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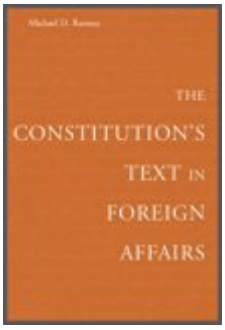
Michael D. Ramsey. *The Constitution's Text in Foreign Affairs.* Cambridge: Harvard University Press, 2007. 504 pp. $65.00 (cloth), ISBN 978-0-674-02490-8.



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Does the Constitution Merit Deference or Respect in Foreign Affairs?

This book covers the history of constitutional law and foreign affairs as the United States evolved from a nascent republic into a magnet for numerous immigrants, overcoming adversity to emerge as a hemispheric leader, then a global juggernaut. America's constitution was a compromise. As a source of unity, cohesion, wherewithal, management, and good governance, it articulated a federalism that distributed powers between states and a central authority. This text created checks and balances and the need for a degree of collaboration between co-equal executive, legislative, and judicial branches, granting federal control over foreign policy and international trade.

The merits of understanding the wide context of clauses in America's main document are tremendously relevant after 9/11, and the prolonged conflict with radical Muslims.[1] Drawing lessons from such comprehension is urgent given the heated debates triggered by official policy, military actions, and clandestine operations undertaken by the Bush administration.[2] The mandate Barack Obama now has to govern this nation, the changes he promises from recent policies, and the tremendous challenges he faces, amplify pre-existing controversies over White House discretion.

Does the Constitution endorse a "unitary presidency," or an "inviolable president," such that the scope and application of executive powers decides all matters of substance and policy during a national security crisis? Is this a modern version of imperialism vested in a presidency that subverts democracy? How do Americans translate core values and a positive vision into compelling legal or political standards at home and diplomatic messages abroad? What is the best path to avoid the moral dilemmas engendered by practices that are of dubious constitutionality, such as the detention facilities in Guantanamo Bay? [3]

Such intricate issues were raised by the exploitation of congressional approval and abuses of executive authority during the Vietnam War. That prolonged conflict helped spawn a rich literature of articles, textbooks, and casebooks addressing the multifaceted points of constitutional law and foreign affairs. In 1971, given this context, Louis Henkin of Columbia University's Faculty of Law published his authoritative textbook on the subject. Henkin pointed out contradictions and multiple legal and diplomatic challenges–posed by rogues and supporters alike–that have occurred throughout constitutional history.[4] Many commentaries and volumes followed, and the field is burgeoning, with constant additions of varying quality.[5]

Joining the honor roll of distinguished works on foreign policy and constitutional law is Michael D. Ramsey's book. He offers insights on the perennial polemic concerning the initial constitutional agenda and its current application. Overall, he supports a more permissive interpretation of federal jurisdiction as opposed to individual states. Similarly, describing the pendulum between competing branches, Ramsey prefers execu-

tive powers–especially those of a commander-in-chief in times of war–over congressional prerogatives and a limited amount of judicial review.

This appreciation of presidential strength would put him–in a measured, thoughtful way that denies, for example, the White House the capacity to unilaterally proclaim supreme laws–in the pro-Bush administration camp with respect to initiating the Iraq war, and to handling its aftermath. Such a position embraces the supremacy of American sources over modern customary international law. Indeed, Supreme Court associate justice Antonin Scalia–who is twice cited approvingly by Ramsey–will almost certainly like this work.[6]

Ramsey is a professor of law in the University of San Diego's School of Law. Holding a law degree, he clerked for several senior judges. Before joining the ranks of the academy, Ramsey practiced international business and trade law. The volume under review is his first book. In it, Ramsey conscientiously builds upon his scholarship on the scope of presidential foreign affairs and national security powers; on judicial review powers exercised by American courts, especially on decisions concerning the interface of the constitution with international law; and on a variety of related case comments.[7]

Through a narrative capaciously combining treatment of jurisprudence and scrutiny of the language, texts, motives, actions, consequences, and memoirs of involved persons, Ramsey demonstrates that the Constitution was not only the absolute basic law of the early American republic, but can also serve as a permanent guide for securing a worthy, ideals-driven foreign policy, conducted by a superpower possessing a global reach for its economic and military might. Showing not just intellectual dexterity, ambition, and imagination, but also a dazzling command of facts, issues, literature, trends, and developments, Ramsey tries to be evenhanded in presenting issues. His study highlights the interface in various policies, cases, and incidents between competing parties responsible for diplomacy. These authorities and leaders include members of the executive, legislative, and judicial branches of the federal government, as well as of state governments.

The study has a logical structure. Ramsey maintains that background materials may lead to fuller understanding of the paramount issues and their suggested resolutions in a manner reminiscent of a dispassionate legal brief. The book is divided into six sections, which consist of eighteen chapters. The first section, with two chapters, focuses on the inherent rights of sovereign states in the international arena, on the role of the Constitution and the Articles of Confederation in delegating power to the federal government, as well as the 1936 *Curtiss-Wright* case that granted broad discretion to the executive branch in conducting foreign policy.

Ramsey defines the concept of national authority as a strong mandate for the White House in conducting diplomacy. While conceding the difficulties of finding the exact legitimacy and meaning of constitutional authority in diplomacy, he marshals many persuasive underpinnings. These include Enlightenment ideas as espoused by prominent thinkers such as John Locke and Charles (Ramsey prefers the formal title Baron de) Montesquieu, who were familiar with the puissance of absolute monarchs; common-law texts by William Blackstone; British traditions widely accepted at the time; the deliberations of the Philadelphia Convention; early American legal, political, diplomatic practices; and some recent scholarship.

Of those, Ramsey displays preferences for the potency of eighteenth-century American customs, and proclamations by people such as Thomas Jefferson, George Washington, John Madison, Alexander Hamilton, John Marshall, Edmund Randolph, John Jay, Roger Sherman, James Wilson, Oliver Ellsworth, and George Clymer. Ramsey particularly emphasizes the Constitution's "vesting clause" of Article II, Section 1, as an entrenchment of presidential supremacy in foreign affairs.

In the second section, with four chapters, Ramsey addresses the sources and the vigor of executive power in foreign policy. He cites the practices of the Washington administration as evidence for a wide appreciation of presidential authority by those who drafted, ratified, and implemented the Constitution, as long as the framework checks and balances persisted, and domestic obligations were not sidetracked. He thus approves of the 1952 *Steel Seizure* case that constrained presidential discretion to following constitutional and statutory authority internally in the aftermath of President Truman's deployment of American forces in Korea with little congressional involvement.

The third section, including three chapters, explores a substantive limit on the White House: the shared powers of the Senate and the presidency in treaty-making, executive agreements, and senior appointments. For example, the Senate has a partial role in approving treaties, but not in suspending or withdrawing from them or even abrogating or terminating their very existence. The president can do the latter two unilaterally in his capacity of

deciding policymaking. George W. Bush did so in 2001 concerning the Anti-Ballistic Missile Treaty. Bush also limited the application of the Geneva Conventions with regard to treating prisoners of war.

In what this reviewer–researching Jimmy Carter with a different focus–found to be a uniquely interesting chapter, Ramsey examines the 1979 case of *Goldwater v. Carter*. That Supreme Court case ruling affirmed the president's capacity to unilaterally terminate the Taiwan treaty. The close analysis of "non-self-executing" treaties here is fascinating and illuminating.

The fourth section, comprising three chapters, investigates exclusive congressional powers in foreign affairs, which Ramsey seems to lament are construed more narrowly than the drafters' intent warrants. He contends that NAFTA gave excessive powers to the executive branch by allowing it to prohibit future trade barriers, a prerogative which should have remained vested in legislative hands. Highlighting the crucial role of war-making authority, by action and/or by declaration–also evident in the ample space devoted to this matter in the Constitution, and by subsequent deliberations–Ramsey blames Madison for the "fault" of muddling what could have been an absolute congressional ability into a complicated, shared field.

The penultimate fifth section, consisting of three chapters, analyzes the role of individual states in conducting diplomacy and trade. Federalism granted states considerable rights, especially since conduct abroad inevitably has consequences at home. Similarly, local initiatives–for example against oppressive foreign regimes–materially impact America's standing internationally. Presidents, moreover, cannot unilaterally define their own power by constricting state jurisdiction, overruling local legislators, or disregarding the authority of governors.

The final, sixth section, taking up three chapters, treats the often expanding, sometimes contracting character of the judiciary in engaging foreign affairs, and its varied appreciation for international law. Ramsey stresses that American law, U.S. presidents, and congressional scrutiny,are all paramount to all other sources, including customary public international law.

This book then offers a thorough presentation of constitutional theory and sound methodology that addresses difficulties and inconsistencies since the 1780s, advocating for an academic appreciation of subtle, complex issues. Nevertheless, perhaps because his solid professional training is in law–Ramsey's undergraduate studies blended history and economics; he previously served as a visiting professor of political science–the book claims to be within reach of a comprehensive factual understanding of constitutional intent, perhaps *the* truth.

Thus, Ramsey focuses on the Constitution as meant and understood at the time of its writing. He contends that there is a correct reading of what the founding fathers meant for the craft and management of foreign policy in perpetuity, an interpretation that Ramsey contends was often subsequently misapplied and revisited through precedents established by Supreme Court decisions. Others, by contrast, have opined that divining one "real intent" in a "frozen" text, much less in the thinking of America's leadership in the formative period, is very complex and likely impossible.[7] What may have been creative, innovative, even revolutionary, in the eighteenth and nineteenth centuries, could seem arbitrary, ossified, and archaic in the twentieth and twenty-first.

The Constitution, moreover, was imperfect by nature. It was not seen as an axiom by its contemporaries, or as the Ten Commandments that allegedly guided the monotheistic Israelites. Seemingly, the main purpose of the Constitution was to organize a country. Were its contents meant to function as scriptures for a civic religion to bind together people of a fledgling country? Did the founding fathers want to erect a "City upon a Hill"–John Winthrop's 1630s hope for Americans to serve as a role model to other nations? [8] In addition, the Constitution was explicitly open to revision and constant amendment, as an important body of evolving laws. The first ten amendments, known as the Bill of Rights, came shortly afterwards. Ramsey rarely discusses this crucial component other than the Tenth Amendment, which modified federal powers by granting residual powers to state legislators and to the people at large.

To be sure, the text of the Constitution is more than a persuasive authority, but it may not possess a controlling, final role, confining contemporary life to the wishes of past sages. Analogies for the constitutional matrix may be a detailed charter establishing the operations of a business corporation, or an exhaustive directive in administrative law. Perhaps the main role for the Constitution was to be a foundational text for a dynamic, resilient civic nationalism?

Furthermore, the letter and the spirit of the Constitution arguably prioritized the rule of law, economic efficiency, and good governance over maximizing jus-

tice and equality–an ordered liberty. The proceedings in Philadelphia often bespeak more of polarization than of a Federalist consensus. Thus, some scholars view the Constitution as a conservative counter-reaction to the "excesses" of democracy unleashed by the political turmoil of the revolutionary era.[9]

Ramsey's thesis that the Constitution offers a humanistic approach, moreover, is not conclusive. His insistence on interpretations that accommodate progressive (or liberal) versions of engaging the international community may be more expansive than past conduct suggests. One may observe that the approach of the drafters largely offered a relativistic approach to human rights: yes to civic and political rights, no to economic, social, and cultural rights; encouraging a wider franchise for white males owning property, but excluding women, poor men, African-American slaves, and displaced Native Americans.

Indeed, in his presentation Ramsey also ignores evidence of commensurability, a fruitful dialogue based on recognition of legitimacy and aptitude between indigenous tribes and European settlers that helps explain early American laws. An example is the Great Law of Peace, *Kaianeraserakowa*. It governed the Iroquois confederation, known to its members as the *Haudenosaunee* (People of the Longhouse). This sophisticated, centuries-old code may have contributed to the U.S. constitutional structure of freedoms protected by checks and balances.[10]

Another controversial premise of Ramsey's work is that a time-specific framework crafted in 1787–by the political elite with negligible input by ordinary people and no regard to the interests of foreigners greatly impacted–should not merely reflect eighteenth-century norms, but should also serve as a guiding light to later practices of a much different, more diverse and multicultural country, including deciding contemporary policy.[11] Strict construction in interpretation or preferring the original intent of the framers as expressed in the text ("originalism" or "textualism") is inherently more conservative when compared with the "organic growth" or "living tree of liberties" model that allows regular expansion of rights, because it freezes an alleged consensus over civic purposes, political applications, and diplomatic consequences.[12]

Ought not the contours of modern jurisprudence be informed by meaningful political, social, economic, racial, gender, class, immigration, philosophical, territorial, and technological developments? First and foremost of these considerations are post-World War II human rights standards that demand more state responsibilities and duties with regard to vulnerable minorities and protected persons at home and abroad.

Recognizing that the Constitution is not sacrosanct, and that its conceptualization of foreign policy is imperfect, would also validate an appreciation for the constraints faced by judges and the approaches they espoused in the case law created by generations of Supreme Court deliberations. In sum, this reviewer believes that the Constitution definitely deserves our continued respect, but not our deference.

While Ramsey's endnotes are thorough, there is no bibliography. These shortcomings affect the quality and the accessibility of this book, which is more law than history. Its sophisticated analysis is worth the reading primarily for the *cognoscenti*: graduate students, lawyers, and scholars. Ordinary people, undergraduates, and even average law students will need considerable context to decipher the contents.

Notes

[1]. Note in this context Ron Suskind, *The Way of the World: A Story of Truth and Hope in an Age of Extremism* (New York: HarperCollins, 2008).

[2]. For an insider's view that supported all-encompassing presidential powers, see John Yoo, *The Powers of War and Peace: The Constitution And Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005).

[3]. See commentary by the American Civil Liberties Union's National Security Project on the usage of military commissions in the recent (2008) *Hamdan* case: `http://www.aclu.org/safefree/torture/36252prs20080806.html`

[4]. Louis Henkin, *Foreign Affairs and the Constitution* (New York: Norton, 1971).

[5]. A fine recent example is Jack Godwin, *The Arrow and the Olive Branch: Practical Idealism in U.S. Foreign Policy* (New York, Praeger, 2007).

[6]. To understand Scalia's views, see Kevin A. Ring, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice* (Washington, DC: Regnery, 2004).

[7]. See Adam M. Samaha, "Dead Hand Arguments and Constitutional Interpretation," *Columbia Law Review* 108, no. 3 (April 2008): 606-680.

[8]. For context and the full text of the sermon, see Edmund S. Morgan, *The Puritan Dilemma: The Story of John Winthrop* (New York: Harper Collins, 1958).

[9]. See Robert Dahl, *A Democratic Critique of the American Constitution* (New Haven: Yale University Press, 2003).

[10]. For more details consult Charles C. Mann, *1491: New Revelations of the Americas before Columbus* (New York: Alfred A. Knopf, 2005).

[11]. Note the substance (and the title!) of Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, And Justice,* 4th ed. (Washington, DC: CQ Press, 2001).

[12]. See Thomas B. Colby, "The Federal Marriage Amendment and the False Promise of Originalism," *Columbia Law Review* 108, no. 3 (April 2008):529-605.