 107 (Michael Byers trans., rev. ed. 2000); M.H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 65-66 (1965).

⁹⁵ There were also theoretical schisms in the later medieval period, and the differences would continue to echo in thinking about the laws of war into the twentieth century, but we need not delve into those differences here. For a detailed analysis of the difference between the scholastics and the humanist schools of just war theory, see, for example, TUCK, *supra* note 65.

⁹⁶ NEFF, *supra* note 86.

⁹⁷ Bobbitt notes that even as late as 1500, there were over 500 princely domains, city-states, and disputed regions within Europe. BOBBITT, *supra* note 86, at 96. For a fascinating if depressing account of the wars waged by the Papacy during part of this period, see TUCHMAN, *supra* note 25, at ch. 3.

⁹⁸ NEFF, *supra* note 86, at 54. This is not to suggest that there were no distinctions made between legal regimes at all. Thus, for instance, distinct from the just war theories, the conduct of war itself was governed in part by *jus armorum*, which was derivative of Roman military law, and these two systems were not merged until the sixteenth century. KEEN, *supra* note 94, at 9-15; NEFF, *supra* note 86, at 69-70.

⁹⁹ NEFF, *supra* note 86, at 56. For more discussion of the evolution of the state, and the relationship between war, law, and the constitutional structure of the state, see BOBBITT, *supra* note 86, at chs. 7, 19 (describing military/political and legal developments of the Westphalian system).

address the causes of war at all levels that then existed. And there is evidence that actual practice in relation to the waging of war was to some degree influenced by this body of law.¹⁰⁰

The emergence of a dual system of law, in which there was a truly independent legal system that governed the recourse to war at the interstate level, and which formed the foundation for modern international law, came with the emergence of the sovereign territorial state in the Westphalian system and the development of the law of nations in the early seventeenth century. The major innovation of Hugo Grotius, who is generally credited with the elaboration of the law of nations in his *On the Law of War and Peace* (first published in 1625, just as the Westphalian system was coming into existence), was the concept of a distinct “law of nations”—a legal system not entirely divorced from natural law, but in which the rights and duties of sovereign states was the primary focus.¹⁰¹ Most significantly, states were the subject of this system of law. It was positivist in nature and derived in part from the actual practice of states, and it was the conduct of and relations among states that were governed by the law. As it related to the recourse to war, the law of nations governed state action, rather than that of individuals as in all earlier laws of war.¹⁰² There thus developed a dual aspect to the legal thinking about war, in which the law of nature continued to form the foundation of the framework, but a “voluntary law” comprising the law of nations supplemented the natural law principles, with ever-increasing importance over time.¹⁰³

Even within this dual system, however, both systems of law were understood to govern and constrain the resort to war. Grotius elaborated the just causes for which a state had a right to engage in war, and these just causes were understood to be

¹⁰⁰ NEFF, *supra* note 86, at 69.

¹⁰¹ See TUCK, *supra* note 65, at 81-83. The Peace of Westphalia actually comprised several separate peace treaties entered into over a period of decades, culminating in a peace Congress convened in 1644. Negotiations at the Congress resulted in peace treaties between Sweden and the Holy Roman Empire, and between France and the Empire. In 1648, another such treaty was signed by the Dutch States and Spain. BOBBITT, *supra* note 86, at 501-08. In this sense, the publication of Grotius's most famous and influential book in 1625 pre-dated the final act, but it was written during the formative years of the peace process and was already exercising some influence by the time of the final peace conference.

¹⁰² NEFF, *supra* note 86, at 85; see also TUCK, *supra* note 65, at ch. 3 (presenting a rather different analysis of Grotius's theory); Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 88.

¹⁰³ NEFF, *supra* note 86, at 86-87.

principles of the law of nations.¹⁰⁴ Nonetheless, they were in part derived from the law of nature, and grew directly out of the earlier just war theory. Indeed, a state's offenses against the laws of nature constituted one of the just causes that provided other states with the right to wage war against it in order to impose punishment and enforce the law. The broad proposition was that violations of the laws of nature by a state on the domestic level could provide the justification under the law of nations for other states to wage war against the offender.¹⁰⁵ While this example relates to the justification for war rather than its legal constraints, implicit in it is an understanding of a close relationship between the domestic operation of the law of nature and the legitimacy of war under the international law of nations. Indeed, as Neff puts it, the two systems formed a kind of partnership, and over time the strands of both would be woven together to develop the modern system of international law—but in the seventeenth century there remained a distinct duality in their approaches to the issues of war and peace.¹⁰⁶ As such, in terms of the three Images on the causes of war, the natural law system continued to operate so as to address individual and group dynamics at the domestic level, and the new law of nations began to govern the conduct of states at the third level, in the emerging system of truly sovereign states.

This Grotian conceptualization of the laws of war, with the dual elements of natural law and a law of nations that was still very much infused with just war theory, became the mainstream perspective in the late sixteenth and seventeenth century. It was also becoming more clearly established within this perspective that war constituted a legal state that triggered the operation of a *lex specialis*, rather than being a simple description of a particular kind of violence, and moreover, states alone could legitimately engage in the use of armed force under the laws of war.¹⁰⁷ But in the seventeenth and eighteenth centuries, aspects of the mainstream view came under pressure from two other schools of thought on the laws of

¹⁰⁴ *Id.* at 96-102.

¹⁰⁵ It was also a rather convenient justification for the imperialist conduct of European states, particularly the Netherlands, to which Grotius was trying to return from exile. See BOBBITT, *supra* note 86, at 510-12; TUCK, *supra* note 65, at 102-04. It thus appears that the basis for concerns that humanitarian intervention may serve as a pretext for self-interested policy has ancient roots.

¹⁰⁶ NEFF, *supra* note 86, at 86.

¹⁰⁷ *Id.* at 101-02.

war. Both of these accepted the dual operation of natural law and the law of nations, and that war constituted a legal state, but they had very different understandings of how the two systems of law operated in times of war and peace. For very different reasons, both of these schools adhered to the view that can be summed up in the phrase “might makes right.” One of the schools was of course associated with Thomas Hobbes, and his ideas that war was the normal state of nature for states and that the use of armed force was entirely justifiable for self-preservation.¹⁰⁸

We need not worry about the details of that intellectual conflict here, but the result was that by the end of the eighteenth century the conflict had left a somewhat incoherent *jus ad bellum* system with little in common with its just war origins, and even less real normative power as a legal constraint on the use of armed force. Indeed, international law generally, and the law of war in particular, was increasingly understood to bear little relationship to any overarching natural law system. This humanist and positivist view of the law was increasingly utilitarian, technocratic in outlook, and rationalist.¹⁰⁹ As part of this development, in the nineteenth century war was elevated to the status of an “institution” of international law.¹¹⁰ In part this was a reflection of the development of a robust *jus in bello* regime; but war was also an institution in the sense that it was viewed as being simply one among many tools of statecraft. In Clausewitz’ famous dictum, war was merely policy pursued by other means.¹¹¹ It was not only justifiable for self-preservation along Hobbesian lines, but also had become a permissible means to further the vital interests of the state.

This shift away from the last vestiges of just war theory—the notion that war had to be justified in terms of self-defense, restoring that which was owed, or punishment for violations of natural law—and the move to ideas according to which armed force could be employed whenever it would further the state’s vital interests, essentially emasculated the

¹⁰⁸ See HOBBS, *supra* note 64, at 223-28; see also NEFF, *supra* note 86, at 133-37; TUCK, *supra* note 65, at 126-39.

¹⁰⁹ NEFF, *supra* note 86, at 161-62.

¹¹⁰ *Id.* at 177, 186-89. Here, “institution” means that there was a highly developed body of law and rules that would kick into operation to govern the conduct and consequences of war once the legal state of war had been triggered. *Id.* at 177.

¹¹¹ CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., trans., 1976) (1832).

jus ad bellum regime altogether. In legal terms, the use of armed force, the commencement of war, did not constitute a wrong either to the state that was attacked or to the broader community of states.¹¹² Indeed, war became a legitimate means of settling disputes, and could give rise to legal rights and establishing claims. The question of justification for the resort to war was relegated to the domain of morality and ethics, while the decision itself was governed only by the utilitarian calculus of policy imperatives. As a result, the distinction between self-defense and aggression became essentially meaningless in terms of international law.¹¹³ In this sense, the centuries-long conception of legal constraints on the use of force, which had at least in theory addressed the causes of war at both the domestic and the international levels, receded into dormancy in the nineteenth century.

B. *Early Constitutional Constraints*

Even as state practice in Europe increasingly reflected the more realist premises of the two dissenting schools, and the influence of the mainstream theory on the legal limits on war began to fade into irrelevance, there emerged new ideas about legal constraints on the use of force within the domestic legal systems. These ideas, which held out some promise of addressing the causes of war at the domestic level just as the combined natural law and law of nations constraints receded, developed from new thinking about the internal distribution of power and authority, in what would later be called constitutional law. The early developments as they related to the waging of war can be traced in their modern form to the Glorious Revolution of 1688 in England.¹¹⁴ In the *Bill of Rights*, which was the product of the settlement between the English Parliament and the King, the monarchy was prohibited from raising standing armies in times of peace without parliamentary

¹¹² NEFF, *supra* note 86, at 197-99.

¹¹³ *Id.*

¹¹⁴ The modern idea of constitutionalism itself is said to originate in the Glorious Revolution, and in the writing of John Locke from that era. See SCOTT GORDON, *CONTROLLING THE STATE* 5 & n.3, 15, 322-23 (1999). For further discussion of the relationship between the rise of constitutional control over the military and the use of force, and international law, see Lori Fisler Damrosch, *The Interface of National Constitutional Systems with International Law and Institutions on Military Forces*, in *DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW* 39-60 (Charlotte Ku & Harold K. Jacobson eds., 2003) [hereinafter Damrosch, *Interface*].

consent.¹¹⁵ Parliament also gained control over the budget, and thus with these two powers gained a degree of control over the executive's ability to take the state to war, though the decision itself remained entirely within the Royal Prerogative.¹¹⁶

These ideas took root in the new constitutional experiment that was undertaken in the United States one hundred years later. The Articles of Confederation, the first constitution of the thirteen colonies, ratified in 1781, placed the power to declare war in the central government (being the States in Congress), but prohibited the central government from engaging in war, granting letters of marque or reprisal in time of peace, or entering into any alliances, "unless nine States assent to the same."¹¹⁷ The U.S. Constitution further developed these ideas on the constitutional control of the use of armed force, ideas that were to a considerable extent grounded in concerns over the relationship between domestic constitutional structure and international relations.¹¹⁸ The Constitution not only included a broad legislative control over the raising, maintaining, regulating, and funding of the nation's army and navy, as well as militias,¹¹⁹ but it provided that the Congress had the power "[t]o declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."¹²⁰

This provision is at the heart of the ongoing war powers debate, with intense disagreement about the original meaning and intent of the language and how it ought to be interpreted today. But without getting mired in the details of that debate here, this granting of authority to the legislature over the steps that were then understood to constitute the initiation of war was a legal mechanism designed to constrain the executive's

¹¹⁵ See BILL OF RIGHTS [ENG.] Dec. 16, 1689, art. V. Alexander Hamilton referred to this prohibition in one of his essays that were to be compiled as the Federalist Papers, on the issue of the limited legislative power to raise and maintain a military. THE FEDERALIST NO. 26, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹¹⁶ See LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004). John Locke himself wrote about the power of war and peace as being part of the "federative power" that was to be held exclusively by the executive. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382-84 (Peter Laslett ed., Cambridge Univ. Press 1988) (1670). The Royal Prerogative is defined, in the English common law, as the residue of power that is reserved to the Crown. There is more detailed discussion of the concept *infra* Part III.D.

¹¹⁷ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 6.

¹¹⁸ FEDERALIST NO. 41 (Madison), *supra* note 33, at 224-35; Madison, *Universal Peace*, *supra* note 1.

¹¹⁹ U.S. CONST. art. I, § 8, cls. 12-16.

¹²⁰ *Id.* art. I, § 8, cl. 11.

ability to go to war.¹²¹ James Madison, in particular, thought that wars could only be avoided by developing domestic constitutional mechanisms to make it difficult for governments to decide to go to war. Foreshadowing Kant, he thought that any solution to the scourge of war was to be found first in the establishment of republican self-government, since once the decision to go to war was subjected to the will of the people, wars waged for the benefit of the rulers (which he viewed as the most common class of war) would be unlikely.¹²² In order to discourage wars fought on the instigation of society itself (which he identified as the second and less common class of war), Madison argued that the state required constitutional mechanisms to ensure that the costs of the war would be internalized and borne by the society, rather than being externalized to other peoples and future generations.¹²³

Similar ideas regarding legislative control over the executive decision to wage war can be found in the short-lived French revolutionary Constitution of 1791.¹²⁴ It provided that

¹²¹ I use the word “war” here quite deliberately, as one of the flash-points of the current debate is whether the provision constrained the executive power to use armed force for measures short of war, or armed conflicts not commenced by formal declaration of war. An issue that is often missed in the war powers debate is the significance of the power to grant letters of marque and letters of reprisal, with almost exclusive focus being on the authority to declare war. Letters of reprisal, in particular, related to a concept quite different from the modern notion of reprisals, and letters of marque and reprisal constituted methods for broad mobilization of civilian forces for employment in an armed conflict. The issuance of such letters was viewed as an act attendant to the initiation of war and as an act of war—an understanding that ought to influence the modern view of the purpose and original meaning of the war powers clause. On reprisals, see NEFF, *supra* note 86, at 122-26, 225-39.

¹²² James Madison, *Universal Peace*, *supra* note 1; see also John Tomasi, *Governance Beyond the Nation State: James Madison on Foreign Policy and “Universal Peace,”* in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 213, 220-21 (John Samples ed. 2002).

¹²³ Tomasi, *supra* note 122, at 220-21. On the other hand, Madison was to some extent a realist in his views regarding the necessity of maintaining armed forces and not excessively fettering the power of the central government to defend the nation. In defending the federal power (as opposed to that of the States) to raise and maintain armies and to declare war, he wrote that

[i]f a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government and set bounds to the exertion of its own safety. . . . The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others.

FEDERALIST NO. 41 (Madison), *supra* note 33, at 225.

¹²⁴ For discussion on the extent to which the American constitutional experience and theories generally influenced the French constitutional developments, see Billias, *supra* note 35, at 19-28.

war could only be declared by the legislative body, acting on a formal proposal by the monarch.¹²⁵ In addition, however, it included a provision authorizing the executive to act first in the case of emergency, but requiring the King to obtain *ex post* approval within a limited time frame, which the legislature could withhold and thereby force an end to hostilities. Moreover, and even more startling, the Constitution of 1791 provided for the legislature to commence criminal prosecution of any ministers of the Crown that were determined to have engaged in “culpable aggression.”¹²⁶ The Constitution of 1791 only survived for a couple of years, victim to the unfolding dynamics of the revolution, yet it reveals the currency of ideas at the time for using constitutional mechanisms to constrain the government from engaging in armed conflict. As we will see, these ideas have not blossomed into more robust domestic systems in the constitutional democracies of the twentieth century.

C. *The Twentieth Century Jus ad Bellum Regime*¹²⁷

In examining the current state of legal constraints, we begin with the international law system as it developed in the twentieth century. There was a strong revival of the legal constraints on the recourse to war beginning at the end of the nineteenth century, but only at the level of the international system. While the nineteenth century was largely characterized by the limited “cabinet wars” in Europe, which reflected the Clausewitzian notion of using force for the achievement of policy objectives that furthered the interests of the state and maintained the balance of power, the American Civil War in the second half of the century was a harbinger of the modern war—war in which the whole nation, its entire economy, and all of its industry and manpower were devoted to an endeavor that was itself transformed by the technological advances of the late nineteenth century.¹²⁸ By the end of the

¹²⁵ 1791 CONST. ch. III, § 1(2) (Fr.).

¹²⁶ *Id.*

¹²⁷ Portions of this section are drawn from an earlier related work, Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum*, 30 U. PA. J. INT’L & COMP. L. 267, 268 (2008) [hereinafter Martin, *Binding Dogs of War*].

¹²⁸ The late nineteenth century saw the development of machine guns, steam-driven naval vessels, rail-transportation of troops, and advances in artillery, all of which quite radically altered the conduct of warfare. See RICHARD A. PRESTON & SYDNEY F. WISE, *MEN IN ARMS: A HISTORY OF WARFARE AND ITS INTERRELATIONSHIPS WITH WESTERN SOCIETY* (4th ed. 1979); THEODORE ROPP, *WAR IN THE MODERN WORLD* 143-44 (1959).

century, there was a growing sense that some limits were required. The Hague Conventions of 1899 and 1907 were the first efforts to place legal limits on the use of armed force as a legitimate means of dispute resolution.¹²⁹ But the relevant provisions merely bound state parties to pursue negotiation with the assistance of the good offices of friendly states prior to making “an appeal to arms.”¹³⁰

The effort to develop constraints on recourse to war picked up steam after the potential horror of the modern total war was fully manifested in World War I, referred to in its aftermath as the “war to end all wars.” The Covenant of the League of Nations, adopted in 1919 as a part of the peace process, reestablished the just war theory premise that peace is the natural state within the international society,¹³¹ and it took the first tentative steps towards the establishment of a form of collective security system.¹³² But it only prescribed cooling-off periods and arbitration procedures that had to be fulfilled prior to commencing war, and did not entirely prohibit recourse to war itself, even in the form of aggression.¹³³

In 1928, however, the Pact of Paris, or the Kellogg-Briand Agreement as it came to be known, became the first multilateral treaty that purported to establish a true

¹²⁹ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE*, 79 (4th ed. 2005); *see also* Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 [hereinafter 1899 Convention]; Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199 [hereinafter 1907 Convention]; Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241.

¹³⁰ 1899 Convention, *supra* note 129, Art. 2; 1907 Convention, *supra* note 129, Art. 2.

¹³¹ NEFF, *supra* note 86, at 290.

¹³² League of Nations Covenant arts. 10-17. Article 10 provided, in part, that “[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.” Article 11 provided that “[a]ny war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.” Article 16 stipulated that “[s]hould any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15 [which provided for the submission of disputes for arbitration, judicial decision, or Council determination] it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League,” which automatically triggered broad economic sanctions. What was lacking was any explicit provision for the use of force to enforce the collective security system thus envisioned.

¹³³ Art. 10 only provided that members “undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression . . . the Council shall advise upon the means by which this obligation shall be fulfilled.” *Id.* art. 10; *see also* INGRID DETTER, *THE LAW OF WAR* 62-63 (2d ed. 2000).

prohibition on the aggressive recourse to war.¹³⁴ The agreement itself purported to renounce all recourse to war, and it was silent on the scope of the prohibition and the existence of any exceptions, but there was an exchange of diplomatic notes during the negotiations that articulated a shared understanding that the proposed agreement did not extend to the exercise of self-defense.¹³⁵ The agreement also contained an implicit collective security component, as the preamble provided that any state party that violated the terms of the agreement would be denied its benefits. In other words, states would not be prohibited by the agreement from using armed force against any state that stood in violation of the treaty.¹³⁶ Over 40 states were party to the Kellogg-Briand Pact by 1929 when it came into force, and there are currently 69 parties to the treaty.¹³⁷ While it failed to provide for any enforcement mechanism, it was the first modern international law prohibition on the aggressive use of force.

Both the League of Nations system and the Kellogg-Briand Pact were discredited by their failure to prevent the mounting incidences of aggressive war—the Japanese occupation of Manchuria and the Italian invasion of Ethiopia being the most serious—which ultimately led to the complete breakdown of the system in World War II. One of the shortcomings of both the League of Nations Charter and the Kellogg-Briand Pact, quite apart from the absence of any effective enforcement mechanism, was the focus on the concept of “war” alone.¹³⁸ This left a number of well established uses of force that fell short of war as it was then understood—particularly reprisals, interventions, and acts of necessity—outside of the scope of the prohibition. Nonetheless, the prosecutions of the former leaders of Nazi Germany and Japan for aggression, or “crimes against peace,” were based on the

¹³⁴ Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. I, Aug. 27, 1928, 46 Stat. 2343 [hereinafter Kellogg-Briand Pact].

¹³⁵ The notes are reproduced at 22 AM. J. INT'L L. SUP. 109 (1928), with replies at 23 AM. J. INT'L L. SUP. 1 (1929); see also DENYS P. MYERS, ORIGIN AND CONCLUSION OF THE PARIS PACT 34-56 (1929) (providing a history of the negotiations); U.S. DEP'T OF STATE, TREATY FOR THE RENUNCIATION OF WAR (1933) (containing reproductions of all the associated documents, including the U.S. note of June 23, 1928).

¹³⁶ Kellogg-Briand Pact, *supra* note 134, at Preamble.

¹³⁷ For the current list of parties to the treaty, see U.S. DEP'T OF STATE, TREATIES IN FORCE 443-44 (2010), available at <http://www.state.gov/documents/organization/143863.pdf>.

¹³⁸ NEFF, *supra* note 86, at 280, 296-98.

breach of the Kellogg-Briand Pact, both re-affirming the prohibition on aggressive recourse to war and creating personal criminal liability for its violation.¹³⁹

The final steps towards the development of the modern *jus ad bellum* regime, and the establishment of a more robust collective security system, were taken with the creation of the United Nations in 1945. Article 2(4) of the U.N. Charter provides that “[a]ll 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.”¹⁴⁰ The only exceptions provided were for the exercise of individual and collective self-defense upon the occurrence of an armed attack (Article 51), or for collective use of force by members as authorized and directed by the Security Council upon a determination that there is a threat to or has been a breach of the peace and security of the international community (Articles 39, 42 and 43).

It will be noted that the word “war” is absent from the prohibition in Article 2(4), and indeed from anywhere else in the Charter other than the preamble. Learning from the failures of the League of Nations and the Kellogg-Briand Pact, the prohibition extends to all uses and even threats of the use of force. As such, it made irrelevant all the earlier debates over how to distinguish between reprisals, interventions, acts of necessity, and war, since all use of force was similarly prohibited.¹⁴¹ The system also reflects a return to some aspects of the Grotian perspectives on just war theory, in that it presumes that the normal state of affairs in the international system is

¹³⁹ U.S. DEPT OF STATE, TRIAL OF JAPANESE WAR CRIMINALS (Pub. No. 2613, Far Eastern Series No. 12, 1946); Charter of the International Military Tribunal, § 2, art 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The debate over the legitimacy of these specific prosecutions, in large part, centers on the then-novel, and thus retrospective, imposition of personal criminal liability for a state violation of a treaty, but the issue of there having been violations of the Kellogg-Briand Pact is not seriously questioned.

¹⁴⁰ U.N. Charter art. 2, para. 4.

¹⁴¹ NEFF, *supra* note 86, at 318-19; *see also* DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129; CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (3d ed. 2008). The threshold for the use of force has also been determined by the International Court of Justice to be quite low, and significantly lower than the scale and intensity of force required to qualify as an “armed attack” that can justify the use of force in self-defense. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua v. U.S.*]; Oil Platforms (Iran v. U.S.), 42 I.L.M. 1334, 1355 (Nov. 6, 2003).

one of peace,¹⁴² and the collective security system reflects elements of the law enforcement character of just war theory.

The U.N. collective security system is implemented by both the collective self-defense and collective security components of the Charter. Collective self-defense, provided for in Article 51, permits member states to use force against an aggressor state in the event of its armed attack on some other member, regardless of whether the attack constitutes any immediate threat to the state responding with force to the attack on the victim.¹⁴³ This goes well beyond the notion of self-defense in its original natural law sense, which was analogous to the right of self-defense exercised by an individual, being a proportionate use of force immediately necessary to prevent an ongoing attack on oneself. It is much more in line with notions of using armed force to enforce the law and punish transgressions in the Grotian scheme.¹⁴⁴ The modern rationale is based on the view that any act of aggression constitutes a threat to the entire international system, and that, like a contagion, unchecked aggression has the tendency to spread, creating costs and risks for other states initially unaffected.¹⁴⁵ The second element of the collective security system, as provided for in Article 42 of the U.N. Charter, contemplates the United Nations itself using armed force, employing the armed forces of contributing members, in order to restore or maintain peace and security. By virtue of Article 2(6), this means that the United Nations may use force against nonmember states, and even nonstate entities.¹⁴⁶ The operation of Article 42 has evolved over time such that member states are typically authorized by the United Nations Security Council to use force on behalf of the United Nations to restore and maintain peace

¹⁴² U.N. Charter, preamble, art. 1.

¹⁴³ DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 252-56; GRAY, *supra* note 141, 167-71.

¹⁴⁴ The Grotian notion of "defensive war" was much more expansive than the natural law right to self-defense. See NEFF, *supra* note 86, at 127. Interestingly, the concept of individual self-defense under Article 51 of the U.N. Charter is clearly a restoration of the very narrow natural law conception, in contrast to the just war theory notions of defensive war. NEFF, *supra* note 86, at 326.

¹⁴⁵ DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 253-56; see also GRAY, *supra* note 141, at 138-41.

¹⁴⁶ Article 2, paragraph 6 of the U.N. Charter provides, "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." For discussion of its operation, see DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 91-92.

and security, as coalitions under American leadership have most famously done in the Korean War and the Gulf War.¹⁴⁷

The U.N. Charter is not the exclusive source of the principles of *jus ad bellum*. Treaties such as the United Nations Convention on the Law of the Sea¹⁴⁸ repeat the principles, and there are a number of treaties, including the Kellogg-Briand Pact itself, which predate the U.N. Charter but remain in effect.¹⁴⁹ More importantly, customary international law is a distinct source of the rules of *jus ad bellum*. As the International Court of Justice in *Nicaragua v. United States (Merits)* held, there is considerable overlap between the treaty regime and the principles of *jus ad bellum* in customary international law (customary international law having evolved over the last sixty years from the widespread state practice in conformity with the U.N. Charter system), but there are important reasons for making the distinction and acknowledging the independent existence of the principles in customary law.¹⁵⁰ The Court noted that there are some important differences between the treaty and customary principles, particularly in the area of self-defense.¹⁵¹ Moreover, customary international law will evolve over time, and so the differences between the Charter regime and the customary international law principles may well increase as a result, and indeed have likely already developed somewhat since the *Nicaragua* decision.¹⁵² These differences will be important in

¹⁴⁷ THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 24-30 (2002) The exact nature and legal authority for both these wars remain controversial. Dinstein, for instance, insists that the U.N. Security Council resolutions did not authorize the use of force under Article 42 and that these were collective self-defense operations under Article 51. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 273-77, 292-96; *see also* GRAY, *supra* note 141, at 258-59 (for a discussion that is much closer to Franck on this issue).

¹⁴⁸ United Nations Convention on the Law of the Sea art. 301, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁴⁹ These would include the Pan American Anti-War Treaty of Non-Aggression and Conciliation art. 1, Oct. 10, 1933, 49 Stat. 3363, 163 L.N.T.S. 393; *see also* DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 97-98.

¹⁵⁰ *Nicaragua v. U.S.*, *supra* note 141, at 93-97.

¹⁵¹ *Id.* Also, famously, Judge Schwebel in his dissenting opinion argued that Article 51, with its condition precedent of an armed attack, constituted the codification of only one of several legitimate grounds for the exercise of self-defense, though this remains a minority view. *See* DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 95-96, 183-85 (noting and refuting Judge Schwebel's interpretation); GRAY, *supra* note 141, at 171-73.

¹⁵² The response to the attacks by non-state actors on 9/11, in the form of the invasion of Afghanistan under the asserted authority of collective self-defense pursuant to Article 51, will likely have an impact on customary international law. *See* DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 207.

our consideration of how best to operationalize the constitutional incorporation of principles of *jus ad bellum*.

The *jus ad bellum* regime that has emerged since the adoption of the U.N. Charter is unquestionably the most robust and stringent of any system that has existed in the history of legal constraints on recourse to war. And as was noted above, it incorporates aspects of the earlier just war theory. But it is an entirely positivist conceptualization of the laws of war, and in many respects it has a far thinner theoretical and philosophical foundation than prior systems of thought on war, and certainly as compared to just war theory itself.¹⁵³ The just war theory, both before Grotius and after, was founded squarely in a deep understanding of natural law, interwoven with theological and ethical theories, while the U.N. Charter is the secular product of lawyers and statesmen, operating in the wake of and in response to the worst global conflict in our history.¹⁵⁴ This is significant in the context of international law's role in mobilizing support for and encouraging compliance with its rules. Without a deeper philosophical foundation, which might operate to bind all the states within the international society with a sense of shared values and investment in the system, in the way that natural law clearly did in medieval Europe, the U.N. Charter may have difficulty in attracting sufficient compliance.

Certainly the incidence of illegitimate uses of force continues apace, often comprising naked acts of aggression in violation of Article 2(4) and frequently perpetrated by liberal democratic states. Indeed, just ten years after the exhausted allied powers ended the worst armed conflict in the history of the world and established the United Nations system, two of those countries conspired in an act of aggression in the Suez crisis of 1956. Notwithstanding internal legal advice that there was no legal basis in international law for the use of armed force against Egypt after it nationalized the canal zone, the government of Prime Minister Anthony Eden in Britain conspired with the governments of France and Israel to create a fraudulent pretext for intervention, and then invaded Egypt according to plan, in violation of international law.¹⁵⁵

¹⁵³ NEFF, *supra* note 86, at 317.

¹⁵⁴ *Id.*

¹⁵⁵ BARRY TURNER, SUEZ 1956: THE INSIDE STORY OF THE FIRST OIL WAR (2006). The senior legal advisor to the Foreign Office, Sir Gerald Fitzmaurice, argued that "there was no legal basis for armed intervention of a neutral state to protect property or to guarantee freedom of passage through a canal or to prevent further violence." *Id.* at 204. The conspiracy involved an agreement among the governments of

What is more, Eden made the decision without even consulting the entire cabinet, far less parliament.¹⁵⁶ That there were no constitutional or statutory limits on the prime minister's discretion to launch the country into a disastrous war is striking. The fact remains that very few constitutional democracies have domestic legal regimes that constrain in any meaningful way how the executive branch of government decides to go to war, an issue we turn to next.

D. The Current Domestic Constraints on the Use of Force

During the same period in which the modern *jus ad bellum* regime blossomed, the world also saw the spread of democracy and constitutionalism. Seven distinct "waves" of democratic constitution-making have been identified, and five of these have occurred since the end of World War I, with most of them coming after World War II.¹⁵⁷ Although not all democracies have constitutions, and not all the new constitutional democracies would meet many definitions of "liberal democracy," the world has in some real sense seen the materialization of Kant's predicted spread of republicanism. Yet, notwithstanding this spread of constitutional democracy, there has been little systemic development of constitutional constraints on the use of force.

Constitutional constraints can generally be divided into two categories. The first, what we may call the "separation of powers" class of constitutional limits, are primarily concerned

the United Kingdom, France, and Israel, for Israel to launch a limited attack against Egypt in the Sinai, thereby creating a pretext for a British and French "intervention," involving an invasion of Egyptian territory around the Suez. *Id.* at 288-301.

¹⁵⁶ *Id.*

¹⁵⁷ Jon Elster, *Forces and Mechanism in the Constitution-Making Process*, 45 DUKE L.J. 364, 368-69 (1995). One recent study, which focused on only the 162 independent states with populations over 500,000, determined that 92 were democracies. MONTY G. MARSHALL & BENJAMIN R. COLE, GLOBAL REPORT 2009: CONFLICT, GOVERNANCE, AND STATE FRAGILITY (2009), available at <http://www.systemicpeace.org/Global%20Report%202009.pdf>. The most recent Freedom House report states that that there were 119 democracies in the world in 2009. *Electoral Democracies 2009*, FREEDOM HOUSE (2009), <http://www.freedomhouse.org/template.cfm?page=477&year=2009>. Most of the expansion has come since 1946, at which time there were only twenty democracies among the world's independent states; the most rapid increase has been since the end of the Cold War. MARSHALL & COLE, *supra*, at 11. It is not the case, of course, that all these democracies have constitutions or are "constitutional democracies," but a large percentage are. One of the most widely recognized databases and studies for the measurement of the degree of democracy among states is the Polity IV Project at the University of Maryland. See POLITY IV PROJECT, <http://www.systemicpeace.org/polity/polity4.htm> (last updated Sept. 9, 2010).

with governing which branch of government has the authority to initiate armed conflict or establish states of emergency requiring a military response. The separation of powers limits, as we saw earlier in the discussion of the English Bill of Rights, the U.S. Constitution, and the French Constitution of 1791, were the first constitutional provisions relating to the use of force to be developed. Such provisions do not, however, bear in any way on the legal justifications for engaging in armed conflict.

In contrast, the constitutional provisions comprising the second category, what we may call the “international law” class of constraints, are designed to implement or incorporate principles of international law relating to the use of force. It was not until the early twentieth century, when international law itself began to move towards limiting the recourse to war, that the first constitution articulated a prohibition on the use of force.¹⁵⁸ The first such constitution was the Constitution of the Philippines of 1935, which provided that the Philippines “renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation.”¹⁵⁹ Its inspiration was the Kellogg-Briand Pact for the renunciation of war clause, and provisions of the Weimer Constitution and the Constitution of Spain for the clause adopting generally accepted principles of international law.¹⁶⁰

In this sense, the Philippine Constitution of 1935 illustrated both the general (provisions that make international law as a whole the law of the land) and the particular (provisions that purport to implement very specific principles of international law) incorporation of international law. The general incorporation of international law is much

¹⁵⁸ The short-lived French Constitution of 1791 was ahead of its time, and the development of international law, in providing for individual criminal liability for complicity in executive decisions leading to acts of aggression.

¹⁵⁹ CONST. (1935), art. II, sec. 3 (Phil.) (translation from the Chan Robles Virtual Law Library of the Laws of the Philippines, available at <http://www.chanrobles.com/1935constitutionofthephilippines.htm>). For a helpful categorization of world constitutional provisions relating in some way to the use of force, see Nishi Osamu, *Sekai no genkōkenpō to heiwashugi jōko* [Pacifist Provisions of the World’s Modern Constitutions] (Feb. 2006), <http://www.komazawa-u.ac.jp/~nishi/Nishi-text/page001.htm> [hereinafter Nishi, *Pacifist Constitutions*]. Except in the cases of Germany, Italy, Japan, and the Philippines, citations to foreign constitutions in Part III.B reference translations from Axel Tschentscher, *International Constitutional Law—Countries*, INT’L CONST. L., <http://www.servat.unibe.ch/icl/index.html> (last updated Nov. 16, 2009).

¹⁶⁰ DIANE A. DESIERTO, FREEDOM AND CONSTRAINT: UNIVERSALISM IN THE PHILIPPINE CONSTITUTIONAL SYSTEM AND THE LIMITS OF EXECUTIVE PARTICULARIST POWER (forthcoming 2010) (manuscript at 130, 134) (on file with author) (citing DIE VERFASSUNG DES DEUTSCHEN REICHS [CONSTITUTION] Aug. 11, 1919, art. 4 (Weimer Ger.); CONSTITUCIÓN ESPAÑOLA, Dec. 9, 1931, art 7 (Spain)).

more common among modern constitutions. The Constitution of the United States, for instance, provides in Article VI that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”¹⁶¹ Similarly, the constitution of Japan, in Article 98(2), provides that “[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed.”¹⁶² But such general incorporation of international law, even in monist states, does not tend to operate in a manner that effectively constrains decision making on the use of armed force.¹⁶³ The incorporation of specific provisions of *jus ad bellum*, or promulgation of constitutional provisions that specifically address the decision making on the recourse to war, is far more likely to have a substantive influence on the decision to use armed force. This proposition is supported by the fact that the few states with constitutions that do have specific international law-based constraints on the use of force, as in the case of Japan, adopted such provisions in addition to general provisions incorporating international law into the domestic legal system. In considering the constitutional constraints on the use of force, therefore, the focus in our analysis here is on the incorporation of specific provisions of the *jus ad bellum* regime.

Compared to the development and spread of other constitutional principles in the last fifty years, particularly with respect to the elaboration of individual rights and the strengthening of such institutions as judicial review, there has been relatively little development with respect to these two types of constitutional provisions regarding the use of force (that is, the separation of powers type provision, and the specific incorporation of international law type provision). This is particularly so among the larger states that might be thought of as being most representative of the community of liberal democracies.¹⁶⁴

¹⁶¹ U.S. CONST. art. VI, cl. 2.

¹⁶² NIHONKOKU KENPŌ [CONSTITUTION], art. 98, para. 2 (Japan) (official translation from the Government Printing Office, available at <http://www.ndl.go.jp/constitution/e/etc/c01.html#s2>).

¹⁶³ For arguments on why Article VI and other provisions of the U.S. Constitution should be understood to require government compliance with international law principles on the use of force, see Jules Lobel, *International Law Constraints, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* 107-20 (Gary M. Stern & Morton H. Halperin eds., 1994).

¹⁶⁴ A complete and systematic study of the constitutions of all the democracies listed by either Freedom House or The Center for Systemic Peace Report has not been undertaken to ground this proposition. But a number of studies do support the claim.

Of the two types of provision, the separation of powers with respect to the decision to go to war is more common. Quite a number of the states that are most representative of liberal democracies have provisions that require legislative approval of a declaration of war, along the lines of the U.S. Constitution. For instance, France, Italy, the Netherlands, and Spain all have provisions that require that the government obtain legislative approval prior to a declaration of war.¹⁶⁵ The German Basic Law does not have any such explicit provision, but the Constitutional Court has interpreted the Basic Law as requiring the government to obtain legislative approval of any deployment of German forces for any “armed operation.”¹⁶⁶ A number of the constitutions of democracies among the so-called nonaligned group of nations, such as Brazil, Mexico, and India, similarly have provisions requiring legislative approval for the declaration of war or a state of emergency relating to the threat of war.¹⁶⁷ But even the apparent spread of this form of provision is somewhat misleading, for these provisions are typically ineffective in constraining unilateral executive decisions to use armed force. The operation of the provision in the United States itself illustrates the problem.

The United States Congress has only ever declared war five times since the Constitution was ratified.¹⁶⁸ Indeed, since the end of World War II, the declaration of war has virtually disappeared from state practice, which raises questions as to the current meaning and effect of constitutional provisions

See WOLFGANG WAGNER, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, PARLIAMENTARY CONTROL OF MILITARY MISSIONS: ACCOUNTING FOR PLURALISM (2006), available at <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=25262&nav1=5>; Nishi, *Pacifist Constitutions*, *supra* note 159.

¹⁶⁵ 1958 CONST. art. 35 (Fr.); Arts. 78, 87(9) Costituzione (It.); GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [CONSTITUTION] Feb. 17, 1983, art. 96 (Neth.); CONSTITUCIÓN ESPAÑOLA, art. 63, Oct. 26, 1978 (Spain).

¹⁶⁶ BUNDESVERFASSUNGSGERICHT [Federal Constitutional Court] July 12, 1994, 106 I.L.R. 320 (Ger.); *see also* Georg Nolte, *Germany: Ensuring Political Legitimacy for the Use of Military Forces by Requiring Constitutional Accountability*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 114, at 231 (providing analysis of the case).

¹⁶⁷ CONSTITUIÇÃO FEDERAL [CONSTITUTION] art. 49, para. II (Braz.); Constitución Política de los Estados Unidos Mexicanos, *as amended*, art. 73, para. 12, art. 89, para. 8, Diario Oficial de la Federación, 5 de Febrero de 1917 (Mex.); INDIA CONST. arts. 352, 353.

¹⁶⁸ They are the War of 1812, the Mexican-American War of 1846, the Spanish-American War of 1898, and World Wars I and II. For a complete history of the war powers, and the authority under which armed force has been employed by the United States throughout history, see FISHER, *supra* note 116. For a brief overview, see JAMES A. BAKER, III & WARREN CHRISTOPHER, MILLER CTR. OF PUB. AFFAIRS, NATIONAL WAR POWERS COMMISSION REPORT 11-19 (2009).

granting authority to legislators to declare war. There is a robust and long-standing debate in the United States over the exact meaning of the war powers provisions of the Constitution. The better argument would seem to be that the clear intention and understanding at the time of drafting and ratification was that the executive would have to obtain Congressional approval for the initiation of any armed conflict.¹⁶⁹ But there is a loud lobby in favor of the position that the provision is limited quite literally to declarations of war and the issuance of letters of marque and reprisal, and since the initiation of armed conflict is no longer characterized by any of the those acts, the provision has become an anachronism.¹⁷⁰ More importantly, the practice of the executive has been ambiguous at best, with virtually every president since Truman arguing that he was not required to obtain Congressional approval to use force.¹⁷¹ Many of them have done so in any event, but many significant actions have been undertaken without Congressional approval, such as the Korean war, aspects of the operations against Laos and Cambodia during the Vietnam war, the invasions of Grenada and Panama, the bombing of Libya in 1986, and the NATO air-war against the Serbs in the Kosovo war of 1999. The War Powers Act of 1973 was enacted (over the veto of President Nixon) for the very purpose of trying to reestablish Congressional authority over the use of force, but it has been utterly ignored by every president since its enactment, to the detriment of the rule of law in the United States.¹⁷²

Similarly, notwithstanding the requirement under Article 35 of the Constitution of the Fifth Republic that a

¹⁶⁹ JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* ch. 1 (1993); FISHER, *supra* note 116, at ch. 1.

¹⁷⁰ See, e.g., JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242-52 (1996). Curtis Bradley and Jack Goldsmith have recently made the interesting and persuasive argument that declarations of war in the context of the U.S. Constitution should be understood to serve a different purpose from congressional approval of the use of force, and that the latter is also required regardless of whether there has been a declaration of war. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057-61 (2005).

¹⁷¹ The administration of Jimmy Carter was the only one since World War II that did not actually engage in the use of armed force, if one does not count the failed mission to rescue the U.S. Embassy personnel being held hostage in Iran as a use of force.

¹⁷² BAKER & CHRISTOPHER, *supra* note 168, at 24-25; ELY, *WAR AND RESPONSIBILITY*, *supra* note 169, at 48-49; see also War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)).

declaration of war must be authorized by the legislature, the executive in France has in practice almost exclusive control over the use of force. In particular, the President is both the Commander-in-Chief and the member of the executive upon whom rests constitutional responsibility for guaranteeing “national independence, the integrity of the territory and observance of Community agreements, and of treaties.”¹⁷³ As such, he is able to initiate the use of armed force without any involvement of the National Assembly.¹⁷⁴ This was most recently illustrated in the process by which France decided to contribute forces to the Gulf War in 1991, and again in its involvement in Rwanda in 1994.¹⁷⁵ As in the American case, this is largely because the clause “declaration of war” in Article 35 has been interpreted in a very restrictive manner.¹⁷⁶ The experiences of both Italy and Spain are virtually the same, with the constitutional requirement to obtain legislative approval for declarations of war having been interpreted to mean that no legislative involvement is necessary for military actions taken in the absence of a declaration of war.¹⁷⁷

A study by Wolfgang Wagner of the Geneva Centre for the Democratic Control of Armed Forces (the “Geneva Study”) examined the legal systems of the twenty-six states that were both members of the Organization for Economic Co-operation and Development (OECD) (and thus economically well developed), and were in the highest rank of democracies in the POLITY IV database (and thus the most representative of liberal democracies).¹⁷⁸ Of the twenty-six states, only eight ranked as having a high degree of parliamentary control over the use of force, of which four were neutral states. These include the small handful of macrostate democracies that have constitutional provisions that require legislative approval for the use of force regardless of a declaration of war. Most notably, the constitutions of both Denmark and Sweden include

¹⁷³ 1958 CONST. arts. 5, 15 (Fr.).

¹⁷⁴ Yves Boyer et al., *France: Security Council Legitimacy and Executive Primacy*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 114, at 289-90; *see also* Elisabeth Zoller, *The War Powers in French Constitutional Law*, 90 AM. SOC'Y INT'L L. PROC. 46 (1996).

¹⁷⁵ Boyer, *supra* note 174, at 290-91.

¹⁷⁶ Zoller, *supra* note 174, at 49.

¹⁷⁷ WAGNER, *supra* note 164, at 45, 52. *See* Art. 78 Costituzione (It.); CONSTITUCIÓN ESPAÑOLA, art. 63, para. 3, Oct. 26, 1978 (Spain). But *see* discussion *infra* note 195 and accompanying text, on new legislative constraints in Spain, which were passed in response to the prior government's policy of support for the invasion of Iraq in 2003.

¹⁷⁸ For more on the POLITY IV database *see supra* note 157.

provisions that blend a requirement for legislative approval with international law concepts of self-defense from the modern *jus ad bellum* regime. Section 19(2) of the Danish Constitution provides that “[e]xcept for the purposes of defence against an armed attack upon the Realm or Danish Forces the King shall not use military force against any foreign state without the consent of the Parliament.”¹⁷⁹ The Constitution of Sweden provides that the government may only commit the armed forces to battle if the parliament has assented, it is permitted by law, and there is an obligation to take such action under some treaty which as been approved by parliament—but the government may unconditionally use the armed forces to repel an armed attack on the country.¹⁸⁰

Similarly, the Constitution of Ireland, which like Sweden and Denmark maintains a defense policy grounded in the concept of neutrality, provides that “[w]ar shall not be declared and the State shall not participate in any war save with the assent of the House of Representatives,” with the proviso that in the event of invasion the government may take necessary steps until the House of Representatives can be convened.¹⁸¹ Another handful of states have constitutional provisions that require some level of “consultation,” but not the prior approval of parliament for the deployment of armed forces. These include the very recent amendments to the Constitution of the Netherlands, which increased the level of legislative consultation, and amendments to the Constitution of Hungary that actually reduced the level of parliamentary control.¹⁸²

In contrast to these examples of varying levels of constitutionally-mandated legislative control, there are of course many major liberal democracies that do not have any constitutional requirement that the legislature be involved in the decision to go to war. Leading the list is the United Kingdom, which is perhaps ironic given that it is where we saw the first developments of mechanisms designed to achieve some legislative check on the executive’s ability to use force. The

¹⁷⁹ DANMARKSRIGES GRUNDLOV [CONSTITUTION] June 5, 1953, sec. 19, para. 2 (Den.).

¹⁸⁰ REGERINGSFORMEN [CONSTITUTION] 10:9(1) (Swed.).

¹⁸¹ IR. CONST., 1937, art. 28, paras. 3.1, 3.2.

¹⁸² A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] Aug. 20, 1949, *as amended*, art. 19 (Hung.); GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [CONSTITUTION] Feb. 17, 1983, *as amended*, art. 100 (Neth.). The amendments to the Constitution of Hungary were largely a result of the accommodation seen as necessary for participation in NATO operations when it joined NATO in 1999. *See* WAGNER, *supra* note 164, at 44.

decision to use force or go to war falls under the Royal Prerogative, which in the common law is defined as the residue of discretionary power left in the hands of the Crown, as exercised by the cabinet.¹⁸³ While parliament has been given the opportunity to debate the issue of pending armed conflict in advance of such recent engagements as the Gulf War and the Kosovo operations, the government has never put the decision in the hands of parliament in the form of a substantive resolution requiring a vote of approval, and in many instances the decision has been made without any consultation of parliament.¹⁸⁴ The same is true of other commonwealth countries such as Canada and Australia, which similarly operate under the Royal Prerogative.¹⁸⁵

The second form of provision—that is, the kind of provision that incorporates international law constraints on the use of force—is even less common. There are only a small handful of macrostate democracies that have provisions that could be classified within this category. For obvious historical reasons the three former Axis Powers lead this group. Both Italy and Germany have provisions that explicitly prohibit engaging in wars of aggression. More precisely, Article 11 of the Italian Constitution provides,

Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for settling international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order

¹⁸³ Council of Civil Serv. Unions & Others v. Ministers of Civil Serv., [1985] A.C. 374 (H.L.) 398 (Lord Fraser of Tullybelton).

¹⁸⁴ See CLAIRE TAYLOR, HOUSE OF COMMONS LIBRARY, ARMED FORCES (PARLIAMENTARY APPROVAL FOR PARTICIPATION IN ARMED CONFLICT) BILL, 2005-06, H.C. Research Paper 05/56 (U.K.); SELECT COMMITTEE ON PUBLIC ADMINISTRATION, TAMING THE PREROGATIVE: STRENGTHENING MINISTERIAL ACCOUNTABILITY TO PARLIAMENT, 2003-04, H.C. 422 (U.K.) [hereinafter TAMING THE PREROGATIVE]; MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN—ANALYSIS OF CONSULTATIONS 75-89 (2008); PAUL BOWERS, HOUSE OF COMMONS LIBRARY, PARLIAMENT AND THE USE OF FORCE, 2003-04, H.C. Standard Note SN/LA/1218. See generally Nigel White, *The United Kingdom: Increasing Commitment Requires Greater Parliamentary Involvement*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 114.

¹⁸⁵ See MICHEL ROSSIGNOL, LIBRARY OF PARLIAMENT OF CANADA, INTERNATIONAL CONFLICTS: PARLIAMENT, THE NATIONAL DEFENCE ACT, AND THE DECISION TO PARTICIPATE (Background Paper BP-303E 1992), available at <http://www2.parl.gc.ca/content/lop/researchpublications/bp303-e.htm>; Deidre McKeown & Roy Jordan, *Parliamentary Involvement in Declaring War and Deploying Forces Overseas*, PARLIAMENT AUSTL. (Mar. 22, 2010), <http://www.aph.gov.au/library/pubs/BN/pol/ParliamentaryInvolvement.htm>. For a concise comparative review of the parliamentary control of military operations in all OECD countries, see generally WAGNER, *supra* note 164.

ensuring peace and justice among the Nations. Italy promotes and encourages international organizations furthering such ends.¹⁸⁶

Article 26(1) of the German Basic Law provides that: “Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for war of aggression, shall be unconstitutional. They shall be made a punishable offence.”¹⁸⁷

The German Basic Law also includes a provision authorizing German participation in international collective security organizations.¹⁸⁸ Thus, both the German and Italian constitutions prohibit uses of force that would constitute acts of aggression, but they also provide the authority for the use of force pursuant to Security Council authority under Chapter VII of the U.N. Charter. Article 9 of the Constitution of Japan on the other hand prohibits any use of force beyond that necessary for individual self-defense (or even for individual self-defense, depending on the interpretation), and the denial of all rights of belligerency.¹⁸⁹

In addition to the three former Axis Powers, the Constitution of the Philippines of 1935 had a similar renunciation of war provision, and that language has been retained in the Constitution of 1987.¹⁹⁰ There are a small

¹⁸⁶ Art. 11 Costituzione (It.) (translation from Senato della Repubblica, the Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communications, *available at* http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

¹⁸⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW) [CONSTITUTION] art. 26, para. 1 (Ger.) [hereinafter GERMAN BASIC LAW] (official translation published by the German Bundestag, Public Relations Division, *available at* <https://www.btg-bestellservice.de/pdf/80201000.pdf>).

¹⁸⁸ *Id.* art. 24, para. 2.

¹⁸⁹ Article 9 of the Constitution of Japan, in full, provides as follows:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

NIHONKOKU KENPŌ [CONSTITUTION], art. 9 (Japan). For my analysis of the provision, see Martin, *Binding the Dogs of War*, *supra* note 127, at 268.

¹⁹⁰ “The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.” CONST. (1987), art. II, sec. 2 (Phil.) (translation from the Chan Robles Virtual Law Library of the Laws of the Philippines, *available at* <http://www.chanrobles.com/philsupremelaw1.htm>).

number of other countries, such as South Korea, Hungary, and Azerbaijan, which also have provisions renouncing aggressive war or war as a means of settling international disputes.¹⁹¹ The constitution of Sweden provides that the government may authorize the use of force “in accordance with international law and custom to prevent a violation of Swedish soil.”¹⁹² And, as touched on above, the constitutions of Denmark and Sweden require increased parliamentary involvement for decisions relating to the use of force that do not effectively meet the test for self-defense in international law. But taken together this entire group of democracies, those that incorporate in some fashion the principles of *jus ad bellum* or otherwise impose conditions with respect to the kind of force that can be used or the basis for going to war, remains a small minority among all macrostate democracies.

This may not strike some as altogether surprising, until it is considered in the context of the broader phenomenon of convergence between international and domestic legal systems. In the last sixty years there has been an ever-increasing level of incorporation or implementation of international law within the domestic legal systems of all the countries of the world.¹⁹³ The incorporation of international human rights law within the constitutions of democracies is only one of the more marked aspects of that process, but the rules, principles, standards, and norms from most of the major international law regimes, from intellectual property and environmental law to international investment and finance law regimes, are being implemented domestically. As will be discussed below in Part IV, such domestic implementation and the increasing integration of the domestic and international legal regimes is considered essential for the purposes of enhancing compliance with the international law regimes in question. And so it is indeed anomalous that the principles of the *jus ad bellum*

¹⁹¹ CONST. (1999), art. 9, para. II (Azer.); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] Aug. 20, 1949, *as amended*, art. 6 (Hung.); CONST. (1962), 68 (Kuwait); 1948 DAEHAN MINKUK HUNBEOB [CONSTITUTION] art. 6 (S. Kor.). For translations, see Tschentscher, *supra* note 165.

¹⁹² REGERINGSFORMEN [CONSTITUTION] 10:9(3) (Swed.).

¹⁹³ See, e.g., Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211 (1998); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006) [hereinafter Ginsburg, *Locking in Democracy*]; Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 VIENNA ONLINE J. INT'L CONST. L. 170, 174 (2009).

regime, which form the central purpose of the U.N. system, find so little domestic expression.

Thus far we have been primarily considering the absence of constitutional constraints. There remains the question of whether liberal democracies may have nonetheless developed a range of sophisticated statutory regimes for the purpose of controlling the decision making on the use of force. The War Powers Act in the United States is, on its face, a perfect example, though as already discussed, that legislation has been entirely ineffective. A more comprehensive comparative analysis would have to be undertaken to answer this conclusively, but existing studies suggest that there is little effective statutory control in the most representative Western liberal democracies over the decision to deploy armed forces or engage in armed conflict.¹⁹⁴

Beginning with the separation-of-powers-type controls, the Geneva Study of twenty-six liberal democracies found that among the handful of states that were characterized by high or medium levels of legislative control, there were very few in which that control was primarily statutory, or in which legislation played a significant role at all.¹⁹⁵ At the other end of the spectrum, there are many of the most representative liberal democracies that have virtually no statutory provisions governing legislative involvement on decisions to use armed force, or limiting the executive powers in that regard. This group includes the United Kingdom and most of its former dominions.¹⁹⁶ Moreover, with respect to the second form of

¹⁹⁴ See generally DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 114; ROSSIGNOL, *supra* note 185; McKeown & Jordan, *supra* note 185; sources cited *supra* note 184. See generally WAGNER, *supra* note 164.

¹⁹⁵ In Finland, while the Constitution itself is silent on parliamentary involvement in military deployments short of war, a "Peacekeeping Act" passed in 1984 and revised in 2001 requires the government to obtain approval from the legislature's Foreign Affairs Committee. WAGNER, *supra* note 164, at 41. Spain, until very recently, had almost no legislative involvement in the decision to use force, but passed new laws in 2005 in response to the prior government's contribution to the invasion of Iraq in 2003. *Id.* at 52-53. Italy passed a law in 1997 providing that parliament was to approve all decisions of the government on defense and security matters involving the deployment of armed forces prior to their implementation. This law has been rendered largely ineffective by the government practice of employing emergency decrees pursuant to Article 77 of the Italian Constitution, and the issue has not yet been resolved by the legislature. *Id.* at 45-46. In Germany, new legislation was recently introduced to implement the constitutional requirement for parliamentary control that had been mandated by the Constitutional Court in the 1994 judgment on German participation in the Bosnia mission. *Id.* at 42-43; see *supra* note 166 and accompanying text.

¹⁹⁶ In Canada, the National Defence Act prescribes how and when the Canadian Forces can be placed on "active service." The Act includes requirements for

constraint, there are virtually no statutory schemes in the most representative democracies that either incorporate international law principles or similarly limit the conditions under which the government may use force.¹⁹⁷ And, as we have seen, there are very few countries that have constitutional provisions that provide such limits.

Indeed, the interesting observation that emerges from this examination of the large representative democracies is that there appears to be a correlation between the existence of constitutional provisions governing the decision to use force or deploy armed forces, and the establishment of underlying legislation implementing or supplementing such principles. Where there are no constitutional provisions, there tends to be no legislation governing the issue either. Having said all that, there have been very recent developments that suggest an increasing desire on the part of many legislatures to enhance the legal constraints on the use of armed force, particularly in terms of increasing parliamentary involvement in the decision to deploy forces and engage in armed conflict. In the United States, the War Powers Act Commission has revived the debate over the effectively defunct War Powers Act, and it has proposed new draft legislation.¹⁹⁸ In the United Kingdom there were parliamentary committee hearings after the invasion of Iraq on the issue of reducing the scope of the Royal Prerogative, and in particular increasing parliamentary involvement in the decision to use armed force, and draft legislation was produced.¹⁹⁹ There have been similar movements in Australia²⁰⁰ and France,²⁰¹ and some debate on the issue in Canada.²⁰²

A final point to be made about statutory controls is that they are far less effective as controls over the decision to use

notice to parliament, but, despite the terminology, this is not determinative of when the armed forces can be sent into action. That remains within the exclusive discretion of the executive. National Defence Act, R.S.C. 1985, c. N-5, para. 31; *see* ROSSIGNOL, *supra* note 185, at 13-17.

¹⁹⁷ *See generally* WAGNER, *supra* note 164.

¹⁹⁸ *See, e.g.*, BAKER & CHRISTOPHER, *supra* note 168, at 6.

¹⁹⁹ *See* MINISTRY OF JUSTICE, *supra* note 184, at 79; TAYLOR, *supra* note 184, at 13. The draft legislation is annexed to TAMING THE PREROGATIVE, *supra* note 184, at 31.

²⁰⁰ McKeown & Jordan, *supra* note 185, at 1.

²⁰¹ Boyer, *supra* note 174, at 290-91.

²⁰² On the development of a practice of parliamentary debate, *see generally* ROSSIGNOL, *supra* note 185. On the decisions relating to the contribution of Canadian forces and the extension of their deployment in Afghanistan, *see* JANICE GROSS STEIN & EUGENE LANG, *THE UNEXPECTED WAR: CANADA IN KANDAHAR* ch. 13 (2007) (discussing increased pressure for parliamentary debate on the decision to extend the mission in 2006).

armed force than are constitutional constraints. This is illustrated by the sad history of the War Powers Act in the United States, and the operation of the recent legislation in Italy.²⁰³ The War Powers Act has its own particular problems, with claims that some of its provisions are unconstitutional, and so is perhaps not the best example.²⁰⁴ But as we will see in Part IV, there are several arguments that legal constraints on the use of force, either statutory or constitutional, would not be respected or obeyed in times of crisis. While I will argue below that such claims are overstated, it has to be said that they would be much stronger when directed at mere statutory controls. Legislation is more vulnerable to being ignored or subverted in times of crisis, which is one reason that the focus of this study has been primarily upon constitutional provisions.

There are several points that emerge from this historical and comparative review that are significant. First, there is the insight that up until the nineteenth century the legal constraints on the resort to war in Europe were understood to operate at both the level of the international system governed by the new law of nations, and the domestic level that continued to be subject to legal systems founded in natural law. But after a hiatus in the nineteenth century there emerged in international law a more robust *jus ad bellum* regime in the latter half of the twentieth century, which has become the primary legal approach to limiting the use of armed force. Notwithstanding early developments in constitutional constraints and the remarkable spread of constitutional democracy in the last forty years, there is very little domestic legal control over the decision to engage in armed conflict. And notwithstanding the considerable and ever-increasing implementation within domestic legal systems of constitutional democracies of the international law relating to virtually all major areas of regulation, there is a remarkable absence of domestic incorporation or implementation of the principles of the *jus ad bellum* regime, the very core of the modern international law system. As such, the domestic causes of war are not sufficiently engaged by the national legal systems of liberal democratic states.

²⁰³ On the operation of the Italian legislation, see *supra* note 195.

²⁰⁴ BAKER & CHRISTOPHER, *supra* note 168, at 23.

IV. THEORETICAL SUPPORT FOR CONSTITUTIONAL CONSTRAINTS ON THE USE OF FORCE

Having looked at the causes of war and the historical development of the legal constraints on the use of armed force, we now turn to the theoretical arguments that can be marshaled in support of the proposed Model. It will be recalled that the Model is designed to address the insufficient compliance with the international law regime and the weakness in domestic-level legal constraints. As will be described in detail in Part V, the Model comprises three elements, which would: (1) require decision makers to adequately consider compliance with international law principles from the *jus ad bellum* regime; (2) require that the executive obtain legislative approval of decisions to use armed force above a specified threshold level; and (3) provide jurisdiction and broad standing for a limited judicial review of the decision-making process. This part of the argument will explore how the Model is supported by a number of theoretical perspectives in both international law and constitutional law. Indeed, while the Model may seem somewhat radical or idealist at first glance, I will explain how the elements of the Model flow logically from a number of these established theories. Moreover, it will be argued that the elements of the Model would operate to not only fulfill the objectives of each of these theories as applied to the specific problem of armed conflict, but also that they would do so in a manner that would engage the causes of war at each of the three levels, within the domestic and the international realms.

A. *International Law and Modern Theories of Compliance*

We begin with theories from international law that support the Model. We are primarily concerned with those theories from international law that attempt to explain, and make normative claims regarding, those features of domestic systems that enhance compliance with international law. Part of the objective of the Model is, after all, to increase compliance with the *jus ad bellum* regime. It turns out, as we will see, that many of those theories focus on, from varying perspectives and for differing reasons, the importance of the incorporation of international law into domestic law. This of course relates most to the element of the Model that calls for incorporation of *jus ad bellum* principles. But we will see that there are some

aspects of these theories that also support the separation of powers elements of the Model.

Before launching into an exploration of the theories, however, a few words are necessary regarding the assumptions of this part of the argument. We start from the proposition that while the members of the international society rely almost exclusively on the international legal system to limit the use of force, the permissiveness of that system is considered to be a fundamental cause of war. International law is thus insufficiently effective to prevent the incidence of unlawful uses of armed force. Many realists in international relations would of course argue that this is because international law is not really law at all, and that it is virtually irrelevant to the issues of war and peace. This view, that international law is neither law properly so called, nor any meaningful constraint on state conduct in the realm of armed conflict (at least in terms of *jus ad bellum*), coupled with the related normative arguments that international law ought not to influence rational decisions regarding the use of force in accordance with “reason of state” imperatives, is obviously the subject of great debate.²⁰⁵

The argument I am advancing in support of the proposed Model does not rest upon any specific theory of international law.²⁰⁶ It does, however, assume that international law constitutes a legitimate legal system and that it operates with some degree of effectiveness. This does not require the embrace of a robust liberal theory of international law. We can take as a

²⁰⁵ George Kennan was one of the most famous and vociferous critics of allowing international law considerations to cloud judgment on foreign policy decision making, criticizing such a “legalistic-moralistic approach to international problems” and “the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints.” GEORGE F. KENNAN, *AMERICAN DIPLOMACY* 95 (expanded ed. 1984). For more recent questioning of the effectiveness of international law, see GOLDSMITH & POSNER, *supra* note 72. For a good review of the history and development of aspects of the debate, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997) [hereinafter Koh, *Why Do Nations Obey?*] (review essay of ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)), and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995). For one of the seminal works on the effectiveness and legitimacy of international law, see HENKIN, *HOW NATIONS BEHAVE*, *supra* note 44. For a more detailed analysis of the various theoretical perspectives on compliance with international law, including an examination of the philosophical foundations of each, see MARKUS BURGSTALLER, *THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW* (2005).

²⁰⁶ Again, for a good review of the various contending theories of international law, see Koh, *Why Do Nations Obey?*, *supra* note 205. On theories of compliance with international law, see BURGSTALLER, *supra* note 205, which includes a critique of each of the current theories of international law compliance, including Koh's.

minimum position the perspective of “liberal-realists” such as Hedley Bull, whose perspective we reviewed earlier. Liberal-realists accept that international law operates sufficiently in accordance with Hart’s concept of law, and that international law is generally observed to a sufficient degree to justify that it be both recognized as law properly so called, and understood to be a substantial factor in the operation of the international system.²⁰⁷ Bull argues that international law functions to identify the very idea of a society of sovereign states as a fundamental normative ordering principle, in addition to functioning as the source of basic rules of coexistence among those state actors—primarily rules relating to the constraint of violence, agreements among states, and rules on the sovereignty and independence of states—and, finally, operating as a mechanism to mobilize compliance with those rules.²⁰⁸

While the liberal-realists accept that international law is effective, however, they also argue that there are limitations in its efficacy. Thus, while it may be, as Louis Henkin has famously observed, that most nations follow international law most of the time,²⁰⁹ Bull argues that it is not necessarily the case that they do so primarily out of respect for the law. International law is a “social reality” to the extent that there is a high degree of conformity, but it does not follow that international law is therefore a powerful constraint on state action.²¹⁰ Apparent obedience, or conformity with the principles

²⁰⁷ BULL, *supra* note 70, at 128-31. While Bull acknowledges that Hart himself found that international law lacked several of the essential characteristics of “secondary rules,” which are in turn necessary for a true system of law, Bull writes that Hart did not thereby conclude that international law was therefore not law. *Id.* at 135. Thomas Franck also argued that, notwithstanding Hart’s own conclusions, international law did in fact have secondary rules so as to conform to Hart’s conditions for a true legal system. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 187 (1990). *But see* Koh, *Why Do Nations Obey?*, *supra* note 205, at 2616 (“Until actors within the international system internalize both a rule or recognition and secondary rules for orderly change and interpretation, Hart argued, international law will consist only of a set of primary rules with which nations will comply out of a sense of moral, not legal, obligation.”). While Hart does conclude that the analogy between international law and municipal law is apt in terms of function and content, but not in relation to form, he does nonetheless appear to accept Bentham’s argument that the analogy is essentially close enough to constitute law. H.L.A. HART, *THE CONCEPT OF LAW* 231 (1961).

²⁰⁸ BULL, *supra* note 70, at 134-35.

²⁰⁹ HENKIN, *HOW NATIONS BEHAVE*, *supra* note 44.

²¹⁰ BULL, *supra* note 70, at 133. For an echo of this argument see GOLDSMITH & POSNER, *supra* note 72, at 7-9 (though they go much further, arguing that not only is international law explicable in terms of state interests, but that any state preference to comply with international law will be trumped by other interests and preferences to the extent they are inconsistent with the international law norms).

of international law, may be a consequence of various factors, including inertia, a belief that the actions required by the law in fact conform to state interests, or that compliance will result in the beneficial reciprocal acts by other states, or finally, by the coercive power exerted by other states requiring compliance. As Bull puts it, “the importance of international law does not rest on the willingness of states to abide by its principles to the detriment of their interests, but in the fact that they so often judge it in their interests to conform to it.”²¹¹

This conception of international law is not being advanced here as correct or the one upon which this Model is based, but as a moderate realist position it can serve as a starting point for our analysis. If one can at least accept that minimum position regarding the legitimacy and operation of international law, then the premises of this part of the argument in support of the Model ought to be accepted as valid: that international law is a legitimate legal system that is at least somewhat effective; that international law is not, however, *sufficiently* effective, and this is one of the causes of illegitimate armed conflict; and that greater compliance with the principles of the *jus ad bellum* regime would therefore help to reduce the incidence of such armed conflict. For those more extreme realists who dismiss international law as being neither law nor relevant to international relations, and who moreover think that the internal structures of countries are of little significance in explaining the incidence of armed conflicts among states,²¹² then quite obviously the arguments being advanced here will be entirely unpersuasive. There is not room here to review that entire debate, and there would be little point in doing so. On the other hand, the premises are of course consistent with more robust liberal theories of international law and international relations, but it is not necessary to embrace those theories in order to endorse the arguments here. The point is that acceptance of the liberal-realist understanding as a minimum position is sufficient to ground my argument.

I now turn to those theories of international law compliance that provide descriptive and normative arguments regarding how domestic implementation of international law principles and rules is crucial to enhancing compliance with the international law system. There are a number of strands among

²¹¹ BULL, *supra* note 70, at 134.

²¹² See *supra* notes 71-73 and accompanying text.

the general theory that domestic incorporation is crucial to the enhancement of compliance with international law regimes. We begin with transnational legal process theory. In considering the question of compliance, this theory focuses on the question of how obedience with international law is actually mobilized. Obedience is understood to mean the internalization of norms such that the actor comes to habitually comply with the norm out of some sense of obligation and acceptance of its legitimacy.²¹³ The theory explains such obedience in part by reference to the complex interaction between the international and the domestic systems—the “transnational legal process”—which operates through various mechanisms and institutional points of entry. The process is developed through an iterative interaction between actors at the domestic and international levels, with an ongoing interpretation of the norms according to which such interaction is conducted, which over time results in the internalization of those norms within the domestic system. Harold Koh actually refers to Waltz’ theory of the three Images of the causes of war as an analogy for the three levels at which the transnational process plays out, and similarly argues that all three levels are important to the overall understanding of compliance.²¹⁴

Norms can be “internalized” through actual incorporation into the legal system, either via legislation or judicial judgment, or they can work their way into the political process through executive action. The norms then become part of institutional standard operating procedures, or policy norms, thereby developing to form the fabric of institutional identity, and domestic decision makers gradually become “enmeshed” in the international norms. Indeed, over time, when fully internalized the norm can reconstitute national identity and the perception of state interests.²¹⁵ This internalization of international law norms through ongoing domestic application and interpretation is the key to compliance, because the norms over time become part of the fabric of the domestic legal system, and often develop into strong constitutive norms with the power to shape domestic policy.²¹⁶ The incorporation into the Constitution of Japan of the international law prohibition on the use of armed force resulted

²¹³ Koh, *Why Do Nations Obey?*, *supra* note 205, at 2616, 2645-46; *see also* HART, *supra* note 207, at 51-61 (discussing the complexities of the notions of “obedience” and “habit”).

²¹⁴ Koh, *Why Do Nations Obey?*, *supra* note 205, at 2649.

²¹⁵ *Id.* at 2654-55.

²¹⁶ *Id.* at 2634, 2655.

in the development of powerful constitutive norms, providing an excellent illustration of this process.²¹⁷

The kind of vertical strategies characteristic of transnational legal process theory are most likely to be effective in enhancing compliance with regimes in which the enforcement mechanisms are weak, but the core customary and treaty norms are clearly defined and mandatory²¹⁸—which, it may be argued, exactly describes the *jus ad bellum* regime. The techniques suggested for facilitating the process itself include the development of strategies for better internalizing the norms that are targeted for support, and, in particular, seeking to find ways to effect such internalization at each of the social, political, and legal levels of the domestic system. By achieving a high level of social internalization, the norm develops such public legitimacy that there is widespread pressure for obedience to it, while political internalization refers to the embrace or acceptance of the norm by the political elites.²¹⁹ The Model's proposed incorporation of the principles of *jus ad bellum* into the constitutions of liberal democracies would constitute legal internalization of the norm, and as reflected in the Japanese experience, such constitutional incorporation can in turn mobilize powerful social and political internalization.²²⁰ This internalization of the international law norms would enhance compliance with the underlying international law rule in a manner that arguably engages the Image III causes of war. But given how it gets woven into the fabric of national values and socio-political norms, such an internalization will also operate in a manner that would engage the domestic causes of war. This will become more clear when we consider it in conjunction with aspects of liberal theories of international law compliance, to which we turn next.

²¹⁷ The international law norm incorporated in Article 9 of the Constitution of Japan (the war-renouncing provision) was "reinterpreted" and embraced by various institutions within the domestic legal and political systems, and over time became the source of powerful constitutive norms that mobilized powerful support for the constitutional provision itself, and consequently the underlying international law norm, in a manner that effectively shaped national policy. Martin, *Binding Dogs of War*, *supra* note 127, at 304, 334-35.

²¹⁸ Koh, *Why Do Nations Obey?*, *supra* note 205, at 2655 (using the term "peremptory" rather than mandatory, but noting nevertheless that he is referring to *jus cogens*).

²¹⁹ *Id.* at 2656-57.

²²⁰ PETER J. KATZENSTEIN, *CULTURAL NORMS & NATIONAL SECURITY* 112 (1996); see also Martin, *Binding Dogs of War*, *supra* note 127, at 304, 334-35.

The second strand we rely on here is liberal theories of international law compliance. This approach also focuses on the domestic level, both for explanations of why states comply with international law and as the subject for normative arguments regarding how such compliance can be enhanced. Consistent with the liberal theory of the causes of war, liberal theories of international law compliance suggest that it is not so much the international system that determines state action, but rather it is the domestic actors within the state that dictate how the state behaves within the international society.²²¹ Theorists such as Anne-Marie Slaughter emphasize the importance of understanding the interaction of the numerous actors within the domestic socio-political-legal system that combine to shape the configuration of state preferences. Liberal theories of international law compliance claim that it is these domestic level preferences, which in aggregated form represent the individual interests and preferences of the dominant actors within the domestic polity at any given moment, that are the primary influence on shaping the state's foreign policy.²²²

Because the government of the state represents and is responsive to a particular mix of dominant entities and groups within the domestic society, the formulation of foreign policy by the government will be influenced by the interests and preferences of these domestic elements. Indeed, the state's preferences and policies will change as the configuration of these domestic entities change and there are shifts in power among domestic political arrangements. Moreover, it is not only the interaction within the state, but also the interaction between internal state actors among different states—especially other liberal democratic states—forming multilevel networks that are increasingly important in explaining state behavior.²²³

From a normative perspective, liberal international legal theory proponents argue that in order for international law objectives to be met, and to increase compliance with the international legal order, mechanisms have to be developed to increase the influence of international law on domestic

²²¹ See generally BURGSTALLER, *supra* note 205, at 165-79; Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

²²² BURGSTALLER, *supra* note 205, at 165-79; Slaughter, *International Law in a World of Liberal States*, *supra* note 221, at 508.

²²³ BURGSTALLER, *supra* note 205, at 174 (citing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 509 (2004)).

institutions. This can be achieved by directly strengthening those institutions through some form of incorporation, back-stopping them through such mechanisms as the principle of complementarity in the International Criminal Court treaty (which acts as a catalyst to state action by threatening international law intervention in the absence of domestic action), or by finding the leverage to compel the institutions to act in compliance with international law.²²⁴ The effectiveness of international law in dealing with evolving transnational threats to peace and security are identified in liberal theory of international law compliance as particularly requiring the mobilization of domestic institutions.²²⁵

There are different strands in liberal theory of international law compliance regarding how exactly domestic actors and institutions operate to determine the manner in which states act within the international system.²²⁶ Two of them in particular are highly relevant to the manner in which the Model would operate to increase compliance with the *jus ad bellum* regime. The first, which has been termed the “ideational” strand, focuses on the manner in which the individual interests and preferences, which form the basis of the aggregated state preferences, are generated and shaped, particularly by forces of social identity.²²⁷ The domestic legitimacy of policy, including foreign policy, will be fundamentally determined by the operation of a number of elements that exercise powerful influences on social identities within the state. The characteristics of ideology that help shape the commitment of domestic groups and organizations to specific institutions are the most important for our purposes. Variations and shifts in domestic “perceptions of domestic political legitimacy translate into patterns of underlying preferences,” which in turn influence the foreign policy that is representative of dominant domestic shared preferences and interests.²²⁸ Thus, for example, the struggle in the United States during the last decade over the question of whether torture or other forms of cruel, inhuman, or degrading treatment could ever be consistent with American values and the rule of law

²²⁴ Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006).

²²⁵ *Id.* at 343.

²²⁶ BURGSTALLER, *supra* note 205, at 169.

²²⁷ *Id.*

²²⁸ *Id.* at 170.

represented such an ideational conflict that could in turn have an effect on foreign policy. The successful incorporation and internalization of the international law principles on torture would in turn influence the development of ideational norms that would in turn shape that policy.

The republican liberal theory—the second important strand or variation of the liberal theory—flows naturally from the Kantian roots that have already been reviewed. From this perspective the emphasis is not on how the domestic preferences are formed, as in the ideational strand, but on the manner in which the institutions and political structures operate in response to those preferences.²²⁹ That is, in how the domestic institutions privilege some preferences and discount others in a process that results in the development of a policy that represents an aggregation of the interests and preferences of some particular combination of domestic actors.²³⁰ True to Kant and Madison, the nature of domestic political representation is central to this strand of the theory.

The form of representation, which of course relates to the structure of the state and Image II causes of war, will help determine who within the polity is most represented and how much political leverage the represented groups have over their agents within government. The more “biased” a structure is, in terms of it being representative of narrow interests, the more vulnerable it is to “capture” by those interests in the formulation of foreign policy. Conversely, the more broadly representative the decision-making bodies are in the formulation of foreign policy, the less vulnerable they are to capture.²³¹ This is of course at the core of the structural explanations of the democratic peace. The separation of powers in the decision-making process on foreign policy is thus not only important for the purposes of engaging the domestic causes of war, as will be discussed in the next section, but is also significant from the perspective of compliance with the international law principles. Indeed, it is a feature of the Model that the three elements work together in a mutually reinforcing manner, with each element being

²²⁹ *Id.* at 172.

²³⁰ *Id.*

²³¹ *Id.* It should also be noted, however, that it is not broad representation or direct representation per se that is at issue, but lack of bias that is key. There are circumstances in which broad representation can nonetheless be susceptible to bias and capture by concentrated or short term interests. *Id.*

explicable for reasons that relate to both international and constitutional law objectives.

There is yet a third broad theory of international law compliance, which is Thomas Franck's theory of "legitimacy." According to this theoretical perspective, international law commands obedience and compliance even in the absence of powers of coercion, due to the extent to which it is characterized by the properties of legitimacy.²³² There are a number of properties that lend legitimacy to a particular rule such that it can exert pressure upon states to comply, but for our purposes the most important are "adherence" and "symbolic validation." The former is simply the perception among states that there is widespread adherence to the rule or principle, and the extent to which there is understood to be a relationship between the primary rule of obligation and a hierarchy of secondary rules related to the sources, interpretation, and application of law, along the lines of Hart's theory of law.²³³ The latter, the symbolic validation element, is the "cultural and anthropological" component of legitimacy, which relates to the manner in which rituals and other forms of recognition and validation help to bestow legitimacy and authenticity upon a particular rule, and operate as a signal that there is an expectation of compliance with the rule. The formal aspects of the recognition of a newly formed state or government would be an example of the ritualized acknowledgement of the operation of specific principles of international law.²³⁴

The constitutional incorporation of the principles of *jus ad bellum* into the highest law of the land of a number of democratic states would serve both to provide such ritualized recognition of the validity and legitimacy of those rules, and to signal the importance placed on adherence to the rules by the incorporating states. The wider the spread of such incorporation, the greater the perceived legitimacy of, and the expectation of adherence with, the rules of *jus ad bellum*. Indeed, in a detailed study of the Japanese experience, it has been explained how this was part of the intuition of those in

²³² See generally THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS, *supra* note 207. For an overview of the theory, see BURGSTALLER, *supra* note 205, at 113-19; Koh, *Why Do Nations Obey?*, *supra* note 205, at 2641-45 (discussing Franck's theories on both legitimacy and fairness).

²³³ BURGSTALLER, *supra* note 205, at 117.

²³⁴ *Id.* at 115.

the Japanese Diet at the time of ratification of the new Constitution, when they embraced the war-renouncing provision of the Constitution as a new model and example for the world, one which they hoped would lead to emulation and a more peaceful international society.²³⁵

A final comment is necessary on the issue of compliance with the *jus ad bellum* regime in particular, which has less to do with general theories of international law compliance. This relates to changes that can be anticipated in the *jus ad bellum* regime in the coming decades and the demands that are going to be placed on institutions for ex ante analysis of compliance issues. In the last decade there has been considerable concern over the continued viability of the current *jus ad bellum* regime, and how it ought to be adjusted in order to accommodate and address some of the new realities in the twenty-first century. The questions raised have focused on a number of specific issues, or more particularly, on uses of force that are increasingly thought necessary or legitimate, but which under current principles are considered illegal. These would include humanitarian intervention,²³⁶ the use of force for “preventive self-defense” (the so-called “Bush Doctrine”),²³⁷ and the use of force directly against nonstate entities.²³⁸ There is increasing pressure

²³⁵ Martin, *Binding Dogs of War*, *supra* note 127, at 289-305; *see also* RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR ch. 14 (2002).

²³⁶ *See generally* INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), *available at* <http://www.iciss.ca/pdf/Commission-Report.pdf>; SEC’Y GEN.’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE, UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY (2004); FRANCIS KOFI ABIEW, THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION (1999); SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001); HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., 2003); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824 (1999).

²³⁷ *See* NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2002) for the actual doctrine. For the debate, *see, for example*, MARY ELLEN O’CONNELL, AM. SOC’Y OF INT’L LAW TASK FORCE ON TERRORISM, THE MYTH OF PREEMPTIVE SELF-DEFENSE (2002); Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT’L L. 677 (2004); William C. Bradford, *“The Duty to Defend Them”: A Natural Law Justification for the Bush Doctrine of Preventative War*, 79 NOTRE DAME L. REV. 1365 (2004); Robert J. Delahunty & John Yoo, *The “Bush Doctrine”: Can Preventive War Be Justified?*, 32 HARV. J. L. & PUB. POL’Y (2009); Peter Dombrowski & Rodger A. Payne, *The Emerging Consensus for Preventive War*, 48 SURVIVAL 115 (2006); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525 (2006).

²³⁸ *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194, para. 139 (July 9); Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Study on*

for some form of change to the international legal regime to relax the prohibition on the use of force or otherwise develop broader exceptions and conditions for the legitimate use of force in these particular circumstances.

These are only three of the most pressing issues, but the point to be made is that there is increasing pressure to adjust the *jus ad bellum* regime to address these and related issues, and the regime is likely to evolve over the coming decade in response to these developments. Given the complexity of the issues that require these adjustments, it can be anticipated that the regime will evolve in ways that demand increasingly complicated and sophisticated standards and conditions precedent for the legitimate use of armed force. That in turn requires thinking about how and where such tests will be applied, and particularly what mechanisms may be developed to ensure that such tests are employed prior to any final decision to engage in armed conflict.²³⁹ There are insufficient institutional mechanisms within the international law system to operationalize such tests and provide the fora for that kind of ex ante analysis. This is one more reason in support of harnessing the domestic legal and political systems—with the established fora and institutions that can provide the space for the debate, analysis, and determination of precisely these kinds of issues—to assist in the implementation and application of the evolving principles of *jus ad bellum*.

B. Constitutional Theory—Precommitment, Rule of Law, and the Role of the Legislature

A number of theories in constitutional law also provide support for the Model, and help explain how the elements of the Model would better engage the causes of war at each level of the three Images. This is of course most obvious in relation to the second and third element of the Model, the two separation of powers provisions. But constitutional theory also provides support for the constitutional incorporation of principles of *jus ad bellum*. Indeed, constitutional theory not only provides further support for the argument that such

Targeted Killings, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston); Harold Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual General Meeting of the American Society of International Law (Mar. 25, 2010); Kenneth Anderson, *Targeted Killings in U.S. Counterterrorism Strategy and Law* (May 11, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1415070>.

²³⁹ Benvenisti, *supra* note 237, at 697-98.

incorporation would enhance the state's compliance with the international law norms, but it also suggests that this element of the Model would help to achieve domestic constitutional objectives as well. In this section I will thus begin with discussion of constitutional theory relating to the first element of the Model, and then turn to the constitutional law theories that support the second element, the requirement for legislative approval of decisions to use armed force.

Constitutional incorporation of international law principles is not itself novel. Indeed, empirical analysis suggests an increasing "convergence" of international and constitutional law, resulting in part from the domestic implementation of international law norms, as discussed earlier.²⁴⁰ Many of the constitutions promulgated or significantly amended in the post-Cold War years have, for instance, incorporated the language and principles of international human rights regimes.²⁴¹ In exploring why this might be, why states would voluntarily incorporate international law norms that would constrain government conduct, it has been argued that modern constitutions, particularly those adopted in new transitional democracies, have employed international law to lock in specific democratic principles and norms.²⁴² One of the methods by which constitutions have locked in international law commitments is by directly incorporating the norms of either customary international law or treaty law into the text of the constitution.²⁴³ It has been argued that these developments reflect examples of constitutional design being used to employ international law as a means of strengthening the precommitment mechanisms of the constitution.²⁴⁴

The theory that constitutions operate as precommitment devices provides support for the Model. According to the theory, drafters create constitutional provisions that will bind the government's behavior in the future, motivated by expectations that there may be

²⁴⁰ Peters, *supra* note 193, at 174.

²⁴¹ See, e.g., Buergenthal, *supra* note 193, and Moravcsik, *supra* note 193 (showing how emerging democracies used international human rights enforcement regimes as a means of locking in compliance with such democratic principles).

²⁴² Ginsburg, *Locking in Democracy*, *supra* note 193; see also WAGNER, *supra* note 164, at 10-11 (making the argument that there are specific parallels between the locking-in of human rights policy and of parliamentary control of military deployment).

²⁴³ Ginsburg, *Locking in Democracy*, *supra* note 193, at 724.

²⁴⁴ *Id.*

circumstances that, in the absence of such constraints, could cause the government of the day to act irrationally, in a manner contrary to the state's fundamental values and interests.²⁴⁵ It is the same idea as when a person gives his car keys to a friend before entering a bar, thereby making arrangements while he is still sober to prevent himself from driving later when he is drunk. It is captured in the metaphor of Ulysses from Greek mythology, who, to protect himself from later jumping to his death while in thrall to the Sirens' song, ordered his men to bind him to the mast, stop up their ears with beeswax, and refuse any subsequent order to release him until they had passed the danger.²⁴⁶

Treaties may similarly operate as precommitment devices. To the extent that the motive in entering into a treaty is to create constraints on the state's own future conduct, out of concern that it may otherwise behave in a manner that is contrary to its welfare (as opposed to being a strategy to constrain or otherwise influence the behavior of other states), the entry into a treaty constitutes a genuine form of precommitment.²⁴⁷ Indeed the use of international law as a precommitment device enjoys the advantage of not being susceptible to change by local actors, so that abrogation or violation are the only options available to avoid the precommitment mechanisms. To the extent that the costs of doing so may be perceived by local actors as being high, it may successfully operate as intended to constrain policy.

²⁴⁵ JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); see also CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 96-101 (2001); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988).

²⁴⁶ The Sirens were beautiful women whose singing voices lured men to a watery grave in the rough waters surrounding their island. For a more recent discussion of some further nuances of the theory, see Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 *TEX. L. REV.* 1751 (2003) (addressing the difference between collective and individual precommitment, and the impact of the different permutations that the factors of passion, interest, and reason may take as between times T1 and T2).

²⁴⁷ Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 *TEX. L. REV.* 2055, 2059-60 (2003). There are other reasons for entering into treaties, such as trying to influence the behavior of other states, or even to gain other benefits within the system. Accordingly, it is not always the case that they are joined for reasons of precommitment. For more on the various reasons for incorporating international law, and the control that domestic actors retain over the process, see Andreas Zimmerman, *Is It Really All About Commitment and Diffusion?*, 2008 *U. ILL. L. REV.* 253 (2008).

The use of constitutions to implement the principles of treaties already entered into, however, serves to internalize the precommitment and subject the commitment to domestic enforcement mechanisms, thereby increasing the costs and difficulty of violating the bonds.²⁴⁸ While Tom Ginsburg, in his study on how constitutions have been used to lock in democratic norms, focused on this device of incorporating international law principles as a means of strengthening the constitutional precommitment to democratic norms, it can be extended more generally, and employed in a normative argument in line with liberal theories of international law. That is, the constitutional incorporation of international law norms can be used for the purpose of strengthening the bind of the international precommitments, and thereby enhancing compliance with international law. To put it another way, while Ginsburg and others argue that international law is often used to strengthen the already existing precommitment mechanisms of the constitution, the corollary that I am advancing here is that the precommitment devices of the constitution can be used to enhance compliance with preexisting commitments in international law.

The constitutionalizing of international law principles increases the likelihood of compliance because it raises the difficulty and costs of noncompliance. The costs of noncompliance with the norm will not only be incurred in the international arena by reason of the violation of the international obligation already entered into, but also domestically as a result of the concurrent violation of the constitutional provision that incorporated the international law norm. The costs of constitutional violation, or the difficulty of avoiding compliance, can be that much higher, or at least more immediate and certainly quite different in nature, than those associated with the corresponding violation of international law, particularly when the issue is subject to judicial review and other such constitutional enforcement mechanisms. The constitutionalizing of a prior international law obligation creates a double bind.

Aside from judicial review and other explicit enforcement mechanisms, it will be apparent that the incorporated norms will also operate on other levels, in a manner that may be more effective than their operation as

²⁴⁸ Ginsburg, *Locking in Democracy*, *supra* note 193, at 724-25, 730.

purely legal rules enforced by the courts. This ties into the earlier discussion of transnational legal process theory and the ideational strand of liberal theories of international law, which emphasize the process of interpretation and internalization of the international legal norms, such that the norms begin to operate not only as legal rules but also as political and social norms within the domestic system.²⁴⁹ Constitutions can, more than any other laws, generate and shape the contours of the norms that operate on the social and political level, and indeed shape culture and the collective identity of nation states.²⁵⁰

The foregoing discussion involves the use of the constitution for the purposes of enhancing compliance with international law and employing constitutional theories in support of the efficacy of doing so. This may seem somewhat anomalous. Constitutions are fundamentally inward looking, not internationally oriented, and the operation of the international legal system is not typically a constitutional concern. But the incorporation of the principles of *jus ad bellum* is also, quite fundamentally, for the benefit of the nation itself, and constitutional theory provides support for the Model in terms of achieving purely constitutional objectives.

As discussed earlier, Madison and Kant thought war to be often ruinous for the state; an unnecessary squandering of the nation's blood and treasure. And while they both argued that democracies would be less likely to wage war precisely because the citizens of the state would be less inclined to embrace the hardships of war, they also understood that other structural checks would nonetheless have to be created. Madison argued that constitutional impediments were required to prevent that class of war that originated with the will of the people, against which the mechanism of the separation of powers alone would not be sufficient.²⁵¹ The constitutional incorporation of the principles of *jus ad bellum*, as contemplated by the Model, would by itself serve to create an additional check on the government and the people's ability to engage in rash military adventures. In addition to the reasons provided above in the discussion of international law compliance theory and precommitment theory, we will below

²⁴⁹ BURGSTALLER, *supra* note 205, at 170; Koh, *Why Do Nations Obey?*, *supra* note 205, at 2654-55.

²⁵⁰ Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, 4 INT'L J. CONST. L. 439, 450 (2006).

²⁵¹ Madison, *Universal Peace*, *supra* note 1.

examine how the Model further operates in conjunction with the core functions of the legislature to influence public debate and the decision-making process within the legislature in a manner likely to reduce irrational or unsound judgments on the use of force. In creating such a check, this element of the Model would help to protect the people from the loss of blood and treasure caused by the illegitimate use of armed force, which would serve the constitutional objectives that Madison had in mind.²⁵² It would constitute a constitutional check that would help resolve the Kantian dilemma, reducing the tendency of democracies to illegitimately use force against illiberal states, without undermining the factors that give rise to the democratic peace.

There is also a relationship between constitutional theory as it relates to the domestic objectives of constitutional law and the conduct of the state in the international society. For a foundational element in the constitutional theory of liberal democracy is the commitment to the rule of law.²⁵³ As an extension of that value system, the liberal democracies of the world have committed to an international legal system that is similarly founded upon notions of the rule of law. But that system itself lacks many of the institutional forms and features that are characteristic of a thick rule of law system, and some would argue that even the features of clarity and certainty that define a thin understanding of the rule of law are rather weak in international law.²⁵⁴ This element of the international law system is thus fundamentally dependent upon the commitment of the participating states—and particularly the liberal democratic states—to over time provide substance and form to its rule of law features.

²⁵² Consider how much better off the state would have been if there had been such a constitutional check in place to help prevent the British disaster in the Suez crisis, or the American misadventure in Vietnam, or indeed the more recent invasion and occupation of Iraq. All three armed conflicts constituted the use of force by liberal democratic states in ways that arguably violated the principles of *jus ad bellum*. Two of them were commenced with formal legislative approval (though both with some measure of executive branch deception). A constitutional requirement to consider the international legality of the proposed action in the decision-making process, in a manner that could be subsequently explained and defended, could have made a difference in the decision-making process and possibly led to a different outcome. See *infra* note 268 and accompanying text.

²⁵³ On the rule of law generally, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

²⁵⁴ *Id.* chs. 7, 8 (discussing the differences between thick and thin conceptions of the rule of law); *id.* ch. 10 (discussing the rule of law at the international level).

I have not, however, reverted here to a discussion of how the Model achieves international law objectives. What is being suggested is that the incorporation of international law can further the fundamental rule of law project within the domestic legal system, and that there are domestic rule of law imperatives that require compliance with international law. This is not new or novel. Such arguments have been made in different forms in the context of both human rights and administrative law.²⁵⁵ And John Rawls has argued that the constitutions of liberal states oblige compliance with a range of international law norms for related reasons.²⁵⁶ The claim that I am making here is that these arguments should be extended more explicitly to the use of force regime—that the failure of liberal democratic states to comply with the most fundamental principles of the international legal system undermines that entire project and erodes the already thin framework of the rule of law at the international level. And that, in turn, has an impact on the integrity of the much thicker rule of law regime in the liberal democratic state that has so violated the international law norm. The constitutional incorporation of the international law principles of *jus ad bellum*, serving as a check on uses of force in violation of international law commitments, can be understood as a mechanism for further protecting and enforcing the rule of law features of the domestic legal system.

Turning to the second element of the Model—the provision that would require legislative approval of decisions to use force—there is of course considerable theoretical support for such a constitutional structure. As we have already discussed, the concept dates back at least to the development of the American Articles of Confederation, and the war powers provisions of the U.S. Constitution continues to be a model of the principle. It is also one of the central issues in the war powers debate that has been raging in the United States for over a hundred years. But much of the modern debate in the United States is over the precise meaning and exact scope of the war powers provisions of the U.S. Constitution, and the particulars of many of those arguments need not concern us

²⁵⁵ See, e.g., David Dyzenhaus et al., *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD U. COMMONWEALTH L.J. 5 (2001).

²⁵⁶ JOHN RAWLS, *THE LAW OF PEOPLES* ch. 13 (1999). This point is emphasized by Patrick Gudridge in his book review, 95 AM. J. INT'L. L. 714, 716-17 (2001).

here.²⁵⁷ As we have already reviewed, however, the primary motive of many of the drafters of the U.S. Constitution, as expressed most clearly by Madison, was to reduce the likelihood of war.²⁵⁸ And the theoretical arguments of Madison, Kant, and others in support of such a separation of powers related to both the domestic objectives of the state: putting an important check on the state's rush to war and increasing the democratic accountability of the process of deciding on war; and the broader goals of reducing the incidence of war generally in the international system. In this sense, the arguments in support of this element of the Model again relate to the causes of war at both the domestic level and the international level.

The starting point is the insight that requiring legislative approval of executive decision making on the use of force will likely reduce the risk of rash decisions to go to war for the wrong reasons. This argument was initially advanced by Madison and Kant, among others, and indeed can be traced all the way back to Thucydides.²⁵⁹ Madison and John Jay both argued that the executive is more likely to be motivated by parochial self-interest and narrow perspectives, and thus more likely to enter into armed conflict than the legislature.²⁶⁰ Madison further argued that there ought to be a separation between those who are charged with the conduct of war, as the President is as the Commander in Chief, and those who have the authority to decide on the commencement of war.²⁶¹ But the argument becomes more compelling when unpacked and explained in a little more detail, with the support of more modern theory. We need to explore the question of how exactly the legislative involvement improves decision making or

²⁵⁷ As a starting point for some of the sources on the war powers debate generally, see the authorities cited *supra* notes 168-72.

²⁵⁸ THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Madison, *Universal Peace*, *supra* note 1; see also ELY, *supra* note 169, at 4; FISHER, *supra* note 116, at 5-9; Lobel, *supra* note 163, at 108. Indeed, notwithstanding the vociferous debate on the war powers, it has been argued that John Yoo stands virtually alone in suggesting that this was not the primary motive of the framers. FISHER, *supra* note 116, at 15 (citing YOO, THE POWERS OF WAR AND PEACE, *supra* note 170).

²⁵⁹ Thucydides recounts Pericles stating, in respect of the Athenian form of democracy, "[I]nstead of looking on discussion as a stumbling block in the way of action, we think it an indispensable preliminary to any wise action at all." THUCYDIDES, *supra* note 11, at 147 [bk. II, l. 40].

²⁶⁰ FISHER, *supra* note 116, at 9.

²⁶¹ Michael J. Glennon, *The United States: Democracy, Hegemony, and Accountability*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 114, at 324 (citing 6 JAMES MADISON, WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906)).

engages the causes of war in a manner that would reduce the incidence of war.

It is helpful to begin by recalling the functions of legislatures.²⁶² In addition to passing legislation, the legislature in virtually all liberal democracies, whether parliamentary or presidential in structure, performs the core functions of representation, oversight, and control over government expenditure.²⁶³ Representation and oversight in particular are important to the argued benefit of legislative involvement in the decision to use force. Both functions are tied to the core notions of democratic accountability and to deliberative democracy, which overlap in important ways. Democratic accountability is understood to include the idea that the people who are likely to be impacted by decisions ought to be able to participate in the decision making. Participation in this sense means not only having some expectation that the collective will of constituents will be taken into consideration in the decision-making process, but that the public debate and deliberation that is part of the parliamentary process of decision making will also serve the vital function of informing constituents and affording them some sense of access to the decision-making process.²⁶⁴

Obviously, this process of debate and information exchange is also at the heart of ideas of deliberative democracy. The perspective here, though, is not so much on the importance of making the process accountable to and representative of the people, but on the extent to which the very process of deliberation among the representatives of disparate stakeholders and interests will result in the generation of sounder judgments. The argument is that the process results in better decisions due to the attenuation of extreme positions, the canvassing of a wider range of perspectives and sources of information, and the vigorous public interrogation of reasons

²⁶² Heiner Hänggi argues that the term “parliament” is a better general term than “legislature,” in order to capture the diverse functions of this branch of government, since “legislating” is only one of its core functions. Heiner Hänggi, *The Use of Force Under International Auspices: Parliamentary Accountability and Democratic Deficits*, in THE ‘DOUBLE DEMOCRATIC DEFICIT’ 3, 11 (Hans Born & Heiner Hänggi eds., 2004). Here, I use the terms interchangeably, unless otherwise noted.

²⁶³ *Id.* (discussing these functions in the context of the democratic deficit relation to the use of force); Owen Greene, *Democratic Governance and the Internationalisation of Security Policy: The Relevance of Parliaments*, in THE ‘DOUBLE DEMOCRATIC DEFICIT,’ *supra* note 262, at 19.

²⁶⁴ Greene, *supra* note 263, at 28-30; Hänggi, *supra* note 262, at 13-15.

and motives underlying proposals.²⁶⁵ More specifically, theories of deliberative democracy hold that the deliberative process, of which the parliamentary debate and decision-making process is a key feature, actually involves the transformation of preferences through the consideration of the justifications offered by various perspectives, rather than merely serving as a means by which society can aggregate preferences.²⁶⁶

The oversight function of legislatures also feeds into both these aspects of democracy, in that the employment of specialized committees to engage in public inquiries into policy choices or proposed courses of action, provides a deeper level of deliberation that ensures a more thorough interrogation of policy justifications and the underlying information upon which policy proposals are based. Senate committee hearings during the Vietnam War illustrate how such oversight can reveal important information underlying policy debates, which in turn can influence public opinion and better inform the policy preferences of the representatives of the people. In 1967, the Senate Armed Services Committee held hearings on the escalation of the strategic bombing of North Vietnam. After the representatives of the Joint Chiefs, and in particular the Chief of the Air Force, had testified before the committee on the necessity of the continued strategic bombing, Secretary of Defense Robert S. McNamara stunned the committee, the government, and the public by testifying that the bombing was entirely ineffective.²⁶⁷

The performance of these functions of the legislature, to the extent that they are permitted or required to operate in the decision-making process on the use of force, engage the domestic causes of war in important ways. The fuller realization of the representative and oversight functions—serving as they do to both incorporate the will of the broader population and to arguably contribute to the arrival at sounder judgments through the deliberative process—would result in those structural aspects of democratic states that comprise the Image II factors most related to the causes of the “democratic

²⁶⁵ See, e.g., AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 1-20 (2004). See generally DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998).

²⁶⁶ Jon Elster, *Introduction* to DELIBERATIVE DEMOCRACY, *supra* note 266, at 1, 1; GUTMANN & THOMPSON, *supra* note 265, at 13. Professors Diehl and Ginsburg make this point in the specific context of war powers and the legislative role in decisions to go war. Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzilebe and Yoo*, 27 MICH. J. INT'L L. 1239, 1249-50 (2006).

²⁶⁷ TUCHMAN, *supra* note 25, at 345.

peace,” being brought to bear more directly on the decision-making process. In other words, the structure would thus more perfectly reflect the theoretical ideal that is part of the structural explanations of the democratic peace.²⁶⁸

The institutional structure of the decision-making process created by the Model’s separation of powers element would also affect the political costs of going to war in a manner that would further engage the Image II causes of war. Absent an overwhelming or obvious threat, the procedural requirements to obtain the support of the majority of the legislature would impose significant political costs upon the executive.²⁶⁹ The structure would effectively create a sliding scale, in the sense that the greater the threat or the more obvious the case for war—such as the use of force in self-defense against an ongoing armed attack—the lower the costs would be in obtaining legislative approval. Conversely, the more tenuous the case for engaging in armed conflict, the more

²⁶⁸ The modern history of the process by which democratic countries have decided to engage in armed conflict reveals a significant degree of executive branch deception, of both the public and the legislature, as to the facts and reasons justifying the decision. A constitutional requirement that the legislature approve the use of force would not necessarily provide a guarantee against the executive misleading the nation down the path to war, but the mechanism would help to ensure that probing questions are asked, that facts and motives are subjected to some rigorous review, and, most importantly, that the issues involved are argued and examined from a range of different perspectives. As an example of such deception, the White House obtained Congressional approval to escalate U.S. involvement in Vietnam after the second “attack” in the Gulf of Tonkin, when it was already known within the executive that the attack had likely never occurred and that Congress was operating on the basis of a false account of the incident. See DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* ch. 1 (2002); ELY, *supra* note 169, at 19. Another is the decision by the British Cabinet to intervene in Egypt in 1956 when many members of the Cabinet, and none of the remainder of the members of Parliament, were aware that the government had entered into a conspiracy with the governments of France and Israel pursuant to which Israel would create the pretext for intervention. TURNER, *supra* note 155, at 296-315. The final determination of the extent to which the Bush and Blair Administrations were duplicitous in their characterization of the reasons for the invasion of Iraq will have to await later historical work, but it is already clear that there was some deliberate deception of the public and the legislature in both the U.S. and U.K. See, e.g., BOB WOODWARD, *PLAN OF ATTACK* (2004); Elizabeth Manningham-Buller, Dir. Gen. of Sec. Serv., Testimony Before the U.K. Iraq Inquiry (July 20, 2010), available at <http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100720.aspx>; Clare Short, Int’l Dev. Sec’y, Testimony Before the U.K. Iraq Inquiry (Feb. 2, 2010) [hereinafter Short Testimony], available at <http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100202.aspx>.

²⁶⁹ Nzelibe & Yoo, *Rational War and Constitutional Design*, *supra* note 49, at 2530-32 (examining how the political costs of the process of obtaining Congressional approval can serve to send signals to potential adversaries in this context); see also Damrosch, *Interface*, *supra* note 114, at 58-60 (making the point that the increased political costs of obtaining parliamentary approval can help to generate public support and signal the depth of commitment to potential adversaries).

politically costly it would be to win over the majority of the legislature for support. This is precisely the kind of structural characteristic that reduces the Image II causes of war.

The second element of the Model would also engage the Image I causes of war, which include particular psychological traits that are common in many executive officers, systemic problems of misperception among decision makers, and the irrational behavior of small-group decision making reflected in “groupthink” and the “bureaucratic politics model” of decision making.²⁷⁰ The risks that such tendencies could lead to irrational or suboptimal decisions to use armed force would be reduced, in the case of each of these particular phenomenon, by spreading the decision-making process more widely through the inclusion of the legislative body. The requirement to obtain legislative approval, bringing to bear the core functions of deliberative democracy on the decision-making process, such that a wider set of perspectives and criteria are brought to the process, as well as a more public interrogation of reasons and rationales, would significantly reduce the potential for these potential features of government decision making to manifest themselves in the form of unsound or dangerous decisions regarding the use of force.²⁷¹

The requirement to consider the legality of the proposed action under international law, as mandated by the first element of the Model, would of course inject precisely the kind of exogenous criteria and divergent perspectives that could operate to reduce the effects of the domestic causes of war. And conversely, the requirement for legislative approval, bringing to bear the foregoing parliamentary functions on the considerations of legality, would vastly increase the traction of that aspect of the process. Evidence has recently emerged, for instance, on the extent to which disputes within the British cabinet over the legality of the contemplated invasion of Iraq

²⁷⁰ See *supra* Part II.A.

²⁷¹ The spreading of decision making across different institutions would by definition reduce the possibility of groupthink, which afflicts decision making within smaller groups characterized by high levels of cohesion and group loyalty, shared values, and the dominance of a strong leader. The broadening of perspectives, public debate, introduction of exogenous criteria, and deeper interrogation of rationales would all help to reduce the problems of misperception caused in part by the assimilation of ambiguous information to pre-existing assumptions and hypotheses. Similarly, the cross-institutional decision making attended by public debate and inquiry into rationales would likely reduce the more obvious problems of the bureaucratic politics model of decision making, since the self-interested departmental interests will tend to be laid bare in such debate.

severely complicated the prime minister's decision making, even in the absence of any constitutional or statutory to consider such issues. Had there been such a legal obligation, and in addition a requirement to take the debate of that issue to parliament, it is quite conceivable that the decision would have gone the other way.²⁷²

Finally, the requirement to obtain legislative approval will also serve to enhance international law objectives and engage the Image III causes of war. Thus far in our discussion of this element of the Model we have been looking primarily at the domestic perspective—the extent to which legislative involvement assists the state in avoiding the ruinous costs of military misadventure. But Kant in particular contemplated the benefits that such a government structure would provide to the international system as a whole.²⁷³ The spread of a constitutional system that included representative government and a separation of powers between the executive and the legislature would lead to an ever-widening circle of peace among these like-minded states. It is ironic that he has been proved prescient, with the actual spread of constitutional democracy and the realization of the democratic peace, while at the same time the feature of his model involving the separation of powers with respect to the decision to go war has been very imperfectly realized among the world's community of liberal democracies.²⁷⁴ It has been argued that this is changing, and indeed as already discussed, there is some significant evidence that a trend is developing, with legislatures in many liberal democracies around the world increasingly addressing the

²⁷² Prime Minister Tony Blair reacted very negatively to a one-page memorandum from Attorney General Lord Goldsmith on the likely illegality of any invasion of Iraq, and to similar advice from legal counsel in the Foreign Office. Blair ultimately brought considerable pressure to bear on Goldsmith to prepare a more positive opinion. Moreover, the head of the British Army indicated reluctance to participate in the invasion without a legal opinion as to the legality of the operation. See Peter Goldsmith, Attorney Gen., Testimony Before the U.K. Iraq Inquiry (Jan. 27, 2010), available at <http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100127.aspx>; Short Testimony, *supra* note 268; see also Rosa Prince, *Government Knew 'No Leg to Stand On' Legally to Go to War in Iraq*, DAILY TELEGRAPH (Jan. 26, 2010 10:00 PM), <http://www.telegraph.co.uk/news/newsttopics/politics/7079895/Government-knew-no-leg-to-stand-on-legally-to-go-to-war-in-Iraq.html>; John F. Burns, *Blair Called a Liar in Iraq Inquiry*, N.Y. TIMES, Feb. 3, 2010, at A6.

²⁷³ See *supra* notes 77-83 and accompanying text.

²⁷⁴ This fact, of course, feeds into the debate in the democratic peace literature over whether structural-institutional or normative-cultural explanations best account for the phenomenon.

issue and mobilizing for change.²⁷⁵ The proposed Model merely builds on the theory and seeks to encourage this actual trend.

Many arguments, already well developed as part of ongoing debates such as constitutional war powers and the operation of the constitution in times of emergency, will be raised in objection to much of the foregoing discussion on constitutional support for the Model. I will address a few of the more likely critiques in order to round out the analysis.

The most fundamental objection, grounded in the theories of Carl Schmitt, is that it is simply not possible to develop effective constitutional constraints on the use of armed force, for in moments of crisis such constitutional provisions will be simply ignored.²⁷⁶ This form of argument comes in a number of variations. It is reflected in the U.S. war powers debate, in which it is frequently argued that requiring Congressional approval of the use of armed force would not really provide for a sober second look, and thereby reduce the incidence of imprudent wars, because Congress would either be just as prone as the executive to patriotic fervor or other inflamed emotions in the midst of a severe crisis.²⁷⁷ An analogous form of argument, much more explicitly grounded in or responsive to the theories of Schmitt, is to be found in much of the post 9/11 theoretical literature regarding the impact of national security imperatives on the normative power of constitutional protections, and the role of the judiciary in times of national crisis or emergency—what Schmitt called the moment of “exception.”²⁷⁸

²⁷⁵ Lori Fisler Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?*, 50 *MIAMI L. REV.* 181, 182-83 (1995); Damrosch, *Interface*, *supra* note 114, at 58-60. See *supra* notes 173-202 and accompanying text regarding trends in Germany, Spain, Italy, the U.K., Australia, France, and Canada.

²⁷⁶ Schmitt's theory is, of course, much deeper than this proposition, attacking the entire foundation of liberal legal theory with the argument that law and the constitution cannot function during moments of exception, and that liberal legal theory is incapable of explaining or accommodating this reality. CARL SCHMITT, *POLITICAL THEOLOGY, FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 2005). For a critical analysis of Schmitt's theory, see, for example, David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 *CARDOZO L. REV.* 2005 (2006); Oren Gross, *The Normless and the Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy*, 21 *CARDOZO L. REV.* 1825 (2000).

²⁷⁷ See, e.g., ELY, *supra* note 169, at 8-9 (considering the argument before criticizing it).

²⁷⁸ Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 *U. PA. J. CONST. L.* 1001 (2004). For a discussion of such arguments, see Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029 (2004);

David Dyzenhaus and others have marshaled several persuasive arguments to refute the Schmittian attack on the idea, central to liberal legal theory, that the law, and more importantly the rule of law, can operate effectively in periods of emergency.²⁷⁹ Dyzenhaus draws upon the theories of Dicey to argue that the continued operation of a thick substantive notion of the rule of law during the period of emergency is not only possible, but that cooperation among the executive, legislature, and judiciary to ensure that legal responses to the emergency comply with the rule of law is crucial to the liberal democratic idea of the state being constituted by law.²⁸⁰ Under this theory of the liberal democratic constitution and a thick conception of the rule of law, the exception does not provide the justification for the creation of legal black holes or the suspension of constitutional constraints at all, and neither does it operate so as to necessarily create such lawlessness. On the contrary, it is feasible to develop constitutional provisions that can survive the exception and operate to govern the response to national security emergencies.²⁸¹

It is not necessary, however, to refute Schmittian theoretical arguments to defend the Model. This is because the Model is designed primarily to constrain conduct in the moment of true exception. The rationales advanced to justify the use of armed force cover a broad spectrum, from protecting national interests as ephemeral as national prestige and credibility, to the desperate need to repulse a massive invasion of the homeland. It may be true that when a state is suddenly confronted with an immediate existential threat, one that truly threatens the “life of the nation,” it might be less likely that a constitutional provision prohibiting any use of armed force will effectively govern state behavior.²⁸² Thus, while the war-

Stanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006); Kim Scheppele, *We Are All Post-9/11 Now*, 75 FORDHAM L. REV. 607 (2006); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

²⁷⁹ Dyzenhaus, *Schmitt v. Dicey*, *supra* note 276, at 2035, 2037-38; *see also* Gross, *supra* note 276, at 1851-53 (providing an analysis of the structural flaws in Schmitt's theoretical attack on liberal constitutionalism).

²⁸⁰ Dyzenhaus, *Schmitt v. Dicey*, *supra* note 276, at 2008, 2030-33, 2037.

²⁸¹ Both Dyzenhaus and Gross do acknowledge, however, that as a descriptive matter the response to the threat of terrorism after 9/11, particularly in the United States, has not been encouraging, with significant erosion of the rule of law and weakening of fundamental constitutional protections. Dyzenhaus, *Schmitt v. Dicey*, *supra* note 276, at 2015-16; Gross, *supra* note 276, at 1853-63.

²⁸² For a useful discussion of what constitutes a threat to the “life of the nation,” see the House of Lords decision *A(FC) and Others (FC) v. Secretary of State for*

renouncing provision of the Constitution of Japan operated effectively to constrain Japanese policy on the use of armed force even in moments of perceived crisis, the provision “would not likely have exercised much influence over national policy in the event of a Soviet invasion of Hokkaido.”²⁸³ But the Model being developed here is not intended to prevent or even hinder the use of force in such dire circumstances.

First, the constitutional incorporation of principles of *jus ad bellum* being proposed here would not actually operate to prohibit an appropriate response to such existential crises. The *jus ad bellum* regime itself provides for the exercise of the right to self-defense, and since most true existential threats would more than satisfy the conditions for the exercise of self-defense in international law, the requirement to consider compliance with international law would not create any constraint on government action. Similarly, requiring legislative approval would not operate as any constraint in such circumstances. So quite aside from the argument that the constitutional provisions will not operate in moments of existential crisis, this Model is neither intended to be, nor would it actually operate as, a constraint in such circumstances.

The Model is intended, rather, to operate as a constraint with respect to the use of force when the life of the nation is not at stake, but where “vital interests” and other such imperatives provoke calls for action. For the fact remains that few armed conflicts that have involved Western constitutional democracies in the last 60 years have been responsive to existential threats. Rather, they range from such low-level operations as the U.S. invasions of Grenada and Panama at one end of the spectrum, which were defended as being for the purpose of protecting nationals overseas,²⁸⁴ to such larger conflicts as the Korean conflict, the Vietnam war, the first Gulf war, the Kosovo war, the Falklands war, or the invasions of Afghanistan and Iraq since 2001, all of which were justified as being exercises of collective or individual self-defense. None of these, however, were in response to existential threats to the Western

the Home Department, [2004] UKHL 56 (appeal taken from Eng.), particularly *id.* para. 88 (Lord Hoffman).

²⁸³ See Martin, *Binding Dogs of War*, *supra* note 127, at 288.

²⁸⁴ The protection of nationals overseas is not a generally accepted justification for the use of force under international law, and the facts necessary to establish such a claim in these two instances are very much in dispute. See DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE*, *supra* note 129, at 232; GRAY, *supra* note 141, at 57-58, 91, 157-58, 390-91.

democracies central to the conflicts. Some were consistent with international law, some were not, but with the possible exception of the invasion of Afghanistan in response to 9/11, none was a reaction to a national security crisis of such a scale that constitutional provisions would likely be ignored in liberal democracies engaged in the conflicts.²⁸⁵

Another set of anticipated objections will be that the executive branch needs to be left free from the encumbrances of domestic legal constraints on its ability to make the appropriate decisions in the realm of national security. These arguments, quite contrary to Schmittian theory, assume that constitutional constraints may indeed hinder the effective response of the executive in times of crisis, and that, normatively, such constraints should be eliminated. According to this view, the government may enter into an international convention that commits the state to observe certain obligations, but that still leaves the government free to breach those obligations in some future circumstance in which it decides that the benefits to be derived from breach are greater than the costs of doing so. To import the obligation into the constitution, however, would be to vastly complicate that option, increasing the costs of breach, and reducing the discretion of the government—which of course, according to the argument I am advancing, is the very point of doing so. But for some, such binding of the hands of the executive in advance, and possibly invoking the involvement of the judiciary by embedding the international law principles into the constitution, would be to interfere unwisely with the scope of executive powers, and at some gut level, with the sovereignty of the nation.²⁸⁶

²⁸⁵ This is not to say that 9/11 constituted a true existential threat to the U.S., for it clearly did not, but it was certainly perceived as a national crisis, and the national response was one that reflected a readiness on the part of the executive to disregard certain constitutional provisions and international law commitments in the name of national security. While Kuwait is not typically grouped among liberal democracies, it is true that the Gulf War was a response to an existential threat to that state, and to a naked act of aggression on the part of Iraq.

²⁸⁶ The term “gut level” is used here, since the state has already voluntarily entered into the relevant treaty regimes. Thus, domestic implementation to enhance compliance with those regimes cannot be any real additional sacrifice of sovereignty. Nonetheless, there are many who feel that any such limitation on the freedom of the nation to act in the future constitutes an infringement of sovereignty. See Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL’Y 73 (2006), for an example of an argument that the President is not, and ought not to be, constrained by international law as a constitutional matter in the U.S.; see also Nzelibe & Yoo, *Rational War and Constitutional Design*, *supra* note 49. For a very good analysis and critique of the range of instrumentalist arguments more generally, see

There are a range of arguments in this category, and in the United States many of them are intertwined with the constitutional war powers debates. One line of arguments makes the claim that the executive is the best positioned and most competent branch to make the determinations of what is in the national interest when it comes to war, and that involvement of other branches would interfere with and degrade the effectiveness and soundness of the decision-making process. We see here a sharp disagreement over the definition and meaning of “sound decisions.” For I have made the argument above that legislative involvement, and the addition of exogenous criteria such as compliance with international law, will lead to decisions that are “better” or “sounder” than unilateral decisions made by the executive. Much of the disagreement can be traced to the criteria that are used in determining the wisdom or soundness of judgment.

John Yoo and Jide Nzelibe, for instance, in their functional analysis of the war powers issue, apply a very narrow cost-benefit analysis that employs the criteria of winning wars as the primary basis for assessing which branch will make the “better” decisions.²⁸⁷ They quite explicitly argue that Congressional involvement is likely to increase errors of omission in which the state will miss opportunities to engage in “good” wars.²⁸⁸ As Tom Ginsburg has pointed out, implicit in their analysis is the argument that under the current arrangement there are too few wars, or at least there is the potential for failure to capitalize on the possible gains through war.²⁸⁹ This relies in part on an excessively narrow and simplistic understanding of the costs and benefits of armed conflict.²⁹⁰ As the term “Pyrrhic victory” reminds us, many wars that may have been “won” in purely military terms, were not necessarily worth the cost to the nation in terms of human life, resources, damage to the domestic political system and the

Deborah Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009).

²⁸⁷ Nzelibe & Yoo, *Rational War and Constitutional Design*, *supra* note 49, at 2525.

²⁸⁸ *Id.* at 2517-19, 2522-26.

²⁸⁹ Diehl & Ginsburg, *Irrational War and Constitutional Design*, *supra* note 266, at 1240.

²⁹⁰ See, for example, Nzelibe & Yoo, *Rational War and Constitutional Design*, *supra* note 49, at 2525, which labels past wars “won,” “lost,” or a “draw” as a basis for assessing the relative merits of congressional approval of presidential decisions to use force. This suggests an exceedingly simplistic and narrow understanding of the true strategic, political, economic, social, and human costs and benefits of going to war.

cultural fabric of the society, and the state's standing in international society.²⁹¹

Aside from pure competency arguments, another claim of the executive power proponents such as John Yoo is that the executive ought to be free from any domestic legal obligation to adhere to international law commitments when it is in the "national interest" to violate those commitments.²⁹² This claim is often made quite explicitly, but it is also implicit in the arguments that the executive should have exclusive power to initiate war, on the grounds that it has the advantages of rapid decision-making capabilities and superior-but-secret information, all of which is crucial (so the argument goes) to the use of force in circumstances requiring speed and surprise. The problem with this, however, is that the circumstances in which the use of force could be initiated with such speed and strategic surprise, and be nonetheless consistent with the principles of *jus ad bellum*, would be rare indeed.²⁹³

²⁹¹ These functionalist arguments have been dismissed in more detail elsewhere. See, e.g., Diehl & Ginsburg, *Irrational War and Constitutional Design*, *supra* note 266; Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); Pearlstein, *supra* note 286. Also, it should be noted that not all functionalist arguments approach the issue with the same assumptions, or employ the same narrow criteria. The arguments referred to above can be classified as those of the "effectiveness functionalists," who in this context focus primarily on which institution would be most effective at achieving the narrowly defined objectives of winning wars. A second category, what has been termed the "purposive functionalists," more appropriately bring a functional analysis to bear on the question of which institution would be best suited to realize the original or intended purpose of the constitutional provisions in question. This latter group, guided as they are by the primary function of constitutional and institutional structures, are less inclined to get caught up in excessively narrow considerations of which branch is best able to win wars. See Pearlstein, *supra* note 286, at 1556-57.

²⁹² See, e.g., Bradley & Goldsmith, *supra* note 170; Nzelibe & Yoo, *Rational War and Constitutional Design*, *supra* note 49; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007) (arguing for greater deference with respect to executive decisions related to foreign relations law, even decisions in violation of international law).

²⁹³ This is to be distinguished, of course, from the need for speed, secrecy, and the element of surprise once the state is engaged in armed conflict, as opposed to in the course of deciding whether to initiate the use of armed force. For those who argue that the Arab-Israeli War of 1967 constituted a legitimate exercise of anticipatory self-defense, with Israel launching a surprise attack to pre-empt a potential first strike by the deployed Egyptian and Jordanian forces, this would constitute one of those very rare circumstances. Most international law scholars, however, do not view the '67 War as having been a legitimate act of self-defense. Even former Prime Minister Menachem Begin publicly stated in 1982 that Israel had other options when deciding whether to launch its attack, undermining any argument that the action met the necessity element of the test for self-defense. See RICHARD N. HAASS, *WAR OF NECESSITY, WAR OF CHOICE* 9-10 (2009).

At a much more fundamental level, however, the overarching argument that the state ought to be left free to violate international law whenever it is in the national interest to do so, without qualification, suggests an underlying refusal to take seriously international law and the obligation to limit the use of armed force. It reflects the “realist” view that states only comply with international law when it is convenient or beneficial to do so, which is obviously a view that is at odds with the assumptions of this entire project.²⁹⁴ But if one does accept the legitimacy of the collective security system and the *jus ad bellum* regime, and one takes seriously the commitments that states have made to that regime in becoming party to the U.N. Charter and other treaties that underlie the regime, then it is difficult to see how one can argue in a principled fashion that governments should avoid any domestic implementation of the commitment to the regime in order to leave room for its violation at the international level. It is like arguing that one should join Alcoholics Anonymous, but ought not to tell anyone at home for fear that they might lock up the liquor cabinet. And when one considers the litany of armed conflicts engaged in by liberal democracies since the establishment of the U.N. system, many in apparent violation of that regime,²⁹⁵ some form of effective domestic mechanism to enhance compliance with the regime would seem desirable.²⁹⁶ Moreover, as discussed earlier, developing a national policy predicated upon the “efficient breach” of the

²⁹⁴ Moreover, this is not a view that is universally embraced by realists and has to be seen as a more extreme view even among them. See, e.g., BULL, *supra* note 70.

²⁹⁵ Examples include the Suez crisis of 1956; the 1967 Israeli-Arab war, though many argue that this was a valid exercise of the right to self-defense; the Vietnam war, including the U.S. bombings of Cambodia and operations in Laos; the U.S. invasion of Grenada in 1983 and Panama in 1989; the U.S. intervention in Nicaragua in the early 1980s; the U.S. bombing of Libya in 1986; the NATO bombing in the Kosovo war in 1999; the second invasion of Iraq in 2003; not to mention smaller scale attacks by the U.S., such as the recent operations against purported terrorists in Somalia in 2007.

²⁹⁶ There has been recent work suggesting that the international law of armed conflict already informs the proper interpretation of congressional approval under the U.S. Constitution for executive use of armed force. In this very limited manner, the current domestic mechanism could be said to provide such compliance, though scholars differ on the extent to which the international laws of war (primarily *jus in bello*) can thereby exercise a real constraint on executive power. See generally Bradley & Goldsmith, *supra* note 170; Delahunty & Yoo, *Executive Power v. International Law*, *supra* note 286; Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005).

most fundamental international law obligations is corrosive of the domestic commitments to the rule of law.

Ronald Dworkin has made the now famous argument that to take rights seriously is to enforce them even though doing so will impose real costs on the society as a whole.²⁹⁷ It is grounded in a recognition that we are prepared, as a liberal democratic society founded on certain values and beliefs, to incur such costs in order to structure our society according to those values, as expressed in the respect for and enforcement of individual rights.²⁹⁸ The analogy can be made to the costs associated with avoiding war and structuring our society—both the individual societies of liberal democracies, and the broader international society within which democracies now form the majority—in such a way that better constrains our ability and propensity to make war. There may indeed be times when those constraints will exact very real and even painful costs, but if we are to take war seriously, or to be more precise, if we are to take the reduction of war seriously, we should be prepared to incur such costs. Aharon Barak, the former President of the Supreme Court of Israel, has in the context of judicial decisions relating to constitutional constraints on the conduct of armed conflict, noted that the laws may seem to require democracies to fight with one arm tied behind their back, but that in fact democracies must indeed remain true to these laws, even if it handicaps them in war, in order to remain true to the values that make them democracies in the first place.²⁹⁹ This can be extended to the realm of *jus ad bellum*. If we are to remain true to the international rule of law, we ought to accept the costs of domestic constraints that merely bind us closer to the commitments we have already made to the most fundamental principles in international law.

C. *Constitutional Theory—The Role of Judicial Review*

The second branch of the separation of powers elements of the Model is the provision of some limited measure of judicial review of the decision-making process. Including the third branch assists in providing a further check on the “second class”

²⁹⁷ DWORKIN, *supra* note 8, at 204.

²⁹⁸ *Id.*

²⁹⁹ CA 5100/94 Public Committee Against Torture in Israel v. The State of Israel 53(4), 37 HCJ [1999] (Isr.); *see also* AHARON BARAK, *THE JUDGE IN A DEMOCRACY* ch. 16 (2006).

of war that worried Madison, those driven by the passions of the people, and it provides further assistance in addressing the Kantian dilemma. For the problem identified in this context is the proclivity of the people, and their representatives in the legislature, to be just as inflamed and bent on action as the executive in certain circumstances, particularly when dealing with illiberal states.³⁰⁰ By providing for yet another check, in the form of potential judicial review of the decision-making process to ensure that the proper procedure was followed, and that the required factors and criteria were sufficiently considered, the Model can further ameliorate this weakness in the democratic process of going to war.

To better appreciate the manner in which judicial review would operate as an effective check on improper decision making of both the executive and the legislature, it is useful to place the discussion in the context of the broader theoretical justifications for judicial review as a fundamental component of constitutional democracy. One of the central justifications for judicial review flows from the idea that constitutions comprise the formal terms of a social contract. The people surrender power and authority to governmental institutions in return for a commitment that such authority and power will be exercised in accordance with the terms of the agreement.³⁰¹ Even for those who view this as being more of a useful fiction rather than any empirical explanation of the formation of constitutions, it reflects the principle of popular sovereignty that is fundamental to constitutional democracy, and captures the principal-agent problems that characterize democratic governance. To the extent that the government constitutes the agent for the voting population as principal, the relationship is likely to suffer from agency problems, with the interests of the agent diverging from those of the principal in various circumstances.³⁰²

The courts play an important role in reducing these agency problems. Informational agency problems are particularly significant in the people-government relationship.³⁰³ It is extremely difficult for the population to obtain information regarding government malfeasance or even

³⁰⁰ See *supra* Part IV.B.

³⁰¹ For a good review of this theoretical explanation of judicial review, see David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009).

³⁰² *Id.* at 723.

³⁰³ *Id.* at 745.

misjudgment. We have already discussed this in the context of the role of legislative oversight of the executive in deliberative democracy, but the judicial review of government conduct also serves a vital monitoring function that helps to attenuate this problem. The courts provide information to the population regarding the extent to which either branch is engaging in activity that is outside of its constitutional authority, or in conduct that violates specific limits or constraints on how it is to exercise power.³⁰⁴ Indeed, the judgments of courts provide particularly accessible and legitimate opinions regarding government action, which tend to be given wide publication by the media. These not only provide information in the form of both findings of fact and judgments relating to the conduct of the other branches of government, but they serve an important coordination function as well. Judicial decisions help to shape public beliefs, both in terms of the factual circumstances alleged to constitute a violation of the constitutional terms, and the normative views as to what ought to constitute legitimate exercises of authority under the constitutional arrangement.³⁰⁵

These two functions of the courts in the exercise of judicial review—the monitoring and informational role, and the coordinating and opinion-shaping role—dovetail in very obvious ways with the theoretical analysis that has been developed thus far in support of the Model. To the extent that the courts are forced to actually engage in judicial review of government decisions on the use of force, the monitoring and informational role amplifies and reinforces the elements of deliberative democracy. Moreover, over time the process of judicial review, in considering and interpreting the manner in which the international law principles were applied in governmental decision making, will internalize those norms in precisely the manner contemplated by transnational legal process theory. And of course, the mere potential for such judicial review, because of the well-understood capability of the courts to judge the legitimacy of government decisions and their power to shape public perceptions, can operate to influence the behavior of both the executive and the legislature.

While theoretically and ideologically appealing, the social-contract theory may not fully explain why political entities engaged in the development of a new constitution, or

³⁰⁴ *Id.* at 745-55.

³⁰⁵ *Id.* at 756-57.

for that matter contemplating the amendment of an existing one, entities which themselves expect to exercise political power within the new polity, would confer such power upon the third branch of government. An alternative explanation is that they do so as a form of insurance, to entrench the political and legal arrangement about which there is now consensus against the possible interference by subsequent regimes. Judicial review thus serves as a hedge against the loss of power in the near to medium term, and insurance against successors acting in ways inimical to the currently agreed-upon structure.³⁰⁶ This may be a better explanation for why new democracies entrench the power of judicial review within constitutions as a factual matter, but it does not deny the agency problems inherent in democratic governance, nor does it negate this understanding of the role courts and judicial review play in providing information and shaping public opinions.

The judicial review of the decision-making process provided for in the Model would bring to bear these monitoring and coordinating functions of the judiciary on the crucial process of deciding on the use of armed force, and in so doing it would engage the Image I and Image II causes of war in a manner very similar to that of the deliberative functions of the legislature already discussed. Yet because it is limited to a review of whether the decision has been made with adequate consideration of specified principles, and that the decision was made with the requisite authority and approvals, the provision for judicial review is not nearly as radical a move as it might seem at first glance. Rather, it is entirely within the scope of what courts are already understood to have full authority to do in most constitutional democracies. What is novel about the Model is the substance of those criteria or factors to be considered by government in its decision making—that it mandates the consideration of the principles of *jus ad bellum* as part of the decision-making process. But it does not require the court to apply those principles substantively, and the court need not agree with the decision makers' judgment that the proposed policy complied with the international law principles—so long as the court is satisfied that the principles were sufficiently and in good faith considered in the process, then the court will have no grounds to interfere with the decision.

³⁰⁶ TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 22-33 (2003).

Including judicial review also addresses a structural weakness in the decision-making process on the use of armed force. The argument above was that the legislature's involvement can bring to bear the core parliamentary functions on the decision-making process. As discussed, that separation of powers on the decision to use force is underdeveloped in most democracies. This is in large measure due to the executive branch jealously guarding what is seen as its prerogative in the absence of clear constitutional requirements to involve the legislature.³⁰⁷ But another aspect of the problem is the natural proclivity of legislatures to abdicate any responsibility for such decision making. Jide Nzelibe and John Yoo make the argument, grounded in agency theory, that legislatures will always have incentives in hard cases to sit on the fence, and so will avoid committing to any position in up-or-down votes, thereby permitting the executive to go it alone and take the blame if things go poorly.³⁰⁸ John Ely, arguing from the other end of the spectrum in the executive powers debate, similarly excoriated Congress for its failure to exercise its constitutional function effectively or responsibly during the early years of escalation in Vietnam.³⁰⁹ This was reflected in the passage of a notoriously ambiguous Gulf of Tonkin Resolution, only to have senior Congressmen later argue that they never intended to authorize various aspects of the war as it began to unfold badly.³¹⁰ Thus, the clear requirement for legislative approval would not only force the executive's hand, but it would help prevent the legislature from shirking its duty. It is the provision of jurisdiction and broad standing for judicial review,

³⁰⁷ This is reflected in the U.S. in the stance of every President since Truman on the war powers provision of the Constitution.

³⁰⁸ Nzelibe & Yoo, *Rational War and Constitutional Design*, *supra* note 49, at 2524-25. Ironically, Nzelibe and Yoo make this argument as part of a broader argument in favor of clear executive control over the power to engage in armed conflict. *See id.* at 2516.

³⁰⁹ ELY, *supra* note 169, at chs. 2-3.

³¹⁰ *Id.* at 16-17. The "intentions" of a deliberative body like Congress can be somewhat misleading, and its voting behavior can seem bizarre if viewed from the perspective of any unitary intent. This is exquisitely reflected by the voting on the U.S. participation in NATO air strikes in the Kosovo war of 1999. On April 28, Congress voted on four related resolutions. First, it overwhelmingly rejected a declaration of war, by a vote of 427 to 2. It also rejected, by a tie vote, a resolution authorizing the President to conduct air operations and missile strikes in the Federal Republic of Yugoslavia. But it then went on to reject a resolution requiring the President to terminate U.S. participation in the NATO operations immediately. Finally, it voted to provide all necessary funds for that operation. In terms of "intention," one could say that Congress did not want to authorize the war, did not want to stop it, and was happy to pay for it. For the voting record, see *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000).

however, that gives this aspect of the Model real bite, since the potential for judicial review would likely reduce legislative resistance to fulfilling its responsibilities.

There is, of course, a final institutional weakness, which is the reluctance of the judiciary itself to be drawn into cases involving high-stakes national security issues. And this lies at the heart of what are likely to be significant objections to this aspect of the Model. General arguments are often raised against judicial review of government conduct that does not implicate individual rights.³¹¹ But there have also been many arguments made in the context of the American war powers debate to suggest that the courts are reluctant to, and that normatively they ought not to, play any role in decisions on the use of force.³¹² And indeed, there are numerous appellate court cases in the U.S. in which judges have made precisely such claims, typically on the basis that such issues are not justiciable due to the operation of the “political question doctrine.”³¹³

Beginning with the descriptive claims, the argument is that courts will employ such devices as the “political question” doctrine, excessively narrow standing rules, or the employment of standards of review that are relaxed or “dialed down” so far as to reduce the judicial review to a mere façade when dealing with national security issues.³¹⁴ Recent empirical research, however, including analysis of the decisions of the U.S. federal courts in national security related cases in the post-9/11 context, suggests that these descriptive claims are not accurate—that the courts are no more reluctant to exercise judicial review of such issues than they are in any other public law cases.³¹⁵

I would argue that when courts have appeared reluctant, it has most frequently been when there was

³¹¹ E.g., Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1497-1505 (2005).

³¹² E.g., *id.*; Nzelibe & Yoo, *Rational War and Constitutional Design*, *supra* note 49, at 2536-38; Vermeule, *supra* note 278, at 1098, 1106-25.

³¹³ See, e.g., *Campbell*, 203 F.3d at 24-25 (Silberman, J., concurring).

³¹⁴ See Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87 (2009), for a good review of these arguments. The reference to “dialing down” the level of review comes from Vermeule, *supra* note 278, which relates more specifically to judicial review in administrative law and the creation of “gray holes” and “black holes” in the legal order—but the same arguments apply to judicial review in the constitutional context.

³¹⁵ Aziz Z. Huq, *Against National Security Exceptionalism* (Univ. of Chicago, Public Law Working Paper No. 299); Kent Roach, *Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Justification for Judicial Review*, 3 INDIAN J. CONST. L. 138 (2009); Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269.

ambiguity as to either what the precise issue was, or where the lines of authority lay with respect to the exercise of power that was in question. Where there is a lack of sufficient clarity, it permits an unfortunate mischaracterization of the question that is properly before the court, appearing in the arguments advanced before the courts, the reasoning in the resulting judgments, and in subsequent scholarly analysis. The issue is all too frequently articulated as being a substantive inquiry into what is, in the particular circumstances, the optimal strategic or tactical policy to achieve national security objectives. The objection is then made that the courts do not have sufficient competence to assess such questions, and that it is not in any event within their proper jurisdiction to be second-guessing the political branches of government on decisions relating to the deployment of forces in the national security of the nation.³¹⁶ But this is usually a mischaracterization of the issue, and it is typically not the kind of question that is actually before the court. The issue before the court in these cases is more often whether a decision that has been made or action taken in respect of the deployment of armed forces has been made with the requisite authority, or whether it has violated some constitutional provision.

Those are questions that are entirely within the proper purview and competency of the judiciary.³¹⁷ Many common law courts have indeed noted the distinction between the non-justiciability of questions relating to the substance of the government's defense policy on the one hand, and on the other hand, questions as to whether a branch of government had the requisite authority to make the decision in question, and whether there is evidence that the decision was made on the basis of the specific considerations required by the authority

³¹⁶ See, e.g., *Campbell*, 203 F.3d at 27-28 (Silberman, J., concurring); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973). To be fair, there are times when the courts mischaracterize the question even when there does not appear to be any real ambiguity, as reflected in the famous *Sunakawa* case in the Japanese Supreme Court: Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 1959(A) No. 710, 13 KEISHŪ 3225, sec. 2, para. 4 (Japan), available at <http://www.courts.go.jp/english/judgments/text/1959.12.16-1959-A-No.710.html> [hereinafter the *Sunakawa* case]. In the context of the war powers cases in the United States the issue is complicated further by questions of whether the terms "war" and the scope of the phrase "declare war" are sufficiently clear standards upon which the court may make judgment. *Campbell*, 203 F.3d at 24-26 (Silberman, J., concurring).

³¹⁷ ELY, *supra* note 169, at 56; Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 606 (1976) [hereinafter Henkin, *Political Question*].

under which the decision was said to be made.³¹⁸ The point was made by Judge Tatel, concurring in *Campbell v. Clinton*:

Resolving the issues in this case would require us to decide not whether the air campaign was wise . . . but whether the President possessed legal authority to conduct military operations. Did the President exceed his constitutional authority as commander in chief? Did he intrude on Congress's power to declare war? Did he violate the War Powers Resolution? Presenting purely legal issues, these questions call on us to perform one of the most important functions of Article III courts: determining the proper allocation of power among constitutional branches of government.³¹⁹

The House of Lords in the United Kingdom and the Supreme Court of Canada have similarly held that while courts may not second-guess the substance of national security decisions in the government's exercise of the Royal Prerogative, they may still review the decision for the purpose of determining whether the government had the requisite authority to take the action in question and whether the action was in violation of any limitation on that authority or other constitutional provision.³²⁰

In short, while a more exhaustive analysis of case law is not possible here, an examination of these cases from different jurisdictions provides some basis for two important and related arguments. First, they suggest that courts are not reluctant to exercise their powers of judicial review where the question

³¹⁸ *E.g.*, *Council of Civil Serv. Unions & Others v. Ministers of Civil Serv.*, [1985] A.C. 374 (H.L.); *Chandler v. Dir. of Pub. Prosecutions*, [1964] A.C. 763 (H.L.); *Aleksic v. Canada*, [2002] 215 D.L.R.4th 720 (Can. Ont. Sup. Ct. J.); *Operation Dismantle, Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.).

³¹⁹ *Campbell*, 203 F.3d at 40-41 (Tatel, J., concurring); *see also Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (holding that the courts do not lack the ability or the authority to determine whether the actions of the executive constitute war-making for the purposes of the war-powers provision of the Constitution); *Dellums v. Bush*, 752 F. Supp. 1141, 1145 (D.D.C. 1990) ("If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the executive. Such an 'interpretation' would evade the plain language of the Constitution, and it cannot stand.").

³²⁰ *Council of Civil Serv. Unions*, [1985] A.C. (H.L.), at 401-02 (Lord Fraser of Tullybelton) (holding that the courts will only defer to the government's opinion as to the necessity of the policy for national security purposes, in so far as it is not patently unreasonable); *id.* at 405-06 (Lord Scarman); *Operation Dismantle*, [1985] 1 S.C.R. (S.C.C. Can.), at para. 65 (Wilson, J.). The *Operation Dismantle* case involved U.S. cruise missile testing in Canada, and the claim was dismissed on the grounds that the risk to the life and security of the person that the policy was alleged to have raised, by reason of making missile strikes against Canada more likely in the event of war with the Warsaw Pact, was too speculative. The majority implicitly accepted that the issue was justiciable, but Justice Wilson explicitly dealt with the issue in her concurring opinion, which has been relied upon in subsequent cases, including *Aleksic*, [2002] 215 D.L.R.4th 720 (Can. Ont. Sup. Ct. J.).

before them is whether the impugned government action was exercised with the requisite authority. Or, to put it another way, where the question is whether the political branch in question has the constitutional authority to do what it proposes to do. Second, the courts are less reluctant to exercise judicial review where the constitutional provisions (or even statutory provisions for that matter) that form the basis of the claim being advanced are clear and unambiguous—whether they delineate the authority at issue, or establish specific limitation on the exercise of government power. It is partly with this insight in mind that the provisions in the Model would make quite explicit the limited scope of the question that the court can address, and the broad standing for advancing the claim.

The “political question” doctrine would not frustrate the operation of the provision. In the constitutional jurisprudence of the United States, the “political question” doctrine suggests that certain categories of issue will be nonjusticiable. The most important and widely accepted categories of constitutional issues that fall within the scope of the “political question” doctrine include: those over which other branches of government have been given specific authority to decide by the constitution; those for which there are no judicially manageable standards available to resolve the question; and those which are impossible to decide without first making an initial policy determination that is clearly outside of the court’s jurisdiction.³²¹ There continues to be considerable controversy regarding the actual scope, continued viability, and legitimacy of the “political question” doctrine in the United States.³²² We need not delve into that debate here, but because the Model

³²¹ *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). The remaining “categories” according to the court, were: questions the resolution of which was impossible without expressing lack of respect for another branch of government; questions that involved circumstances in which there was an unusual requirement for unquestioning adherence to a political decision already made; and questions which raised the possibility of embarrassment caused by the different positions taken by coordinate branches of government. *Id.* at 211-17. There is, however, much less agreement on these criteria, and, indeed, some scholars do not even accept the criteria I have set out as most widely accepted. See authorities cited *infra* note 322. In my view, there is no principled basis for foreclosing judicial review of any decision simply because it might cause embarrassment or reflect a lack of respect for another branch of government, where the decision potentially constitutes an unconstitutional act.

³²² See, e.g., ELY, *supra* note 169, at 55-56; THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* (1992); Choper, *supra* note 311; Henkin, *Political Question*, *supra* note 317; Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002).

would provide clear issues for the courts to determine, for the reasons explained above it would not, run afoul of the most widely accepted criteria of the “political question” doctrine.

Turning to the normative arguments against judicial review of national security issues, many of these are similar to the functionalist claims for executive power in the war powers debate. These claims are a subset of undertheorized and often internally inconsistent “special deference” doctrines, according to which the courts ought to defer entirely on foreign affairs issues.³²³ The reasons given include the need for secrecy in decision making; the courts’ lack of access to crucial information to resolve complex issues relating to national security; the courts’ lack of professional competency to decide such issues; and from the political question doctrine itself, the need to avoid “embarrassment” flowing from conflicting decisions from different branches of government in foreign affairs, and the lack of manageable standards for the judiciary to apply in resolving disputes, particularly given the allegedly political and dynamic nature of international norms (in contrast to the stable and legal norms in the domestic system).³²⁴

All of these claims have been dismissed at some length elsewhere,³²⁵ and many of the more general counterarguments to broader functionalist claims have already been addressed in the previous section on the legislative role. To address briefly a few of the criticisms specific to the judicial role, the arguments advanced on the lack of judicial competency do not bear scrutiny when placed in the context of the demands made of courts for the resolution of incredibly complex, large scale, and hugely significant domestic issues. The problems relating to judicial access to information, specialized knowledge and competency, and the development of sufficiently manageable standards are no less problematic in various kinds of environmental, securities, insolvency, and similarly technical issues arising in a regulatory context, some of which may include constitutional aspects and even impact the state’s foreign affairs.³²⁶ Yet the advocates of special deference on national security issues do not object to judicial review of these

³²³ Knowles, *supra* note 314, at 89, 130-38.

³²⁴ *Id.* at 130-38. See generally Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659-63 (2000); Jinks & Katyal, *supra* note 291; Posner & Sunstein, *supra* note 292.

³²⁵ See, e.g., Knowles, *supra* note 314, at 130-38.

³²⁶ *Id.* at 290.

sorts of complex domestic cases. Moreover, those who suggest that there is some fundamental difference between these kinds of cases and those relating to national security issues again mischaracterize the question at issue in national security cases. As already discussed, the courts are not seeking to second-guess the policy determination as to what is in the national interest on the basis of highly classified information—they are simply assessing whether such decisions were made with the requisite authority, based on a sufficient consideration of the required criteria, and not otherwise in violation of constitutional rights or limitations.

The notion of “special deference” is inconsistent with a thick conception of the rule of law, as David Dyzenhaus has argued, and even champions of “special deference” such as like Adrian Vermeule have conceded.³²⁷ The idea rests in part on the theories of Carl Schmitt regarding the ineffectiveness of constitutional law constraints in moments of crisis—arguments that were ultimately intended to prove the invalidity of liberal democratic theory, as we have already examined. And it will of course be clear by now that this entire project is premised upon the legitimacy and validity of liberal democratic theory and the importance of a thick or substantive conception of the rule of law.³²⁸

Claims for deference to the executive in foreign affairs are also grounded in an anachronistic adherence to the most conservative versions of realism in international relations. They flow from the belief in a Hobbesian world characterized by an anarchical international system in perpetual conflict, in which unitary sovereign states are the sole actors and self-preservation is the prime directive.³²⁹ That worldview does not comport with the reality of an increasingly interconnected and globalized international society, with growing networks of transnational relations at various levels and involving nonstate actors, governed by an increasingly integrated web of international and domestic legal systems. Descriptively, the international society does not reflect the Hobbesian conception of the world, and normatively, this project is predicated upon

³²⁷ DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN TIME OF EMERGENCY* (2006); Dyzenhaus, *Schmitt v. Dicey*, *supra* note 276, at 231, 235, 237-38; Vermeule, *supra* note 278, at 1132-33.

³²⁸ For the discussion of Schmitt’s theories and the arguments refuting them, see *supra* notes 275-82 and accompanying text.

³²⁹ Knowles, *supra* note 314, at 25-39; see *supra* Part II.C (discussing the Hobbesian perspective).

the need to move us further away from the vestigial remnants of that pre-twentieth century understanding of the world.

In short, as an empirical matter, the evidence casts doubt on the extent to which courts are reluctant to engage national security issues. The normative arguments for such deference are neither persuasive nor grounded in theories of international relations and constitutional law that are consistent with a liberal understanding of international law and explanations for the democratic peace, or indeed deliberative democracy and the place of the rule of law in liberal democracy. There is evidence to suggest that courts will quite willingly engage in judicial review where there are clear constitutional provisions regarding the distribution of authority and the establishment of limits on the exercise of such authority in national security matters. And the kinds of questions that are presented to courts in such situations do not attract many of the objections, such as technical competence and the nature of standards to be applied, that are often raised by opponents of judicial review in the realm of national security.

In closing, it should be emphasized how the three distinct elements of the Model would operate together in a mutually reinforcing fashion, and indeed the extent to which the theoretical rationales for them are complimentary and interlocking. Taken as a whole the Model has a certain Gestalt character, with the combined effect of these mutually reinforcing elements being greater than the sum of the individual benefits that each could provide alone. This becomes clearer with a consideration of the actual design of the Model, to which we turn next, and at the end of that discussion I will revisit the importance of the combined operation of the elements of the Model.

V. DESIGN OF THE MODEL

The last question to consider is exactly how the Model would be structured in practical terms, and to explain briefly why certain choices were made in developing the suggested design. Moreover, in this discussion of the specific provisions comprising the Model, I shall explore further how the elements would operate to effectively achieve the theoretical objectives previously outlined. To facilitate this discussion, I have developed draft language for a constitutional provision. The entire Model would be comprised of one article, divided into three sections or clauses, with each section constituting one of

the elements of the Model. This is a generic proposal to serve as a vehicle for illustrating the conceptual design of the Model. It is not aimed at any specific constitution.

A. *A Process-Based Constitutional Incorporation of Jus ad Bellum*

The article begins with the incorporation of the principles of *jus ad bellum*. The first section provides:

- (1) Any decision to use armed force, or to deploy armed forces in circumstances likely to lead to the use of armed force, of a level in scale, duration, and intensity equal to that constituting an armed attack in international law, shall be made only after sufficient and demonstrable consideration of whether the proposed action is consistent with the applicable principles of international law relating to the use of armed force, as found in the United Nations Charter, other relevant treaties to which the State is a party, and the related principles of customary international law.

The key elements of this section, which require some further discussion and explanation, are that: (i) it incorporates both conventional international law (that is, treaty law) and customary international law; (ii) it specifies the regime of law from which the principles are drawn, with reference by name to the most important governing convention (the U.N. Charter); (iii) it incorporates the relevant principles of international law by reference only, rather than explicitly stipulating the substance of those principles; (iv) it is process based rather than substantive, in the sense that it does not purport to incorporate and impose the actual prohibitions from international law, but rather it only creates an obligation for decision makers to sufficiently consider compliance with those prohibitions (and the exceptions thereto); and finally, (v) it provides a threshold level of force that would trigger the operation of the provision, with some criteria for defining that trigger.

Beginning with the first element, there are a number of reasons underlying the decision to incorporate both treaty and customary international law. There is a wide range of approaches among constitutional democracies regarding the manner in which international law is treated within their domestic legal systems, and great variation in the extent to which there is already some constitutional provision for such treatment. This not only relates to the classic theoretical division between monist and dualist perspectives, but also relates, in practical terms, to the significant differences among

states regarding how the different forms of international law are received and the status each is afforded within the domestic legal system.³³⁰ The mechanisms and processes by which states incorporate (or transform, as the case may be) customary international law are typically different than those used for the incorporation of conventional international law, and many states also afford one a higher status within the domestic legal system than the other. Moreover, these differences themselves vary considerably across states, even among liberal democracies, with some such as the Netherlands placing a primacy on treaty law,³³¹ while others such as Germany, Austria, and Italy giving customary international law higher status.³³² States vary as well on how each of these is to be received by the domestic legal systems.³³³

All of this suggests a couple of inferences. First, there are clear examples of constitutional democracies incorporating within their constitutions both conventional international law and customary international law, and indeed examples of each being afforded a higher status than domestic statutes and even a national constitution. Second, given the very uneven treatment among democracies for the purposes of developing a universal model of incorporation, and given that there are principles from both a treaty and custom that are thought to be

³³⁰ For a more extensive review of the various permutations of how monism and dualism are reflected in the legal systems of a number of constitutional democracies, and the varying ways in which treaty and custom are ranked in different systems, see Ginsburg, *Locking in Democracy*, *supra* note 193, at 713-19.

³³¹ GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [CONSTITUTION] Feb. 17, 1983, arts. 91, 93, 94 (Neth.); *see also* Ginsburg, *Locking in Democracy*, *supra* note 193, at 713. The French Constitution of 1958 ranks ratified treaties above statute, subject only to a condition of reciprocity. 1958 CONST. art. 55 (Fr.). The Constitution of Costa Rica of 1968 has a similar provision. CONST. Nov. 8, 1949, art. 7 (Costa Rica). *See generally* Buergenthal, *supra* note 193, at 215-20.

³³² Buergenthal, *supra* note 193, at 215-20. *See* GERMAN BASIC LAW, *supra* note 187, art. 25 (“The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”) The Constitution of Austria includes only the first clause of Article 25 of the German Basic Law. BUNDES-VERFASSUNGSGESETZ [CONSTITUTION] art. 9 (Austria). The Constitution of Hungary similarly provides that “the legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country’s domestic law with the obligations assumed under international law.” A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] Aug. 20, 1949, *as amended*, art. 7, para. 1 (Hung.).

³³³ The principle in the United Kingdom was articulated most famously by Lord Denning in *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1997] Q.B. 529, 553-57; *see also* U.S. CONST. art. I, § 8; GIBRAN VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS 142-50 (2002). *See generally* Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999); Ginsburg, *Locking in Democracy*, *supra* note 193, at 109.

important, the incorporation mechanism should explicitly incorporate the principles of both systems as part of the Model. That way, regardless of the more general approach within the particular constitutional system, the provision would make quite clear that the principles of both systems are being incorporated directly into the constitution for the purposes of this constraint on the use of armed force.

This of course raises the question of whether there are significant differences between the principles of *jus ad bellum* to be found in conventional international law and custom. There is in fact very little difference, as the International Court of Justice went to some pains to establish in *Nicaragua v. United States (Merits)*.³³⁴ And the most fundamental principles of the *jus ad bellum* regime, the incorporation of which is central to the Model, are essentially found in Article 2(4) and Chapter VII (which includes Article 51) of the U.N. Charter. Nonetheless, it will be recalled that one of the theoretical arguments in support of adopting the Model to begin with is that the *jus ad bellum* regime is coming under pressure to change, leading to the possible development of new principles and new legal tests to determine their application. The extent to which there is indeed some change to the *jus ad bellum* regime in the near to mid-term, it is unlikely to come in the form of amendments to the U.N. Charter or the adoption of any new treaty. It is much more likely to come in the form of changes to customary international law. In such circumstances, it will be important that the Model will have been structured so as to incorporate the relevant principles of customary international law, and to require that the decision making on the use of armed force be informed by the most current developments in the law.

The second element of this subsection of the provision is the manner in which it refers specifically to the principles of the *jus ad bellum* regime, and refers even more explicitly to a particular treaty regime, namely the U.N. Charter. This is in contrast to the option of a much broader incorporation of international law as a whole, as many national constitutions already have. Some of the reasons for a more narrow and specific incorporation will be obvious and were discussed earlier.³³⁵ In addition, given fairly widespread concerns about

³³⁴ *Nicaragua v. U.S.*, *supra* note 141, at 14.

³³⁵ See *supra* text accompanying notes 161-63.

the legitimacy in permitting international law to trump domestic law—concerns grounded in arguments about the democratic deficiency of the international law-making process, the erosion of national sovereignty, and the negating of the democratic will of the state's citizenry—it may be considerably easier in practical terms to mobilize support for a carefully tailored provision than a blanket incorporation of international law along the lines of the Netherlands.

In addition to this, however, the incorporation of specific principles or regimes of international law provides a much more fertile basis for the internal interpretation and internalization of the associated norms, which as was discussed earlier is an important aspect of the process of enhancing compliance with international law according to transnational legal process theory. Moreover, by identifying particular regimes and specifying the precise treaty from which principles are drawn, examples from a number of countries suggest that the constitutional provision will thereby create the legitimate basis for courts and other domestic institutions to consider how those principles have been interpreted by international tribunals and organizations. This can be an important factor in insuring that the principles that are incorporated remain organically connected to the international law sources from which they were drawn.

One of the best examples of this approach is the constitutional incorporation of human rights principles by a number of countries over the last few decades. For instance, Article 10(2) of the Spanish Constitution of 1978 provides that “the norms relative to basic human rights and liberties which are recognized by the constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.”³³⁶ This has been interpreted to mean that such human rights conventions as the European Convention on Human Rights and the International Convention on Civil and Political Rights³³⁷ have constitutional status within the Spanish legal system; or, to put it another way, the relevant provisions of those conventions have effectively been incorporated by reference into the

³³⁶ CONSTITUCIÓN ESPAÑOLA, art. 10, para. 2, Oct. 26, 1978 (Spain).

³³⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

Constitution.³³⁸ What is more, this incorporation by explicit reference to the conventions themselves has provided a basis for the Spanish courts to not only interpret the constitutional provisions in light of the principles in the conventions, but also to draw upon the interpretation of the relevant provisions of the conventions by international courts and other interpretative bodies.³³⁹

The third element of this subsection of the Model relates to the manner in which the provision incorporates the principles of *jus ad bellum* by reference only, rather than specifying the content of those principles as part of the constitutional text. In other words, the provision requires decision makers to consider the applicable principles relating to the use of force, as found in the U.N. Charter and other sources, but it does not provide an explicit list of what those principles are. An alternative approach would have been to provide a set of subsections detailing the content of each principle and rule taken from international law that decision makers had to consider before taking action. Aside from the sheer awkwardness of trying to stipulate all the relevant rules and principles, the reasons for employing the “by reference” mechanism are similar to those discussed above in relation to the importance of including general references to customary international law and treaty sources. That is, incorporation by reference preserves the flexibility of the Model, such that the provision can essentially evolve as the underlying international law principles change over time, and it retains the organic link to those principles for purposes of interpretation. As already discussed, that has its own inherent risks, but given the likelihood that the *jus ad bellum* regime will develop over the next few decades, coupled with the difficulty associated with any constitutional amendment, building in that kind of flexibility is important.

An example of this approach, albeit in a regular statute rather than a constitutional context, can be found in the *Alien Tort Statute* in the United States, the key clause of which states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of

³³⁸ Buergenthal, *supra* note 193, at 217.

³³⁹ *Id.* A number of Latin American countries have followed a similar path. See, e.g., Art. 75, para. 22, CONSTITUCIÓN NACIONAL (Arg.). For a discussion of similar developments among the new democracies of Eastern Europe, see Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT'L L. 427 (1994).

the law of nations or a treaty of the United States.”³⁴⁰ This does not incorporate international law norms per se, but as the Supreme Court held in *Sosa v. Alvarez-Machain*, the statute confers subject matter jurisdiction and creates a cause of action for the violation of the “laws of nations,” which is a reference to customary international law.³⁴¹

Two advantages of the incorporation by reference are well illustrated by this example. The first is the flexibility of the legislative provision, as its content can essentially evolve over time without requiring any change to statutory language. Thus, in *Sosa* it was recognized that the content of the “narrow set of violations of the law of nations” today is certainly not the same as the narrow set of violations that were contemplated back in 1789 when the statute was enacted. Rather, the range of what types of violations within the law of nations was defined, but the content of those violations was not specified, and is left to be ascertained according to the current principles of customary international law.³⁴² Second, but very much related, is the advantage of maintaining an organic connection to the international law principles, which thus continue to be the living source of the rules. The employment of the term “in violation of the laws of nations” constituted an intermediary within the statute, or a trigger, for the application of the primary norms that are promulgated in detail somewhere else—in this instance in the sources of the laws of nations. In the sense of Hart’s primary and secondary rules, therefore, the reference in the statute is merely a secondary norm, and leaves the primary norm as the source of the content.³⁴³

³⁴⁰ Alien Tort Statute, 28 U.S.C. § 1350 (2006) (enacted as part of the Judiciary Act of 1789).

³⁴¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

³⁴² *Id.* at 720, 724, 732.

³⁴³ Patrick Gudridge explains how the Retaliation Act of March 1813 employed this device to incorporate the laws of war. The Act conferred authority upon the President to retaliate against any “violations of the laws and usages of war, among civilized nations.” Law of March 3, 1813, ch. LXI, 2 Stat. 829-30 (1813). Gudridge makes the argument that use of legislation as an intermediary was a common device at the time, and it essentially rendered available to the President an entire body of law, the international laws of war; and as a secondary norm, did not attempt to specify the content of the primary norms it thus incorporated. Patrick O. Gudridge, *Ely, Black, Grotius & Vattel*, 50 U. MIAMI L. REV. 81, 85-86 (1995); see also Bernard H. Oxman, *The Relevance of the International Order to the Internal Allocation of Powers to Use Force*, 50 U. MIAMI L. REV. 129, 133-34 (1995) (arguing that the changes to the international law regime on the use of force should inform our understanding of the relationship between the constitutional war powers provisions and international law).

As explained earlier, this retention of an organic connection with the underlying international law principles also ensures that there will be full access to the associated interpretations and understanding of those principles, including the decisions of international tribunals and organizations, as they have developed over time. This relationship tends to be lost when the contemporary understanding of customary international law rules is taken or the language of a rule is lifted from some treaty and then dropped into the text of a constitution (often in some slightly revised form). Moreover, the juxtaposition of the revised language with other provisions, severed as it is from its conceptual source, can lead to significant unintended consequences.³⁴⁴

The fourth element of the subsection is that it is process-based rather than substantive in nature. In other words, the provision does not incorporate the prohibitions (and corresponding exceptions) of the *jus ad bellum* regime as substantive clauses in the Constitution. Rather, it merely requires that the decision makers contemplating the use of force sufficiently and demonstrably consider whether the proposed action is consistent with the international law principles that have been incorporated.

There are several reasons for choosing to develop the mechanism in this fashion, but they largely relate to the practical issues of implementation. It can be anticipated that there would be significant political objection in many jurisdictions to any contemplated adoption of this Model. The foundation of many of these objections, principled and otherwise, would be a resistance to the idea of incorporating international law principles to bind the hands of government on issues of national security—issues relating to self-preservation and defending “vital interests.” As has already been suggested above, the arguments behind many of these objections are misplaced. But the fact remains that if the Model proposed the incorporation of the principles as binding constitutional prohibitions, which would also entail conferring upon the judiciary the power to decide whether a proposed use of force did or did not comply with the exceptions to the prohibition as a matter of both constitutional and international

³⁴⁴ Both these problems are reflected in the history of the drafting and operation of the war renouncing provision of the Japanese Constitution, one clause of which was developed using adapted language from principles of *jus ad bellum*. See Martin, *Binding Dogs of War*, *supra* note 127, at 289-327.

law, then the volume of these objections would likely be overwhelming. Such implementation of binding prohibitions may be possible and desirable in the future, but for now a process-based model may serve as an initial and more viable step along the road to that objective. And for the reasons already discussed in the previous Part, a process-based provision will still have a significant effect.

The final element in the subsection is the initial gate-keeping mechanism, which limits the application of the provision to only those decisions regarding the use of armed force that could constitute an “armed attack,” as that term is understood in international law. This is to ensure that there is a *de minimis* level below which the government would not be bound by the provision. Moreover, as will be discussed in the next section, the same trigger would apply to the other elements of the Model, thus ensuring that the various elements of the Model operate in harmony, and the domestic elements are triggered by criteria that are consistent with valid concepts in international law.

The parameters of this threshold test are not novel. As explained briefly in the discussion of the modern system of *jus ad bellum*, the occurrence of an armed attack is a condition precedent to the exercise of the right of self-defense (or, for the exercise of anticipatory or preemptive self-defense, that an armed attack is imminent, in the sense that it is irrevocably in motion).³⁴⁵ Similarly, the current understanding in international law is that the use of force against a state must reach a certain level—or be of “sufficient gravity,” to use the language of the U.N. Resolution on the Definition of Aggression—before it can be considered an act of aggression.³⁴⁶ The International Court of Justice has adopted this language in holding that the use of armed force must rise to a certain level before it constitutes an “armed attack” justifying the exercise of the right of self-defense, and it is clearly well above the mere use of force that would violate the prohibition in Article 2(4) of the U.N. Charter.³⁴⁷ Where that line is actually drawn, or what criteria are to be used to determine exactly where to draw the line, has not yet been clearly established in international law, but the principle itself has been. It is no

³⁴⁵ DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 187.

³⁴⁶ G.A. Res. 3314 (XXIX), 29(1) RGA 142, 143 (Dec. 14, 1974).

³⁴⁷ *Nicaragua v. U.S.*, *supra* note 141, at 110; *Oil Platforms (Iran v. U.S.)*, 42 I.L.M. 1334, 1355 (Nov. 6, 2003).

more uncertain or incapable of determination than any number of other constitutional principles. Dinstein suggests that an armed attack requires that the use of force must be of a magnitude that is likely to “produce serious consequences, epitomized by territorial intrusions, human casualties, or considerable destruction of property.”³⁴⁸

The trigger mechanisms in current constitutions, in legislation such as the War Powers Act, and proposed legislation such as that in the War Powers Commission Report, are not any clearer, and what is more, they often employ terms that are not related to known and valid concepts in international law. We have already seen that the constitutions of many countries, including that of the United States, require legislative approval of any “declaration of war.” While declarations of war continue to be theoretically part of the international law on the use of force, they are no longer reflected in state practice, and are certainly no longer considered necessary to trigger the operation of the laws of war or bring into existence the legal state of war.³⁴⁹ To the extent the term is interpreted to mean anything other than a formal declaration that triggers a technical state of war, it becomes highly ambiguous, as the war powers debate in the United States illustrates.

The War Powers Act lowered the threshold significantly, using as the trigger “any case in which United States Armed Forces are introduced: . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”³⁵⁰ There is no definition of “hostilities,” and so there is no indication of what scale, intensity, or duration of armed conflict that would be required to constitute “hostilities” for the purpose of the provision. It could arguably encompass peace-keeping operations, or the lowest-level border skirmishes, yet could potentially be interpreted to exclude such uses of force as cruise missile strikes on foreign targets.

The proposed legislation of the War Powers Commission Report, in contrast, tries to raise the threshold by requiring a “significant armed conflict” as a condition precedent, which is defined as being “any combat operation by U.S. armed forces

³⁴⁸ DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 193.

³⁴⁹ *Id.* at 30-34; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT 15 (2004).

³⁵⁰ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)).

lasting more than a week or expected by the president to last more than a week.” It explicitly excludes a number of activities, such as “limited acts of reprisal against terrorists or states that sponsor terrorism,” “covert operations,” and “missions to protect or rescue American citizens or military or diplomatic personnel abroad.”³⁵¹ Again, “combat operation” remains undefined, creating uncertainty as to what precisely is contemplated. More significantly, not only does this formulation similarly employ concepts for the trigger that do not equate with the principles of *jus ad bellum*, but the provision also explicitly endorses unilateral executive action for purposes that could very well violate the prohibition on the use of force in international law. Reprisals, as the term is understood in international law, are illegal.³⁵² Covert ops and missions to protect nationals abroad would easily encompass the support provided to the Contras in Nicaragua, and the invasions of Grenada and Panama, all actions that are widely seen as having been unlawful.³⁵³ Moreover, aside from the explicit exceptions, the threshold would not be crossed by such uses of force as extensive missile or air strikes, including strikes with nuclear weapons, so long as they would not be expected to lead to “combat” lasting more than one week. There is little apparent relationship between the requirements of international law and that which the War Powers Commission Report considered important enough to require Congressional involvement.

The trigger that is contemplated in the Model, while it admittedly contains some uncertainty as to its precise scope, is a concept understood in international law. By employing it in the Model, we ensure that the same criterion is used for both requiring consideration of international legality and for obligating the government to obtain legislative approval, and that the criterion itself is comprised of concepts taken from international law. It is the kind of principle that courts are in any event well accustomed to working with, and it is necessary to have some threshold to ensure that the government is able to act more freely in circumstances that would not implicate the *jus ad bellum* regime in international law. It is only the use

³⁵¹ BAKER & CHRISTOPHER, *supra* note 168, at 45 (proposed War Powers Consultation Act of 2009 § 3(A)-(B)).

³⁵² GRAY, *supra* note 141, at 150-51. Professor Dinstein makes some allowance for “defensive reprisals,” as being actions short of war taken in self-defense that would otherwise meet all the conditions for legitimate self-defense. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 129, at 221-22.

³⁵³ *Nicaragua v. U.S.*, *supra* note 141, at paras. 75-126, 227-28; GRAY, *supra* note 141, at 57 (Panama), 157-58, 390-91 (Grenada).

of force constituting an armed attack, whether legally justified or not, which is likely to escalate into an armed conflict. Armed attack, therefore, is arguably the appropriate level of force to trigger the requirement to involve the other branches of government and focus consideration on the questions of whether that use of force will comply with international law.³⁵⁴

A final word should be said about whether the trigger makes any distinction between the use of force for individual self-defense and that used for other purposes, be it collective self-defense or collective security operations. Constitutional controls of some countries do make such a distinction, as discussed in Part III. The Constitution of Denmark, for instance, provides that “[e]xcept for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Parliament.”³⁵⁵ This clearly limits the exception to the exercise of individual self-defense.

The trigger as it is employed in both this element of the Model and in the separation of powers element to be discussed next, makes no such distinction. In this element, the whole point is to force the decision makers to consider whether the proposed action complies with the principles of *jus ad bellum*—that is, to determine whether it falls within the scope of either self-defense, individual or collective, or collective security operations authorized by the U.N. Security Council (to state the current exceptions on the prohibition on the use of force). It would simply beg the question to suggest that they could avoid such a requirement in the event that the contemplated use of force was to be an exercise of self-defense. Whether it is legally a case justifying self-defense is the very thing to be determined by considering compliance with international law principles.

In the context of the next element of the Model, the requirement to obtain approval of the legislature, the trigger would serve the same function. Permitting the government to avoid obtaining legislative approval in the event the force is to be used for self-defense would simply create further incentives

³⁵⁴ The jurisprudence of the ICJ has made clear that there is a gap between the minimum use of force that would violate the prohibition on the use of force in Article 2(4) of the U.N. Charter and the scale, intensity, and effect that is required of any specific use of force in order for it to rise to the level of constituting an “armed attack” for the purposes of triggering the right to use force in self-defense under Article 51. See *Nicaragua v. U.S.*, *supra* note 141, at paras. 191, 210-11, 230-32; *Oil Platforms (Iran v. U.S.)*, 42 I.L.M. 1334, paras. 51, 64 (Nov. 6, 2003).

³⁵⁵ DANMARKSRIGES GRUNDLÖV [CONSTITUTION] June 5, 1953, sec. 19, para. 2 (Den.).

for the government to manipulate the record to provide support for a claim that the action is in fact an exercise of self-defense. It would thereby defeat the very objective of having such assertions subjected to inquiry and debate in the legislature. If the case is obvious and pressing, the analysis will be easy and the approval from the legislature quickly forthcoming; if it is not easy, than there is all the more reason for having the legislature involved in the deliberations, with all the advantages that such deliberation brings to the exercise. In the event of an invasion or the like, there is an emergency exception, as will be discussed in the next section.

B. Separation of Powers: Legislative Approval and Judicial Review

The second element of the Model would require legislative approval of any decision to use force, while the third element would explicitly confer jurisdiction and establish standing for judicial review of the decision-making process. Together they form the “separation of powers” component of the Model, and as such they will be considered together here. The two provisions would read as follows, allowing, of course, for the necessary changes to conform to the circumstances of each jurisdiction:

2. (i) Any decision to use armed force, or to deploy armed forces in circumstances likely to lead to the use of armed force, of a level in scale, duration, and intensity equal to that constituting an armed attack in international law, shall be approved by both houses of the legislature by a simple majority of votes cast.

(ii) In the event of an armed attack against the territory or armed forces of the state, or other such national security emergency requiring the urgent use of armed force, making prior approval from the legislature impractical, the government may use armed force without prior approval, but shall immediately provide notice of such determination to the legislature, and it shall obtain approval from each house of the legislature in accordance with the terms of subsection (i) above within 14 days of providing such notice, failing which the executive shall cease any such use of armed force.

(iii) The approval of any use of force by the legislature in accordance with subsections (i) and (ii) above shall also constitute a decision to use force, subject to the requirements of Section 1 above.

3. (i) Any person may apply to a court of competent jurisdiction to obtain a declaration, injunctive relief, or damages, or any other remedy that the Court may consider just and appropriate in the circumstances, for any violation of this Article.

(ii) Any person who has made application under subsection 3(i) above shall have standing so long as the issue raised is a serious issue to be tried, the person has a genuine interest in the issue, even if only as a representative of the general public, and there would be no other reasonable or effective means for the issue to be brought before the Court.

Again, a number of the elements of these two sections require further explanation, namely, (i) the terms of the requirement for legislative approval of the use of armed force; (ii) the trigger for the provision, being the same *de minimis* level that was provided for in the first section of the Model; (iii) the emergency exception and ex post approval requirement; (iv) the fact that the approval of the legislature is a “decision to use force,” thus triggering the application of the requirements of Section 1 of the same Article; (v) the provision of specific jurisdiction for judicial review, and the remedies provided for; and (vi) the creation of broad standing for applications for judicial review.

The first element, legislative approval for the use of armed force, is obviously an explicit move away from a “declaration of war,” and it does not even require that the approval be in the form of a law. But it does require “approval,” expressed through a formal vote. This is in contrast to the “consultation” that is contemplated by the draft legislation proposed in the War Powers Commission Report.³⁵⁶ As discussed earlier, legislatures may have natural tendencies to avoid making difficult decisions in these kinds of situations, but that is precisely why the Model should require the executive to work to obtain the legislature’s approval. At the same time, while in some jurisdictions such approval requires supermajorities of some form, a simple majority of votes cast should be sufficient for the purposes of a general model, albeit in both houses if the system consists of a bicameral

³⁵⁶ Under that proposed scheme, there is no affirmative requirement for the executive to do anything more than consult, and there is no requirement that Congress actually vote on the issue. Rather, Congress must on its own initiative vote in disapproval of any proposed or undertaken action by the President if it does not agree with the policy on which it is being “consulted.” This reverses the onus contemplated by Article 1, Section 8 of the U.S. Constitution and significantly reduces the probability that Congress would act as any check on the executive. While the Commission states that it was making an effort to remain entirely agnostic on the long-standing constitutional debate, its recommended legislation by default reverses the onus in a manner that entirely undercuts the “congressional power” argument. This effectively endorses the “executive power” side of the debate. BAKER & CHRISTOPHER, *supra* note 168, at 43-48. On the problems of mobilizing support of Congress, see the voting of Congress on the Kosovo war, *supra* note 310 and accompanying text.

legislature.³⁵⁷ The requirement to obtain a majority vote in each house should be sufficient to engage the deliberative and representational features of the parliamentary process in a manner that will have an impact on the operation of the domestic causes of war.

The second element is the employment of the same trigger or threshold level of force as was used in the first section of the Article. The reasons for employing this particular concept as the threshold has already been discussed at some length in the explanation of Section 1 so will not be repeated here. It is perhaps helpful to emphasize yet again, however, how important it is to use a concept that has real meaning in international law for the purposes of triggering the involvement of the legislature in the decision to use armed force.³⁵⁸ Even if a provision providing for the separation of powers with respect to the use of force does not have as one of its objectives an increased compliance with international law, the principles of *jus ad bellum* would naturally serve as a good proxy for the kinds of armed force that are likely to both escalate conflict and attract international censure. The trigger employed in this Model is taken directly from international law, based on precisely the kind of action that is most likely to lead to wider armed conflict, which are exactly the types of action that should be subject to legislative deliberation and oversight. Moreover, it still provides the executive with significant scope for limited use of force that falls below that threshold.

The third element is the emergency carve out. As mentioned earlier, this too is not a novel concept, and various forms of such an emergency exception with ex post approval requirements can be found in a number of constitutions, though more frequently with respect to the power to declare emergencies and thus trigger emergency powers domestically. An early example of such a mechanism can be seen in the

³⁵⁷ *E.g.*, CONST. (1935), art. VI, sec. 23, para. 1 (Phil.) (requiring a two-thirds majority in each house to approve a declaration of war). Article 115a of the German Basic Law requires a two-thirds majority of votes, and votes cast by at least a majority of the Bundestag, to determine that the territory of Germany is under attack or immediately threatened with such an attack, and to thereby declare a state of defense. GERMAN BASIC LAW, *supra* note 187, art. 115a.

³⁵⁸ It is striking that the draft legislation proposed in the War Commissions Report not only uses a concept that has little meaning in international law, but also explicitly excludes several uses of force that could, in many foreseeable circumstances, constitute violations of the principles of the *jus ad bellum* regime. *See* BAKER & CHRISTOPHER, *supra* note 168, at 43-48.

Constitution of France of 1791.³⁵⁹ A variation on this form of emergency carve-out is also the cause of much of the controversy regarding the structure and operation of the U.S. War Powers Act of 1973. Upon closer inspection, however, the War Powers Act provisions in question are not so much an emergency carve out as the grant of a *carte blanche* for up to ninety days, followed by an effective legislative veto of further action if Congress does not move to approve the operation.³⁶⁰ That is very different from what is contemplated by the Model.

Many of the criticisms of the War Powers Act may be quite valid, but they ought not to be extended to constitutional provisions that require the executive to obtain legislative approval, and which include an automatic termination mechanism in the event that approval is not obtained within a specified period following an emergency use of force. Precisely because the provision is constitutional rather than statutory, the legislature would be less able to shirk its obligations to take up the issue when approval is sought by the executive. And requiring the executive to overcome the difficulty of mobilizing support within the legislature is a key element of the Model. That it is difficult and costly is not a basis for criticism, but one of the virtues of the structure. If the executive cannot galvanize the legislature to approve the use of force by a simple majority, particularly where the use of force has already been undertaken in what are alleged to be urgent circumstances, then that by itself ought to raise significant questions about both the necessity and legitimacy of the use of force in question.

The fourth element of this subsection of the article specifies that any approval to use force enacted by the legislature constitutes a “decision to use force” as contemplated by the provisions of section 1 of the article, thus being subject to the requirements of that section. This means that the legislature too, in deliberating on the question of whether or not to approve the use of force, must sufficiently and demonstrably consider whether the use of force in question is in compliance with the relevant prevailing principles of international law. This is key to the combined operation of the distinct elements of the Model, as it is the mechanism through which the Model effectively causes the deliberative functions of

³⁵⁹ 1791 CONST., ch. III, sec. 2 (Fr.).

³⁶⁰ 50 U.S.C. §§ 1543(a)(1), 1544(a)-(b) (2006). For criticism of the operation of these provisions, see BAKER & CHRISTOPHER, *supra* note 168, at 21-25; ELY, *supra* note 169, at 115-31.

the legislature to engage the issues of international law compliance, and which causes the criteria of legitimacy under international law to be integrated into the deliberative process of the legislature. It is only by requiring both branches of government to grapple with the question of compliance with international law that the Model can ensure that this perspective will be brought to bear in a meaningful and serious fashion in the decision-making process, and that over time the international law norms will be internalized and subsequently exercise influence, in the manner contemplated by transnational process theory and the ideational strand of the liberal theories of international law compliance.

The next element is the first subsection of the judicial review provision of the Model. It establishes specific jurisdiction for judicial review of the decision-making process. This aspect of the separation of powers component of the Model is likely to be the most controversial. As already discussed, there are many who argue that the courts should have little involvement in matters of national security policy generally, and particularly with respect to broader strategic questions relating to the use of force. We have already reviewed at some length the theoretical justification for it,³⁶¹ so here the discussion will be focused on the specifics of the structure of the provision.

First, we must address why a specific section on judicial review would be required at all, once the substantive aspects of the Model are adopted into any given constitution. For it might be supposed that once made part of the constitution, these provisions would be enforceable through judicial review in the normal course. The reason is quite simply to make it more difficult for the courts to evade their responsibility by avoiding the issue. The courts in some jurisdictions have shown themselves to be reluctant to engage in review of issues relating to national security policy, in some cases employing perceived ambiguity as to jurisdiction as the grounds for denying claims.³⁶² This reluctance might be unfounded, and I have argued above that such judicial reluctance is neither as great as some would suggest, nor as likely when the lines of authority and the precise constitutional limits in issue are clear.³⁶³ But there have been examples of courts avoiding their

³⁶¹ See *supra* Part IV.C.

³⁶² See, e.g., the *Sunakawa* case, *supra* note 316; *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring).

³⁶³ See *supra* Part IV.

responsibility, and indeed the more extreme versions of the political question doctrine constitute an attempt to deny the jurisdiction of courts on most issues having any bearing on foreign relations.³⁶⁴ The creation of specific jurisdiction, like the creation of clear provisions, will help ensure that courts do not abdicate their authority or avoid their responsibility to provide oversight of the decision-making process.

The second aspect of the first subsection of the judicial review provision relates to the kinds of remedies that ought to be available. The provision is broad in this sense, and many will no doubt take particular issue with the idea of courts being given the authority to grant injunctions in respect of decisions to use force. The idea that a court could enjoin the executive from deploying military force, when the executive has made a determination that the use of force is necessary for national security reasons, smacks of the judiciary being given the authority to second-guess the government on the soundness of its judgments relating to national defense. But that is simply not the case under the provision being proposed here. As discussed above, the issues before the court would be whether the executive obtained legislative approval as required, and whether the decision makers in both branches sufficiently and demonstrably considered the principles of international law. It is well established that courts have jurisdiction to consider whether a branch of the government has exceeded its constitutional powers, and to issue injunctions to prevent the execution of a policy that the government has no constitutional authority to undertake.³⁶⁵

While the availability of the injunctive remedy is important, the reality is that courts may be very reluctant to issue an injunction for the obvious reason that in circumstances in which the stakes were that high (and depending on the institutional power of the courts in whichever country we might be talking about), there could be a real fear that the injunction might be ignored, with a resulting constitutional crisis or at least a serious weakening of the judiciary.³⁶⁶ Thus the subsection also

³⁶⁴ See, e.g., *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); Choper, *supra* note 311, at 1497-99; Henkin, *Political Question*, *supra* note 317, at 610-12 (critiquing such interpretations).

³⁶⁵ *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990) (claim ultimately failing for reasons of ripeness).

³⁶⁶ As discussed in Martin, *Binding Dogs of War*, *supra* note 127, at 341, this is one of the arguments made to explain the posture of the Supreme Court of Japan in Article 9 litigation.

provides for declaratory relief and other remedies that the court might find more appropriate in the circumstances. And it should not be thought that these lesser remedies are insignificant.

Declarations can have a considerable impact in national security cases. For instance, the Nagoya High Court in Japan handed down a judgment in 2008 on the constitutionality of Japan's deployment of air forces to support coalition forces in Iraq.³⁶⁷ While the court dismissed the application for an injunction on standing grounds, it nonetheless opined that the deployment of troops to Iraq was a violation of Article 9 of the Constitution, the provision that provides for the prohibition on the use of force. That judgment, which was not even a formal declaration, but merely an opinion incidental to the dismissal of the claim, nonetheless had a significant impact in Japan, and arguably played a role in the formulation of national policy in the immediate aftermath.³⁶⁸ And of course, this is entirely consistent with the theoretical explanation of judicial review outlined above in Part IV. That is, the issuing of declarations such as this are examples of the courts functioning to monitor government conduct and provide information to the population on the legitimacy and propriety of the government's exercise of power, potentially shaping public opinion on the issues in the process.

The second subsection of the judicial review element of the Model is the explicit provision of broad standing to commence an application. The reasons for this are likely rather obvious. From the United States to Japan, courts have used standing as a mechanism to avoid being dragged into the minefield of adjudicating controversial public policy issues. And even when lower courts have not been reluctant to engage the issues, they have nonetheless been bound by narrow standing rules established by higher courts. The Japanese courts, for instance, have developed a doctrine on standing that has

³⁶⁷ Kōtō Saibansho [Nagoya High Ct.] Apr. 17, 2008, Heisei 19 (Ne) no. 58, http://www.haheisashidome.jp/hanketsu_kousho (Japan) (unpublished decision).

³⁶⁸ *Id.* The remaining Japanese Self-Defense Forces in Iraq were withdrawn by the government ahead of schedule. *ASDF's Iraq Mission to End by December*, JAPAN TIMES (July 30, 2008), <http://search.japantimes.co.jp/print/nn20080730a2.html>; *Japan's Iraq Aid Mission Officially Ends*, JAPAN TIMES (Feb. 16, 2009), <http://search.japantimes.co.jp/print/nn20090216a2.html>; see also Martin, *Binding Dogs of War*, *supra* note 127, at 352-54; Kobayashi Takeshi, *Jieitai iraku hakken—iken Nagoya kōsai hanketsu no igi* [Unconstitutionality of the Iraq Deployment: The Significance of the Nagoya High Court Judgment], 80 HŌJI JIHŌ 8, 1 (July 2008). Similarly, the Supreme Court of Canada recently issued a declaration on the government's complicity in the violation of the human rights of a Canadian detainee being held in Guantanamo Bay, which created considerable pressure on the government to act. See *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 3 (Can.).

rendered the war-renouncing provision of the Constitution effectively unenforceable, as virtually no one outside of the military could ever demonstrate the narrow and direct legal interest in the issues sufficient to ground a claim.³⁶⁹ Similarly, the courts of the United States have dismissed many of the war powers lawsuits on the basis of standing, the conditions for which have been construed very narrowly by the courts.³⁷⁰

Without getting into the intricacies of standing doctrine in any one country, one of the key problems common to many jurisdictions is that standing for constitutional litigation often requires some direct legal interest in the issues, flowing from some personal harm, such as would arise from being the direct victim of a violation by the state of a constitutionally protected right. Because a use of force provision such as that contemplated here does not create any individual rights, these requirements will typically render the provision unenforceable by the courts. The government decision will be insulated from judicial review, which seriously undermines the normative effectiveness of the provision.

By way of contrast, the Supreme Court of Canada has formulated a test for determining when courts may grant standing in constitutional cases in which there is a broader public interest that will be advanced by the claim, but the claimant lacks a direct and substantive legal interest in the issue, or has not suffered an exceptional prejudice. According to the test, the courts will grant standing so long as the applicant can demonstrate that (i) the issue is a serious one; (ii) the applicant has a genuine interest in the issue; and (iii) there is no other reasonable and effective manner for the issue to come before the court.³⁷¹ The term “genuine interest” here is defined broadly, not requiring a direct legal interest, but rather including an interest that may be shared by the public at large.

The genuine interest in cases likely to be advanced under the proposed Model would be similarly shared by the public at large, in that the policy being undertaken would not only be allegedly in violation of the constitution, but would indeed embroil the country in armed conflict—something in

³⁶⁹ See Martin, *Binding Dogs of War*, *supra* note 127, at 338-39.

³⁷⁰ *E.g.*, Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), though courts have also held that members of Congress have standing to commence an application. *E.g.*, *Dellums*, 752 F. Supp. 1141.

³⁷¹ Thorson v. Attorney Gen., [1975] 1 S.C.R. 138 (Can.); Nova Scotia Bd. of Censors v. McNeil, [1976] 2 S.C.R. 265 (Can.); see also PETER HOGG, CONSTITUTIONAL LAW OF CANADA 776-80 (5th ed. 2007).

which the entire nation surely has an interest. It is the third element of this Canadian test, therefore, that is the key, for it permits the court to grant standing even when the genuine interest is no more specific than a shared public interest in the enforcement of a fundamental constitutional provision—the consideration that there is likely no one else who would have a more narrow and direct legal interest in the issues who could commence the claim.³⁷² It will often be the case that only members of the armed forces would have the kind of direct legal interest that would meet many typical standing requirements, and it is unreasonable to look to members of the armed forces to bring constitutional claims against their commander in chief.

In closing the discussion on this aspect of standing, it should be noted that this broadening of standing is entirely consistent with the theoretical justification for judicial review outlined above in Part IV. If we agree that the courts serve an important function in monitoring government conduct and providing information to the public on the legitimacy of the government's exercise of power, we should want a broad standing doctrine. The fact that there is no one person who has a narrow legal interest in the issue is irrelevant to the role of the judiciary as a check on the improper or excessive exercise of power by one of the political branches.

Finally, I have described the judicial review here as being "limited." It might be thought, given the breadth of both the remedies available and the basis for standing, that this provision for judicial review is anything but limited. But it is in fact limited by the nature of the rest of the Model. All that the courts are being given jurisdiction to review here is whether the legislature has approved the use of force as required by the provision, and whether the decision makers in both the legislature and the executive have sufficiently and demonstrably considered whether the contemplated action is consistent with the prevailing principles of international law. It

³⁷² As Chief Justice Laskin wrote for the majority in one of the cases establishing this test,

The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

Thorson, [1975] 1 S.C.R. at 145.

does not require, nor does it provide jurisdiction for, the courts to engage in any inquiry into whether the decision arrived at is actually consistent with international law, or whether it is a sound judgment, or whether it is in the national interest. It is simply a question of whether the mandated process was followed such that the authorized branches of government made and approved the decision, and that it was made on the proper basis. It is in this respect that the judicial review is limited, and indeed is limited to the types of questions that are entirely within the competence and constitutional authority of courts to decide.

The objection may be made that it is a small step for courts to take, in their examination of whether the decision makers have sufficiently considered the principles of international law, to engage in impermissible substantive review of the decision itself. In other words, a court could find that the substance of the government's decision was so patently inconsistent with the principles of international law that no reasonable person could conclude that the government had sufficiently considered those principles in reaching its decision. Thus under the cover of process, the courts will be engaging in substantive review. And it is conceded that such a "patently unreasonable" test could indeed evolve. At least one of the Law Lords in the House of Lords has suggested that such a test could apply in cases involving the exercise of the Royal Prerogative in respect of national security issues.³⁷³

On the one hand, this would still give the government a very large margin of appreciation, and it could be argued that it would be a positive development to have a judicial check on decisions that are so blatantly in violation of principles of international law that it could not satisfy such a test. But it is in any event unlikely. The better argument is that under the language of the provision it would be open for the government, in circumstances where it was clearly acting in a manner inconsistent with the principles of *jus ad bellum*, to argue that it had indeed sufficiently considered the principles, but that in the circumstances, and all other things having been considered, it had nonetheless decided that it was in the national interest to proceed with the proposed policy. Under the language of the Model, which only requires adequate consideration of the

³⁷³ Council of Civil Serv. Unions & Others v. Ministers of Civil Serv., [1985] A.C. 374, 401-02 (H.L.) (Lord Fraser of Tullybelton); *id.* at 405-06 (Lord Scarman).

principles of international law rather than compliance with them, a court would not be able to interfere with that determination. In this way, the Model would actually create incentives for the government to be more open and forthright about its position.

The final objection might be that the courts will have to decide the threshold issue relating to whether the impugned policy rose above the *de minimis* level of force so as to trigger the operation of the provision. A court would have to ask whether the contemplated action was of such a scale, duration, and intensity so as to constitute an armed attack under international law. This, it may be argued, is a question that is beyond the competence of domestic courts to decide, and involves a test that is too vague to be justiciable. This is the stuff of the political question doctrine, which has already been discussed.³⁷⁴ But the concept of “armed attack” has meaning in international law, and is not so vague that the ICJ has been unable to work with it. Nor is the concept any more vague than other constitutional concepts that courts have developed standards to interpret and enforce, as Judge Tatel eloquently argued in *Campbell v. Clinton*:

To begin with, I do not agree that courts lack judicially discoverable and manageable standards for “determining the existence of a ‘war.’” . . . Whether the military activity in Yugoslavia amounted to “war” within the meaning of the Declare War Clause, U.S. CONST. art. I, § 8, cl. 11, is no more standardless than any other question regarding the constitutionality of government action. Precisely what police conduct violates the Fourth Amendment guarantee “against unreasonable searches and seizures?” When does government action amount to “an establishment of religion” prohibited by the First Amendment? When is an election district so bizarrely shaped as to violate the Fourteenth Amendment guarantee of “equal protection of the laws?” Because such constitutional terms are not self-defining, standards for answering these questions have evolved, as legal standards always do, through years of judicial decisionmaking. Courts have proven no less capable of developing standards to resolve war powers challenges.³⁷⁵

Finally, the courts of all common law countries, even those of the United States, as illustrated most recently in the line of Supreme Court decisions on detainee rights,³⁷⁶ have shown

³⁷⁴ See *supra* notes 314-24 and accompanying text.

³⁷⁵ *Campbell*, 203 F.3d at 37 (Tatel, J., concurring).

³⁷⁶ See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

themselves willing and able to interpret and apply concepts drawn from the principles of international law.

In closing this discussion of the operation of the entire article, it should be emphasized that each of the elements of the Model will operate in combination in ways that will provide cumulative benefits and mutually reinforcing effects greater than the sum of the individual benefits of the three sections of the provision. The first element of the Model is the incorporation of the principles of *jus ad bellum* for the purposes of enhancing compliance with the international law regime. But that provision is vastly strengthened by virtue of the operation of the separation of powers elements of the Model. For while the first section of the Model alone would operate to require the executive to consider the international law principles, if such consideration were conducted in a secret process among a small number of individuals, the prospect for it being paid only lip-service while being entirely glossed over would be much higher. The public debate likely to accompany any legislative consideration of the issues, and the obligation that two separate political branches independently consider the issue of international legality—resulting in publication of widely different perspectives and interpretations of the issues from varying ideological approaches—would make for a much more meaningful satisfaction of the requirement.³⁷⁷ In the short run, with respect to any particular situation, this combined operation would make it much more likely that compliance with the governing international law principles would be a serious factor in the decision-making process. In the long run, however, it would also contribute to the process of internalization and reinterpretation of those international law norms, in the manner that transnational process theory and ideational strands of liberal theories of international law suggest is so important in enhancing compliance with any given international legal regime.

Similarly, the Model is further strengthened by making the decision-making process subject to limited judicial review, because this element maximizes the extent to which the domestic constitutional enforcement mechanisms are employed to assist in the implementation of the international law principles. Moreover, yet again, to the extent that the judiciary becomes involved in interpreting these principles in the course of

³⁷⁷ See *supra* note 272.

judicial review, the Model would provide for the increasing institutional internalization of those norms. The very prospect that the judiciary might be called upon to review whether the legislative and executive decision makers considered in good faith the extent to which the proposed use of force complied with the prevailing international law norms would serve to increase the likelihood that the decision-making process would be conducted in a conscientious and genuine manner. And turning full circle, such enforcement, or even potential for enforcement, of international law principles by the central and highly respected institutions of the state, only serves to increase the legitimacy of those principles, which in turn enhances their overall effectiveness at the international level.

CONCLUSION

The prevention of armed conflict is central to modern international law, and reducing the prevalence of war one of the enduring philosophical problems with which man has grappled. The causes of war are understood to operate at three levels—that of the individual, the state, and the international system. It follows that we need mechanisms that are capable of addressing causes within all three levels. In legal terms, that requires legal constraints at both the domestic and the international level. Yet in the twentieth century, we have left the legal constraint of armed conflict entirely to a positivist international legal system, one with thin theoretical and philosophical foundations, and without any of the domestic implementation that is necessary to improve compliance with international law regimes.

The proposed Model would be a significant step towards the development of more robust and multi-dimensional legal constraints on the use of armed force, thereby reducing the prevalence of war. The domestic implementation of the international law principles on the use of force would be consistent with the ever increasing penetration of international law into domestic legal systems, and the use of domestic law mechanisms to enforce and enhance compliance with the international law regimes. This incorporation of international law principles would not only operate to ameliorate the permissiveness of the international system, the primary cause of war at the international level, but it would also engage significant domestic causes of war as well. The move is consistent with and supported by international law compliance

theory and constitutional law theory, operating to realize both international law and constitutional law objectives.

The requirement for legislative approval of government decisions to use armed force would amplify and strengthen the operation of the first provision. Such legislative involvement would also enhance democratic accountability and bring to bear the deliberative and oversight functions of the legislature on the decision-making process, making it both more transparent and subject to diverse perspectives and arguments. It would more fully realize the structure originally thought to make republics less likely to wage war, and would engage the domestic causes of war in important ways. Subjecting the entire process to a limited form of judicial review would place a further check on the system, helping to ensure that the decision-making process was conducted as required, and genuinely based on the mandated considerations. Together, the separation of powers elements of the Model would operate to resolve aspects of the Kantian dilemma, reducing the tendency of democracies to engage in armed conflict with illiberal states, while strengthening the features of democracies that help explain the democratic peace. This would not only be a benefit to the international society more generally, but it would fundamentally benefit the states that adopt the Model, not only by increasing democratic accountability and strengthening the rule of law, but ultimately by protecting them from involvement in illegitimate and unwise military adventures.

At first glance the proposal might seem both somewhat radical and rather utopian in nature. But in considering more closely both the theoretical foundations of the Model and the manner in which it would be expected to operate, the moves contemplated are not so extreme as might first appear. Each of the elements is entirely consistent with current established theory. What is more, it may be entirely timely, and responsive to concerns that are growing in a number of countries. With debates in Japan over the possible amendment of the war renouncing provision in its Constitution, draft legislation and formal reports in Britain and Australia on revising parliament's role in decision making on the use of force, new proposals in the United States for amending the War Powers Act, to name only a few examples, the time is surely ripe for serious consideration of these issues. There may be theoretical difficulties still to overcome and problems of implementation to resolve, and indeed it is not suggested that the Model is the optimal arrangement. It is a proposal intended to advance the

debate and contribute to the consideration of these issues. For in the spirit of Madison's exhortation with which I began this article, war continues to be such cause of horror in the world that everything should be tried in the effort to reduce the prevalence of armed conflict.