

CLIO AT WAR: THE MISUSE OF HISTORY IN THE WAR POWERS DEBATE

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INTRODUCTION

Almost thirty-five years ago, historian Alfred Kelly published his classic article, *Clio and the Court: An Illicit Love Affair*,¹ complaining about the Supreme Court's use of history in support of its interpretations of the Constitution. Kelly's article began what has amounted to a cottage industry among academics, who have criticized the Court's use of history, even (or especially) as the Court has increased its reliance on the Framers' intentions in recent years.² While many have attacked the normative basis underlying the Supreme Court's use of history, Kelly focused his criticisms more precisely on the Court's historical methodology. He found that the Justices repeatedly engaged in the practice of selectively using sources to support their desired results, of refusing to acknowledge contrary evidence, and generally of ignoring context and the work of historians. While Kelly's article stands as one of the earliest and

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1. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

2. Numerous examples abound of the academic community's criticism of the Court's turn to history. For cases and literature discussing the use of original understanding and federalism, see, for example, *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1357-59 (1997) [hereinafter Yoo, *Judicial Safeguards*] (evaluating use of history in federalism cases). On the use of original understanding and the separation of powers, see, for example, *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995); *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983). See also John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENTARY 87, 97-116 (1998) (discussing use of original understanding in the Appointments Clause cases).

most penetrating criticisms of “law office history,” it and other academic criticisms have done little to convince courts to cease their reliance on history. If anything, Justices of the Burger and Rehnquist Courts have only re-doubled their use of history—particularly of the Framers’ intent—in the course of interpreting the Constitution, especially its structural provisions.³

If anything, historians’ criticisms of law office history apply with equal force to the use of history in foreign affairs scholarship, from which Professor White’s insightful paper is a welcome respite.⁴ As this seems to be the season to reveal illicit love affairs, this symposium is an opportunity to examine the relationship between Clio and academic work in the foreign affairs area. In particular, I wish to focus on the debate over war powers, a question on which scholars have invoked the original understanding of the Constitution to attack the presidential practice of initiating military hostilities without a declaration of war.⁵ Arguing that the Framers intended Congress to enjoy exclusive control over the decision to begin war, these scholars interpret the Declare War Clause as a separation of powers provision that limits the Executive’s commander-in-chief abilities to wartime. In response, a smaller group of supporters of presidential war-making authority turn to historical practice—Congress has declared war only five times, while the President has committed troops to combat perhaps hundreds of times, most recently in Iraq, Somalia, Haiti, Bosnia, and Kosovo—and the executive branch’s structural superiority in protecting the nation in a dangerous world.⁶

3. For an outspoken defense of the Rehnquist Court’s use of history by one of the leading practitioners, see, for example, ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1996); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

4. See G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109 (1999).

5. See, e.g., JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (book review); William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

6. See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS*,

Scholars of both camps set up a classic problem of constitutional interpretation: a contradiction between the Constitution's original understanding and constitutional practice. This divergence between academic theory and political practice, however, begins to disappear on closer examination. In particular, most pro-Congress scholars have committed classic errors of law office history by quoting sources selectively, by failing to address and resolve conflicting evidence, and by ignoring current historiography. To the extent more recent works have displayed a greater sensitivity to history,⁷ they have made the mistake of analyzing the history at too broad a level of generality to prove useful in interpreting legal texts. On the other hand, pro-Executive scholars place excessive weight on post-ratification history. In conceding to the pro-congressional voices their claims about the original understanding, they are left asserting that the recent practice of the political branches can trump the original meaning of the Constitution. In both cases, too much history, if not handled with care, may cloud rather than sharpen analysis.

Another fault shared by both the pro-Congress and pro-Executive views is the belief that the Constitution establishes a precise process for war making. Pro-Congress supporters believe that the President may not begin any military conflicts, aside from defending an attack on the United States, without congressional approval. Pro-Executive adherents claim that the President has the authority to wage war unilaterally. In fact, a careful attention to the historical sources suggests that the Framers did not have a fixed vision of the correct method to begin war. The Constitution vests Congress and the President with different powers in the field of war, and it allows the exercise of war powers to develop within the boundaries established by those powers. Evidence from the Founding period indicates

1787-1984 (5th ed. 1984); ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* (1991); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364 (1994); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693 (1990); Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (1970); W. Michael Reisman, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 YALE J. INT'L L. 203 (1991); Eugene V. Rostow, "Once More unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986).

7. See generally Treanor, *supra* note 5.

that the Framers expected that the branches would exercise their plenary powers to cooperate, and, at times, to struggle for control over war. They did not understand the Constitution to establish a precise, permanent process for making war in the same manner that it created a detailed method for making laws.

The Constitution's flexibility on the question of war powers will become clearer when we focus on a different type of history concerning the original understanding. Scholars who have worked on this issue generally have used history much in the way lawyers use other forms of evidence.⁸ The statements of the major players are combed for the perfect quote that reinforces a thesis, or for an admission against interest, without regard to context. In contrast, other recent work has sought to locate war powers within the broader political and cultural themes of the times, by using the methods of the intellectual history of the Founding era.⁹ This approach, however, has the tendency to increase the complexity of the evidence at hand without tethering it to the constitutional text. I propose instead that we focus our inquiry on the historical development of legal texts and their expression of political and institutional relationships of their time. We might call this method "historical textualism," because it focuses on the origins and development of the constitutional phrases and clauses in the Constitution's precursors. It might be compared to, in the field of statutory interpretation, the practice of reading a statute *in pari materia* with the United States Code, but one that also makes comparisons between code provisions over time.

An example will illustrate this approach. In interpreting the meaning of the Declare War Clause, we should not look exclusively at what a particularly influential Framers said about the provision at the Philadelphia Convention or in the ratification debates. Instead, we first should examine the phrase's meaning in significant Founding era legal documents, principally the British Constitution in the seventeenth and eighteenth centuries, the state constitutions, and the Articles of Confederation. We should attempt to reconstruct what the British believed a declaration of war to be, and how the power

8. See, e.g., ELY, *supra* note 5; FISHER, *supra* note 5; GLENNON, *supra* note 5; KOH, *supra* note 5; Stromseth, *supra* note 5.

9. See, e.g., Treanor, *supra* note 5.

was to be exercised, because the Framers had been, after all, citizens of the British Empire for most of their lives. As the British Constitution was (and is) an unwritten one formed by tradition and practice, the power to declare war can be given meaning not just by examining writers such as Blackstone, but also by reviewing British political history. Examples of British war making will indicate the processes, institutional relationships, and patterns of activity that the Framers understood would be created by adopting—or rejecting—the British Constitution's allocation of governmental powers. Examining state constitutions will provide similar context concerning the meaning of constitutional texts and the governmental conduct that these phrases were expected to permit. Finally, we should look to the ratification debates as the formal expression of approval for the Constitution.

Approaching constitutional interpretation in this manner bears several advantages. First, focusing on the text employs history at an effective level of generality. It avoids the dangers of allowing pure intellectual history to scatter our analysis. Although we can use historical works about systems of belief widely held by Americans at the time of the Framing, they are relevant only insofar as their findings found expression in the constitutional text. The text serves as the instrument that distilled abstract political theories and beliefs into a workable system of government. It is these concrete texts, and the political institutions and relationships to which they had given rise, that would have formed the context within which the Framers would have understood the war clauses.

Second, focusing on the texts and the ratification process is more faithful to the normative goals of originalist interpretation. Originalism focuses both on what the Framers believed and what they did. The action of ratification by popularly elected conventions selected specifically for the purpose gave the Constitution its political legitimacy.¹⁰ Therefore, what those who ratified the Constitution believed the meaning of the text to be is determinative for originalist purposes, rather than the intentions of those who drafted the document. It is the original *understanding* of the document, held by its ratifiers, that is dispositive, not the original *intentions* of its drafters.

10. See, e.g., JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 94-130 (1996).

Our effort should seek to reconstruct the understandings of the delegates who participated in the ratification process of the state conventions, and of the leaders who debated the proposed Constitution in the press, rather than the intentions of those who drafted the Constitution but were not politically authorized to adopt it. Of course, statements and arguments the drafters made in Philadelphia can provide evidence of the widely held beliefs and understandings of the Framers.

On this point, I am following the distinction made by several students of the ratification period, such as Leonard Levy, Jack Rakove, and Charles Lofgren.¹¹ These scholars distinguish between "original intent," which refers to the purposes and decisions of the Constitution's authors, and "original understanding," which includes the impressions and interpretations of the Constitution held by its "original readers—the citizens, polemicists, and convention delegates who participated in one way or another in ratification."¹² If we are looking at history from the ratification simply to inform a contemporary decision regarding the Constitution's meaning, then all sorts of material, including the Philadelphia Convention debates and post-ratification interpretations of the Constitution, will become relevant. For that matter, history well after the ratification could prove just as useful, as a sign of consistent practice. If we begin, however, at the normative starting point that the Constitution's legitimacy derives from its popular ratification, a narrower set of sources becomes authoritative. Because the approval of the state ratifying conventions gave the Constitution its life, the understanding of those who participated in the ratification should guide our interpretation of the text. Speeches, pamphlets, and debates during the ratification will indicate what those convention delegates believed the text and structure of the Constitution to mean.

If one agrees with this normative goal of originalist constitutional interpretation, then some heavy lifting is required. Simply dredging up a few selective quotes from famous Framers at the Philadelphia Convention cannot fully re-create the legal and political world of the ratifiers; in fact, such an ap-

11. See LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 1-29 (1988); RAKOVE, *supra* note 10, at 8-9; Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 111-13 (1988).

12. RAKOVE, *supra* note 10, at 8.

proach may yield a decidedly distorted view of the Constitution. Instead, we must attempt to understand the political theories, the recent political history, the assumptions, and the conceptions that comprised the likely worldview of all of the ratifiers, rather than the ideas of a few. Examining textual development does this in several ways. Looking at the British constitutional practice allows us to sketch the general assumptions about governmental structure and practice that the ratifiers would have held. If the Framers incorporated and borrowed British phrases in the Constitution, they may have expected the political branches to duplicate British notions and British practice as well. Colonial charters, state constitutions, and the Articles of Confederation also provide important baselines against which to measure the Framers' design. Elements of the ratifiers' work may have represented rejection, or approval, of colonial and early state political experiences. These sources provide examples of other options that the Framers could have chosen, of the manner in which different government structures had operated, and of the way in which political ideas and agendas had found earlier expression.

I

Although the text of the Constitution divides the power to make war between the President and Congress, it does not clearly address the authority to initiate a war. Article I vests Congress with the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."¹³ Congress also possesses the authority to "raise and support Armies,"¹⁴ to "provide and maintain a Navy," to "make Rules for the Government and Regulation of the land and naval Forces,"¹⁵ "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"¹⁶ and to "provide for organizing, arming, and disciplining, the Militia."¹⁷ Other foreign relations powers vested in Congress include the authority to regulate in-

13. U.S. CONST. art. I, § 8, cl. 11.

14. *Id.* cl. 12.

15. *Id.* cl. 13.

16. *Id.* cl. 15.

17. *Id.* cl. 16.

terstate commerce,¹⁸ to enact immigration laws,¹⁹ and to pass laws for punishing piracy.²⁰

In light of this lengthy enumeration, the President's foreign affairs powers appear to be less extensive than those of Congress. Article II of the Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."²¹ He also is vested with all of the executive power of the United States,²² which may contain additional war-making authority. The President also possesses the authority to receive ambassadors, and he shares with the Senate the power to appoint ambassadors and to make treaties.²³ While federal courts have no explicit constitutional role in war making, they exercise jurisdiction over cases arising under the Constitution, treaties, and federal laws,²⁴ and those involving ambassadors, admiralty and maritime, and diversity suits with foreign states or citizens.²⁵

What the Constitution gives to the political branches, it explicitly takes from the states. Article I, Section 10 declares that "[n]o State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."²⁶ It also prohibits the states from entering into any treaties, alliances, or confederations.²⁷ Unfortunately, war powers scholars have ignored the Constitution's treatment of the relationship between federalism and the foreign affairs powers. Comparing the text of Article I, Section 10 with the vesting of war-making powers at the national level produces some overlooked insights. For example, in prohibiting the states from becoming involved in war, the Constitution states that states may not "engage" in war, while Congress only has the power to "declare" war. If the Framers had wanted to

18. *See id.* cl. 3.

19. *See id.* cl. 4.

20. *See id.* cl. 10.

21. *Id.* art. II, § 2, cl. 1.

22. *See id.* § 1, cl. 1.

23. *See id.* cl. 2.

24. *See id.* art. III, § 2, cl. 1.

25. *See id.* cl. 2.

26. *Id.* art. I, § 10, cl. 3.

27. *See id.* cl. 1.

vest in Congress the power to decide on war, then we would have expected them to state that Congress had the power to decide whether to engage the United States in war, rather than using the more ambiguous “declare war” phrase. The absence of the word “engage” from Congress’s store of powers at least suggests that the President may have more powers than academics think, and Congress less.²⁸ If the Framers had wanted to require congressional authorization before the initiation of hostilities, Article I, Section 10 also shows that they knew how to say so (“The President shall not, without Consent of Congress . . .”).

This formal distribution of powers has produced a system of modern war making in which presidents have unilaterally committed troops to hostilities. While academics believe that the power to declare war indicates that Congress must authorize the beginning of any hostilities against a foreign power, Congress has declared war only five times, most recently more than fifty years ago in World War II.²⁹ Meanwhile, the United States has committed military forces to combat at least 125 times in the Constitution’s 210-year history, although most of these interventions either were small-scale operations or received some form of congressional approval.³⁰ Since World War

28. Works in other foreign relations law areas place similar interpretive weight on the comparison between Article I, Section 10 and the national government’s foreign affairs powers. For example, Article I, Section 10 bars the states from entering into “any Treaty, Alliance, or Confederation” and declares that “[n]o state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.” U.S. CONST. art. I, § 10. Scholars such as Myres McDougal and Laurence Tribe have argued that this language suggests that the Constitution contemplates other species of international agreements in addition to treaties. Because the Constitution does not prohibit the national government from entering into these nontreaty international agreements, so the reasoning goes, the President or the President and Congress may enter the nation into sole executive agreements and congressional-executive agreements that do not meet the Treaty Clause’s requirements. See, e.g., Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*: 1, 54 YALE L.J. 181 (1945); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*: 2, 54 YALE L.J. 534 (1945); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1265-67 (1995). But see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

29. The other four were the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, and World War I.

30. See OFFICE OF THE LEGAL ADVISER, U.S. DEP’T OF STATE, *THE LEGALITY*

II, however, presidents have engaged in several significant military engagements without a declaration of war or other congressional authorization. When President Truman introduced American troops into Korea in 1950, he did not seek congressional approval, relying instead on his inherent executive and commander-in-chief powers.³¹ In the Vietnam conflict, President Johnson never obtained a declaration of war nor unambiguous congressional authorization, although the Gulf of Tonkin Resolution expressed some level of congressional support for military intervention.³² In the wake of Vietnam, Congress, over President Nixon's veto, enacted the War Powers Resolution, which placed time limits and reporting requirements on the use of American military force abroad.³³ Presidents Ford, Carter, and Reagan engaged in several military actions without congressional assent, although they did submit reports in compliance with the requirements of the War Powers Resolution.³⁴ Publicly declaring that he had the constitutional authority to unilaterally initiate war, President Bush committed a half-million soldiers to warfare in Operation Desert Storm for a period of time that violated the War Powers Resolution.³⁵ President Clinton has followed these precedents in Somalia, Haiti, Bosnia, the Middle East, and Kosovo.

These examples suggest that by conduct and consent, the

OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIET-NAM (1966), *reprinted in* 1 THE VIETNAM WAR AND INTERNATIONAL LAW 583, 597 (Richard A. Falk ed., 1968) (125 incidents); CONGRESSIONAL RESEARCH SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1789-1989 (Ellen C. Collier ed., 1989), *reprinted in* THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 650 (2d ed. 1993).

31. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 178-79 (1996) [hereinafter Yoo, *War Powers*].

32. While presidential critics such as Ely and Henkin generally attack unilateral executive war making in the postwar period, they find the Gulf of Tonkin Resolution to amount to acceptable congressional authorization for war, even though it was not a declaration of war. See ELY, *supra* note 5, at 16; HENKIN, *supra* note 5, at 101-02. Other critics, however, believe the Vietnam War was unconstitutional as well. See, e.g., ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 177-207 (1973); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 690-94 (1972).

33. See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1994)).

34. See Yoo, *War Powers*, *supra* note 31, at 181-82.

35. See *id.* at 186-88.

branches of government have established a stable, working system of war powers. The President has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war, and instead has assumed the role of approving military actions after the fact by declarations of support and by appropriations.³⁶ Throughout, courts have invoked the political question doctrine to avoid interfering in war powers questions. War powers scholars such as John Hart Ely, Michael Glennon, Louis Henkin, and Harold Koh have criticized the performance of each of the branches.³⁷ They argue that the President possesses no unilateral authority to begin offensive wars, that the separation of powers dictates a balanced system in which both the President and Congress must share the war power, and that courts have a constitutional duty to enforce this allocation of war powers. The linchpin of their arguments is the Declare War Clause, which they believe gives Congress the sole right to decide whether to take the nation into military hostilities.

In criticizing presidential war making, these scholars have relied heavily on the original understanding. Professor Ely, for example, declares that there is a “clarity of the Constitution on this question.”³⁸ While he acknowledges that “the ‘original understanding’ of the document’s Framers and ratifiers can be obscure to the point of inscrutability,” he bluntly concludes that “[i]n this case, . . . it isn’t.”³⁹ He turns to several well-known statements by prominent Founding-era Framers—such as James Madison, James Wilson, and Joseph Story—to demonstrate that the Framers understood the Declare War Clause to give Congress the sole power over deciding on war. During the debate over the clause in the Philadelphia Convention, for example, Madison moved to “insert ‘declare,’ striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.”⁴⁰ Ely takes this evidence as proof that the Framers intended the President to keep battlefield command of the military, but only once war is declared, unless the President is

36. See KOH, *supra* note 5, at 123-33.

37. See ELY, *supra* note 5, at 47-67; GLENNON, *supra* note 5, at 35-70; HENKIN, *supra* note 5, at 17-43; KOH, *supra* note 5, at 117-49.

38. ELY, *supra* note 5, at 5.

39. *Id.* at 3.

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1911).

defending the nation from surprise attack.⁴¹ If anything, however, Madison's quote here hurts Ely's case, as the change in the Constitution took from Congress the power to "make" war and reduced it only to "declaring" war, which indicates that war power had been transferred from Congress to the Executive. Nonetheless, Madison and other Framers supported the diminution of executive power, according to Ely, because they suspected that the President was prone to war. They place great store in a quote by Madison: "The constitution supposes, what the History of all Governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature."⁴² Pro-Congress scholars place great weight on Madison's arguments due to his status as the "father of the Constitution," as the author of the Bill of Rights, and as a coauthor of the *Federalist Papers*.⁴³

The second link in Ely's trilogy of evidence is James Wilson's defense of the Constitution before the Pennsylvania Ratifying Convention. Describing the vesting of war powers in the national government at the expense of the states, Wilson said:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.⁴⁴

Ely and others interpret this statement as supplying the rea-

41. See ELY, *supra* note 5, at 5.

42. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON, at 312 (Gaillard Hunt ed., 1906); see also ELY, *supra* note 5, at 4.

43. See, e.g., Treanor, *supra* note 5, at 745-48.

44. JONATHAN ELLIOT, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 528 (1836). This is the citation provided by Ely and Stromseth, among others. For reasons I discuss below, the better citation is to 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 583 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY].

son for vesting in Congress the power to declare war.⁴⁵ Apparently, the Framers hoped that by making the procedure of going to war a difficult one, they would succeed in limiting the occasions for war to those that were absolutely necessary.⁴⁶ The Framers sought to remove this power from the Executive, which they believed to be the branch most prone to war, and to give it to the legislature, which would require time and deliberation for its decision.⁴⁷ The third piece of evidence raised by pro-Congress scholars are the comments of Joseph Story, who, like Wilson, maintained that vesting the House with the power to declare war would slow down the war-making process.⁴⁸

Ely's work represents the leading brief for the traditional pro-Congress view of war powers, and as such it is typical in its methodological flaws. None of this evidence is used to show a common understanding among the Framers that a declaration of war had to precede the initiation of hostilities, or that the Declare War Clause was shorthand for a requirement of congressional authorization for all uses of military force. Of the three sources upon which Ely places chief reliance, two of them are quite weak as evidence of an original understanding. We perhaps should accord Joseph Story the least interpretive weight. Story did not participate in the Philadelphia Convention or the ratification debates; he was only eight years old at the time. He was born three years after the American Revolution. While his *Commentaries on the Constitution* is a classic treatise on the Founding document, it first left the printing press in 1833, forty-five years after the ratification.⁴⁹ Although one of the nation's greatest Justices and one of its first law professors, Story had no personal experiences that gave him special insight into the drafting or ratification of the Constitution. Story deserves the same respect accorded to the opinions of any other intelligent, learned observer of the Constitution, but his

45. See ELY, *supra* note 5, at 3; Stromseth, *supra* note 5, at 851; Treanor, *supra* note 5, at 717.

46. See ELY, *supra* note 5, at 140 n.10.

47. See, e.g., Stromseth, *supra* note 5, at 851-52 (quoting Letter from James Madison to Thomas Jefferson (Apr. 2, 1798)).

48. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 570 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833); see also ELY, *supra* note 5, at 4; Stromseth, *supra* note 5, at 859 n.76.

49. For Story's biographical details, see Ronald D. Rotunda & John E. Nowak, *Introduction to STORY*, *supra* note 48, at v, v-xiv.

analysis should not be considered to be evidence of the original understanding.

Although James Madison was a leading participant in the Philadelphia Convention and the ratification, his comments have other problems for originalist purposes. His amendments to the Declare War Clause came during the Philadelphia Convention, a closed session of like-minded delegates who had not been elected by the people to represent them in the task of drafting a constitution. As the records of the Convention debates, kept in Madison's own hand, were not made available during the process of ratification, the intentions of the drafters of the provision could not have guided ratifiers' understanding.⁵⁰ According dispositive weight to statements made during the Philadelphia Convention is like allowing the intentions of a special interest group, having drafted a proposed statute, to dominate judicial interpretation of a public law, rather than using the statements of the members of Congress who introduced and voted for it. While they constitute our most extensive record of the Philadelphia Convention, Madison's journals are also spotty and incomplete. At best, his notes were able to record only ten percent of the speeches made at Philadelphia, and it has become clear that Madison added to the journals at a later time to expand on ideas that he expressed in only embryonic form in the summer of 1787.⁵¹ The fragmentary and incomplete nature of Madison's notes is nowhere clearer than with regard to the Declare War Clause. Several scholars acknowledge that the debate over the Clause, which consists of only one page of Madison's 1273-page record, is confusing at best, which may be understandable in light of the fact that the issue arose late in the day toward the end of the Convention's deliberations in August.⁵² Anyone who has experienced the pleasure of spending August in Philadelphia can sympathize with the Framers' weariness and cloudy thinking.

Repeating Madison's suspicions about the executive branch's tendency towards war presents even more methodo-

50. Madison's journals were not made public until the time of his death. See RAKOVE, *supra* note 10, at 3-5.

51. See Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1604-06 (1987); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 34-35 (1986).

52. See, e.g., RAKOVE, *supra* note 10, at 83-84; Treanor, *supra* note 5, at 716-17.

logical problems. Scholars who employ this statement—and there are several—often fail to reveal that Madison made it in a private letter to Thomas Jefferson in April 1798, a decade after the ratification. The timing of the letter itself should indicate that it was not a reflection of a shared understanding held by the Framers at the time of ratification.⁵³ Unlike his Helvidius-Pacificus exchanges with Hamilton four years earlier, Madison did not even declare these sentiments in a public forum. Furthermore, it is difficult to believe that Madison had written these thoughts free from partisan influence. In the spring and summer of 1798, the Federalists appeared to be driving the nation into war with France, a conflict that Thomas Jefferson and his new party badly wanted to avoid.⁵⁴ On April 2, 1798, Congress had asked for and made public the papers of the XYZ Affair, in which French ministers had demanded bribes before allowing American envoys to negotiate.⁵⁵ In response to the ensuing outrage throughout the country, Congress voted to expand the peacetime military to 10,000 troops and to allow American ships to attack French merchantmen.⁵⁶ A furious Jefferson believed that the papers proved nothing and were being used as the pretext for a war desired only by the Federalists, whom he believed sought to create a military-industrial state along British lines.⁵⁷ Madison's private comments came, then, during a period of heated partisanship between his party and that of his rival, Hamilton, over a war ten years after ratification. Unless Madison's thoughts in 1798 constituted part of a sustained strain of thought that he had held since before the ratification (which they did not), or they were emblematic of a broad consensus among the Framers both before and after 1788, they are post-enactment legislative history of the sort that deserves limited weight.

Wilson's Pennsylvania Convention address, however, does not suffer from the anachronisms of Madison's private letter. As a speech apparently directly on point by one of the leading figures of the Philadelphia Convention and the ratification, it

53. See, e.g., ELY, *supra* note 5, at 4; Stromseth, *supra* note 5, at 851.

54. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 581-618 (1993).

55. See *id.* at 588.

56. See generally ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801* (1966).

57. See *id.*

has become the crucial piece of evidence in the pro-Congress arsenal.⁵⁸ Although he favored a strong presidency in domestic affairs, James Wilson led the charge in the Philadelphia Convention to reduce the Executive's foreign affairs powers.⁵⁹ We should be wary, however, of the perfect quote that appears to say exactly what we want. When we look at Wilson's language in context, it is not as clear as it at first seems. Wilson's speech did not occur in response to complaints that the President possessed excessive war powers; rather, it took place in a broader discussion about the virtues of forming a true nation-state, whose unified strength would deter the European powers from attacking the United States. Much as President Washington would predict in his farewell address, Wilson argued that a stronger nation, and the great distances of the Atlantic Ocean, would keep the new nation from "mix[ing] with the commotions of Europe."⁶⁰ "No sir," Wilson said to the Pennsylvania Antifederalists, "we are happily removed from them, and are not obliged to throw ourselves into the scale with any."⁶¹

Wilson's oft-quoted statement, it seems, addresses as much a federalism issue as a separation of powers issue. It seeks to reassure its listeners that the President and Senate, using their treaty powers, could not oblige the nation to go to war, which was a fairly common practice in an international system dependent on alliances and balance of power politics.⁶² In fact, this issue would become a source of political controversy during the Washington administration, which struggled over whether the 1778 Treaty of Amity and Commerce with France required the United States to assist revolutionary France in its war with the other European great powers.⁶³ Instead, Wilson argued, only a democratic process involving the President, Senate, and

58. See, e.g., ELY, *supra* note 5, at 3-5; FISHER, *supra* note 5, at 7-8; Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 36 (1972); Lofgren, *supra* note 11, at 83-84.

59. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 65-66 (Madison's notes record that Wilson "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."). In the Committee of Detail, Wilson issued a draft of the Constitution that assigned to Congress the power "to make War." 2 *id.* at 168.

60. See 2 DOCUMENTARY HISTORY, *supra* note 44, at 583.

61. See *id.*

62. See Yoo, *War Powers*, *supra* note 31, at 286 n.547.

63. See ELKINS & MCKITRICK, *supra* note 54, at 346-53.

House of Representatives, not merely “a single man” nor “a single body of men,” could bring the nation into a full-scale war.⁶⁴ Wilson’s speech, however, does not fully equate the power to declare war with the power to decide to initiate war. One could also read Wilson as understanding a declaration of war to be a necessary component to total war, but not the first step toward such a conflict. Nor was he clearly addressing all forms of conflict, such as “imperfect” war, as some eighteenth-century treatises called it,⁶⁵ or lesser types of hostilities. Pro-Congress scholars need to place comments such as Wilson’s in a broader intellectual framework so that we might understand whether Wilson’s use of words such as “war” equate with our end-of-the-millennium understandings. Only in this way can we evaluate whether Wilson’s beliefs were shared by other Framers.⁶⁶

64. See 2 DOCUMENTARY HISTORY, *supra* note 44, at 583.

65. See Yoo, *War Powers*, *supra* note 31, at 204-08.

66. To show the faults of Ely’s approach, which is rather typical of much war powers scholarship, one could simply answer his Wilson quote with yet another quote. If we were using history in the law office fashion, we simply could pull out a comment that suggests an opposite principle at work. Wilson made his comments on December 11, 1787, during the Pennsylvania Ratifying Convention. He did not make his speech in answer to a specific Antifederalist criticism of the Constitution for vesting too much war power in the President. Rather, he made the comment as an aside in his general response to concerns about Congress’s powers to keep a standing army in peacetime. See, e.g., 2 DOCUMENTARY HISTORY, *supra* note 44, at 572, 577-83. An essay that received much wider circulation, *Federalist No. 6*, took the opposite position on the nature of legislatures and war. Wrote Alexander Hamilton as Publius:

Has it not . . . invariably been found, that momentary passions and immediate interests have a more active and imperious controul over human conduct than general or remote considerations of policy, utility or justice? Have republics in practice been less addicted to war than monarchies? Are not the former administered by men as well as the latter? Are there not aversions, predilections, rivalships and desires of unjust acquisitions that affect nations as well as kings? Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals, in whom they place confidence, and are of course liable to be tainted by the passions and views of those individuals?

THE FEDERALIST NO. 6 (Alexander Hamilton), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 44, at 99. Continuing in this vein, Publius then listed various republics from antiquity that had proven just as warlike as their monarchical or aristocratic neighbors. See *id.* Just as Wilson believes that a democracy will slow down the path to war, Publius appears to argue that democracies are just as warlike as any other form of government. The example of *Federalist No. 6* does not “counter” Wilson’s Convention speech, just as Wilson’s Convention speech, by

To be sure, Ely is not the only war powers scholar to engage in these methodological missteps. For example, another member of the pro-Congress camp, Professor Jane Stromseth, makes several of the same mistakes that corrupt Ely's analysis. In her discussion of the original understanding, she begins with comments by Madison and Wilson in the Philadelphia Convention and the Pennsylvania Ratifying Convention, without making any distinctions about the relevance or methodological importance of the two.⁶⁷ She then rapidly expands her analysis to include all sorts of evidence, most of it from well after the ratification, without regard to their value in reflecting the *original*, not subsequent, understanding of the Constitution. For example, Professor Stromseth quotes and cites, in rapid order, Hamilton's and Madison's remarks in the 1794 Helvidius-Pacificus debates; a private 1848 letter by Abraham Lincoln (certainly not a Framers); an opinion by Thomas Jefferson as Secretary of State (he was not even in the United States during the Philadelphia Convention or the ratification); the seventeenth and eighteenth-century international law treatises of Hugo Grotius, J.J. Burlamaqui, and Emmerich de Vattel; a private letter by Hamilton in 1798; Madison in a private 1827 letter; Hamilton in 1801 examining Jefferson's message to Congress; Supreme Court prize cases from the early 1800s; dicta from an 1806 federal case in New York circuit court that did not hold on war powers; and the 1863 *Prize Cases*.⁶⁸ Stromseth's methodological problem is not just that many of her sources come from after the ratification, but that her evidence is mixed all together rather than placed in something of an order that demonstrates the flow and pace of ratification history. Rather than explain the relevance and weight of each piece of evidence, and show how each fits into the greater political, constitutional, and legal developments of the ratification period, Professor Stromseth collects all of her sources without sensitivity to context and then asks the reader to rely on her judgment as to the overall picture that she draws.⁶⁹

itself, cannot disprove arguments for executive war powers. Rather, my example of *Federalist No. 6* is offered merely to show how difficult it is to evaluate the usefulness of selective quotations without understanding the broader context within which they occurred.

67. See Stromseth, *supra* note 5, at 851.

68. See *id.* at 851-64 nn.24-103.

69. See, e.g., *id.* at 859 ("[M]y own reading of the sources from the Founding

Perhaps sensing the weakness of the traditional pro-Congress view, Stromseth and others, such as Jules Lobel, have shifted the thrust of their arguments from the Declare War Clause to, of all things, the Marque and Reprisal Clause.⁷⁰ In part, this is a response to recent history, in which presidents have conducted "police actions," smaller conflicts, and covert activity involving military hostilities that are hard to classify as full-blown wars of the same magnitude as World Wars I and II. Stromseth, who relies on the earlier works of Jules Lobel and Charles Lofgren,⁷¹ believes that letters of marque and reprisal had come "to signify any intermediate or low-intensity hostility short of declared war."⁷² When combined with Congress's control over declaring war, Stromseth, Lobel, and Lofgren argue, the Marque and Reprisal Clause provides Congress with full control over the initiation of all military hostilities, whether they be total war or covert actions. They rely on the definition of marque and reprisal contained in international law treatise writers, such as Grotius (1629),⁷³ Vattel (1758),⁷⁴ and English writers such as Blackstone,⁷⁵ who declared that such letters were a form of "imperfect" war in which the hostilities did not rise to the level of total war.

Such interpretive moves, however, rip the constitutional text from historical context. Treatises by writers such as Blackstone or Vattel can be useful in filling in the intellectual backdrop to the thinking of the Framers. Selections from these authorities, however, can prove misleading because they could

ultimately convinces me that Rostow's understanding of Congress's constitutional war powers is too narrow."). Stromseth also maintains:

My best reading of the sources is that the Founders would have expected the President as Commander in Chief and Chief Executive to protect the United States in a dangerous and uncertain world by repelling actual or imminent attacks against the United States, its vessels, and its armed forces, but not, on his own, to go beyond this authority and effectively change the state of the nation from peace to war.

Id. at 862.

70. See *id.* at 854; Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

71. See Lobel, *supra* note 70, at 1035; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972).

72. Stromseth, *supra* note 5, at 854 (quoting Lobel, *supra* note 70, at 1045).

73. See HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis W. Kelsey trans., 1925) (1646).

74. See EMMERICH DE VATEL, *THE LAWS OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (Charles G. Fenwick trans., 1916) (1758).

75. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *258-59.

not accurately take into account the manner in which legal concepts and terms were changing by the time of the Revolution and the ratification. For example, even though Blackstone's description of the English King's powers was probably the most complete one of its time, it failed to describe the manner in which that power was evolving even while he was writing.⁷⁶ Similarly, by the time of the Framing, letters of marque and reprisal had come to refer to a fairly technical form of international reprisal, in which a government gave its permission to an injured private party to recover, via military operations, compensation from the citizens of a foreign nation.⁷⁷ Without a letter of marque and reprisal, such actions—usually conducted on the high seas—would constitute piracy; with a letter, they were legitimate forms of privateering condoned by sovereign consent.

While marque and reprisal certainly are one category of what we today might call low-level conflict, it does not follow that marque and reprisal must refer to *all* forms of conflict short of war. Defenders of the pro-Congress position fail to identify a common understanding during the Founding that shows that the Framers interpreted the provision as referring to all military hostilities short of total war. Recent work suggests that, during the American Revolution, letters of marque and reprisal authorized a rather narrow form of commercial warfare that was conducted for profit and regulated by prize courts, in contrast to government-directed military actions with strategic, tactical, or political goals.⁷⁸ Privateers sought to capture enemy merchant vessels with the object of selling their cargoes back home.⁷⁹ As individualistic commercial entrepreneurs, they failed miserably at actual fighting and did not coordinate their efforts with the American Navy.⁸⁰ Rather than provide Congress with full control over the initiation of all conflicts, the Framers might have included the Marque and Reprisal Clause to give Congress control, through its power of the purse, over both military operations that it funded and those

76. See WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 340-41 (1938).

77. See Yoo, *War Powers*, *supra* note 31, at 250-51.

78. See C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953 (1997).

79. See *id.* at 963-66.

80. See *id.* at 968-72.

that it authorized but did not fund, such as military operations by privateers. What seems fairly clear is that *marque and reprisal* did not refer to all forms of undeclared war, especially those with purely military and political goals, but only to one species of commercial warfare.

A context-less treatment of the *Marque and Reprisal Clause*, as well as the poor methodology of the history surrounding the *Declare War Clause*, is symptomatic of a deeper problem with the use of history by pro-Congress scholars. In focusing on a few statements here and there, or in swiftly drawing contemporary lessons from phrases such as "*marque and reprisal*," they fail to make a sufficient effort at understanding the political, legal, and constitutional world of late eighteenth-century America. While this may be a difficult task, it is not impossible. If anything, we enjoy today an outpouring of excellent primary and secondary sources on the American Revolution and Founding periods that make such historical reconstruction possible and worthy of effort. The *Documentary History of the Ratification of the Constitution*⁸¹ collects, and continues to collect, into one place almost all of the extant speeches, debates, and pamphlets of the ratification period. We have the excellent works of historians Bernard Bailyn,⁸² Gordon Wood,⁸³ J.G.A. Pocock,⁸⁴ Forrest McDonald,⁸⁵ and now Jack Rakove,⁸⁶ as well as a host of other excellent histories⁸⁷ that have sought to describe the intellectual thought and political worldview of the Founding generation. An outstanding journal, the *William and Mary Quarterly*, provides a forum for the historical discussion of the colonial, revolutionary, and

81. 1-18 DOCUMENTARY HISTORY, *supra* note 44.

82. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS (1970).

83. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) [hereinafter WOOD, CREATION]; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

84. See J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

85. See FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985).

86. See JACK RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979); RAKOVE, *supra* note 10.

87. Here, one might refer to works by John Philip Reid, Jack Greene, Edmund S. Morgan, Richard B. Morris, Lance Banning, and Joyce Appleby.

Framing periods. At a minimum, works that rely on history ought to take these original and secondary works into account in providing the necessary context for their inquiries. To do otherwise is to engage in what Professor Martin Flaherty, a serious constitutional historian, appropriately has described as "history lite."⁸⁸

Whether one wants to develop a set of rules for originalists,⁸⁹ or measure the use of historical sources concerning the Framing by the basic standards of the historical profession,⁹⁰ scholars who use an originalist approach must, at the very least, be sensitive to the broader intellectual picture of the Founding generation and the secondary works that attempt to re-create it. And on this ground, the works of pro-Congress scholars such as Ely, Stromseth, and Lobel fail to meet the test. Ely, for example, extensively quotes a student's paper about his feelings about going to war in 1991,⁹¹ but does not refer to Bailyn, Wood, McDonald, Pocock, or Rakove. He quotes a few *Federalist* papers, but does not discuss the Antifederalists or give any sense of the changes in political thought and political events between the time of the Revolution and the ratification of the Constitution.⁹² Stromseth cites to Bailyn once, but only for the proposition that the Framers relied on Vattel and Burlamaqui on the law of nations; she cites to the other historians not at all.⁹³ Lobel also fails to refer to any of the leading historians on the Founding period, and, like Stromseth, provides no discussion of the political and constitutional changes occurring in America during the Framing period. For these scholars, it is as if the Constitution were written just yesterday, and that the Framers' thoughts can be understood as easily now as 210 years ago. To the extent any of these writers rely on secondary sources about the Framing period, they usually turn to law review articles written on the same question of war powers, which commit many of the same methodological errors, which appeared before the great wealth of recent historical research,

88. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

89. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (setting out 14 "rules" for the use of history by originalists).

90. See Flaherty, *supra* note 88, at 549-56.

91. See ELY, *supra* note 5, at 8.

92. See *id.* at 8, 139-54 nn.1-68.

93. See Stromseth, *supra* note 5, at 854 n.45.

or which seem to have been motivated by opposition or support for the Vietnam War.⁹⁴ And none of these pro-Congress scholars use primary documents from the standard resource, the *Documentary History of the Ratification of the Constitution*, nor do they indicate that they have undertaken a thorough examination of the primary sources.

Referring to leading historical works about the Framing period is not just more persuasive;⁹⁵ it is also more faithful to the idea of a usable past. As constitutional lawyers, or constitutional historians, our inquiry into the history certainly is more narrow and purposive than the intellectual historian, who seeks to draw a broader, more complex picture of the eighteenth-century American world. Yet we cannot resort to the quotations and debates of the ratification as if they had just happened yesterday. Instead, we need to re-create some of the intellectual and political background that would have given those words meaning and context in that time. In Part II, I point out a few important pieces of that contextual puzzle that have been ignored by war powers scholars.

II

This part reviews some key elements of the institutional history of war powers leading up to the Framing. Re-creating the entire world of war powers during the late eighteenth century is beyond the scope of this paper.⁹⁶ We can, however, discuss some themes that provided key context for the way in which the Framers would have understood the Constitution's allocation of war powers. First, we can look to the experience under the British Constitution during the Stuart and Hanoverian periods. Second, we can refer to the system of war

94. See, e.g., W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* (1981); SCHLESINGER, *supra* note 32; ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); Berger, *supra* note 58, at 29; Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527 (1974); Alexander Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971); Lofgren, *supra* note 71, at 672.

95. See, e.g., Flaherty, *supra* note 88, at 554.

96. For a more comprehensive effort, see generally Yoo, *War Powers*, *supra* note 31.

powers that operated in America under the colonial charters and the state constitutions. Examining how the executive and legislative branches shared powers in Great Britain, the colonies, and the new states will give us the constitutional baseline against which the Framers acted. If the Framers thought the Constitution changed the allocation of war powers, we can better understand that change by comparing the Constitution with the previous state of affairs. And if the Founding generation believed the Constitution continued the working political system that they had inherited and modified, then the outlines of British and early American practice will help us define those arrangements. Third, we can examine significant moments in the ratification debates to determine if the understandings of the British, colonial, and state periods continued into the Framing, or were rejected.

As former citizens of the British Empire, the Framers operated within the intellectual context of British political, constitutional, and legal thought of the time. Indeed, as John Philip Reid has argued, Americans rebelled in part because they believed that Parliament had violated the customary imperial British Constitution that they maintained gave state legislatures autonomy and guaranteed their political and civil privileges.⁹⁷ The British Constitution provided a reservoir of history, tradition, and experience that defined terms such as "Commander-in-chief," "executive power," "declare war," "Letters of marque and reprisal," and "raise and support armies."⁹⁸ Furthermore, recent British political history provided the Framing generation with the results that they could expect from certain arrangements of the war power. While the formal elements of the British Constitution, as sketched by Blackstone, appeared to vest all foreign affairs power in the Crown,⁹⁹

97. See 3 JOHN PHILIP REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE* 3-16 (1991); see also 4 JOHN PHILIP REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW* (1993); 1 JOHN PHILIP REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986); 2 JOHN PHILIP REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* (1987).

98. BLACKSTONE, *supra* note 75, at *245, *249-50, *254.

99. See *id.* at *257. According to Blackstone:

[T]he king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given

in practice the British constitutional system gave rise to checks and balances in which Parliament's funding powers played the primary checking role.¹⁰⁰ To be sure, transferring the power to declare war from the Executive to the legislature, in the eyes of the British imperial citizen, would have reduced the President's powers and increased Congress's. But it would have mattered only in that it gave Congress the sole right to transform hostilities into a "perfect" war under international law, rather than changed the domestic balance of powers concerning the decision to commence war.

It is unlikely that a late-eighteenth-century American or Englishman would have understood the power to declare war as equivalent to the domestic authority to commence military operations. Interpreting "declare" to mean "authorize" or "commence" is a twentieth-century construct inconsistent with the apparent eighteenth-century meaning of the phrase. According to the international law authorities of the time, a declaration of war played the technical function of providing notice to the enemy nation that hostilities were to begin, due to some injury suffered.¹⁰¹ It ensured that hostile actions taken by the citizens of the declaring nation would be considered sovereign acts of war, valid under the law of nations, rather than private acts of piracy. In other words, a declaration made certain, according to Grotius, the father of modern international law, "that war was being waged not by private initiative but by the will of each of the two peoples or of their heads."¹⁰² A declaration also notified citizens at home of the change in legal rights and status that came with a shift into wartime.¹⁰³

None of these writers discuss the necessity of a declaration of war for domestic constitutional purposes. Indeed, they men-

up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.

Id. In addition, the King held complete control over all military operations once war had commenced. The King is the "generalissimo, or the first in military command, within the kingdom." *Id.* at *262.

100. See Yoo, *War Powers*, *supra* note 31, at 208-14.

101. See 2 GROTIUS, *supra* note 73, at 633.

102. *Id.* at 639.

103. See 3 VATTEL, *supra* note 74, at 255.

tioned several ways in which hostilities could begin without a declaration. A lack of a declaration only reduced the spectrum of legitimate military actions that a warring nation could undertake under the law of nations.¹⁰⁴ In his description of the King's war powers, Blackstone hewed closely to these definitions:

[The reason] why according to the laws of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard (which is [a] matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it.¹⁰⁵

According to Blackstone, whose writings were the most influential legal authority in America at the time of the Revolution, declarations of war were necessary only "to make a war completely effectual."¹⁰⁶ They declared, under international law, that hostile actions by British forces and citizens were authorized by the sovereign, and hence legal under the laws of war.

Reading the power to declare war as a technical function under international law, one that was quasi-judicial in function, comports not just with the comments of treatise writers, but with the history of Anglo-American war making that was familiar to the Framing generation. In perhaps its two most significant military conflicts of the seventeenth and eighteenth centuries, the entry into the Thirty Years War in 1624 and the struggle against France in the Seven Years War in 1756, the Crown did not declare war until a year after hostilities had be-

104. Stromseth, among other pro-Congress scholars, fails to understand this point. See Stromseth, *supra* note 5, at 860 n.79. While international law treatise writers at the time would have liked nations to issue declarations of war, they did not conclude that a declaration was absolutely necessary to start hostilities. Without a declaration, hostilities were just given a different status under the law of nations; they were not barred altogether.

105. BLACKSTONE, *supra* note 75, at *258.

106. *Id.*

gun.¹⁰⁷ Between the restoration of the British monarchy and the American Revolution, Great Britain appeared to have been at war more often than at peace, as it engaged in the following conflicts:

- Second Anglo-Dutch War (1665-67)
- Third Anglo-Dutch War (1672-74)
- War of the Grand Alliance (1689-97)
- War of the Spanish Succession (1702-13)
- War of the Quadruple Alliance (1718-20)
- War of the Austrian Succession (1739-48)
- Seven Years' War (1756-63)
- American Revolution (1775-83)

In all of these wars, Great Britain issued a declaration of war *only once* before or at the commencement of hostilities.¹⁰⁸ Several smaller-scale conflicts that occurred during this period often received no declaration of war at all.¹⁰⁹ Usually, the declarations that were eventually issued tracked Blackstone's definition; they recited a litany of offenses against Great Britain by the enemy nation, and they declared the new legal status that certain hostile acts were to assume.¹¹⁰

At times, the Crown issued the declaration in a tardy, even desultory, fashion. For example, British naval forces had engaged their French and Spanish counterparts in running conflicts for at least a year before the declaration of war, on May 4, 1702, of the War of the Spanish Succession.¹¹¹ Months before the declaration of war against Spain in 1739, British naval commanders had conducted offensive operations against the Spanish in North America.¹¹² Almost a year before the declaration of war in 1744, King George II himself had led British forces to victory in the battle of Dettingen, which was cele-

107. See THE STUART CONSTITUTION, 1603-1688, at 58 (J.P. Kenyon ed., 1966) (Thirty Years' War); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 53-54 (12th ed. 1873) (Seven Years' War).

108. See 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 234-35 (1809) (declaration of war at start of King William's war); Yoo, *War Powers*, *supra* note 31, at 214.

109. See generally Yoo, *War Powers*, *supra* note 31, at 214-15.

110. See *id.* at 215.

111. See *id.* at 216.

112. See *id.*

brated throughout the Empire.¹¹³ And in the conflict that was most recent and dear in the Framers' minds, the Seven Years War, American and British troops had fought with French troops as early as July 3, 1754 (in the very battle that began (then) Major George Washington's rise to greatness), even though war was not formally declared until May 17, 1756.¹¹⁴ Indeed, by the time of the Framing, if "declaring" war was equivalent to "commencing" it, then the British (and the Framers) considered the word "war" to refer only to total war of a very formalistic sort, and not to many of the types of military conflicts that we would consider war today. The other logical explanation is that the British (and their colonies) simply did not consider "declare" to mean "commence."

Eighteenth-century British citizens would not have been concerned about the obsolescence of the power to declare war, nor would they likely have seen its transfer to the legislature as a significant modification of the allocation of war powers. Despite Blackstone's broad, and certainly exaggerated, description of the King's foreign affairs powers,¹¹⁵ Parliament already possessed ample means to control the Crown's actions in war and peace, powers that it had won after more than a century of struggle with the Stuarts and their successors.¹¹⁶ In short, the conflict between the English Civil War, the interregnum under Oliver Cromwell's protectorate, the restoration of the British monarchy, and finally the Glorious Revolution of 1688 made clear that the King could conduct no military operations without the cooperation of Parliament.¹¹⁷ Parliament was able to win this equal role through its sole control over the raising, maintaining, and funding of the military and over the funding of wars.¹¹⁸ Its funding monopoly allowed Parliament to transform the political system from the seventeenth-century model, in which the King and his privy council dominated affairs, to

113. *See id.*

114. *See, e.g.,* DOUGLAS E. LEACH, *ARMS FOR EMPIRE: A MILITARY HISTORY OF THE BRITISH COLONIES IN NORTH AMERICA, 1607-1763*, at 210, 380-81, 340-41 (1973).

115. *See Yoo, War Powers, supra* note 31, at 208.

116. *See id.* at 208-14.

117. *See id.*

118. *See* BILL OF RIGHTS (1689), *reprinted in* 1 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 132 (William Swindler ed., 1982); DAVID L. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 268-69 (7th ed. 1966).

the cabinet system of the nineteenth century, in which the majority party in Parliament led the executive branch. By the time of the American Revolution, the British system constituted a balance between executive initiative and planning on the one hand, and legislative control over appropriations and public debate on the other.¹¹⁹ While the King controlled the military and possessed the formal powers of war and peace, he could exercise none of these powers effectively without Parliament's financial support. The legislature would not have needed to declare war in order to control the Crown's military operations if it already controlled the power of the purse. A complete understanding of Britain's approach to declaring war, therefore, leads to the conclusion that the issuance of a declaration of war was not linked to the decision to begin military operations against an enemy nation. As Alexander Hamilton observed during the ratification, "the ceremony of a formal denunciation of war has of late fallen into disuse."¹²⁰

The Framers' experience under the colonial and revolutionary state governments provided the second frame of reference for their thinking on war powers. As in Great Britain, the colonial system was characterized by the royal governors' formal control over the initiation and operation of war, and by legislative control over appropriations. Under their colonial charters, the executives of the colonies possessed total control over the military and the decision to begin war.¹²¹ Governors could not issue declarations of war—that was the sole prerogative of the King in London—yet they conducted military hostilities against various Indian tribes and other European colonies and troops throughout the pre-Revolutionary period.¹²² The

119. See, e.g., JEREMY BLACK, *A SYSTEM OF AMBITION?: BRITISH FOREIGN POLICY, 1660-1793*, at 44 (1991).

120. THE FEDERALIST NO. 25 (Alexander Hamilton), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 44, at 62. Publius was defending the Constitution's authorization of the maintenance of standing armies in peacetime because of the dangers of a surprise attack without a formal declaration of war. Other Federalists and Antifederalists shared Hamilton's judgment. See *Brutus X*, N.Y. J. (Jan. 24, 1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 44, at 462-67; *Marcus IV*, NORFOLK & PORTSMOUTH J. (Mar. 12, 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 44, at 384-86.

121. See, e.g., CHARTER OF MASSACHUSETTS BAY (1691), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1884 (Frances N. Thorpe ed., 1909) [hereinafter THORPE]. See generally Yoo, *War Powers*, *supra* note 31, at 219-21.

122. See EVARTS B. GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH*

American revolutionaries would not have seen the power to declare war as a critical component in the system of checks and balances governing war making, because colonial legislators, like their counterparts in the home country, used their power over funding to control executive decision making.¹²³ Governors depended on the assemblies for "temporary acts for the enforcement of the simplest military obligations."¹²⁴ In Virginia, for example, the House of Burgesses had used its power of the purse to assume "a large part of the responsibility for all military operations within the colony."¹²⁵ Americans obviously placed great store in the colonial assembly's exclusive right to make funding decisions for military operations, as the American Revolution would demonstrate. If the revolutionaries had intended to change this system, or thought it faulty, we might have expected them to have made it clear.

When they successfully broke away from England, the revolutionaries had their chance to reject the system they inherited from the British and to reallocate war powers to the legislature. Revolutionary state constitutions initially engaged in a substantial reduction of executive power, although whether this was done to bolster the legislature or to simply disperse government power is a matter of some historical dispute.¹²⁶ War powers scholars have been quick to assume that the general revolutionary reaction against executive power was designed to give legislatures—and Congress—dominance in matters of war as well.¹²⁷ The change in state constitutions

COLONIES OF NORTH AMERICA (1966).

123. See WOOD, CREATION, *supra* note 83, at 154.

124. See GREENE, *supra* note 122, at 101.

125. See JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSE OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689-1776, at 303 (1963).

126. See WOOD, CREATION, *supra* note 83, at 138. Gordon Wood's *Creation of the American Republic* remains the leading work on the revolutionary state constitutions, but it is not the only such work. Willi Paul Adams makes important contributions, especially in his discussion of governmental structure. See WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (Rita Kimber & Robert Kimber trans., 1980); see also DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980). A newer work, MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1997), attempts to balance Wood's account by arguing that the framers of the state constitutions sought not to vest power in the legislature, but to reduce government power in order to protect individual liberty.

127. See, e.g., SOFAER, *supra* note 94, at 16-19; Bestor, *supra* note 94, at 568;

over time, however, and their relationship to the federal Constitution, tells a more complex story. States that wrote constitutions in the first flush of revolution did restrict executive power, but not by transferring gubernatorial powers wholesale to the legislature. Instead of reducing the Executive's substantive foreign affairs powers, the revolutionaries weakened the institutional unity of the executive branch. Pennsylvania, for example, went the extreme route and replaced its single governor with a twelve-man executive council, while other states created councils that often held a veto over gubernatorial decisions.¹²⁸

Despite the fragmentation of the structural unity of the executive branch, these early states left the location of many substantive powers, such as the power to wage war, unchanged. Prominent efforts to explicitly remove the Executive's traditional war powers, such as Thomas Jefferson's proposals for an "Administrator" of Virginia who could not wage war without legislative permission, found unreceptive audiences.¹²⁹ Writers of state constitutions followed the advice of Jefferson's friend and future rival, John Adams, whose *Thoughts on Government* recommended that states retain a governor and a bicameral legislature, and that they maintain the traditional allocation of war-making authority.¹³⁰ In the field of foreign affairs, the significant change occurred within the executive branch rather than between the executive and legislative branches. State constitutions required the governor to receive the consent of the state council—usually composed of officials appointed by the legislature but formally part of the executive branch—before calling forth and deploying the militia.¹³¹ These explicit consultation provisions seem significant for interpretive purposes, because they suggest that before their enactment, the Executive had no constitutional obligation to consult with anyone before deciding to commence war. It further indi-

Treanor, *supra* note 5, at 723.

128. See PA. CONST. of 1776, art. XIX, reprinted in 5 THORPE, *supra* note 121, at 3086-87; see also WOOD, CREATION, *supra* note 83, at 138.

129. See THOMAS JEFFERSON, THE VIRGINIA CONSTITUTION: FIRST DRAFT BY JEFFERSON art. II (1776), reprinted in 1 THE PAPERS OF THOMAS JEFFERSON 337, 341 (Julian P. Boyd ed., 1950).

130. See JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), reprinted in 4 PAPERS OF JOHN ADAMS 65, 89 (Robert J. Taylor ed., 1979).

131. See, e.g., DEL. CONST. of 1776, art. IX, reprinted in 1 THORPE, *supra* note 121, at 564.

cates that many in the Framing generation accepted the inherited allocations of those powers, because these consultation provisions constituted the only textual change in the Executive's war powers.¹³²

Only one state, South Carolina, marked a different path, one that the federal Constitution's Framers could well have emulated. In its temporary 1776 Constitution, South Carolina required that the chief executive receive the consent of both the assembly and council before making war or peace.¹³³ Two years later, the state legislature adopted a permanent constitution that made the legislature's primacy in deciding on war even clearer. "[T]he governor and commander-in-chief shall have no power to commence war, or conclude peace, or enter into any final treaty" without legislative approval.¹³⁴ South Carolina's example reinforces the conclusion that we can draw from the council approval provisions in other state constitutions. If there were a common understanding that the Executive needed formal legislative approval to commence military hostilities, then South Carolina's explicit transfer of such authority to the assembly would have been unnecessary. And if the power to declare war was so clearly seen as the power to commence war, then one would have expected the South Carolina Constitution to have given the legislature power to begin war in those terms, rather than the terms it actually used.

South Carolina, like the state council provisions, also provides a model of an alternate path of which the federal Framers were aware, but did not follow. If the Framers had wanted to require the President to receive legislative approval before going to war, they could have emulated South Carolina's example, or Jefferson's proposal. If the pro-Congress scholars are correct, then Article I, Section 8 or Article II, Section 2 should have read "the President shall have no power to commence

132. Willi Paul Adams maintains that:

The striking fact of historical dimension is that the reaction against the colonial governor was so weak that it did not lead to parliamentary government with an executive committee of members of the legislature, but rather that within a decade the American system of presidential government evolved with full clarity and permanence.

ADAMS, *supra* note 126, at 271.

133. See S.C. CONST. of 1776, art. XXVI, reprinted in 6 THORPE, *supra* note 121, at 3247.

134. See S.C. CONST. of 1778, art. XXXIII, reprinted in 6 THORPE, *supra* note 121, at 3255.

war, or conclude peace, without the consent of Congress.”

In part, the federal Framers did not favor this option because by the time of the Philadelphia Convention, American leaders were turning against the weakening of the Executive in favor of legislative power. In the critical period between the Revolution and the new Constitution, American leaders became concerned that they had exchanged monarchical tyranny for the tyranny of the majority.¹³⁵ As James Madison summarized it in a memorandum written shortly before the Philadelphia Convention, unrestrained state legislatures had passed unjust laws, taken property without compensation, and favored the interests of factions over the public interest.¹³⁶ According to Gordon Wood's *Creation of the American Republic*, the Framers underwent a Thermidorean reaction to legislative excess by embracing the once-feared executive branch and taking pains to restore its unity and independence.¹³⁷

Enacted after the first wave of new state constitutions, New York's 1777 Constitution began returning power to the executive by vesting all executive power, including the commander-in-chief authority, in a governor free from a state council.¹³⁸ The assembly participated in war making through its traditional control over the purse.¹³⁹ Following suit in 1780, Massachusetts adopted a constitution that also placed the initiative in war making in an independent, popularly-elected governor.¹⁴⁰ New Hampshire adopted an almost identical provision in its 1784 Constitution.¹⁴¹ Historians have observed that these post-revolutionary constitutions, particularly those of New York and Massachusetts, were widely admired by the Framers for their restoration of a balance between the legisla-

135. See WOOD, *CREATION*, *supra* note 83, at 393-429.

136. See JAMES MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES* (1787), *reprinted in 2 WRITINGS OF JAMES MADISON*, *supra* note 42, at 361, 365-66.

137. See WOOD, *CREATION*, *supra* note 83, at 446-53; *see also* CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 34-35 (1922).

138. See N.Y. CONST. of 1777, art. XVII, *reprinted in 5 THORPE*, *supra* note 121, at 2632.

139. See Yoo, *War Powers*, *supra* note 31, at 228-30; *see also, e.g.*, ADAMS, *supra* note 126, at 271.

140. See MASS. CONST. of 1780, art. VII, *reprinted in 3 THORPE*, *supra* note 121, at 1901.

141. See N.H. CONST. of 1784, *reprinted in 4 THORPE*, *supra* note 121, at 2463-64.

ture and an institutionally independent executive possessing its traditional powers. According to Wood, the Massachusetts Constitution “came to stand for the reconsidered ideal of a ‘*perfect constitution*.’ . . . [It] seemed to . . . have recaptured . . . the best elements of the British constitution that had been forgotten in the excitement of 1776.”¹⁴² These state constitutions set American political and constitutional development on the pro-Executive trajectory that it would assume during the Philadelphia Convention and the ratification.

The third significant frame of reference for the Founding generation’s understanding of the war power is the ratification itself.¹⁴³ As Jack Rakove’s *Original Meanings* demonstrates, ratification was anything but the smooth political process that we have come to expect for legislation or constitutional amendments.¹⁴⁴ After the Philadelphia Convention, political events moved to state ratifying conventions, depriving the process of any single, unified forum for debate. These thirteen conventions were separated by geography and time, a distance exacerbated by the Framers’ lack of modern communication or sources of information. Nor did the struggle occur just on the convention floor; a parallel debate took place in the public square, in pamphlets, and in newspapers. Although the vote on the Constitution was either complete acceptance or rejection, that single decision concealed a broad, complicated mass of issues ranging from government structure, to the division of powers between federal and state governments, to the rights of individuals. We might look at the mass of evidence from the ratification—including the *Federalist Papers*, convention debates, stray thoughts, and even poetry—and throw our hands up in despair at the idea of ever finding any single understanding.

If we approach the ratification process from an institutionalist perspective, however, we may be able to filter through this morass of information to identify some important themes and moments. For example, those who study the legislative process

142. WOOD, CREATION, *supra* note 83, at 434.

143. The Articles of Confederation provide yet another model with which to compare the constitutional text. Under the Articles, Congress enjoyed “the sole and exclusive right and power of *determining* on peace and war . . .” U.S. ARTS. OF CONFEDERATION of 1777, art. IX (emphasis added). The consent of nine states was necessary before the United States could “engage in any war.” *Id.*

144. See RAKOVE, *supra* note 10, at 94-130.

place great interpretive weight on congressional committees and their reports, because they serve as “veto-gates” in which the committee and its members can sink a bill or significantly modify its provisions before it can progress to the floor of the legislature.¹⁴⁵ Institutionalists also look to the actions of certain leaders on different issues in an effort to identify the preferences of the median legislator who supports a bill.¹⁴⁶ Taking these considerations into account, we should focus on the events of the Virginia Ratifying Convention. Virginia was perhaps *the* critical state in the ratification effort. Geographically, it linked the South and the North, and its political leadership in the nation was such that even Alexander Hamilton doubted that the Constitution could survive the New York Convention unless Virginia approved first.¹⁴⁷ It is difficult to imagine the Union succeeding, even if the necessary number of states had ratified, without the home state of Washington, Jefferson, Madison, and John Marshall, among others. Nor was the Constitution railroaded through the Virginia Convention. According to the records that survive, Virginia witnessed the fullest and most contentious debate of all the ratification gatherings, as the Antifederalists—with leaders such as Patrick Henry, George Mason, and James Monroe—chose to make their strongest stand there. Their final motion to send the Constitution back to the states for amendments lost only by vote of 88-80.¹⁴⁸ The closeness of the vote suggests that the Virginia Convention was not just an institutional roadblock, but also that its views approximated the views of the median Framer. While neither the Federalist or Antifederalist vision of the Constitution was more correct or true,¹⁴⁹ their debates reveal common areas of agreement, similarities in reasoning, and sometimes a shared understanding of constitutional texts.

At the Virginia Convention, the Antifederalist attack on the Constitution, and the Federalist response, indicate that the

145. See, e.g., McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) (applying positive political theory to statutory interpretation).

146. See *id.*

147. See 2 THE DEBATE ON THE CONSTITUTION 1067 (Bernard Bailyn ed., 1993).

148. See 10 DOCUMENTARY HISTORY, *supra* note 44, at 1538 (vote of June 25, 1788).

149. See Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632-33 (1987).

Framers shared a common understanding on the subject of war powers. When the Constitution went to the states, the people found that Congress no longer had the "sole and exclusive right and power of determining on peace and war," as under the Articles of Confederation,¹⁵⁰ but instead that it possessed only the power to declare war. Where the Articles provided for no separate executive branch, the Constitution now created an independent, unitary Presidency that alone possessed the executive power of government and the power of a commander-in-chief. Finally, it created a legislature that could impose direct taxes, rather than relying on the states for supply (as under the Articles), in order to support a standing army in peace as well as war. Without Madison's still secret notes to guide them, average American readers of the Constitution could not have helped but recognize that the Constitution had been built on the rejuvenated executives of New York and Massachusetts, and that it recalled the checks and balances of war powers that existed in Great Britain.

The Antifederalists objected to the Constitution's regulation of military power on two grounds. Initially, Antifederalists attacked the Constitution for federalism reasons because it vested in the national government both the power of the sword and the power of the purse.¹⁵¹ They feared that this arrangement—which they believed would produce collusion between the President and Congress—would lead to the sort of military dictatorship that had plagued classical republics and eighteenth-century England.¹⁵² In Virginia, Patrick Henry accused the Federalists of seeking to establish an unchecked national government that would have the ability to commence, wage, and financially support war, and thereby threaten liberty.¹⁵³ Second, anticipating the Federalist response that the separation of powers would prevent the branches of the national government from colluding in the use of its war power,

150. U.S. ARTS. OF CONFEDERATION of 1777, art. IX.

151. See, e.g., *Brutus X*, N.Y. J. (Jan. 24, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 44, at 462; *Brutus IX*, N.Y. J. (Jan. 17, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 44, at 393; *Federal Farmer: Letters to the Republican II* (Oct. 9, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 44, at 25; *Federal Farmer: Letters to the Republican I* (Oct. 8, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 44, at 18.

152. See generally sources cited *supra* note 151.

153. See Patrick Henry, *The Virginia Convention Debates* (June 9, 1788), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 44, at 1050-72.

Antifederalists directed their fire on the Presidency. The new President, Antifederalists charged, held military powers that were no different than those enjoyed by the hated King of England, and to which Congress's control over the purse would prove to be no obstacle.¹⁵⁴ In his usual overheated rhetorical style, Henry summarized these arguments at the Virginia Convention: "If your American chief, be a man of ambition, and abilities, how easy is it for him to render himself absolute!" Henry exclaimed.¹⁵⁵ "The army is in his hands, and, if he be a man of address, it will be attached to him; and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design . . ."¹⁵⁶ If the President were to violate the laws, Henry asked, "where is the existing force to punish him? Can he not at the head of his army beat down every opposition?"¹⁵⁷ Antifederalists clearly did not think much of Congress's power to declare war as a check on the Executive; they never mentioned it as a significant weapon in the congressional arsenal. While they did acknowledge that funding was a possible congressional check on the Executive's war-making abilities, they just did not believe it would pose a serious obstacle to a president bent on war.¹⁵⁸

Federalists responded first by generally citing the separation of powers, then by invoking the traditional checks that executives and legislatures had exerted on each other in Anglo-American political history. Throughout these debates, the Federalists did not mention the Declare War Clause as a means for congressional control of the executive branch, even though Federalists had every incentive to do so. At first, the Federalists sought to downplay the powers of the President by

154. See, e.g., *Philadelphiensis IX*, PHILA. FREEMAN'S J. (Feb. 6, 1788), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 44, at 57; Luther Martin, *Genuine Information IX*, BALTIMORE MD. GAZETTE (Jan. 29, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 44, at 494; *Tamony*, VA. INDEP. CHRONICLE (Jan. 9, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 44, at 322; *Cato IV*, N.Y. J. (Nov. 8, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 44, at 7; *An Old Whig V*, PHILA. INDEP. GAZETTEER (Nov. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 44, at 538.

155. Patrick Henry, *The Virginia Convention Debates* (June 5, 1788), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 44, at 964.

156. *Id.*

157. *Id.*

158. See, e.g., *Cato IV*, *supra* note 154; Patrick Henry, *The Virginia Convention Debates* (June 14, 1788), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 44, at 1274-78; *Tamony*, *supra* note 154.

comparison with the English King. In *Federalist No. 69*, for example, Hamilton contrasted the broad nature of the Crown's formal war powers, as described by Blackstone, with the American President's sole power as Commander in Chief.¹⁵⁹ Hamilton and other Federalists, however, quite slyly exaggerated the Crown's war powers and understated those of Parliament, and avoided predicting how the new system would work in practice.¹⁶⁰ These arguments, however, did not prove convincing to Antifederalists—witness Henry's dire predictions in the Virginia Convention. Federalist leaders at the Convention responded to Henry by analogizing Congress's financial powers over the President to those enjoyed by Parliament over the Crown. Federalist George Nicholas, former Attorney General of Virginia, declared: "Under the new government, no appropriation of money, to the use of raising or supporting an army, shall be for a longer term than two years. The President is to command. But the regulation of the army and navy is given to Congress."¹⁶¹ Making the comparison between Parliament and Congress explicit, Nicholas then concluded: "Our Representatives will be a powerful check here. The influence of the Commons in England in this case is very predominant."¹⁶²

James Madison, the leader of the ratification effort in Virginia, followed with a comprehensive rebuttal of the Antifederalist critique. Madison admitted that the Constitution vested the purse and the sword in the national government, but that did not place them in the same hands. "What is the meaning of this maxim? Does it mean that the sword and purse ought not to be trusted in the hands of the same Government?" Madison asked rhetorically.¹⁶³ "This cannot be the meaning. For there never was, and I can say there never will be, an efficient Government, in which both are not vested. The only rational

159. See THE FEDERALIST NO. 69 (Alexander Hamilton), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 44, at 388-89.

160. Hamilton, for example, claimed that the King had the sole right to raise and regulate armies and navies, as did Iredell in the North Carolina Convention. See *id.*; see also, e.g., 4 ELLIOT, *supra* note 44, at 107-08. This was flatly wrong, as Parliament had clearly won these powers by the end of the Glorious Revolution of 1688. See KEIR, *supra* note 118, at 268; BILL OF RIGHTS (1689), reprinted in 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 134 (William F. Swindler ed., 2d series 1982).

161. 10 DOCUMENTARY HISTORY, *supra* note 44, at 1281.

162. *Id.*

163. *Id.* at 1282.

meaning, is, that the sword and purse are not to be given to the same member."¹⁶⁴ Madison then directly invoked the British example as a prediction of the operation of the American system. "The sword is in the hands of the British King. The purse in the hands of the Parliament. It is so in America, as far as any analogy can exist."¹⁶⁵ Safety was to be found not in allowing the states to control supply, but by relying on Congress to use its constitutional powers to check the President. Madison had every opportunity to raise the Declare War Clause in response to Henry, but he did not. Instead, he continued: "The purse is in the hands of the Representatives of the people. They have the appropriation of all monies.—They have the direction and regulation of land and naval forces. They are to *provide* for calling forth the militia . . ."¹⁶⁶ Meanwhile, "the President is to have the command; and, in conjunction with the Senate, to appoint the officers."¹⁶⁷

Madison's defense of the Constitution's distributions of war powers was consistent with the legal and historical context of the Founding. Federalists understood Congress's power of the purse as the primary check on presidential use of the military. If the pro-Congress account were correct, we might have expected the Federalists to argue that the President's control of the military was held in check by Congress's control over the initiation of wars via a declaration of war. If the Declare War Clause bore the weight that pro-Congress scholars now place on it, we might have expected the Antifederalists to have attacked it as an ineffectual check on presidential power. Rather, the Framers seem to have expected the branches to pursue their war goals by relying on their own constitutional powers to check each other. Congress would control the executive initiative in war with its power over funding, just as Parliament and the colonial and state legislatures had done.

One might criticize the reliance on the materials used to reach this conclusion, perhaps, by questioning the Framers' ability to focus on the issue of war powers during the ratification. To be sure, war powers was not the most extensively debated issue during the ratification debate; the lack of a Bill of

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Rights and the balance of powers between the federal and state governments clearly consumed the great majority of the Framers' attention. If that is the case, however, then the original understanding itself is not determinative on war powers, and the current pro-Congress argument collapses. Nonetheless, the original understanding can provide some answers. While intermittent, the discussion of war powers was focused and produced the dialogues described above. If these discussions do not reflect a sufficient consideration of war powers for interpretive purposes, then the case for relying on the broader context of Anglo-American political and constitutional history becomes even more compelling. We can assume that an American Framers of the middle eighteenth century would have interpreted the Constitution's text, including its distribution of war powers, by taking account of the history of Anglo-American constitutional development and political events. If the ratification debates do not prove conclusive, then an effort to reconstruct the original understanding must rely on the types of sources this essay has emphasized.

III

Detailed attention to historical context, as described in this essay, makes the question of war powers much closer than modern pro-Congress scholars contend. Indeed, if we begin with originalist assumptions, the existing evidence appears to support a much more balanced reading of war powers, one that allocates different powers to the political branches, and then relies on them to work out a system of determining whether to wage war. One of the faults of existing war powers scholarship, on both pro-Congress and pro-Executive sides, is its desire to determine a fixed process—much like promulgating a statute—for going to war. It seems, however, that the Constitution provides for flexibility in war decision making, shaped by each branch's exercise of its plenary powers. As in England, the President and Congress could cooperate to wage a successful war, or they could use their powers to frustrate each other when their policy preferences came into conflict. Ironically, originalism's resort to history on this question does not yield certain answers, only the broad constitutional outlines within which politics determines the results.

Nonetheless, recent, more sophisticated literature has re-

newed the quest for a specific war-making process. In a work that shows great sensitivity to and knowledge of the history of the Founding period, Professor William Treanor admits that much of the contextual evidence available supports the reading offered here.¹⁶⁸ Not only was a declaration of war a quasi-judicial power that, along with letters of marque and reprisal, bore a limited, technical meaning, and not only were the Framers acting against the Anglo-American background of executive initiative in war checked by legislative funding, but the Constitution also was the product of a political transformation among the Framers toward a stronger executive branch. "To allocate the war power to Congress alone," Treanor concludes, "would have been directly countercyclical—taking from the Executive a power that was so much a core Executive function that even anti-Executive state constitutions had allocated it to him."¹⁶⁹

Yet Treanor still concludes that the Framers vested the war power solely in Congress, with the President's role limited to command of the military once war has begun. Relying heavily on historian Douglass Adair's famous 1967 essay, *Fame and the Founding Fathers*,¹⁷⁰ Treanor argues that the Framers had a love-hate relationship with fame.¹⁷¹ For thirty-two pages, Adair speculated that the Framers had an overwhelming desire to be remembered by history because, influenced by classical history and lacking faith in an afterlife, they believed that they were living during a unique historical moment that produced the Founding of a great nation.¹⁷² To Adair's thinking, Charles Beard had things only half right. While it was true that many of the Framers acted out of self-interest, Beard had defined self-interest too narrowly to focus on financial interest.¹⁷³ Self-interest ought to include the "love of fame"—the desire to make history, to make one's mark on the world. It was our fortune

168. See Treanor, *supra* note 5, at 719 ("[P]ro-Executive scholars have advanced a strong independent argument: the Founders operated against a background in which there was a 'shared understanding' that the Executive had the power to start war, and pro-Congress scholars have failed to offer convincing evidence that the Founders departed from that understanding." (footnote omitted) (quoting Yoo, *War Powers*, *supra* note 31, at 173)).

169. *Id.* at 721.

170. Douglass Adair, *Fame and the Founding Fathers*, in *FAME AND THE FOUNDING FATHERS* 3 (Trevor Colbourn ed., 1974).

171. See Treanor, *supra* note 5, at 729.

172. See Adair, *supra* note 170, at 17-29.

173. See *id.* at 23.

that the American Revolution led the Framers to pursue this self-interest by "creating a national system dedicated to liberty, to justice, and to the general welfare."¹⁷⁴ Love of fame, however, also constituted a danger, because it might lead to ambitious, glory-seeking actions that might threaten the health of the Republic. To illustrate, Adair tells the wonderful story of Alexander Hamilton and Thomas Jefferson's 1791 dinner together, in which Hamilton asks Jefferson about the identity of the individuals depicted in the paintings hanging in his dining room.¹⁷⁵ Jefferson responds that they are Bacon, Newton, and Locke, the "trinity of the three greatest men the world had ever produced."¹⁷⁶ Hamilton pauses, then responds, "[t]he greatest man . . . that ever lived, was Julius Caesar."¹⁷⁷ Naturally, this threw Jefferson into something of a tizzy, because it only reinforced Jefferson's suspicions that Hamilton harbored monarchical tendencies. The love of fame proved to be a double-edged sword, for while it urged the revolutionaries such as Washington on to great deeds, it also tempted them toward Caesarism.

According to Treanor, it was such fears that led the Framers to vest Congress with the war power. In the economic arena, the Framers sought to create a political system that would contain and channel self-interest by setting interest against interest, as described by Madison in *Federalist No. 10*.¹⁷⁸ (Whether anyone at the time of the Framing had actually read or understood the ideas in *Federalist No. 10* are questions raised by yet another famous Adair essay).¹⁷⁹ So, too, Treanor argues, in the political arena the Framers split up the war power to accommodate fame. The Framers expected the President's love for glory to provide him with the incentive to win wars, but the fear that the Executive might start wars solely for that glory led the Framers to vest the power to commence warfare in Congress.¹⁸⁰ This is why, Treanor maintains, the Framers did not treat declarations of war like legislation,

174. *Id.* at 24.

175. *See id.* at 13.

176. *Id.*

177. *Id.*

178. *See, e.g.,* WOOD, CREATION, *supra* note 83, at 499-506, 606-15.

179. *See* Douglass Adair, *The Tenth Federalist Revisited*, in FAME AND THE FOUNDING FATHERS, *supra* note 170, at 76; Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999).

180. *See* Treanor, *supra* note 5, at 700.

in which the President has a veto—instead, declarations of war are solely the product of Congress.¹⁸¹ Only by wholly excluding the President from this decision could the Framers protect the Republic from the temptations of wars fought for military glory. As one of those legal academics currently enamoured of the “translation” approach to constitutional interpretation,¹⁸² Treanor “translates” this original understanding to today’s circumstances. Translation, however, does not appear all that necessary, because Treanor concludes that presidents continue to seek fame in order to assure their place in history.

While I find Treanor’s analysis problematic, it is a welcome effort because it represents exactly the type of historical scholarship that the debate on war powers needs. As Treanor and I have observed in separate articles, the war powers debate had become rather stale. Arguments were being recycled, and the same list of sources were being cited without regard to historical context. Treanor’s work, in contrast, demonstrates a thorough knowledge of both the primary and secondary historical sources in regard to the Framing, which he has employed to good effect in other areas.¹⁸³ Best of all, Treanor has unearthed a theme from the Founding period and caused us to think differently about war powers as a result. If the war powers debate is to have an interesting future, hopefully it will look something like this.

That said, Treanor’s approach is ultimately unsatisfying on several grounds, and it serves as an example of what can happen when the reliance on history goes too far. First, while Treanor is certainly correct to identify the love of fame as an important theme in the Founding, one wonders how prominent it sat on the Framers’ agenda of concerns. Adair himself never claimed that the leading Framers held such fear of the ambition of their fellows that it affected their design of the Constitution. In all likelihood, the Framers’ other worries would have taken precedence in their minds over any generalized concerns

181. *See id.* at 724-29.

182. *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993); William Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *COLUM. L. REV.* 782, 784 (1995).

183. *See, e.g.*, William M. Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 *U. PA. L. REV.* 491 (1994); Treanor, *supra* note 5; William M. Treanor, *Taking the Framers Seriously*, 55 *U. CHI. L. REV.* 1016 (1988).

about the ambition of the nation's leaders. More fearsome than the quest for fame was the possibility of foreign invasion due to lack of an effective national government, and the fragmentation of the United States due to destructive economic competition among the states.¹⁸⁴ Another concern, as noted earlier, was the desire to control oppressive majorities and to contain unrestrained democracy—whether these concerns and their solutions were “republican” or “liberal” is the focus of continuing historical debate.¹⁸⁵ At the level of government design, both Federalists and Antifederalists clearly were most preoccupied with the challenge of creating an energetic national government, while at the same time placing limits on its powers.¹⁸⁶ Of secondary concern was the separation of powers generally, and here, in their discussions of the subject, the Framers did not mention controlling the quest for fame as an overriding consideration. In fact, as Treanor admits, the Framers' discussions of fame “do not directly involve Congress or a democratically-selected President.”¹⁸⁷ If anything, the Constitution's creation of the independent, unitary Presidency seems to cut against the idea that the Framers were motivated, in designing the Constitution, by a fear of fame.

Second, Treanor's discussion of the Framers' attitudes toward fame takes place at a high level of generality, one so lofty that it sheds little useful light on the allocation of war powers. Even if the Framers shared a fear of the ambition of great men, there were many possible ways to address this concern. They might have believed that establishing the separation of powers—three separate but coordinated branches, exercising their independent power—by itself would contain the tendency of men to seek fame. In fact, as Madison argued in *Federalist No. 51*, ambition might be a necessary component of the separation of powers to ensure that the branches monitored and controlled each other.¹⁸⁸ “Ambition must be made to counteract ambi-

184. See FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 3-95 (2d ed. Scholarly Resources Inc. 1986) (1973).

185. See, e.g., JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992); WOOD, *CREATION*, *supra* note 83, at 393-425; Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

186. See, e.g., Yoo, *Judicial Safeguards*, *supra* note 2, at 1362-91.

187. Treanor, *supra* note 5, at 742.

188. See THE FEDERALIST NO. 51 (James Madison), *reprinted in* 16

tion," Publius famously declared.¹⁸⁹ They might have believed that the enumeration of broad powers—the executive power on the part of the President, the power to legislate in the Congress, and the power to adjudicate in the courts—might prevent seizures of power. They might have thought that popular election of the Presidency, through the filter of the state-controlled electoral college, would produce presidents who would respect the limits on their powers. They might have believed that the presence of the states and the Constitution's written limitation on federal powers would provide an ultimate check on any threat to republican government.¹⁹⁰ At no point does Treanor trace how generalized concerns about fame and ambition directly led to the drafting or understanding of the war clause in particular. Instead, without showing whether the Framers consciously recognized any such connection, he re-creates a certain atmosphere and attempts to link it to the decision made on the war clauses.¹⁹¹

DOCUMENTARY HISTORY, *supra* note 44, at 43.

189. *Id.* at 44.

190. *See, e.g.,* Yoo, *Judicial Safeguards*, *supra* note 2, at 1395-97.

191. Treanor finds his most compelling piece of evidence in Madison's Helvidius essays. In essay number four, Helvidius argued that war was "in fact the true nurse of executive aggrandizement," because in war "laurels are to be gathered; and it is the executive brow they are to encircle." JAMES MADISON, HELVIDIUS NUMBER 4, *reprinted in* 6 THE WRITINGS OF JAMES MADISON, *supra* note 42, at 174. At this point, however, Madison was no longer speaking as a Framers during the process of ratification, but as a participant in a contentious, partisan debate that occurred four years later. (He was writing only at the urging of Jefferson, in order to counter Hamilton's defense, under the pseudonym of Pacificus, of Washington's Neutrality Proclamation.) Madison did not represent that he was summarizing the views of the Framers, and there is some question—and much historical debate—on whether the Madison after 1789 was consistent with the Madison of 1787-88. *See, e.g.,* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC (1995); RAKOVE, *supra* note 10, at 347-65 (discussing whether Madison's views on removal, national bank, and treaty power, had changed between ratification and service in Congress).

Treanor does not explain why Madison's views as Helvidius in 1793 are to be accorded more weight, as an expression of the original understanding, than Hamilton's as Pacificus. While Madison may have appealed to publicly held notions of the link between war and fame, it is unclear whether these ideas were broadly shared. It seems, in fact, that Hamilton and President Washington's views, in the end, commanded the public's agreement. *See* ELKINS & MCKITRICK, *supra* note 54, at 356. Madison's arguments were not considered to have been very persuasive either now, *see* Treanor, *supra* note 5, at 746-47, or at the time they were written, *see* ELKINS & MCKITRICK, *supra* note 54, at 362. Madison had suffered so in the head-to-head confrontation with Hamilton that two years later, when Hamilton wrote in defense of the Jay Treaty, Madison refused to confront again

Third, even if the Framers had a concern over executive ambition in war, and even if they sought to express this concern in the constitutional design, it seems odd for the Framers to have sought their goal by prohibiting presidents from signing declarations of war. Keeping declarations of war free from a presidential veto does not make Congress less likely to initiate wars in which the President can achieve glory. As a formal power, the presidential veto is only *negative*—the President can use it only to prevent Congress from starting wars, not to force Congress to start wars. If the President wants Congress to declare war, he is still free to use the same powers and politics that he would use to push any other kind of legislation. While the President's veto over legislation, of course, allows him to win changes in legislative provisions, such a power is unnecessary in the declaration of war context. Declarations of war are binary propositions—they either put the United States in a state of war or they do not. Consequently, war-related work—how large the military is to be, what domestic measures are to be taken, and so on—is still the job of the normal legislative process. Further, the President's plenary commander-in-chief power allows him to exercise a functional veto over the declaration of war. If Congress declares a war that the President believes to be detrimental to the national interest, he can just use his monopoly over battlefield command to refuse to prosecute it. Treanor simply places too much weight on the fact that presidents have no veto power over declarations of war.

Treanor's analysis generates these faults, I believe, because it approaches history at too high a level of generality. He is to be commended for bringing the intellectual history of the Framing to bear on the war powers question, but I think that his work suffers from too much love of the history, untethered to any constitutional text. The task of the intellectual historian, it seems to me, is to make the story of events more com-

the Hamiltonian view of foreign affairs. *See id.* at 435.

In Treanor's words, Madison "played a central role in drafting the War Powers Clause, as well as a central role—perhaps *the* central role—in drafting the Constitution as a whole." Treanor, *supra* note 5, at 748. Against this example we have the same person in the Virginia Convention, defending the Constitution from its critics, declaring that Congress's funding powers would provide the check on executive initiative in war. *See supra* text accompanying notes 163-67. I think that originalists would want to accord the views of the Madison in 1788 more interpretive weight than the Madison of 1793.

plex, to describe the many different themes of thought and understanding that shaped events, to show how conflicts in thought were or were not resolved. If broader concepts and intellectual themes, however, are not centered around the discussion of specific constitutional texts, then it is difficult to determine how influential different ideas actually were. In the Founding period, for example, some people no doubt feared the threat to republicanism posed by ambition. But any number of other concerns were at work as well; fame may or may not have been important in the Framers' minds as they voted to ratify the war clauses. Without any direct link between the thoughts and the text, we as interpreters could give the text any reading within a fairly broad universe of possibilities.

For this reason, I think that the better approach is to focus on the type of sources discussed in this paper. A text-bound approach helps us filter through all of the different themes percolating throughout the Founding period, and it seeks direct links between the Framers' thoughts, concepts, opinions, and expressions in actual constitutional provisions. It places their actions in the historical and political context within which they occurred, and it seeks to recapture the significance of their decision by re-creating the constitutional and political events that provided the basis for their thinking. In doing so, we can see the decisions on the war clauses in the context of a century-and-a-half of struggle in England and her colonies about the distribution of war powers. We can see that a common understanding existed that the Executive would hold the initiative in war, subject to the check of the legislature's traditional power of the purse. We also can see that the leaders of the ratification effort, when pressed to the wall in the most significant of the state conventions, drew on that shared history to defend the Constitution's distribution of war powers. It was a vision of war powers that provided for checks and balances, but one based on the branches' possession of independent powers that could be used for political cooperation or frustration.

CONCLUSIONS

This analysis of war powers suggests a different perspective on the relationship between the Constitution and foreign affairs than the one presented by Professor White's paper. First of all, however, it should be made clear that White's paper

for this symposium¹⁹² and his related article in the *Virginia Law Review*¹⁹³ represent a new, badly needed direction for the study of history and foreign relations law. His papers are characterized by the highest standards of both historical and legal scholarship. They make excellent use of both primary and secondary sources. They place the changes in foreign relations law under study in the broader context of constitutional, legal, and intellectual thought. They present the history not as revealing one clear answer, but as the working out of contradictions and tensions in the different strains of constitutional and intellectual thought of the time. They certainly do not suffer from the criticisms I have lodged here against much war powers scholarship. Rather, White's paper should serve as a model for future work on foreign affairs that appeals to history.

The attitude toward history sketched in this essay, however, differs in some important respects from White's approach. Professor White portrays an original Constitution that created a balance among the branches in foreign affairs. Only under the impetus of intellectual and legal changes at the turn of the century did today's familiar system emerge in which the President has taken the lead in foreign affairs, Congress has ceded a significant amount of its power in the making of international agreements, and the courts have found many foreign affairs disputes non-justiciable—what Professor Curtis Bradley's introduction to this symposium calls the "old" American foreign affairs law.¹⁹⁴ Implicit in White's analysis is the idea that the changes occurring in this period, which paralleled developments during the New Deal, deviated from the original constitutional framework. Further implicit in his work is the idea that this transformation was the result of an internal dynamic in the systems of constitutional, legal, and intellectual thought of the time. Professor White does not provide much consideration in his account of the constitutional changes during this period to exogenous factors, such as the changes in America's position in the world that took place during this time. While America's rise in the international system may have produced cases that raised difficult foreign affairs questions, White does

192. See White, *supra* note 4, at 1109.

193. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

194. See Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1090 (1999).

not believe that the nature of the rise influenced the outcome of those cases.

The two direct responses to Professor White's paper in this symposium share some of these assumptions about the development of foreign affairs law. Both Professor Richard Collins and Professor Sarah Cleveland conclude that no revolutionary transformation occurred, because they believe that developments in related areas of law, such as Indian law, immigration law, and territorial law, already had established the foundations for the system of executive dominance, legislative acquiescence, and judicial abstention.¹⁹⁵ Professor Collins identifies several cases that he believes provided antecedents for decisions such as *Missouri v. Holland*,¹⁹⁶ *United States v. Curtiss-Wright Export Corp.*,¹⁹⁷ *United States v. Belmont*,¹⁹⁸ and *United States v. Pink*.¹⁹⁹ Examining similar cases, Professor Cleveland cautions that we ought not "overdramatize the extent of the transformation."²⁰⁰ It strikes me, however, that a revolution occurred in foreign affairs law during the period that White describes. While it may be true that decisions in areas such as Indian law and immigration law contained language presaging the transformation that was to come, they did not rob the later decisions of their revolutionary character or impact. Law governing Indians, immigration, and overseas possession are, to say the least, technical, discrete bodies of law that have not been the focus of the larger body of constitutional law. Indian law, in particular, is virtually *sui generis*. To show that the earlier cases in these technical fields share some elements of thought with the later, more significant decisions does not demonstrate that the later relied on the earlier, that the earlier compelled the later, or that the earlier even influenced the later. Surveying Indian law for lessons on foreign affairs law is sort of like gleaning the tax code for rules on reading the Constitution.

Professors Collins and Cleveland, however, engage in this

195. See Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999); Richard B. Collins, *Nineteenth-Century Orthodoxy*, 70 U. COLO. L. REV. 1157 (1999).

196. 252 U.S. 416 (1920).

197. 299 U.S. 304 (1936).

198. 301 U.S. 324 (1937).

199. 315 U.S. 203 (1942).

200. Cleveland, *supra* note 195, at 1128.

analysis because they are laboring under the same assumptions about causation as Professor White. They see the constitutional law of foreign relations as somewhat fixed, and that the developments that occur, to the extent that they do, as the result of an internal dynamic. Under closer analysis, however, these assumptions do not hold. Using Indian law as an example, it is clear that nineteenth-century Supreme Court jurisprudence was not static, but rather oscillated between polar extremes in defining tribal sovereignty. *Worcester v. Georgia*,²⁰¹ Chief Justice Marshall's seminal opinion in the last of a series of cases that have come to be known as the *Marshall Trilogy*,²⁰² recognized the independent status of tribal sovereignty. Grappling with this same issue of tribal sovereignty in *United States v. McBratney*,²⁰³ the Court scaled back tribal self-government, implicitly finding tribes to be dependent communities, wards of the federal government. And as the nineteenth century drew to a close, the Court continued to swing back and forth on the issue, sometimes recognizing independent sovereignty,²⁰⁴ and sometimes not.²⁰⁵ Certainly, the reliance on Indian law as a static body of law during the nineteenth century is misplaced, and the only difference between the Collins-Cleveland approach and the analysis taken by Professor White is that Collins and Cleveland believe that the changes began at an earlier stage than does Professor White. What they fail to do is explain why doctrines that they argue developed well before the turn of the century jumped over to the broader context discussed by Professor White. In a sense, they cannot provide this necessary explanation because their analyses are similarly unlinked to any exogenous influences, and they see changes in the law as internal to the law itself.

Our discussion of war powers here suggests a different way of looking at the constitutional regime of foreign affairs, one

201. 31 U.S. (6 Pet.) 515 (1832).

202. See CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 24 (1987). I have also relied on the important article by Professor Philip P. Frickey in understanding these issues. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

203. 104 U.S. 621 (1881).

204. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896); *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

205. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886).

that may bring more harmony to the apparent tensions between White and his critics. It seems from the war powers example that the Framers did not understand the Constitution to create a fixed, narrow framework to govern foreign affairs. Instead, they anticipated that the Constitution's allocation of power to the President and Congress would yield a fluid and flexible system that could expand and change to meet international challenges, and that could recede and change shape during more quiescent periods. War powers also suggests that the constitutional system could, and perhaps did, accommodate two different models of foreign affairs policymaking from the earliest days of the Republic. A president could use his executive powers to take the initiative in war making, especially in periods of danger or emergency, but at other times Congress could use its powers to win an equal role in decision making. Such flexibility would explain the contrary themes identified by White on one hand and Collins and Cleveland on the other. During some historical periods and in some areas, the political branches may come to the conclusion that an executive-dominant system is necessary to effectively pursue the national interest; at other times, a more balanced approach might be desirable. This adaptable system, probably peculiar to foreign affairs law, would allow the pro-Executive system described by Collins and Cleveland in certain narrow fields, while generally permitting the normal balance of powers, as described by White, for most of the nineteenth century. It also would permit the transformation described by White without raising the same concerns about illegitimacy that have plagued the parallel New Deal changes to this day.

If the constitutional system is as flexible as suggested here, then the dynamic driving the changes in the constitutional regime cannot be internal, because the system itself does not determine any specific framework or outcome. Instead, as war powers demonstrates, the constitutional system allows a range of subconstitutional institutional arrangements for policymaking that arise from the interaction of domestic political power *and* international pressures on the United States. For example, at the very birth of the Constitution, the United States was drawn into the ongoing war between Great Britain and France, first as a neutral supplier and shipper of goods and eventually, by the War of 1812, as a theater of combat. In response, the constitutional system allowed the executive branch

to assume greater leadership and initiative in foreign affairs, as indicated by President Washington's Neutrality Proclamation, which was the subject of the Pacificus-Helvidius debates, which themselves were a reflection of the competing models of foreign affairs law.²⁰⁶ As the end of the Napoleonic Wars and the Concert of Europe brought relative peace and stability to Western Europe, the United States no longer needed to maintain a high level of readiness or involvement in world politics, and a system of balanced participation by the branches could take root. The Civil War, however, disrupted this arrangement. Under the pressure of Southern rebellion, President Lincoln took wartime measures that relied on an expanded notion of presidential authority, and his lawyers defended his actions as constitutionally permitted in time of war and emergency in terms that recalled the arguments of the Washington administration and Pacificus.²⁰⁷ Peacetime, however, allowed the foreign relations framework to revert back to the system of balanced participation that served as the stage for the transformation so clearly perceived by Professor White.

Several pressures external to constitutional law may explain, in similar terms, White's revolution. The period examined by Professor White witnessed a stunning transformation in America's place in the world. The frontier closed, creating domestic pressures for a more ambitious foreign policy.²⁰⁸ With its great physical resources and its unchallenged dominance in the Western Hemisphere, the United States soon assumed a place as a great power. It fought the Spanish-American War of 1898 against a declining colonial power and seized an overseas empire as a result. It intervened in the Great War between the European powers and played the decisive role in the winning of the war and the making of the peace. Despite its efforts to create a structure for a new world order, as historian Walter LaFeber describes it, the United States could not prevent another world war without entering the conflict.²⁰⁹ Accepting the

206. See KOH, *supra* note 5, at 78-79.

207. See, e.g., WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* (Legal Classics Library 1997) (10th ed. 1864).

208. See, e.g., WALTER LAFEVER, *THE AMERICAN AGE: UNITED STATES FOREIGN POLICY AT HOME AND ABROAD* 185 (2d ed. 1994).

209. See *id.* at 334-63; see also WARREN I. COHEN, *EMPIRE WITHOUT TEARS: AMERICA'S FOREIGN RELATIONS, 1921-1933* (1998); AKIRA IRIYE, *THE GLOBALIZING OF AMERICA, 1913-1945* (1993).

common wisdom of the United States as profoundly isolationist during the interwar period might lead one to think that American policy aims and external pressures could not have effected a change in the constitutional regime of foreign relations. During the period discussed by White, however, the United States sought to maintain international peace through economic diplomacy and ambitious multilateral treaties, and then, as is well known, cooperation with and support of, the anti-fascist alliance.²¹⁰ This policy of international engagement required greater initiative and independence on the part of the Executive.

As I have argued, I think that history indicates—at least for scholarship on foreign affairs and the Constitution—the broad constitutional boundaries within which the political system can structure different frameworks for making policy. Approaching history, the Constitution, and foreign affairs in this way makes Professor White's work all the more important, and indicates why it represents a striking new direction for foreign affairs scholarship. If the Constitution provides for a flexible arrangement of foreign affairs powers within some fairly broad parameters, then understanding how our modern system evolved is indispensable for the job of evaluating it. The expansion of executive authority in international agreement making, for example, may have been necessary to deal with the nation's growth as a world power, but perhaps it was not the inevitable or compelled result of the constitutional design. If we live in a different world today, one in which the threats to our security posed by other nation-states have receded, but one in which the problems that were formerly the subject of domestic regulation require international solutions, then a flexible foreign affairs Constitution allows us to modify the existing framework to take into account new concerns and goals. White's work helps us understand the impulses and intellectual developments that produced the foreign affairs framework we have today, and it gives us the necessary perspective to decide whether to change it in light of new circumstances. Originalism has an important part to play in this aspect of foreign affairs scholarship, because it can help us identify the constitutional boundaries within which politics can establish the framework of the moment, and it can explain why the Framers

210. See LAFEBER, *supra* note 208, at 334-406.

established the boundaries that they did. Together, these uses of history can provide a complete picture of foreign affairs and the Constitution.