FOREWORD

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In the past few years, the U.S. Supreme Court has decided several high-profile cases that are directly relevant to the conduct of U.S. foreign policy. In *Medellin v. Texas* and *Sanchez-Llamas v. Oregon*, the Supreme Court grappled with issues involving the U.N. Charter, the Vienna Convention on Consular Relations, and the International Court of Justice. In *Boumediene v. Bush*, *Hamdan v. Rumsfeld*, *Hamdi v. Rumsfeld*, and *Rasul v. Bush*, the Court tackled issues arising from the detention and prosecution of enemy combatants in the war on terror. For all of these cases, the opposing parties submitted legal briefs that relied heavily on historical practice and precedent to support their respective positions.

Having read many of the briefs in those cases (and having authored or co-authored a couple of amicus briefs as well), it struck me that some of the advocates made historical claims that were difficult to square with the historical record. My frustration with some of the historical argumentation, in which advocates seemed to reinvent the history to suit their biases in the case at hand, prompted me to organize a symposium on "The Use and Misuse of History in U.S. Foreign Relations Law." The live symposium was held at Saint Louis University School of Law on March 7, 2008. (At that time, I was a law professor at Saint Louis University.) This issue of the *Saint Louis University Law Journal* publishes the papers from that symposium.

The symposium brought together a group of leading legal historians and foreign relations law scholars to examine the use and misuse of history in framing legal arguments related to the conduct of U.S. foreign policy. The symposium was organized around four main panels. For each panel, a principal author presented his or her paper, and other scholars provided commentaries on the main article. I thank all of the participants for their valuable contributions to the symposium, both oral and written.

Ingrid Wuerth's excellent article is entitled *An Originalism for Foreign Affairs?* Her paper poses the question: "What are the normative reasons in favor of originalism, and how do they apply in the area of foreign affairs?"[1]

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1. Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5, 6 (2008).

She concludes that the main normative arguments in favor of originalism "are at best underdeveloped and at worst weak when it comes to many constitutional issues that arise in the foreign affairs area."[2] Professors Stephen Vladeck and Eugene Kontorovich offered insightful commentaries on Professor Wuerth's paper. Their commentaries are included in this volume.

Thomas Lee's thought-provoking article is entitled *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*. In this article, Professor Lee contends that the Civil War had a transformative effect on the United States' foreign affairs constitution.[3] However, he maintains, the changes to the foreign affairs constitution that had their origins in the Civil War lay dormant for several decades thereafter, only to "reappear later in the modern history of the United States as it reengaged the great powers and ultimately assumed a leading role in world politics."[4] Deborah Pearlstein and Stephen Vladeck provided very thoughtful commentaries on Professor Lee's paper; they are also included in this volume.

Michael Van Alstine's excellent article, *Taking Care of John Marshall's Political Ghost*, offers a reassessment of the famous speech in which Marshall, then a Congressman from Virginia, declared that "[t]he President is the sole organ of the nation in its external relations."[5] Professor Van Alstine notes that "advocates of expansive presidential power" have invoked this "speech to support all manner of executive branch causes."[6] He cautions us that "a detached examination of . . . Marshall's speech should give significant pause about extrapolation beyond the narrow dispute that occasioned it."[7] Professor Martin Flaherty's insightful commentary on Professor Van Alstine's article is also published in this volume.

I wrote the fourth main paper for the symposium, entitled *Judicial Foreign Policy: Lessons from the 1790s*. The article examines a set of Supreme Court decisions between 1794 and 1797 that were directly related to the U.S. effort to maintain neutrality in the ongoing naval war between France and England. The analysis demonstrates that the federal judiciary played a leading role in implementing U.S. neutrality policy during this period. Professors A. Mark Weisburd and Daniel Hulsebosch provided valuable commentaries on the article; their commentaries are included in the present volume.

2. *Id.*

3. Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 54-55 (2008).

4. *Id.* at 55.

5. 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall on Mar. 7, 1800).

6. Michael P. Van Alstine, *Taking Care of John Marshall's Ghost*, 53 ST. LOUIS U. L.J. 93, 93 (2008).

7. *Id.* at 94.

Historical analysis rarely, if ever, produces a clear right answer to questions of constitutional foreign affairs law. However, good historical analysis can contribute to a more intelligent, informed debate about those questions. The articles and commentaries in this volume will make a substantial contribution to that debate for many years to come.