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Textualism and War Powers

Michael D. Ramsey[†]

This Article explores the eighteenth-century use of the phrase “declare war,” with the goal of shedding some light upon the original understanding of the Constitution’s Declare War Clause. It finds that “declaring” war in the eighteenth century had a broader meaning than is commonly supposed: Nations could declare war by formal proclamation, but nations could also “declare” by action alone. An armed attack showing an intent to settle differences between nations by force created a state of war between those nations. Launching such an attack, even in the absence of a formal proclamation, was called “declaring” war. As the Article explains, this provides a textual basis for the common assertion that Congress’s constitutional power “to declare War” broadly encompasses the power to initiate warfare. It also refutes the claim that the President can order military attacks upon foreign powers without Congress’s approval so long as no formal declaration is involved. The Article further argues, however, that since Congress’s constitutional power is only to declare war (by proclamation or by authorizing an attack), presidential actions that do not create a state of war—even if they involve the use of military force or the threat or likelihood of war—do not require congressional authorization.

INTRODUCTION

The contemporary debate over the constitutional allocation of war powers offers an unsatisfactory choice between ignoring the Constitution’s text and ignoring what the Framers said about it. Those who would give comprehensive war powers to Congress point to an array of quotations from leading Framers and other political leaders

[†] Professor of Law, University of San Diego Law School. Thanks to Larry Alexander, Curtis Bradley, H. Jefferson Powell, Saikrishna Prakash, Richard Pugh, Michael Rappaport, John Rogers, and John Yoo, and to the participants in the University of San Diego Law School Research Colloquium for assistance in developing these ideas. Thanks also to the University of San Diego for providing financial support for research.

stating or heavily implying that the decision to go to war lies with the legislative body.¹ Those who favor presidential war powers² reply that Congress has the constitutional power “to declare War,” not the power to authorize the use of military force;³ and since few in the eighteenth century would have thought that a formal declaration of war was required before using military force, Congress’s power cannot be so broad.⁴ Congressional advocates have no persuasive answer to the textual point, save to say that the text cannot be taken literally in light of the Framers’ later statements. Presidential advocates have no persuasive response to the Framers’ post-drafting commentary, save to say that the Framers’ commentary cannot be taken literally in light of the plain text.

As we confront complex questions about the constitutional allocation of war powers in modern conflicts, this impasse at the level of first principles presents a serious difficulty. If we cannot establish how the Constitution originally made the basic allocation of war powers, there seems to be little hope of consensus regarding its application to complicated modern events.⁵ The roles of the President

¹ See, for example, William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 Cornell L Rev 695, 740–56 (1997); Louis Fisher, *Presidential War Power* 3–12 (Kansas 1995); John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 3–5 (Princeton 1993); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 Geo L J 597, 597, 663–64 & n 343 (1993); Michael J. Glennon, *Constitutional Diplomacy* 80–84 (Princeton 1990); Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 74–77 (Yale 1990); Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* 17–31 (Southern Methodist 1986); W. Taylor Reveley, III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* 55–115 (Virginia 1981); Raoul Berger, *War-Making by the President*, 121 U Pa L Rev 29, 39–47 (1972); Charles A. Lofgren, *War-Making under the Constitution: The Original Understanding*, 81 Yale L J 672, 677–88 (1972).

² See, for example, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal L Rev 167 (1996); Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (Brassey’s 1991); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex L Rev 833 (1972); Henry P. Monaghan, *Presidential War-Making*, 50 BU L Rev 19 (Special Issue 1970).

³ US Const Art I, § 8, cl 11.

⁴ In claiming a presidential power to use military force based on the text of the Constitution, presidential advocates rely on Article II, Section 1, which states that “the executive Power” of the United States is vested in the President. As recent scholarship has shown, in the eighteenth century the ordinary understanding of the phrase “executive power” included substantial power over foreign affairs, including war powers. See Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L J 231, 265–72 (2001) (referring to the ideas of Locke, Montesquieu, Blackstone, and others). Thus, unless the Constitution specifically allocates it elsewhere, the power to begin military hostilities would seem to lie with the President. See Part I.B.2.

⁵ To raise a few modern problems: If the United States is attacked, as it was on September 11, 2001, may the President respond not only against the attackers, but against their allies and supporters? May the President respond against state supporters of terrorism more generally, even those not directly complicit in the September 11 attacks? What if a U.S. ally is attacked, or U.S. strategic interests are threatened by aggression, as occurred prior to the Gulf War? What if

and Congress in recent conflicts such as the Gulf War, Bosnia, and Kosovo, and in the ongoing response to the recent terrorist attacks, have been much debated.⁶ But it is hard to see much progress being made in this regard, if both the case for the President and the case for Congress are subject to such fundamental objections.

This Article describes a textual allocation of war powers that avoids the difficulties of both sides in the current debate. The problem, I argue, is that neither side has paid sufficient attention to the eighteenth-century meaning of declaring war. At present, essentially everyone in the war powers debate assumes that this phrase means issuing a formal declaration of war, in keeping with its most common modern meaning. Thus presidential advocates argue that the phrase should be given its literal meaning in Article I, Section 8, so that Congress's power does not extend to "undeclared" conflicts; congressional advocates counter that we must move beyond the literal meaning of the text to give effect to a broader "Framers' intent," since the Framers, despite what they wrote, could not have meant to limit Congress's role to issuance or nonissuance of a formal declaration.⁷

I argue below that the eighteenth-century meaning of declaring war was not limited to formal declarations, as has commonly been supposed. Instead, "declaring war" meant initiating a state of war by a public act, and it was understood that this could be done either by a formal declaration *or* by commencing armed hostilities. In the words of Emmerich de Vattel, perhaps the leading international law scholar of the time, "when one nation takes up arms against another, she from that moment declares herself an enemy to all the individuals of the latter."⁸ Or as John Locke earlier wrote, war may be declared "by Word or Action."⁹

the U.S. military campaign is of limited scope to achieve a narrow objective, as was the air campaign during the Kosovo crisis; or what of a U.S. peacekeeping deployment into an area fraught with hostilities but not directly opposed by any hostile power, as in Bosnia? And if congressional involvement is required in any of these actions, must it actually take the form of a formal declaration of war, or may something less definitive suffice? Without an agreed textual starting point, we cannot begin to answer these questions. Even scholars who generally agree that Congress has most of the war-initiation powers are divided upon the proper outcome in specific cases.

⁶ See, for example, John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U Pa L Rev 1673 (2000); Louis Fisher, *Unchecked Presidential Wars*, 148 U Pa L Rev 1637 (2000).

⁷ Presidential advocates note that whatever the meaning of the Declare War Clause, Congress retains an important voice in war policy through its control over appropriations. See Yoo, 84 Cal L Rev at 176–82 (cited in note 2). Congressional advocates respond that the funding limitation is not meaningful, or does not capture all of the limitations on the President the Framers appeared to assume. I discuss the impact of the funding limitation on the declare-war debate in Parts IV and VI.D.

⁸ Emmerich de Vattel, *The Law of Nations* 399 (T. & J.W. Johnson 1863) (Joseph Chitty, ed) (originally published 1758).

⁹ John Locke, *The Second Treatise of Government*, in John Locke, *Two Treatises of Government* 265, § 16 at 278 (Cambridge 1988) (Peter Laslett, ed).

Applying this definition reveals a textual division of war powers between the President and Congress. Because war can be declared by commencing hostilities as well as by formal announcement, it should be clear from the text that Congress has power over both sorts of declarations, and the President does not. The President's possession of "the executive Power" does not alter this conclusion, even if the executive power is read, in keeping with modern textualist scholarship, to include foreign affairs power. Though previously included within the traditional executive power of eighteenth-century political thought, the power to declare war by hostilities or formal announcement is assigned to Congress by the Constitution's text, and thereby denied to the President.

This conclusion is not, however, a complete vindication of Congress, for eighteenth-century usage suggests two substantial presidential war powers. First, a nation under direct attack did not need to "declare" war.¹⁰ Because self-defense in the face of hostile attack was considered an absolute right that a nation would always exercise, one did not need to look for a public manifestation of an intent to do so—rather, it was assumed. Thus "declaring" war by action indicated an initiation of armed hostilities in a time of peace, not a response to an attack where the peace had already been breached by the other side.¹¹ If this is correct, Congress's declare-war power does not limit the President's power to respond to an attack, which remains part of the "executive Power" of Article II, Section 1.¹² And the response, in eighteenth-century terms, did not have to be limited to defensive or proportionate measures. Thus an attack in itself gives the President the authority to respond and carry the conflict to its conclusion.

Second, the declare-war power extends only to war. Eighteenth-century usage is clear that not all military deployments are "war" (although the distinction did not turn on the presence or absence of a formal declaration).¹³ Moreover, threatening or provocative acts, while sometimes giving a just cause for war, were not declarations of war in

¹⁰ See Part VI.C.

¹¹ It was not uncommon in the eighteenth century for a nation to issue a formal proclamation of war after it was attacked. This was not done to create a state of war (since the state of war was created by the attack), but it nevertheless remained an important communicative and rhetorical device.

¹² See Prakash and Ramsey, 111 Yale L J at 252–65 (cited in note 4) (arguing that the President's executive power includes powers over foreign affairs that are not textually allocated to another branch of government by the Constitution). An element of this power is captured by the often-repeated observation that the President has the power "to repel sudden attacks." See Fisher, *Presidential War Power* at 11 (cited in note 1). I argue in Part VI.C that the President's power to respond to attacks extends considerably further than merely deflecting sudden attacks.

¹³ See Part VI.D.

themselves. Again, as these matters were not conveyed to Congress as part of the declare-war power, they remain part of the President's executive power over foreign affairs.¹⁴

The ensuing Article elaborates the foregoing argument. Part I outlines the difficulties of both the case for Congress and the case for the President in the contemporary war powers debate. Part II reviews the eighteenth-century meaning of the formal declaration of war. This Part concludes that, while some eighteenth-century writers argued that a formal declaration should be prerequisite to commencing hostilities, or at least prerequisite to the existence of a legal state of war, neither view represented the ordinary understanding of the term. Rather, in common usage the formal declaration was no more than an official notification that a war existed, and it could be given or not given according to the convenience of the belligerent powers.

Next, Part III demonstrates that eighteenth-century writing at times spoke of war being "declared" not only by formal proclamation, but also by acts manifesting a nation's intent to go to war. Most prominently, this included launching an armed attack, even in the absence of a proclamation. As a result, this Part concludes that the Constitution's Declare War Clause, standing alone, has a critical ambiguity. There were two common meanings of "declare war" in the eighteenth century: a narrow meaning limited to issuing a formal proclamation, and a broad meaning that also included armed attacks creating a state of war.

Part IV argues that this textual ambiguity should be resolved in favor of the broader meaning of "declaring" war. The broader meaning makes the best sense of the text and structure of the Constitution, and only the broader meaning is consistent with the later statements of the Framers and other political leaders. In particular, reading the power to "declare war" to include the power to create a state of war by formal proclamation or by action harmonizes the Constitution's text and the post-drafting commentary, for it provides a reading that is both consistent with the text's ordinary eighteenth-century meaning and consistent with the views later expressed by key members of the constitutional generation.

Parts V and VI elaborate the implications of this conclusion. Part V considers the war powers of Congress, and Part VI considers the war and war-related powers of the President. In particular, these sections argue that while Congress generally has the power to initiate hostilities, the President retains broad power to respond to hostilities

¹⁴ True, Congress also has power over letters of marque and reprisal, US Const Art I, § 8, cl 11, a form of limited hostility short of war. But, as shown below, marque and reprisal was one subset of hostilities short of war, not a complete description of the category. See Part V.B.

begun by another nation, and to make military deployments or take other potentially provocative actions not amounting to “war.” As a result, the Article concludes that both Congress and the President have substantial war-related powers arising from the original meaning of the Declare War Clause.

I. THE WAR POWERS DEBATE

A. The Framers and the Case for Congress

Most academic voices in the war powers debate agree that, in the original understanding of the Constitution, most or all power to authorize military hostilities against another nation lies with Congress. Louis Fisher’s leading work argues that “[t]he constitutional framework adopted by the Framers is clear in its basic principles. The authority to initiate war lay with Congress. The President could act unilaterally only in one area: to repel sudden attacks.”¹⁵ Historian Charles Lofgren concludes that Congress’s power was understood “as meaning the power to commence war, whether declared or not.”¹⁶ Professor John Ely observes:

One of the recurrent discoveries of academic writing about constitutional law . . . is that from the standpoint of twentieth-century observers, the “original understanding” of the document’s Framers and ratifiers can be obscure to the point of inscrutability. Often this is true. In this case, however, it isn’t. The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, “declared” in so many words or not . . . had to be legislatively authorized.¹⁷

While this view is in some tension with the actual practice of recent decades, which have witnessed frequent hostilities initiated by the President with little or no congressional authorization,¹⁸ the scholarly consensus has not been shy in charging that modern practice simply and obviously runs counter to the Framers’ expectations.¹⁹

¹⁵ Fisher, *Presidential War Power* at 11 (cited in note 1).

¹⁶ Lofgren, 81 Yale L J at 699 (cited in note 1).

¹⁷ Ely, *War and Responsibility* at 3 (cited in note 1). See also note 1.

¹⁸ See Fisher, *Presidential War Power* at 70–161 (cited in note 1) (recounting practice from Presidents Truman through Clinton).

¹⁹ See, for example, Fisher, *Presidential War Powers* at 185–206 (cited in note 1) (arguing that practice since World War II has radically transformed the Framers’ design); Ely, *War and Responsibility* at 10–11 (cited in note 1) (stating that Truman’s reading of the Constitution during the Korean War “had from the dawn of the republic been recognized as erroneous”); Glennon, *Constitutional Diplomacy* at 94–95 (cited in note 1) (claiming that critics of congressional war powers have a “quarrel . . . with James Madison”); Koh, *National Security Constitution* at 97 (cited in note 1) (suggesting that growing American power and expanding presidential authority

The academic case for Congress stands, in main, upon three points. First, during the drafting and ratifying debates, and in the years immediately following, a number of key Framers and other leading figures made statements heavily implying that Congress had complete control of the decision to initiate hostilities. In the Pennsylvania ratifying convention, for example, framer James Wilson said of war powers:

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.²⁰

Jefferson famously wrote: “We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body”²¹ Madison stated less colorfully but to similar effect: “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.”²² Hamilton, perhaps the leading exponent of presidential power among the Framers, stated in his 1793 *Pacificus* essays that “the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility” and thus “[i]t is the province and duty of the executive to preserve to the nation the blessings of peace. The Legislature alone can interrupt them by placing the nation in a state of war.”²³ In John Marshall’s view, “the

combined to transform the original “National Security Constitution” during the twentieth century to one of excessive presidential war powers).

²⁰ Jonathan Elliot, 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 528 (2d ed 1836). This quotation is a centerpiece of many academic studies of the original understanding of war powers. See, for example, Ely, *War and Responsibility* at 3 (cited in note 1); Reveley, *Who Holds the Arrows* at 102 (cited in note 1).

²¹ Letter from Thomas Jefferson to James Madison (Sept 6, 1789), in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 392, 397 (Princeton 1958).

²² Letter from James Madison to Thomas Jefferson (Apr 2, 1798), in Gaillard Hunt, ed, 6 *The Writings of James Madison* 311, 312 (G.P. Putnam’s Sons 1906) (abbreviations altered). In a similar vein, Madison in 1793 wrote: “Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be commenced.” Letters of Helvidius No 1, in Hunt, ed, 6 *Writings of James Madison* at 138, 148.

²³ Letters of *Pacificus* No 1, in Henry Cabot Lodge, ed, 4 *The Works of Alexander Hamilton* 432, 443 (G.P. Putnam’s Sons 1904). Hamilton was defending President Washington’s 1793 neutrality proclamation. Agreeing that the decision to go to war was vested in Congress, he argued that preservation of neutrality, until Congress might have a chance to decide, was a presi-

whole powers of war” are “by the constitution of the United States, vested in congress”²⁴ These quotes, and others like them, show (it is said) the Framers’ understanding that Congress controls the decision to initiate hostilities.

Congressional advocates also point to the records of the Philadelphia convention regarding the drafting of the Constitution’s Declare War Clause. The convention’s draft, at a point fairly late in the proceedings, gave Congress the power to “make war.” Madison and Elbridge Gerry moved to substitute “declare” for “make,” a proposal ultimately adopted.²⁵ Madison said that the President should have the power to repel sudden attacks without the delay of consulting Congress.²⁶ Rufus King pointed out that congressional power to “make” war might suggest that Congress had tactical control over the conduct of the fighting once begun, and that this was properly a presidential function.²⁷ It is not clear if either or both of these reasons persuaded the delegates to accept the change, but in any event the change did not excite much discussion, and none of the delegates seemed to think it effected a major reallocation of war powers. The implication for the war powers debate is clear enough. A Congress with the power to “make” war would have a comprehensive power over the decision to initiate hostilities. A reading of Madison’s declare-war language that gives substantial war power to the President would mean that the “make”-to-“declare” change *did* effect a substantial reallocation of war powers—something the Framers did not appear to contemplate.²⁸ Accordingly, it is said, it should not be read that way.

Third, congressionalists draw comfort from the exercise of war powers in the years immediately following ratification. Though Washington, as President, was fairly aggressive in exercising unilateral

dential power. Hamilton also wrote, as “Lucius Crassus” in 1801, that “it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; . . . in other words, it belongs to Congress only, *to go to war*.” Examination of Jefferson’s Message to Congress of December 7, 1801, No 1, in Lodge, ed, 8 *Works of Hamilton* at 246, 249.

²⁴ *Talbot v Seeman*, 5 US (1 Cranch) 1, 28 (1801) (Marshall).

²⁵ Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 318–19 (Yale rev ed 1937). For secondary accounts of the debate, see Reveley, *Who Holds the Arrows* at 81–85 (cited in note 1); Lofgren, 81 Yale L J at 675–83 (cited in note 1).

²⁶ Farrand, ed, 2 *Records* at 318 (cited in note 25) (Madison in support of the motion).

²⁷ *Id* at 319 (“‘make’ war might be understood to ‘conduct’ it, which was an executive function”) (statement of Rufus King).

²⁸ This assumes that whatever power given to Congress was by the same measure taken away from the President. As I have discussed elsewhere, this was the usual construction put on the foreign affairs provisions of the Constitution, both with respect to war and elsewhere. See Prakash and Ramsey, 111 Yale L J at 253–54 (cited in note 4) (presenting a “residual principle” of the President’s executive foreign affairs power). For example, the Convention’s declare-war proposal itself contemplated that if Congress had the power to “make” war, the President would not have it. See Farrand, ed, 2 *Records* at 318 (Madison) (cited in note 25).

foreign affairs powers,²⁹ he did not unilaterally commit the nation to hostilities, even though opportunities to do so arose on several occasions. For example, facing hostilities from various tribes along the United States's western border, Washington limited himself to defensive measures and rejected offensive action without congressional approval.³⁰ Washington said: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."³¹ Similarly, Secretary of War Henry Knox said on Washington's behalf:

Whatever may be [the President's] impression relatively to the proper steps to be adopted, he does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.³²

Washington's restraint was notable because he could easily have claimed that countermeasures were necessary to an adequate defense, that the tribes themselves had begun the hostilities, or that declarations were unnecessary against the tribes, which were not fully foreign nations but resided on territory claimed by the United States; none of these justifications would sound strained to the modern ear, nor entail a frontal assault upon congressional war power.³³

²⁹ See Prakash and Ramsey, 111 Yale L J at 295–354 (cited in note 4) (discussing the executive power over foreign affairs in Washington's administration); H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 Wm & Mary L Rev 1471, 1477–1511 (1999) (recounting Washington's conduct of foreign policy).

³⁰ On Washington's relations with the western tribes, see Fisher, *Presidential War Power* at 13–16 (cited in note 1); Abraham D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins* 116–27 (Ballinger 1976).

³¹ Letter from George Washington to William Moultrie, in John C. Fitzpatrick, ed, 33 *The Writings of George Washington* 73, 73 (GPO 1940).

³² Letter from Henry Knox to William Blount, in Clarence Edwin Carter, ed, 4 *The Territorial Papers of the United States* 220, 220–21 (GPO 1936).

³³ At least two other incidents suggest deference by the Washington administration to Congress's war powers. First, the North African state of Algiers had seized U.S. citizens as hostages and demanded ransom; Washington and Secretary of State Jefferson agreed that any military action in response required congressional approval. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm & Mary L Rev 211, 242–60 (1989) (discussing the Washington administration's relations with Algiers). Second, during a dispute between Britain and Spain known as the Nootka Sound incident, it seemed likely that Britain would seek to march troops through U.S. territory to attack Spanish territory; the question was whether the United States should resist militarily, and Washington and his cabinet agreed that this was a question for Congress. See Sofaer, *War, Foreign Affairs, and Constitutional Power* at 101–03 (cited in note 30). On both points as examples of Washington's war-powers deference, see Prakash and Ramsey, 111 Yale L J at 339–40, 346–50 (cited in note 4).

But this broad academic consensus conceals a serious textual embarrassment: Advocates of congressional war powers have great difficulty grounding their view in the actual words of the Constitution. Congress, after all, has the power “to declare war,” not the power “to authorize hostilities,” and it is not immediately clear why the two should be equated. Modern armed conflict rarely begins with a formal declaration of war,³⁴ and the eighteenth century likewise witnessed an array of “undeclared” wars.³⁵ But if formally declaring war is no more than an optional prelude to armed struggle—as it apparently was in the Framers’ day and as it is in ours—Congress’s authority “to declare war” would seem to fall far short of comprehensive war powers. Advocates of congressional war powers have given little attention to this problem, inviting us on the strength of post-ratification quotations and practice to look past the literal wording of the text and to construe the “declare war” power to encompass all conflicts, whether declared or not.³⁶

In short, the consensus academic account of Congress’s war powers remains essentially without an explanation of how the text accomplishes the result the consensus says must have been accomplished.³⁷ This failure leaves the standard academic account

³⁴ See Brien Hallett, *The Lost Art of Declaring War* 112–41 (Illinois 1998) (discussing modern practice).

³⁵ See J.F. Maurice, *Hostilities without Declaration of War* (Her Majesty’s Stationery Office 1883) (discussing eighteenth-century practice).

³⁶ Two theories in support of Congress have been advanced that grapple with the actual words of the text. One view is that whatever war power is not encompassed by the “declare war” power falls within Congress’s power to issue letters of marque and reprisal. See Lofgren, 81 Yale L J at 696–97 (cited in note 1) (discussing this view). A second position, elaborated by Professor Gregory Sidak, is that the Declare War Clause actually requires Congress to issue a formal declaration of war prior to all military engagements. See J. Gregory Sidak, *To Declare War*, 41 Duke L J 27, 63–73 (1991) (arguing that a formal declaration is necessary to maintain the separation of powers). These views are discussed below, but two observations may be made at this point. First, neither view commands much of a following among advocates of congressional war power. Second, neither view is in accord with the eighteenth-century understanding of the relevant phrases. The power of marque and reprisal was not equivalent to undeclared war in the eighteenth century, but rather involved a small subset of undeclared wars. See Part V.B. And, as noted, undeclared wars were common in the eighteenth century, so it is a stretch to suggest that the Framers intended by implication to render this common practice unconstitutional.

³⁷ Congressional advocates have stated, on the basis of the evidence discussed here, that “declare war” must be read to mean “commence war,” but little effort has been devoted to showing that eighteenth-century usage in fact did equate the two. See Wormuth and Firmage, *To Chain the Dog of War* at 20 (cited in note 1) (arguing that “[t]he verb *declare* . . . describe[d] a formal public proclamation of hostilities, but it was used also to mean simply the initiation of hostilities”); Lofgren, 81 Yale L J at 695 (cited in note 1) (suggesting that “‘declare’ had a broader meaning . . . [i]t meant ‘commence’”). Wormuth and Firmage purport to describe a common understanding, but their lone citation—to a 1552 dictionary—does not appear to support their claim. See Wormuth and Firmage, *To Chain the Dog of War* at 20 (cited in note 1). Lofgren concedes that his suggestion is contrary to “treatises and international practice” of the time, but thinks it compelled by the quotations of the Framers. Lofgren, 81 Yale L J at 695 (cited in note 1). Both works, and others like them, essentially reach their results by reasoning

vulnerable to troublesome textual objections. As elaborated in the ensuing sections, three developments have called the case for comprehensive congressional war powers much into doubt, and its academic defenders have managed little in the way of response.

B. The Text and the Case for the President

The congressionalists' textual weakness has opened the door to a powerful counterattack. A series of presidential administrations—from Truman in Korea through Bush in the Gulf War and Clinton in Kosovo³⁸—and a small group of legal scholars—most recently Professors Robert Turner and John Yoo—have claimed broad presidential warmaking powers on the basis of the Constitution's text. Recent scholars further contend, in keeping with broader shifts in scholarly attitudes toward the meaning of "original understanding," that the congressionalists' case is methodologically flawed: The search should focus upon the ordinary meaning of the text itself and not merely upon the subjective views of a few prominent Framers.

1. Textualism and original understanding.

The first problem for congressional advocates is that, although they are making a claim about how the Constitution was originally understood, their approach does not comport with the increasingly accepted approach to determining the Constitution's original meaning.³⁹ Previously, those who sought an original interpretation of the Constitution typically spoke of unearthing a (somewhat hypothetical) intent of the Framers—commonly by assembling a series of quotations from key Framers and extrapolating from these a guess as to what those individuals would have decided, had they been presented with the questions we now ask.⁴⁰ But modern theories of

backwards from the post-convention statements of the Framers.

³⁸ See Fisher, *Presidential War Power* at 70–161 (cited in note 1).

³⁹ This is perhaps unsurprising, as most leading war powers scholars—including Professors Ely, Glennon, and Koh—are not also leading theorists of originalist interpretation. The principal exception is Charles Lofgren, a self-consciously originalist scholar whose work pays the closest attention to the text, and works hardest (though in my view unsuccessfully) to ground the standard academic account of war powers in the actual words of the Constitution. For Professor Lofgren's other works on the original understanding of the Constitution, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const Comm 77 (1988) (finding the founders themselves rejected framer intent, but not necessarily ratifier intent); Charles A. Lofgren, *Government from Reflection and Choice: Constitutional Essays on War, Foreign Relations, and Federalism* (Oxford 1986) (collecting several essays on original understanding); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 Yale L J 1 (1973) (questioning the historical basis of Justice Sutherland's opinion in *Curtiss-Wright*). Most of Professor Lofgren's work occurred, however, before the turn to textualism in modern originalist scholarship.

⁴⁰ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BU L Rev

original understanding focus much less on a reconstructed or subjective Framers' intent and much more on the objective meaning of the constitutional text, as it would have been understood at the time it was written.⁴¹ Though this approach does not necessarily lead to different results, it is a fundamentally different methodology that gives much more primacy to the actual words of the Constitution, and accords much less importance to extrapolations from statements (particularly after-the-fact statements) of the generalized outlook of individual Framers.

This new textualist orientation is problematic for advocates of congressional war powers because it elevates to primacy the most troublesome part of their argument. In the modern intellectual climate it is no longer tenable to say, on a subject specifically addressed in the Constitution's text, that we need not be concerned with the actual meaning of the words since we have sufficient extrinsic evidence of the drafters' subjective thinking. As noted, the congressionalist case relies primarily upon selected quotations from key Framers and other political leaders, excerpts from the debates in the Philadelphia convention, and practice following ratification. For most modern scholars of the Constitution's original meaning, however, none of these sources would be the primary focus of inquiry.

This is true in part because each of these sources may prove less than it appears to. Selected quotations may be taken out of context or might have been made for political or strategic reasons; our records of the debates are fragmentary and in any event were not available to the ratifiers or anyone else for decades after the Convention; and early presidents may have asserted constitutional limitations not from their actual reading of the Constitution but to justify decisions they would have made anyway.⁴²

More important to modern views of original understanding, however, is the observation that the Constitution does not enact the unstated views, beliefs, preferences, or predictions of its drafters and ratifiers. Rather, the authoritative voice is the text itself.⁴³ Regardless

204, 205–24 (1980) (criticizing this approach).

⁴¹ See, for example, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Princeton 1997) ("What I look for in the Constitution is . . . the original meaning of the text, not what the original draftsmen intended."). For an engaging discussion of the shift, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loyola L Rev* 611, 620–29 (1999).

⁴² As to early practice, President Washington had no navy and a tiny standing army; practicalities as much as constitutional limitations would have curtailed unilateral hostilities. See So-faer, *War, Foreign Affairs, and Constitutional Power* at 61–129 (cited in note 30) (discussing Washington's administration). On the fragmentary nature of the convention debates, see especially Reveley, *Who Holds the Arrows* at 69–70 (cited in note 1). For a wide-ranging critique of the use of history by congressionalist scholars in the war powers debate, see John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 *U Colo L Rev* 1169, 1172–74 (1999).

⁴³ See Barnett, 45 *Loyola L Rev* at 621 (cited in note 41) ("[T]he shift . . . from original in-

of what any individual thought the best system to be, what the ratifiers collectively adopted (and all they collectively adopted) is what actually appears in the Constitution's language. Accordingly, the inquiry is not what any individual member of the constitutional generation intended, or even our best guess as to what that generation collectively intended; it is, instead, the best reading of the text.⁴⁴

But few textualists suppose that a text can have a single meaning, shorn of its context.⁴⁵ This means textualist interpreters look not for what the words mean in the abstract, but for how the words would have been understood at the time they were used. This produces an overlap of textualism and originalism, for textualist interpretation seeks not the meaning of the words in isolation, but the *original* meaning—that is, the meaning of the words in the context in which they were written. As a result, the focus is on history, though not history broadly, but rather the history of the particular words and phrases in question.⁴⁶ Thus to know what the constitutional text meant to the constitutional generation, one must look to see how the words of the Constitution were used (and thus would have been understood) at the time the document was drafted and ratified. Moreover, one must look to the circumstances surrounding their use in the Constitution, for most words, even in a given historical period, may have multiple meanings depending upon how they are used. The question is, given the range of meanings a word or phrase had in the eighteenth century, which meaning would have made the most sense

tentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”).

⁴⁴ Id at 622 (“While some originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases, original meaning originalists need not concern themselves with this, except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener.”). As Justice Scalia puts it:

We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris* And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated Government by unexpressed intent is [] tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

Scalia, *A Matter of Interpretation* at 17 (cited in note 41).

⁴⁵ See Scalia, *A Matter of Interpretation* at 37 (“In textual interpretation, context is everything.”) (cited in note 41).

⁴⁶ In Judge Posner’s description, textualist originalism is “a narrowly focused inquiry into precise and answerable questions of historical meaning of specific words and sentences” in the Constitution. Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U Chi L Rev 573, 595 (2000).

in the context in which it was used in the Constitution. This ordinary understanding establishes the original meaning of the Constitution. In Justice Holmes's aphorism, "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."⁴⁷

This inquiry, in turn, leads (in part) back to the statements of the Framers, the convention and ratification debates and post-ratification commentary and practice. The way "intelligent and informed people of the time," such as the Framers and their contemporaries, used language is evidence of that language's ordinary meaning.⁴⁸ Thus a modern textualist/originalist would not dismiss the evidence upon which the advocates of congressional war power rely. But neither would such an interpreter find it wholly dispositive, nor use it in the way that it is typically used. The congressionalists' evidence is usually presented not as an interpretive guide to any particular language in the text, but as authority in itself. The evidence, in the congressionalists' hands, does not show how the ordinary eighteenth-century meaning of "declare war" encompasses all decisions to use military force; rather, it purports to show that Congress must control all decisions to use military force, whatever the literal meaning of the language in the Constitution. Under the modern view of the way to ascertain the Constitution's original meaning, this is exactly backwards: It is the text that controls, and the surrounding circumstances that help explain the text.

Further, the modern view likely would not accept the congressionalists' evidence, standing alone, as the best evidence of the ordinary eighteenth-century meaning of the relevant words. None of the evidence shows members of the constitutional generation unambiguously using "declare war" to mean "commence hostilities." Rather, it is indirect evidence: statements that Congress has control over commencement of hostilities, or that declaring war is an important power, from which it is surmised that "declare war" means "commence hostilities." In addition, most of the congressionalists' evidence comes in the context of an asserted interpretation of the Constitution, made against a political and strategic background that may have influenced the speakers' reading. For example, Washington said that Congress's power over war foreclosed him from unilaterally opening offensive action against the western tribes. This might have been because Washington actually read the Constitution that way, but it might also have been because Washington did not wish to

⁴⁷ Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv L Rev 417, 417-18 (1899). See Scalia, *A Matter of Interpretation* at 22-23 (cited in note 41) (approving of two similar quotes from Holmes).

⁴⁸ See Scalia, *A Matter of Interpretation* at 38 (cited in note 41).

commence offensive actions for some other reason. In any event, it is less persuasive than a more complete history of the relevant phrase.

In short, modern textualist interpretation focuses on the objective meaning of the particular words and phrases appearing in the Constitution as they would have been understood at the time and in the context of its adoption. That entails, first, starting with the precise words of the text and attempting to give them the meaning that they would have had to an ordinary eighteenth-century reader. It further means looking at the surrounding context to see how the words of the text would have been understood as part of the Constitution as a whole. Finally, it acknowledges the relevance of the statements of Framers and other political leaders, the convention and ratification debates, and the post-ratification practice—but not as ends in themselves. The goal is not to construct an ideal (or intended) system of government from the general statements or intents of individual Framers and politicians, but rather to reconstruct what the words of the text meant in the context in which they were used.

2. Textual problems of the case for Congress.

Focusing on text throws harsh light upon the academic case for congressional war powers. The immediate difficulty for congressional advocates is that the text on its face does not appear to say what they want it to say. The core congressionalist position is that Congress has complete (or nearly complete) control over the decision to initiate hostilities. The text, however, only says that Congress can “declare war.”⁴⁹ There is good reason to believe that the primary meaning of a declaration of war in the eighteenth century was roughly what it is today: a formal announcement of a state of war between two nations, often (though not necessarily) coupled with justifications for mounting the war or conditions on which peace can be made.⁵⁰ As eighteenth-century Americans likely would have known, the practice dates at least to Roman times, when it was accompanied by elaborate ceremony.⁵¹ Though shorn of many of its rituals by the eighteenth century, the practice remained common, with Britain, for example, commonly issuing pronouncements styled “declarations of war”

⁴⁹ I leave aside for the moment the question of the power to issue letters of marque and reprisal. See Part V.

⁵⁰ See Vattel, *Law of Nations* at 314–20 (cited in note 8) (discussing the declaration of war). See especially id at 315:

[W]e owe this further regard to humanity, and especially to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force, for the purpose of bringing him to reason. This is called *declaring war*.

⁵¹ See id (describing “the Roman manner of proceeding, regulated in their *fecial law*”).

between 1700 and 1789.⁵² If “declare war” had this meaning in the eighteenth century (as assuredly it did), what justifies refusing to give that phrase in the Constitution its ordinary eighteenth-century meaning? And if the phrase is given its ordinary meaning, is not Congress’s power much less extensive than commonly claimed, and indeed limited to the making of a formal declaration?

A further problem for congressionalists is that in the eighteenth century, hostilities were regularly commenced prior to, or in the complete absence of, a formal declaration of war. If a formal declaration had been understood as necessary to begin war in the eighteenth century, one might comfortably read the constitutional language as equivalent to commencing war. Modern practice, of course, involves “undeclared” wars and low-level hostilities perhaps not needing a declaration, but if eighteenth-century practice were otherwise, it might be appropriate to say that the Constitution’s phrase “declare war” in effect meant “commence hostilities” since hostilities could not be commenced without a formal declaration.

Unfortunately for the congressionalists, the eighteenth-century practice—as they themselves acknowledge—was essentially the same as modern practice. The “undeclared” war was very much a part of eighteenth-century reality, as eighteenth-century Americans surely knew. A number of leading wars were never formally declared or were formally declared only long after hostilities had begun. The Seven Years’ War, which was fought between Britain and France in the mid-eighteenth century largely in North America, was not formally declared by either side until long after hostilities began, and neither France nor Britain made a formal declaration of war prior to hostilities during the American Revolution.⁵³ Further, any number of smaller localized conflicts went without a formal declaration.⁵⁴ In short, one simply cannot say that a formal declaration was necessary or even common prior to initiating hostilities in the eighteenth century.⁵⁵

⁵² See Maurice, *Hostilities* (cited in note 35). Examples include the War of the Spanish Succession (Declaration of England against France, May 4, 1702), id at 13; Declaration of England against Spain, 1719, id at 15; War of Austrian Succession, declaration of England against Spain, October 19, 1739, id at 16; and against France, in March of 1744, id at 19; Seven Years’ War, declaration of England against France, May 17, 1756, id at 21.

⁵³ See Yoo, 84 Cal L Rev at 215–17 (cited in note 2) (discussing the Seven Years’ War); Lofgren, 81 Yale L J at 693 (cited in note 1) (“During the War of the American Revolution [] Britain and France never expressly declared war on each other.”); Maurice, *Hostilities* at 20–23, 24–25 (cited in note 35).

⁵⁴ See generally Maurice, *Hostilities* (cited in note 35).

⁵⁵ The point is not seriously contested, as Congress’s academic advocates readily concede it. See, for example, Ely, *War and Responsibility* at 3 & n 5 (cited in note 1) (acknowledging “most weren’t [declared], even then”). See also Lofgren, 81 Yale L J at 693 (cited in note 1) (stating that “hostilities without declarations of war were common during the period”); Federalist 25

Taken together, these points are a substantial problem for advocates of congressional war power. One cannot seriously contest that the primary meaning of “declaring war” in the eighteenth century was—as it is today—issuing the formal pronouncement of war known as a “declaration.” Nor can one seriously claim that the ordinary eighteenth-century reader would have thought such a declaration prerequisite to beginning a war, since that was not the practice in the eighteenth century. Thus the language of the Constitution appears, at first inspection, to give Congress only the power to make a formal announcement of war, not the power to control the initiation of hostilities. The congressionalists’ evidence suggests that the Framers, in some post-ratification contexts, asserted a broader reading of congressional war power, but this might merely have been an overreading of the text motivated by political and strategic considerations. Advocates of congressional war power must show *how* the constitutional language gives Congress broad war power (not merely that some Framers later claimed it did).

Advocates of Congress make at least two important responses. The first is to rely on Congress’s power to “grant Letters of Marque and Reprisal.”⁵⁶ The argument is that, if the Declare War Clause encompasses only formally declared wars (as its language might suggest), then the Marque and Reprisal Clause covers everything else—and thus maintains congressional control over the initiation of hostilities.⁵⁷ The Marque and Reprisal Clause is discussed in greater detail below,⁵⁸ but for present purposes it is sufficient to say that this reading does not conform to the eighteenth-century meaning of marque and reprisal. Even given its broadest meaning, marque and reprisal meant something fairly specific: the seizure or destruction of the property of another nation to atone for an international wrong committed by that nation.⁵⁹ Reprisal did not encompass all undeclared

(Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 162, 165 (Mentor 1961).

⁵⁶ US Const Art I, § 8, cl 11.

⁵⁷ See Lofgren, 81 Yale L J at 696–97 (cited in note 1) (suggesting this point). See also Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U Pa L Rev 1035, 1040 (1986) (arguing “that the marque and reprisal clause grants Congress sole authority to authorize private individuals to use force against another country or its citizens, whether in peacetime or during declared war”).

⁵⁸ See Part V.B.

⁵⁹ See Vattel, *Law of Nations* at 283–86 (cited in note 8) (discussing reprisals and letters of marque). Vattel writes:

If a nation has taken possession of what belongs to another . . . the latter may seize something belonging to the former, and apply it to her own advantage till she obtains payment of what is due to her, together with interest and damages, or keep it as a pledge till she has received ample satisfaction.

Id at 283–84. 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, 981 (1997) (argu-

wars or include all military actions. For example, the French actions during the American Revolution were not reprisals, since they were not directed at avenging any particular British wrongdoing and were directed toward achieving strategic goals rather than toward seizing or destroying British property.

The second response is that, whatever the textual problems with a broad reading of the Declare War Clause, there are greater textual problems with a narrow reading. Most notably, it is said, the textual powers of the President also do not extend to initiating undeclared wars. A narrow reading of Congress's declare-war power thus apparently creates an improbable gap in the Constitution's allocation of war powers: No branch appears to have the power to begin hostilities without a formal declaration, even though that was a common practice of nations in the eighteenth century.⁶⁰ The onus is therefore placed upon advocates of presidential war powers to develop a competing textual explanation of war powers, and this, congressional advocates maintain, cannot be done. True, the President has the commander-in-chief power, but there are reasons for thinking that this power should not be read broadly to encompass all decisions to commence hostilities.⁶¹ At first reading, one might not suppose that the President has any other plausible source of war power. As Professor Lofgren has argued, Congress seems to have most of the war powers specifically allocated by the text. Therefore, it makes sense to locate the whole of war powers in Congress.⁶² But as set forth in the next subsection, the congressionalist claim in this regard has been substantially eroded, as recent scholarship has developed a competing textual theory of presidential war powers.

ing for a narrow reading of the Marque and Reprisal Clause emphasizing "the unique and pervasive financial aspects of letters of marque and reprisal that allowed their holders to operate independently of Congress's power of the purse").

⁶⁰ See Lofgren, 81 *Yale L J* at 695 (cited in note 1) (advancing this argument).

⁶¹ Briefly, the eighteenth-century political theorists, on whom the Framers relied in developing their views of executive power, seemed to regard the war initiation power as distinct from the commander-in-chief power; they described them as separate components of the executive power over foreign affairs. The Framers would have been familiar with a system that separated the war-initiation power and the commander-in-chief power, since that was the system of the Articles of Confederation (in which the Continental Congress had the power to "determine on war and peace" but Washington was the field commander). And although the founding period discussed presidential power in some detail, no one gave the commander-in-chief power a broad construction. See *id.* at 679–80, 685–87, 695.

⁶² See *id.* at 695 ("It seems unlikely [] that an observer in 1787–88 would have concluded that the Constitution would leave such an important power unvested. . . . It also seems improbable that a contemporary would have accepted the alternative that the power was lodged with the executive.").

3. War and the executive power over foreign affairs.

The textual argument for presidential war powers begins with Article II, Section 1 of the Constitution. By this provision, the “executive Power” of the United States is vested in the President.⁶³ Recent scholarship has argued that the common eighteenth-century understanding of “executive power” included power over foreign affairs.⁶⁴ Many of the greatest political writers of the time—including Locke, Montesquieu, and Blackstone—spoke of the executive power as encompassing foreign affairs.⁶⁵ The British monarch—the executive most familiar to the Framers—had broad power over foreign affairs, and the political writers said that this arose from the monarch’s possession of the executive power. Further, this terminology was common in pre-constitutional America. For example, in the Continental Congress under the Articles of Confederation the foreign affairs department was called an executive department, and foreign affairs were considered to be part of the executive powers of Congress under the Articles.⁶⁶ And in practice after the Constitution was ratified, foreign affairs powers continued to be called executive powers. As Thomas Jefferson said, “The transaction of business with foreign nations is Executive altogether.”⁶⁷ Thus, when the Constitution gave the “executive Power” to the President, that phrase included an independent power over foreign affairs.

⁶³ US Const Art II, § 1.

⁶⁴ See Prakash and Ramsey, 111 Yale L J at 265–72 (cited in note 4) (discussing the executive power in eighteenth-century political theory); Yoo, 84 Cal L Rev at 196–217 (cited in note 2) (same). See also Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 NC L Rev 133, 206–10 (1999) (suggesting the executive power as a textual source of foreign affairs power); Turner, *Repealing the War Powers Resolution* at 52–80 (cited in note 2) (same); Charles J. Cooper, et al, *What the Constitution Means by Executive Power*, 43 U Miami L Rev 165, 167–68 (1988) (same). Of course, not everyone accepts the “executive power” as a source of substantive presidential power. See, for example, *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 641 (1952) (Jackson concurring) (“I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.”); Lawrence Lessig and Cass Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 47–48 n 195 (1994) (“[T]he [Article II] Vesting Clause does nothing more than show who . . . is to exercise the executive power, and not what that power is.”).

⁶⁵ See Locke, *Second Treatise* §§ 143–48 at 364–66 (cited in note 9); Montesquieu, *The Spirit of the Laws* 156–66 (Cambridge 1989) (translated and edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone); William Blackstone, 4 *Commentaries on the Laws of England* *244–49 (Chicago 1979). See also Jean L. De Lolme, *The Constitution of England* 49–50 (William Hein & Co. 1999) (originally published 1784); Thomas Rutherford, 2 *Institutes of Natural Law* 54–59 (J. Bentham 1756).

⁶⁶ Prakash and Ramsey, 111 Yale L J at 272–79 (cited in note 4).

⁶⁷ Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr 24, 1790), in Boyd, ed, 16 *Papers of Jefferson* at 378, 379 (cited in note 21). For other examples, see Prakash and Ramsey, 111 Yale L J at 295–339 (cited in note 4).

This analysis does not argue that all previously executive foreign affairs powers, as conceived by Montesquieu, Blackstone, and others, and as exercised by the British monarch, became powers of the U.S. President. To the contrary, the Constitution specifically assigned some foreign affairs powers elsewhere: for example, treaty-making and diplomatic appointments (shared with the Senate), and the power to declare war and grant letters of marque and reprisal (given to Congress).⁶⁸ These provisions took from the President powers previously understood to be executive. But other foreign affairs powers, not specifically mentioned in the Constitution's text, remained part of the President's executive power. Thus, in this view, the President's executive power in foreign affairs is residual: Executive foreign affairs powers not otherwise allocated in the text are presidential powers.⁶⁹

The theory of residual executive powers in foreign affairs has important implications for the war powers debate. There can be no doubt that the power to commence hostilities was an executive foreign affairs power prior to the Constitution. The leading theorists of executive power such as Locke, Montesquieu, and Blackstone, all included initiation of hostilities as part of the executive power.⁷⁰ In Britain, the monarch's executive power included the unilateral power to initiate hostilities. As the delegates in Philadelphia recognized, a grant of "executive power" if otherwise unqualified likely would include the "power of war and peace."⁷¹

As a result, the theory of residual executive power in foreign affairs holds that *if* the power to commence hostilities is not taken away by the Constitution, it remains an executive/presidential power. This in turn supplies a textual basis for presidential war powers: If the declare-war power is read narrowly, the President can claim the balance of war powers (including the power to commence hostilities without a formal declaration) as part of the unallocated executive powers. As a result, the congressionalist argument based on incompleteness is eliminated: If the declare-war power is read narrowly, it is not the case that power over undeclared war is unallocated. Rather, it is part of the presidential residual. This conclusion places the burden squarely on the advocates of

⁶⁸ See US Const Art II, § 2, cl 2; US Const Art I, § 8, cl 11.

⁶⁹ Prakash and Ramsey, 111 Yale L J at 253–54 (cited in note 4) (describing the President's residual executive foreign affairs powers).

⁷⁰ Locke, *Second Treatise* §§ 143–48 at 364–66 (cited in note 9); Montesquieu, *Spirit of the Laws* at 156–66 (cited in note 65); William Blackstone, 1 *Commentaries on the Laws of England* *244–49 (Chicago 1979).

⁷¹ Prakash and Ramsey, 111 Yale L J at 279–87 (cited in note 4) (discussing the executive power over foreign affairs at the Philadelphia Convention).

congressional war power to explain why “declare war” means “commence hostilities.” Presidential advocates would not deny that Congress has the sole power to declare war, nor would they deny that *if* declare war meant commence hostilities then Congress would have that power as well. However, they can argue that *unless* “declare war” means “commence hostilities,” war power other than the formal declaration itself remains with the President. And they would say that the congressional advocates have not carried the argument about the meaning of “declare war.”

4. The case for presidential war powers.

The foregoing scholarly trends—focus on eighteenth-century textual meaning and recognition of the executive power in foreign affairs—are forcefully united in Professor John Yoo’s attack on congressional war powers, the most powerful modern indictment of the conventional academic view. Professor Yoo begins with the idea of executive power, showing that in the English constitution and in eighteenth-century political thought the monarch possessed broad powers in war and foreign affairs as part of the “executive power.”⁷² However, he stresses that these powers were limited by two very substantial legislative powers: the control of spending and impeachment. Thus it is not true that the executive/monarch had unchecked war power; rather, Professor Yoo argues that during the eighteenth century Parliament played a considerable role in foreign affairs, and in the commencement of war in particular, through the exercise of these powers, and especially through the spending power.⁷³

Turning to the U.S. experience, Professor Yoo finds a similar structure, with similar but enhanced checks upon executive war power. In his view the President/executive retained most of the traditional executive war power held by the monarch. The U.S. Constitution also retained the traditional checks upon that power—legislative control of spending and impeachment—but in both cases the checks were strengthened. Whereas the eighteenth-century monarch had some independent sources of revenue, the Constitution stated that all appropriations must be made through Congress. Thus the President was wholly dependent upon Congress for wartime finance. In addition, under the Constitution the President could be impeached, whereas in

⁷² Yoo, 84 Cal L Rev at 198–207 (cited in note 2). See also Turner, *Repealing the War Powers Resolution* at 52–80 (cited in note 2) (grounding presidential war power in the historic meaning of “executive power”).

⁷³ See Yoo, 84 Cal L Rev at 208–14 (cited in note 2). See also the work of English historian Jeremy Black. Jeremy Black, *A System of Ambition?: British Foreign Policy 1660–1793* 43–58 (Longman 1991) (discussing Parliament and British foreign policy); Jeremy Black, *British Foreign Policy in the Age of Walpole* 75–92 (John Donald 1985) (same).

England impeachment was a remedy only against the crown's ministers.⁷⁴

With respect to the Declare War Clause, Professor Yoo does not deny that grants of foreign affairs power to other branches of government take power away from the President—and thus the power to declare war, though formerly an executive power of the monarch, is in the U.S. system exclusively a power of Congress. But he denies that declaring war equates with commencing war. He criticizes the congressionalists for their “traditional focus on the legislative history of the Declare War Clause and on a few statements by individual Framers,” arguing instead that the focus should be on the text as understood in its eighteenth-century context.⁷⁵ Further, he argues, congressional advocates “have misinterpreted the meaning of a declaration of war. Interpreting ‘declare’ war to mean ‘authorize’ or ‘commence’ is a twentieth-century construct inconsistent with the eighteenth-century understanding of the phrase.”⁷⁶

Professor Yoo then presents his own view of the eighteenth-century meaning of declare war. In his reading, “a declaration of war was significant for its juridical purposes—for altering the formal legal status *between* nations—but not for the domestic constitutional question of commencing hostilities.”⁷⁷ As he further explains,

[A]ccording to [eighteenth-century international] scholars, a declaration of war played a dual legal purpose. First, it notified the enemy that a state of war existed between them. If a nation warned its enemy of future hostilities, its later actions would receive the protection of international law. A declaration announced that hostile actions by its soldiers were taken under national aegis, and thus did not constitute piracy or robbery.⁷⁸

In addition, “declarations played a domestic legal role by informing citizens of an alteration in their legal rights and status. . . . Declarations instructed citizens of their new relationship with the enemy state, and informed them that they could take hostile actions against the enemy without fear of sanction.”⁷⁹

As Professor Yoo emphasizes, this did not mean that a formal declaration was required before commencing war. To the contrary, numerous wars began without a declaration: “[T]he usual British

⁷⁴ See Yoo, 84 Cal L Rev at 241–90 (cited in note 2).

⁷⁵ Id at 196. For an elaboration of the critique of the congressionalists’ use of history, see Yoo, 70 U Colo L Rev at 1175–91 (cited in note 42).

⁷⁶ Yoo, 84 Cal L Rev at 204 (cited in note 2).

⁷⁷ Id.

⁷⁸ Id at 206.

⁷⁹ Id at 207.

course toward war involved months, if not years, of direct armed conflict without a declaration of war.”⁸⁰ The declaration was employed only when the monarch wished to accomplish the legal changes it implied. In short, “a declaration of war performed a primarily juridical function under eighteenth-century international law, and it was this understanding that the Framers drew upon in giving Congress the authority to declare war.”⁸¹ Because it altered legal rights, it made sense for the Constitution to give the power to Congress. But in Professor Yoo’s view there is no basis for believing the power carried with it any authority over commencement of hostilities:

[A] *declaration* of war was not the same thing as a domestic *authorization* of war. In fact, a declaration of war was understood as what its name suggests: a declaration. Like a declaratory judgment, a declaration of war represented the judgment of Congress, acting in a judicial capacity (as it does in impeachments), that a state of war existed between the United States and another nation. Such a declaration could take place either before or after hostilities had commenced. While the power to “declare” war adds to Congress’ store of powers, it does little to alter the relative domestic authorities of the executive and legislative branches. Its primary function was to trigger the international laws of war, which would clothe in legitimacy certain actions taken against one’s own and enemy citizens.⁸²

As Professor Yoo concludes, “Americans of the eighteenth century would have understood that the power to declare war dealt with setting the formal, legal relationships between two nations, and not with authorizing real hostilities.”⁸³ In short, the power transferred away from the President by the Declare War Clause was not a broad authority over initiating hostilities, but a narrow authority over establishing war in a legal sense.

C. The Framers and the Case for the President

The foregoing points add up to a serious challenge to the conventional view of congressional war powers, yet no one has convincingly taken it up. Very few responses of any length have addressed the arguments of Professors Yoo and Turner, and those that have merely repeat the prior approach.⁸⁴ None has engaged the

⁸⁰ Id at 215.

⁸¹ Id at 242.

⁸² Id.

⁸³ Id at 245.

⁸⁴ See Fisher, 148 U Pa L Rev 1637, 1658–68 (cited in note 6) (analyzing Professor Yoo’s work); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology*

modern scholarship of textualist originalism, nor considered the new scholarship of executive power in foreign affairs.

But, while the presidential advocates such as Professor Yoo would thus seem to have the better of the textual argument, they are unable to explain contemporaneous readings of the Declare War Clause given to it by the Constitution's drafters and other political leaders of the period. As congressional advocates have detailed, Madison, Hamilton, Jefferson, Wilson, Washington, Jay, Marshall, and an array of lesser figures indicated that war power lay primarily with Congress, and no prominent figure took the other side.⁸⁵ True, textualist/originalist scholarship would not accord these post-drafting statements conclusive effect, since the ultimate authority is the text itself. But the way leaders of the time read their own language—even if after the fact—is at least some persuasive evidence of its objective meaning.⁸⁶ Even though advocates of Congress have not been able to explain as a textual matter *why* the Framers thought Congress had the war-initiation power, the fact that the Framers apparently did think so leaves presidential advocates in a difficult position. It is one thing to insist upon an interpretative methodology that gives primacy to the Constitution itself and not the subjective views of the Framers, and quite another to insist upon a reading that runs precisely counter to what the Framers said about a particular clause of the text.

Presidential advocates have launched various attacks seeking to discredit the congressionalist sources, arguing principally that they are not legitimate evidence of Framers' intent, that they represent idiosyncratic views, or that they do not unambiguously show an understanding of the Declare War Clause in which Congress has most of the war initiation power.⁸⁷ But none of these strategies is entirely effective. As to the first point, congressional advocates have left themselves open to criticism by relying on materials with only the remotest bearing upon the original understanding (for example, a letter by Abraham Lincoln).⁸⁸ But not all the congressionalists' evidence can be so easily dismissed, for, as noted, it includes the observations of many leading members of the late-eighteenth-century political and legal elite. This circumstance also undermines attempts to

Matters, 106 Yale L J 845, 853–61 (1996) (discussing the arguments of Professors Yoo and Turner in a book review of Louis Fisher's *Presidential War Power*).

⁸⁵ See Part I.A.

⁸⁶ See Scalia, *A Matter of Interpretation* at 38 (cited in note 41) ("I will consult the writings of [members of the constitutional generation such as Hamilton, Madison, Jay, and Jefferson] because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.").

⁸⁷ See generally Yoo, 70 U Colo L Rev 1167 (cited in note 42).

⁸⁸ *Id.* at 1186 ("Professor Stromseth quotes and cites . . . a private 1848 letter by Abraham Lincoln (certainly not a Framers).").

make the pro-Congress Framers seem like outliers. Professor Yoo argues, for example, that James Wilson—who supplies one of the congressionalists' most devastating quotes⁸⁹—was not representative of conventional thinking about congressional powers.⁹⁰ But the number of leading members of the constitutional generation arrayed on the other side make the “outlier” argument difficult. As described in greater detail below, what Wilson said was not materially different from contemporaneous comments by, for example, Hamilton and Madison in the 1793 *Pacificus/Helvidius* debates and James Iredell and Charles Pinckney in the ratifying debates.⁹¹

Presidential advocates have also been able to find little in their favor in the post-drafting history. Professor Yoo, for example, finds that the Declare War Clause was not often discussed in the ratifying debates, and accordingly finds little direct evidence in either direction.⁹² His principal point here is that during the ratification process, the defenders of the Constitution stressed the congressional powers of spending and impeachment as checks on the President, not the Declare War Clause. That is certainly consistent with his view of the Framers' design, but it is also consistent with the opposing view. The ratifiers probably did think that spending and impeachment were the *most important* checks upon the President, but this hardly proves that the President was not also limited in war power. In any event, as discussed below, important voices in the ratification debates did identify the Declare War Clause as an important limit on presidential power (though unfortunately they failed to elaborate this point fully). Moreover, presidential advocates have not found any affirmative evidence in the ratifying debates of a broad understanding of presidential war power.⁹³ Presidential advocates generally make their case in spite of the Framers' post-drafting commentary, not in reliance upon it.

D. Conclusion: The Constitution's Text and the War Powers Debate

In short, the debate over the original understanding of war powers stands at an impasse. Neither side can produce a reading that is both based on the ordinary eighteenth-century meaning of the Constitution's text and in harmony with the way the Framers and other political leaders of the time described war powers in the

⁸⁹ Elliot, 2 *Debates* at 528 (cited in note 20). See Part I.A.

⁹⁰ Yoo, 84 Cal L Rev at 286 & n 547 (cited in note 2) (“James Wilson's views can be seen as exceptional rather than typical.”).

⁹¹ See Part IV.B.

⁹² See Yoo, 70 U Colo L Rev at 1202–08 (cited in note 42) (discussing the state ratification debates); Yoo, 84 Cal L Rev at 269–94 (cited in note 2) (same).

⁹³ See Yoo, 70 U Colo L Rev at 1208 (cited in note 42) (essentially conceding this point).

ratifying debates and in post-ratification practice. Instead, the congressional advocates would emphasize the Framers' post hoc statements at the expense of the apparent ordinary meaning of the text, and presidential advocates would embrace what appears to be the ordinary meaning of the text at the expense of the Framers' later comments.

There seems no way out of this dilemma, for while neither side can present a complete explanation, both sides seem to be right on their central claims. Presidential advocates seem correct in saying that the power to issue a formal declaration of war—which is what Congress appears to have—cannot be the equivalent of comprehensive war powers, since no one in the eighteenth century would have thought a formal declaration was required to begin an armed attack. Presidential advocates also seem correct in saying that the President's "executive power" encompasses foreign affairs power not given to other branches by the text, and therefore includes war powers other than the power to issue the formal declaration. It is hard to see how giving Congress the ability to issue a formal declaration could take away the President's power to commence hostilities *without* a formal declaration, given that a formal declaration was not required prior to commencement. And presidential advocates are right to say that modern theories of original understanding demand that a search for the ordinary meaning of "declare war"—not isolated post-drafting statements—should be the central focus of the inquiry. Advocates of congressional war power simply have not grappled with these difficulties.

On the other hand, the congressionalists appear to be on solid ground in saying that the Framers and other political leaders, in the period immediately following the drafting of the Constitution, generally seemed to regard all of the war power—not just the formalities of the declaration—as lodged in Congress. If the congressionalists truly relied on isolated quotes from only a few leaders, these likely could be discounted. However, the breadth of the consensus on which the congressionalists rely seems much greater than executive advocates credit. It is difficult to dismiss all of these quotes as taken out of context, the work of philosophical outliers, or the product of political and strategic considerations. At minimum, these leaders must have thought it a plausible claim that Congress had the exclusive power to initiate a state of war, and that the Declare War Clause imposed material limits on presidential power. Presidential advocates have not explained how such a broad spectrum of leaders could have arrived (as they apparently did) at an interpretation of

“declare war” completely at odds with the (supposed) ordinary meaning of the phrase.”⁹⁴

Such a paradox, were it actually to exist, would pose profound questions about the methodology of “original meaning.” But the reality is that it is an unlikely historical outcome for most of the leading members of the constitutional generation to converge upon an understanding of the text wholly at odds with the text’s ordinary meaning at the time. This illustrates a leading way in which textualists can use statements of the Framers (and other members of the constitutional generation), the convention and ratification debates, and post-constitutional practice to establish textual meaning. To a textualist the text is authoritative, and the meaning of the text is fixed by its ordinary meaning at the time it was adopted; what particular individuals—even particular drafters or ratifiers—said, thought or predicted about it does not alter its meaning. In the first instance, then, one should interpret the text, not interpret what people later said was intended by it. But views of the drafters and their contemporaries, particularly consensus views, are nonetheless an important interpretive tool because they provide a cross-check upon our reading of eighteenth-century meaning. That meaning is sufficiently remote that we may doubt our ability to uncover it, even where the constitutional language seems reasonably clear. Where we, through our best efforts to reconstruct eighteenth-century meaning, reach a result at odds with the consensus views of the Framers and other eighteenth-century interpreters, it is particularly appropriate to doubt our construction. That does not mean that we should substitute the Framers’ intent for the meaning of the text, but it does invite us to revisit our assumptions about the meaning of the text, to see if we might have missed something.

II. THREE VIEWS OF THE FORMAL DECLARATION OF WAR

This Part examines the eighteenth-century understanding of the formal declaration of war, as reflected in both theory and practice. The most obvious meaning of the Constitution’s phrase “declare war” is that it referred to the practice of issuing a formal proclamation, styled a “declaration of war,” which announced the existence of a state of hostilities. As noted, this was a common sense in which the phrase

⁹⁴ The commentary of the founding generation is particularly troubling because much of it comes from individuals such as Hamilton, who generally took an expansive view of executive power. One would not expect Hamilton, for example, to embrace a substantial limit on executive power if he did not think the Constitution compelled it. Yet Hamilton consistently acknowledged—most plainly in his 1793 *Pacificus* essay—that the decision to go to war lay with Congress. See Parts IV.B and IV.C (discussing Hamilton’s views).

“declare war” was used in the eighteenth century.⁹⁵ It is, moreover, what today we most immediately associate with “declaring” war, especially in the constitutional sense. When we speak of times that the United States has “declared war,” we refer to times that the United States has issued a formal proclamation announcing war, as done during World War I and World War II; when we speak of “undeclared” wars we mean conflicts such as the Korean War, where no such formal proclamation was promulgated. Accordingly, it is important to examine closely the role the formal proclamation of war played at the time the Constitution was drafted.

As set forth below, eighteenth-century theoretical writers did not agree upon the role of the formal announcement of war (which they variously called a “proclamation” or “denunciation” as well as a “declaration”) in international law. Their views fall into three categories: (a) that it was prerequisite to commencing hostilities, (b) that it was necessary to invoke the legal state of war, or (c) that it served as an optional medium for the notification and justification of (often-preexisting) conflict. While each of these views appears in theoretical writing, only the last view described the actual practice, and thus can be called a common or ordinary meaning.

A. Grotius and the Seventeenth Century

We may begin with Hugo Grotius, the great Dutch writer of the seventeenth century. Grotius, who wrote his leading work, *De Jure Belli et Pacis*,⁹⁶ in Latin more than 150 years before the framing of the Constitution, might seem too remote from the Framers to offer any clear guidance as to their meaning. But Grotius is important for at least three reasons. First, he has been called “the founder of modern international law,” and though this may overstate his work’s novelty, he certainly was recognized as a preeminent figure in the field.⁹⁷ In particular, the international law writers of the eighteenth century saw

⁹⁵ See Vattel, *Law of Nations* at 315 (cited in note 8) (“[W]e owe this further regard to humanity, and especially to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force, for the purpose of bringing him to reason. This is called *declaring war*.”).

⁹⁶ Hugo Grotius, *The Rights of War and Peace* [*De Jure Belli et Pacis*] (M.W. 1682) (William Evats, trans) (originally published 1625).

⁹⁷ William Holdsworth, for example, calls Grotius the “founder of modern international law” and says that “publication in 1625 of the *De Jure Belli et Pacis* marks the beginning of modern international law.” William Holdsworth, 5 *A History of English Law* 54–55 (Little, Brown 1924). As Holdsworth notes, Grotius had intellectual roots in the prior writing of Francisco de Vitoria and Alberico Gentili, though neither of these authors had received the wide reception Grotius did. On Grotius’s influence generally, see Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds, *Hugo Grotius and International Relations* 65 (Clarendon 1990).

him as an intellectual forefather, and often defined their views by comparison to his. Second, Grotius was widely read and cited in eighteenth-century America, despite his temporal and physical remoteness.⁹⁸ Third, he offered an interpretation of the formal declaration of war that forms an important element in the textual case for presidential war powers.⁹⁹

Grotius's view was that war "must be publicly declared; yea so publicly, that both parties may have equal knowledge thereof . . . : to exercise Hostility without denouncing War or requiring satisfaction, is not done like a Christian, nor allowable by the Law of Nations."¹⁰⁰ In support Grotius relied heavily on Roman practice. The Romans had (at least in theory) an elaborate ritual for beginning war, by which heralds or "feciales" were sent to make demands upon and announce war to neighboring states.¹⁰¹ Grotius, writing at a time when recovering Roman knowledge was much in vogue, held up their wisdom in warmaking as guidance to his own time.¹⁰²

Grotius carefully rejected the idea that the formal declaration was required by a sense of chivalry or fair play (which might be regarded as a medieval, and hence outdated, concept). The point was not to allow the enemy time to prepare, but rather to make plain the sovereign authority by which war was made: "[T]he true reason [for a formal declaration] is to remonstrate unto all Nations, That the War is made not rashly or upon any private ends, but with the Consent and Approbation of both Nations, or at least of those who have the Supreme Power on both sides."¹⁰³ This was to distinguish the actions of "Pyrats and Robbers" whose actions did not have the endorsement of any sovereign; as Grotius quoted a Roman authority: "*They are enemies . . . against whom we publicly denounce War, or who do the like against us*; the rest are but Pyrats and Robbers."¹⁰⁴

The difference between authorized and unauthorized force was of enormous importance. As far back as St. Augustine, the idea of "just war" held that war to be lawful must be "waged for a just cause" and "waged on the authority of a prince."¹⁰⁵ As Professor G.I.A.D. Draper

⁹⁸ On Grotius's influence in eighteenth-century America, see Lofgren, 81 Yale L J at 689 & n 74 (cited in note 1), and sources cited therein.

⁹⁹ Yoo, 84 Cal L Rev at 206–07 (cited in note 2) (citing and quoting Grotius).

¹⁰⁰ Grotius, *Rights of War* at 452 (cited in note 96).

¹⁰¹ See G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas about War*, in Bull, Kingsbury, and Roberts, eds, *Hugo Grotius and International Relations* 177, 177–79 (cited in note 97) (discussing Roman practice and its influence on Grotius).

¹⁰² See Grotius, *Rights of War* at 450, 452 (cited in note 96) (citing such Roman authors as Cicero and Livy); id at 455–56 (citing other Roman authors).

¹⁰³ Grotius, *Rights of War* at 454 (cited in note 96).

¹⁰⁴ Id at 450.

¹⁰⁵ Draper, *Legal Ideas about War* at 180 (cited in note 101). See M.H. Keen, *The Laws of War in the Late Middle Ages* 65–67 (Routledge & Kegan Paul 1965) (discussing the influence of

summarizes, “If a war were just in this sense . . . then it could not only legitimize acts that would otherwise have been criminal—e.g. killing as an act of war, as opposed to brigandage—but also confer on such acts legal consequences, including, for example, legal title to a ransom for a prisoner.”¹⁰⁶ But, Professor Draper continues, despite lip service to the idea of just cause, the sovereign authority became the only material component:

By the late Middle Ages a war waged on the authority of the prince (although there might be much legal debate about which princes had that right), was presumed to be a ‘just war’ The prince being sovereign, it followed that in practice there was no other authority to pass judgement upon the ‘wrong’ alleged by the prince who declared the war. The only practical standard of justice to be applied was that the war had been levied on the authority of a prince.¹⁰⁷

Thus a private act of hostilities without sovereign imprimatur was not properly war and was not protected by the laws of war, while sovereign-authorized violence was entitled to legal protection.¹⁰⁸ But as Professor Draper also points out, “[a] difficult legal question was determining whether such a prince had indeed authorized an act of war,” especially as this period represented “a phase in the gradual transition from warfare seen as a form of private *commercium* by military personnel to the idea of war as a public military service in a sovereign’s army.”¹⁰⁹

Grotius, adopting Roman tradition, argued that the formal declaration provided the sovereign imprimatur. He described the Roman ceremony of declaring war, saying “[the ceremony] being done, it was lawful for them to kill and spoil.”¹¹⁰ On this basis he concluded, for example, that in a “solemn” (that is, formally declared) war a person who “doth thus injure his Enemy, though he be apprehended in another Princes Dominion[,]” cannot “be proceeded against as an Homicide,

thinkers such as Augustine, Isidore, and Cicero).

¹⁰⁶ Draper, *Legal Ideas about War* at 182 (cited in note 101).

¹⁰⁷ Id at 183. Specifically, Professor Draper discusses the writings of Balthazar Ayala and Alberico Gentili. See id at 189–90. See, for example, Balthazar Ayala, 2 *De Jure et Officiis Bellicis et Disciplina Militari Libri III* 9 (Carnegie Institution of Washington 1912) (John Pawley Bate, trans) (originally published 1582) (concluding that a war duly authorized on both sides should be viewed as just on both sides); Alberico Gentili, 2 *De Jure Belli Libri Tres* 15–21 (Oxford 1933) (John C. Rolfe, trans) (originally published 1612) (concluding that the legal status of war is unrelated to its cause, so long as it is authorized by the sovereign).

¹⁰⁸ Draper, *Legal Ideas about War* at 182–84 (cited in note 101) (describing the rise of sovereign authority and decline of private roles in war); Keen, *Laws of War* at 78–81 (cited in note 105) (same).

¹⁰⁹ Draper, *Legal Ideas about War* at 183–84 (cited in note 101).

¹¹⁰ Grotius, *Rights of War* at 456 (cited in note 96).

or as a Thief” for “[b]y the Law of Arms all things are lawfull.”¹¹¹ In short, the effect of a “just and solemn war”—by which Grotius meant a formally declared war¹¹²—is a “license and impunity” to injure the enemy in ways that would be considered criminal in peacetime.¹¹³

In describing his view of the specific laws of war in subsequent sections, Grotius was careful to say, in each case, that these laws apply only to what he called a “just” or “solemn”—that is, formally declared—war. He wrote, for example, of the “Right to things taken in War” that “[b]esides the license that a just War gives to commit such acts [in other words, violence] against men, . . . there is also another effect, which by the Law of Nations is proper to a solemn War” which is that “those things may be acquired by a just War, which are, either equivalent to that, which though due, cannot otherwise be obtained; or which causes them to suffer who have done wrong.”¹¹⁴ In short, war authorized seizure of enemy property, but only if it was a “just”—that is, formally declared—war.

The reason, again, was that sovereign approval manifested by the formal declaration made legal what otherwise would have been illegal. Samuel Pufendorf, another seventeenth-century writer who closely followed Grotius on many points, argued that the difference was between a formal war “conducted on each side by the authority of the supreme sovereignty of a state” and informal hostilities which were not announced by previous notice and were more in the nature of a “freebooting expedition.”¹¹⁵ For Pufendorf, as for Grotius, the key was sovereign authorization, and the formal declaration (or “proclamation” to Pufendorf) was needed to show that authorization. As an eighteenth-century commentator on Grotius observed, in Grotius’s view “the great necessity for a declaration, is that there may be undoubted evidence, that the war proceeds from a sovereign power.”¹¹⁶ Or as Professor Yoo summarizes, the formal declaration’s “primary function was to trigger the international laws of war, which would

¹¹¹ Id at 457.

¹¹² In this context, Grotius defined “just war” not as a matter of justice, but only whether it had been declared. See id at 450 (stating that a war is called just “not from the Cause that excites it, nor from those Heroick Actions that are done in it[,]” but from whether it is commenced with due formalities). This point follows from the idea expressed previously by Ayala and Gentili, among others, that there is no authority to assess the “justness” of a war between equal sovereigns. See note 107.

¹¹³ Grotius, *Rights of War* at 457 (cited in note 96).

¹¹⁴ Id at 468. See also id at 481 (discussing the rights over captives “taken in a solemn War”).

¹¹⁵ Samuel Pufendorf, *2 De Jure Naturae et Gentium Libri Octo* 1300 (Clarendon 1934) (C.H. and W.A. Oldfather, trans) (originally published 1688).

¹¹⁶ Robert Ward, *An Enquiry into the Manner in which the Different Wars in Europe Have Commenced, During the Last Two Centuries*, 61–62 (G. Woodfall 1805).

clothe in legitimacy certain actions taken against one's own enemy citizens."¹¹⁷

Grotius's view suffered from two insuperable difficulties, one practical and one theoretical. As a practical matter, Grotius simply did not describe the world around him. Something like the Grotian ideal may have existed in earlier times,¹¹⁸ but in any event by the seventeenth century the pre-hostilities formalities were becoming rare. Matthew Hale, a leading English treatise writer well known in America, wrote:

A general war is of two kinds: 1. *Bellum solemniter denunciatum*, or *bellum non solemniter denunciatum*; the former sort of war is, when war is solemnly declared or proclaimed by our king against another prince or state. . . . A war that is *non solemniter denunciatum* is, when two nations slip suddenly into war without any solemnity, and this ordinarily happeneth among us.¹¹⁹

Hale's example was Spain's abortive 1588 invasion of England, which was launched without a formal declaration being made on either side.¹²⁰ Similarly, Cornelius van Bynkershoek, writing in the early eighteenth century, found Grotius unrealistic, as in practice "[w]ar may begin by a declaration, but it may also begin by mutual hostilities."¹²¹ Bynkershoek pointed to the undeclared Spanish-Dutch war of the late sixteenth century, and also to Sweden's undeclared attack on the forces of the Holy Roman Emperor during the Thirty Years War, roughly contemporaneous with Grotius's writing.¹²²

Of course, Grotius never claimed that undeclared wars did not happen, only that they did not create a legal state of war differentiated from piracy. But this too had no basis in seventeenth- (or eighteenth-) century reality. True, pirates and similar unauthorized forces were

¹¹⁷ Yoo, 84 Cal L Rev at 242 (cited in note 2).

¹¹⁸ See Hallett, *Lost Art* at 61–95 (cited in note 34) (discussing early practice).

¹¹⁹ Matthew Hale, 1 *The History of the Pleas of the Crown* [*Historia Placitorum Coronae*] 162–63 (E. Rider 1800) (originally published 1672). Hale's influence in America is noted in Bernard Bailyn, *The Ideological Origins of the American Revolution* 30 (Belknap 1992). See also Charles Molloy, 1 *De Jure Maritimo et Navali, Treatise of Affairs Maritime, and of Commerce* 7 (T. Waller 9th ed 1769) (using parallel language to describe the prevalence of wars begun without formal declaration). Professor William Hall, a leading internationalist of the nineteenth century, cited Molloy approvingly and agreed that "[m]ost of the wars of the seventeenth century began without declaration, though in some cases declarations were issued during their continuance." William Edward Hall, *A Treatise on International Law* 446–47 & n 1 (Clarendon 8th ed 1924) (A. Pearce Higgins, ed).

¹²⁰ Hale, 1 *Pleas of the Crown* at 162–63 (cited in note 119). See also Molloy, 1 *De Jure Maritimo* at 7 (cited in note 119) (also relying on the Spanish invasion as a key example of war begun without formalities).

¹²¹ Cornelius van Bynkershoek, 2 *Quaestionum Juris Publici Libri Duo* 19 (Clarendon 1930) (Tenney Frank, trans) (originally published 1737).

¹²² See id at 21–25.

treated harshly and not in accordance with the laws of war. But where sovereign authorization was manifest, the applicability of the rights of war did not turn on the presence of a formal declaration. As Bynkershoek argued in his critique of Grotius, it simply was not the case that nations applied the laws of war only in formally declared wars, and applied the laws of piracy otherwise. Bynkershoek, who was Dutch, was most familiar with examples from Dutch history, and in particular the struggle between the United Provinces and Spain that occupied much of the early seventeenth century. That conflict, he pointed out, was never formally declared, and yet the laws of war (as described by Grotius) were applied by both combatants, as even Grotius acknowledged.¹²³

Hale's treatise makes the same point. Though war may often not be solemnly declared, such a conflict constituted "a real, tho not solemn war"; as a result,

to prove a nation to be in enmity to *England*, or to prove a person to be an *alien enemy*, there is no necessity of showing any war proclaimed, but it may be averred, and so put upon trial by the country, whether there was a war or not.¹²⁴

As an example, Hale cited a case from the 1580s, when England had been at war with Spain; as Hale recounted, the defense turned upon the existence of war and, in Hale's words, the defense's "plea was ruled good, tho he [the defendant] shewed not, that any war was proclaimed between the two realms" since "in very deed there was a state of war between the crowns of *England* and *Spain*, and the *Spaniards* were actual enemies, especially after the attempt of invasion in [15]88 by the *Spanish Armada*, and yet there was no war declared or proclaimed between the two crowns."¹²⁵ From this and similar cases Hale concludes "that a state of war may be between two kingdoms without any proclamation or indiction thereof or other matter of record to prove it."¹²⁶ Accordingly, if a case turns upon it, "whether there were a war between the king of *England* and [another] prince . . . is purely a question of fact and triable by the jury."¹²⁷

¹²³ Id at 18–53 (discussing the laws of war); id at 82–85 (in discussing neutral rights, describing Grotius's reliance on a case from the undeclared Dutch-Spanish war).

¹²⁴ Hale, 1 *Pleas of the Crown* at 162 (cited in note 119).

¹²⁵ Id at 163.

¹²⁶ Id.

¹²⁷ Id at 163. Hale's immediate point was proof of treason, which among other things consisted of adhering to the king's enemies in wartime, and thus called for a determination of when war existed. The idea that the legal state of war was triggered by hostilities rather than purely by the declaration continued through the eighteenth and nineteenth centuries. See Hall, *International Law* at 81 (cited in note 119) ("When differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use

In short, Grotius described an ideal world with little basis in seventeenth-century reality. In practice, a formal declaration of war might be useful in deciding whether a legal state of war existed, but it was not necessary to the existence of a legal state of war. But even as a theoretical matter, Grotius's view had enormous drawbacks. Grotius stated a commonplace in saying that war required assent of the sovereign, and that sovereign direction distinguished war from homicide and piracy.¹²⁸ But this hardly showed that a formal declaration was necessary. The formal declaration made sovereign authority plain, but sovereign authority could also be manifested in other ways. Grotius set up a dichotomy between formally declared, sovereign authorized war, on the one hand, and unauthorized piracy on the other; the laws of war applied to one and the criminal law applied to the other. This dichotomy was seriously incomplete, for it took no account of a war obviously begun with sovereign approval, but not formally declared. Even in Grotius's theoretical world, it made no sense to treat participants in an authorized but undeclared war as pirates, for the very definition of piracy was *unauthorized violence*.¹²⁹

A new generation of international law writers soon pointed this out. Bynkershoek was the first to take the point on directly: "[I]f two sovereigns are engaged in hostilities without having declared war, can we have any doubt that war is being waged according to the will of both? In that case there can be no need of a declaration, since it is being waged publicly and needs no proof."¹³⁰ Jean Jacques Burlamaqui, another leading writer of the first half of the eighteenth century, agreed:

With respect to the reasons why a solemn denunciation was required into such a war, as by the law of nations is called just; Grotius pretends it was, that the people might be assured, that the war was not undertaken by private authority, but by the consent of one or other of the nations, or of their sovereigns. But this

regulated violence against each other . . ."); Henry Wheaton, *Elements of International Law* 214 (De Capo 1972) (originally published 1836) ("[N]o declaration, or other notice to the enemy, of the existence of war, is necessary, in order to legalize hostilities, and [] the property of the enemy is, in general, liable to seizure and confiscation as prize of war . . ."); id at 212 ("A contest by force between independent sovereign states is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other.") (emphasis added).

¹²⁸ See Draper, *Legal Ideas about War* at 180–84 (cited in note 101) (showing that Augustine, Aquinas, and subsequent thinkers required war be waged on sovereign authority).

¹²⁹ See Samuel Johnson, 2 *A Dictionary of the English Language* (Arno 1979) (originally published by W. Strahan 1755) ("War may be defined as the exercise of violence under sovereign command . . . Violence, limited by authority, is sufficiently distinguished from robbery, and like outrages.") (defining "war" and quoting Walter Raleigh).

¹³⁰ Bynkershoek, 2 *Quaestionum Juris Publici* at 21 (cited in note 121).

reason of Grotius's seems insufficient; for are we more assured, that the war is made by public authority, when a herald for instance comes to declare it with certain ceremonies, than we should be, when we see an army upon our frontiers, commanded by a principal person of the state, and ready to enter our country?¹³¹

Similarly, Thomas Rutherforth, the leading eighteenth-century English commentator on Grotius, emphasized that the difference between lawful combatants on one hand and pirates on the other was that one had sovereign authorization and the other did not. Grotius maintained that sovereign authorization could only come from a formal declaration, but, Rutherforth said, that was plainly untrue:

But even this effect [Grotius's "impunity and license"] may be produced . . . without a declaration of war. For in the less solemn kinds of war, what the members do, who act under the particular direction and authority of their nation, is by the law of nations no personal crime in them: they cannot therefore be punished consistently with this law for any act, in which it considers them only as the instruments, and the nation as the agent.¹³²

As Burlamaqui, Bynkershoek, and Rutherforth suggest, Grotius's concerns about clarifying the sovereign authority of a military expedition were largely outdated even as Grotius wrote them, and had little place in the eighteenth century at all. In earlier times a fair bit of hostility among nations was carried on by quasi-private forces with quasi-sovereign authority—consider, for example, the sixteenth-century voyages of the English buccaneers against the Spanish.¹³³ In such times a fine line separated the pirate from the patriot, and Grotius's attention to clarifying the sovereign authority of a hostile act made sense. But the seventeenth century—and even more so the eighteenth century—was an era of nation-states and national armies, and most hostility was conducted by regular armies and navies rather than freelancers.¹³⁴ To take one of Bynkershoek's examples, Sweden's army attacked the forces of the Holy Roman Empire without declaration upon Sweden's entry into the Thirty Years War, but there could have been no doubt as to the sovereign authority behind the attack, since Sweden's king Gustavus Adolphus led the army in person.¹³⁵ Nor could anyone

¹³¹ Jean Jacques Burlamaqui, 2 *The Principles of Natural and Politic Law* 189 (Cambridge 1807) (Thomas Nugent, trans).

¹³² Rutherforth, 2 *Institutes* at 580 (cited in note 65).

¹³³ See Harry Kelsey, *Sir Francis Drake: The Queen's Pirate* 40–67 (Yale 1998).

¹³⁴ See Christopher Duffy, *The Military Experience in the Age of Reason* 14–18 (Atheneum 1988) (discussing the regularization of military forces in the eighteenth century).

¹³⁵ Bynkershoek, 2 *Quaestionum Juris Publici* at 24 (cited in note 121).

mistake the eighteenth-century Prussian army for a group of pirates, even when Frederick the Great invaded his neighbors without formal declaration.¹³⁶ Under these circumstances, it became increasingly difficult to maintain that a formal declaration was necessary to show sovereign authorization.

B. The Formal Declaration in Eighteenth-Century Theory

As described above, Grotius's view of the formal declaration had no basis in the realities even of his own time, and by the eighteenth century it had come under withering theoretical attack from first Bynkershoek and then Burlamaqui and Rutherforth. To Bynkershoek and Rutherforth, at least, Grotius's theoretical incoherence was sufficient reason to abandon the formal declaration altogether.¹³⁷ But another group of writers, led by Burlamaqui, shifted the focus of the formal declaration to preserve its status as prerequisite to war. The point, they said, was not to make known the sovereign endorsement of war (which could be done in other ways, as Bynkershoek and Rutherforth pointed out), but to serve as a demand upon an erring nation to cease giving injury or face armed attack.

Burlamaqui began by saying that a just war could only be made in defense, or "to obtain satisfaction for the damages, we have injuriously sustained, and to force those, who did the injury, to give security for their good behaviour."¹³⁸ Further, war was a last resort: "[W]e ought not to have recourse to force; but when we can employ no milder method of recovering our right."¹³⁹ So far, he largely tracked Grotius's views.¹⁴⁰ But then he tied these points directly to the formal declaration:

[I]f after having used all our endeavours to terminate differences in an amicable manner, their remains no further hope, and we are absolutely constrained to undertake a war, we ought first to declare it in form. . . . [P]rudence and natural equity equally require, that, before we take up arms against any state, we should try all amicable methods to avoid coming to such an extremity. We

¹³⁶ Duffy, *Military Experience* at 151–88 (cited in note 134) (discussing Frederick's campaigning style); Maurice, *Hostilities* at 22 (cited in note 35) (discussing Frederick's wars against Austria and Saxony).

¹³⁷ See Bynkershoek, 2 *Quaestionum Juris Publici* at 21 (cited in note 121) ("[T]he arguments by which they [including Grotius] generally support the requirement of such a declaration are of no worth. Grotius disapproves of the one offered by Gentili, but his own argument . . . if not worse is at least very poor."); Rutherforth, 2 *Institutes* at 576–80 (cited in note 65) (questioning Grotius).

¹³⁸ See Burlamaqui, 2 *Principles* at 163 (cited in note 131).

¹³⁹ *Id.* at 184.

¹⁴⁰ See Draper, *Legal Ideas about War* at 194–97 (cited in note 101) (discussing Grotius's ideas on the just causes for war).

ought then to summon him, who has injured us, to make a speedy satisfaction, that we may see whether he will not have regard to himself, and not put us to the hard necessity of pursuing our right by force of arms.¹⁴¹

Burlamaqui's justification for the formal declaration was picked up by the leading German internationalist, Christian Wolff, shortly after mid-century. Wolff began by saying that the "declaration" should really just be called an "announcement" since declaration might imply an unnecessary level of formality.

Since a declaration or announcement of war is made with the purpose that the other party may understand that we have determined on war against him and for what reason that has been done, consequently nothing else is required than that this should come to the notice of the other; the method of announcing the war will naturally depend upon the will of the one announcing it, nor does it require special solemnities.¹⁴²

But whatever the form, Wolff was clear that some announcement was required prior to hostilities:

[W]e must not resort to this remedy [in other words, war], which is especially to be avoided, because it draws after it a great mass of evils for each of the belligerent parties, as long as there is even the least hope that without it we can acquire what we are striving to acquire by force of arms; it is therefore necessary that we should indicate that we are going to bring war upon another, in order that, before there may be a resort to arms, he can offer fair conditions for peace, and thus war may be avoided.¹⁴³

Emmerich de Vattel, the international law writer best known to the Framers, made similar points. He began by emphasizing that war can only be made in a just cause, to remedy an injury:

The right of making war belongs to nations only as a remedy against injustice: it is the offspring of unhappy necessity. This remedy is so dreadful in its effects, so destructive to mankind, so grievous even to the party who had recourse to it, that unquestionably the law of nature allows of it only in the last extremity,—

¹⁴¹ Burlamaqui, 2 *Principles* at 187 (cited in note 131). See also *id.* at 189 ("[T]he principal end of a declaration of war . . . is to let all the world know, that there was just reason to take up arms, and to signify to the enemy himself, that it had been, and still was, in his power to avoid it.").

¹⁴² Christian Wolff, 2 *Jus Gentium Methodo Scientifica Pertractatum* 365 (Clarendon 1934) (Joseph H. Drake, trans) (originally published 1764).

¹⁴³ *Id.* at 367.

that is to say, when every other expedient proves ineffectual for the maintenance of justice.¹⁴⁴

Accordingly, said Vattel, a nation must have suffered an injury from another, and “a reasonable satisfaction have been denied” by the latter.¹⁴⁵ At that point, in his view, the injured nation had the right to resort to war, but only upon making a formal declaration, for:

[a]s it is possible that the present fear of our arms may make an impression on the mind of our adversary, and induce him to do us justice,—we owe this further regard to humanity, and especially to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force, for the purpose of bringing him to reason. This is called *declaring war*.¹⁴⁶

The key to the Burlamaqui/Wolff/Vattel view of the formal declaration was that it gave the opposing party a chance to offer compensation without fighting; as in Grotius’s view, the purpose of the formal declaration was not to give the other party a fair chance to prepare to fight. In Wolff’s words, “war is not announced for the purpose that you may not assail another who is unprepared.”¹⁴⁷ Further, “war is to be announced with no other purpose than that the opposing party can avoid it by the offer of fair conditions of peace.”¹⁴⁸ Thus “it is not to be doubted that an announcement of war can be made by one who has already advanced with his army to the boundaries of the territory of the opposing party.”¹⁴⁹

In short, Burlamaqui, Wolff, and Vattel saw war (properly conducted) as a system of justice providing a remedy for nations injured by another sovereign. The formal declaration of war was a key part of this “judicial” system, since war was permitted only as a last resort: The formal declaration was the final warning, required before hostilities could be commenced, to assure that the last resort was indeed necessary. In this way they preserved Grotius’s requirement of a for-

¹⁴⁴ Vattel, *Law of Nations* at 314 (cited in note 8).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 315.

¹⁴⁷ Wolff, 2 *Jus Gentium* at 370 (cited in note 142). Vattel makes the same point in almost the same language. See Vattel, *Law of Nations* at 317 (cited in note 8) (“The law of nations does not impose the obligation of declaring war, with a view to give the enemy time to prepare for an unjust defence.”). Burlamaqui less conclusively said that “we ought not to commit acts of hostility immediately upon declaring war, but should wait . . . until he, who has done us the injury, plainly refuses to give us satisfaction,” although he thought such restraint was required only “so long at least, as we can without doing ourselves a prejudice.” Burlamaqui, 2 *Principles* at 187–88 (cited in note 131).

¹⁴⁸ Wolff, 2 *Jus Gentium* at 370 (cited in note 142).

¹⁴⁹ *Id.*

mal declaration, while investing it with a new rationale to shield it from Bynkershoek's critique.¹⁵⁰

Though Burlamaqui, Wolff, and Vattel were arguably the three leading internationalists of their day, their view could hardly be said to represent a new consensus. First, it did not even persuade all international law writers. Bynkershoek's work remained a powerful rejection of the whole idea of the necessity of formal declarations, although he had written before Burlamaqui began to reconceptualize the formal declaration and thus did not address the new arguments. But even some late eighteenth-century writers—in particular the English internationalist Rutherford and his compatriot Richard Lee—rejected the idea of a formal declaration being in any sense required.¹⁵¹

Second, legalists like Burlamaqui, Wolff, and Vattel described a theoretical world wholly divorced from the reality of eighteenth-century power relations. European war in the eighteenth century was not primarily about pursuing redress for injuries, but about territorial expansion, commercial advantage, and domestic security from over-powerful neighbors. Though nations often ascribed their aggression to real or imagined slights, there can be little doubt, for example, that the War of Spanish Succession was (on the coalition side) primarily about preventing France from dominating Europe; that the War of Austrian Succession was (on the Prussian side) primarily about making territorial gains at the expense of Austria and (on the English side) about keeping Austria as a balance to Prussian ambition; and that the Seven Years' War (in its Franco-British dimension) was about control of colonial empires, especially in North America.¹⁵²

In this world the formal declaration as Burlamaqui, Wolff, and Vattel described it had little place. If war was not really about righting a wrong, there was little point in a prior statement of the wrong, which would do little but betray one's plans and goals prematurely. Not surprisingly, therefore, in the real world (as opposed to the world of the treatise writers) formal declarations almost never preceded the commencement of hostilities. As noted, Hale, Molloy, and Bynkershoek

¹⁵⁰ The rationale was not really new, in that it formed at least part of the rationale of the ancient Roman system. See Vattel, *Law of Nations* at 315 (cited in note 8) (interpreting Roman practice as designed to give an enemy a chance to offer satisfaction).

¹⁵¹ Rutherford, 2 *Institutes* at 577 (cited in note 65) ("The only real effect of a declaration of war is, that it makes the war a general one, or a war of one whole nation against another whole nation."); Richard Lee, *A Treatise of Captures in War* 11–34 (W. Clarke & Sons 2d ed 1803). Lee, relying heavily on Bynkershoek and Rutherford, concluded that "it does not appear, by the law of nations, that a solemn *declaration of war* is absolutely requisite," while noting that princes often do it voluntarily from a "greatness of mind." *Id* at 19.

¹⁵² See Duffy, *Military Experience* at 319–26 (cited in note 134) (appendix describing principal wars and campaigns during the Age of Reason). See generally J.R. Hale, *War and Society in Renaissance Europe, 1450–1620* (St. Martin's 1985); Michael Howard, *War in European History* (Oxford 1976).

recorded the rarity of the pre-hostilities declaration in the seventeenth century;¹⁵³ it became, if anything, rarer still in the eighteenth. Ward and Maurice, who each compiled exhaustive lists of eighteenth-century conflicts, concluded that no more than three or four were declared in advance.¹⁵⁴ Of the three most important wars of the mid-eighteenth century—the war of Austrian Succession, the Seven Years’ War, and the Anglo-French conflict associated with the American Revolution—none was declared in advance.¹⁵⁵ In sum, the Burlamaqui/Wolff/Vattel view was as removed from actual practice as was that of Grotius.

The Burlamaqui/Wolff/Vattel view, by reconceiving the formal declaration, also created a new theoretical problem. If the formal declaration was not about showing sovereign authorization, there was less justification for applying the laws of war to declared conflicts but not to undeclared conflicts, as Grotius had urged. On the other hand, if the formal declaration was not required to trigger the legal protections of the laws of war, there was even less incentive for rulers to embrace it. Grotius’s system at least provided a penalty for failure to declare (or at least, it would have provided a penalty, had domestic legal systems treated undeclared wars the way he said they should). Burlamaqui’s system even in theory lacked comparable sanctions.

The eighteenth-century advocates of formal declarations dealt with this problem in three ways. Burlamaqui, generally the most critical of Grotius, flatly rejected Grotius’s conclusion as to the consequences of a failure to declare. Following his discussion of the laws of war, Burlamaqui wrote: “These are the rights, which war gives us over the effects of the enemy. But Grotius pretends, that the right, by which we acquire things taken in war, is so proper and peculiar to a solemn war, declared in form, that it has no force in others.”¹⁵⁶ This, however, was to Burlamaqui unwarranted; he extended the laws of war to all contests, even civil wars, except those involving actual pirates.¹⁵⁷ In short, Burlamaqui, while requiring a formal declaration as a matter of the law of nations, did not admit of any immediate practical consequences of failing to issue one.

Wolff maintained the idea that the rights of war applied only in just wars, not in unjust wars.¹⁵⁸ (By “just” he meant not merely

¹⁵³ See notes 119–28 and accompanying text.

¹⁵⁴ See generally Maurice, *Hostilities* (cited in note 35); Ward, *Enquiry* (cited in note 116).

¹⁵⁵ See generally Maurice, *Hostilities* (cited in note 35); Ward, *Enquiry* (cited in note 116). Richard Lee’s mid-eighteenth-century treatise similarly concluded that wars frequently began without formal declarations. See Lee, *Captures in War* at 29–32 (cited in note 151) (citing examples, including the crucial example of the Seven Years’ War).

¹⁵⁶ Burlamaqui, 2 *Principles* at 209 (cited in note 131).

¹⁵⁷ See *id.* at 209–10.

¹⁵⁸ Wolff, 2 *Jus Gentium* at 402 (cited in note 142) (“He who wages an unjust war has no right in war.”).

formally declared, but also undertaken for good cause.)¹⁵⁹ But, he said, as a practical matter the international community must deem all wars just on both sides, leaving the judgment of the justice of a war to the sovereigns involved. Thus all combatants enjoyed equally the rights of a just war.¹⁶⁰ As with Burlamaqui, this would seem to produce no legal effects of failing to issue a formal declaration.

Vattel is a more complicated case. Initially, he appears to follow Grotius:

Thus, when a nation, or a sovereign, has declared war against another sovereign on account of a difference arisen between them, their war is what among nations is called a lawful and formal war; . . . Nothing of this kind is the case in an informal and illegitimate war, which is more properly called depredation. Undertaken without any right, without even an apparent cause, it can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules prescribed in formal warfare. She may treat them as robbers.¹⁶¹

Like Grotius, Vattel thereby appears to set up a sharp dichotomy between formally declared wars and piracy:

Legitimate and formal warfare must be carefully distinguished from those illegitimate and informal wars, or rather predatory expeditions, undertaken either without lawful authority or without apparent cause, as likewise without the usual formalities, and solely with a view to plunder. . . . Such were the enterprises of the *grands compagnies* which had assembled in France during the wars with the English,—armies of banditti, who ranged about Europe, purely for spoil and plunder: such were the cruises of the *buccaneers*, without commission, and in time of peace; and such in general are the depredations of pirates.¹⁶²

Therefore, Vattel, like Grotius, does not have a way to deal with wars undertaken for strategic reasons (or other reasons beyond mere robbery) under clear sovereign authority, but without formal declaration.

¹⁵⁹ See *id.* at 42 (“[T]here is no just cause of war unless a wrong has been done or threatened.”).

¹⁶⁰ See *id.* at 454–56 (describing war considered just on both sides). Hall echoed Wolff’s point a century later: “[B]oth parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights.” Hall, *International Law* at 82 (cited in note 119).

¹⁶¹ Vattel, *Law of Nations* at 320 (cited in note 8). See also *id.* at 319 (“A war in due form is also called a regular war, because certain rules, either prescribed by the law of nature, or adopted by custom, are observed in it.”).

¹⁶² *Id.* at 319.

In his discussion of formal war, Vattel finessed the point: All his examples of affairs that were not “legitimate and formal war” were situations in which sovereign authority was either unclear or plainly lacking. Vattel did not say how he would handle undeclared but plainly authorized war. In working out the details, though, Vattel approached the matter differently from Grotius, suggesting that he (like Wolff and Burlamaqui) thought that the rights of war turned on sovereign authorization, not upon the formal declaration. Grotius, it will be recalled, carefully prefaced his discussion of each specific right of war by saying that this was a right that obtained in a formally declared war.¹⁶³ Vattel, on the other hand, defined the laws of war as relating to “belligerents” or “enemies,” which in turn he defined in a way that did not depend upon formal declaration. The enemy, he said, is simply “he with whom a nation is at open war.”¹⁶⁴ The laws of war, he said, permit us to seize property from “the enemy”—so that the right of seizure does not appear to turn on a formal declaration.¹⁶⁵

In any event, the legal systems of the eighteenth century, as in the seventeenth century, did not treat the participants in undeclared wars as pirates. Rutherford and Lee, who followed Bynkershoek in rejecting the required declaration, emphasized that in practice the declaration was not necessary to invoke the laws of war. Rutherford, for example, followed English practice in denying that a formally declared war “produces any effects of right, by a purely positive law of nations, which other public wars will not produce.”¹⁶⁶ Nothing occurred in eighteenth-century jurisprudence that would call into question Matthew Hale’s conclusion of a century earlier, namely that while a legal state of war might be established by the existence of a formal declaration, it might also be established by actions taken by the contending sides.¹⁶⁷ Rather, English courts adhered to the view that hostilities created a state of war, as reflected in a leading 1779 decision:

¹⁶³ See Part II.A.

¹⁶⁴ Vattel, *Law of Nations* at 321 (cited in note 8).

¹⁶⁵ Id at 364 (“We have a right to deprive our enemy of his possessions.”).

¹⁶⁶ See Rutherford, 2 *Institutes* at 577 (cited in note 65). See also Lee, *Captures in War* at 64–77 (cited in note 151) (discussing the right to seize an enemy’s goods during war without suggesting that the presence or absence of a final declaration affected the matter). Lee said of the formal declaration: “[W]hether these methods are observed or not, yet, if *de facto* there be a war between princes, they and their subjects are in a state of hostility; and they are in the condition of enemies to each other,” and in any case “these solemnities are now, for the most part, antiquated.” Id at 17. And, as Lee asked rhetorically, “What is, or ever was, the difference between a war declared and not declared?” Id at 14.

¹⁶⁷ See notes 119–28 and accompanying text. Professor Yoo relies on Blackstone as importing the Grotian ideal into eighteenth-century English law. See Yoo, 84 Cal L Rev at 205–07 (cited in note 2). But Blackstone seems highly ambiguous. He followed Grotius in saying that a formal declaration served to distinguish between wars conducted under sovereign authority and acts of private piracy. See Blackstone, 1 *Commentaries* at *249–50 (cited in note 70) (citing Grotius explicitly). However, he softened Grotius’s language somewhat, saying only that “a denunciation of

Where is the difference, whether a war is proclaimed by a Herald at the Royal Exchange, with his trumpets, and on the Pont Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon? . . . If learned authorities are to be quoted, Bynkershoek has a whole chapter to prove, from the history of Europe, that a lawful and perfect state of war may exist without proclamation.¹⁶⁸

C. The Formal Declaration in Eighteenth-Century Practice

The Burlamaqui/Wolff/Vattel view of formal declarations ultimately suffers the same problem as did Grotius's view: It is too remote from practice, since undeclared wars were frequent, and were fought on the same terms as formally declared wars. This is not to say, however, that there were no formal declarations of war. In fact, formal declarations remained fairly common throughout the eighteenth century. There simply were few *pre-hostilities* declarations.¹⁶⁹ Further, the declarations rarely set out conditions for peace, as the legalists would have them do. Rather, they served purposes that Vattel and Wolff described as secondary. They made a "publication" (as Wolff called it) of the war to subjects and third parties, and frequently contained specific directions to subjects and third parties of rules to be enforced during the war. Further, they often recited injuries sustained, not with a view

war ought always to precede the actual commencement of hostilities" so that "it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community." Id at *250. This passage certainly suggests that a declaration might be dispensed with if sovereign authority was "certainly clear" from another source. For Blackstone the key distinction was sovereign authority: "Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless [it] should justify their proceedings, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers . . ." Id at *249. Again, this suggests that duly authorized sovereign agents, even in an undeclared war, would not be treated as robbers and pirates, not being "unauthorized volunteers in violence." See id.

Blackstone also wrote 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." Id at *250. Professor Yoo relies heavily on this passage, Yoo, 84 Cal L Rev at 205, but the difficulty is that Blackstone did not specify what he meant by "completely effectual"; his contemporary Thomas Rutherforth thought this a meaningless phrase. See Rutherforth, 2 *Institutes* at 576–80 (cited in note 65). In any event, Blackstone nowhere directly contradicted what Hale said in the previous century: that under English law the legal state of war could be created either by a formal declaration or by a hostile act.

¹⁶⁸ *The Maria Magdalena*, 165 Eng Rep 57, 58 (Adm 1779). Wormuth and Firmage quote this passage and conclude that "it has always been possible at British and American law to enter into war without a formal proclamation . . ." Wormuth and Firmage, *To Chain the Dog of War* at 19–20 (cited in note 1).

¹⁶⁹ See generally Maurice, *Hostilities* (cited in note 35).

of averting war by settlement (as typically the war had been going for some time), but with a view to justifying the hostilities to third parties. As Wolff said:

Now justifying reasons are set forth in declarations of war particularly for the sake of outsiders, that they may be able to decide as to the justice of the war; and they are explained for the sake of subjects, that their complaints concerning the undertaking [of] the war may be cut off or at least mollified.¹⁷⁰

Thus eighteenth-century practice suggests a different and more modest role of the formal declaration. In theory it could be used to provide advance notice of war, but in fact it was rarely used that way. In theory it also could be used to show sovereign approval of hostilities, in order to create (or confirm) a legal state of war, but in fact it was rarely used that way either, and sovereign authorization was rarely in doubt as a result of eighteenth-century military practice. Rather, the formal declaration was used to give notice of the existence of hostilities, to those who might not otherwise have heard of them, and as a rhetorical device for explaining the reasons for the war.

Neither of these uses should be dismissed as empty or pointless. In a century of limited communications the official pronouncement was an important (and reliable) source of news. A formal declaration served as a warning to subjects and neutrals of the existence of a state of war, and thus of the applicability of the international laws of war (especially those relating to seizure of persons and property). This was particularly important to international merchants, who would need to take steps to safeguard ships and cargo. As indicated by practice in the prize courts, prizes could be taken without a formal declaration, but the formal declaration made merchants—especially one's own merchants—aware of the risks. Similarly, a formal declaration was a warning to subjects that treating with the enemy was treason. As Hale's treatise made clear, treating with the enemy would be treason even absent a formal declaration, but the formal declaration was useful in informing subjects of the risks. Conversely, the formal declaration notified one's own subjects that property of the enemy could be seized. Again, the formal declaration itself was unnecessary to legitimize the seizure, but it made that legitimacy more widely known. In short, the formal declaration was a practical convenience—a way of conveying official notice—but not a legal or practical necessity.

As Wolff's comments indicate, the rhetorical element of the formal declaration might also be useful. Though the eighteenth century generally had a practical and strategic view of international power re-

¹⁷⁰ Wolff, 2 *Jus Gentium* at 380–81 (cited in note 142).

lations, rhetorically it remained under the influence of the international writers' legalism. Nations often felt the need to justify war in terms of wrongs done by the other party. Again, given the limited communication, the formal declaration was a way of showing to citizens and third parties the justness of the war in a communication likely to attract attention due to its symbolic significance. Thus, formal declarations often included justifications or lists of outrages committed by the other side, and frequently asserted that the other side had begun the hostilities. Although as a practical matter the reasons given might be pretextual, they might have rhetorical force in rallying support. Relatedly, as Wolff noted, formal declarations might contain specific directions or prohibitions aimed at neutrals, or subjects of the warring states. A formal declaration might state, for example, that certain goods would be treated as contraband or a certain type of contact with the enemy would or would not be permitted. These prohibitions did not flow from the formal declaration itself, but rather were specifically enunciated by the sovereign authority. As such, they could have been announced independently from the formal declaration, and sometimes were, but the formal declaration made a convenient vehicle.

This view of the formal declaration is (unlike the theorists' views) consistent with seventeenth- and eighteenth-century practice. It explains why formal declarations were commonly made, but rarely made prior to the commencement of hostilities, and sometimes not made at all. Because they were made largely for the convenience of the warring state and its subjects, they were dispensed with or delayed when issuance would not be convenient for other reasons. However, they were not abandoned altogether, for they still had some utility. Moreover, they were typically directed at neutrals and subjects rather than enemies, and were often phrased as recognizing an existing state of war, usually said to have been begun by the other side.¹⁷¹

D. Conclusion: The Eighteenth-Century Understanding of the Formal Declaration

In sum, the eighteenth-century formal declaration of war was a matter of convenience to the nation that issued it, and not a thing required to achieve any particular result in international law or practice. The idea of a formal declaration as prerequisite to war, while appealing, represented little more than the wishful thinking of a number of European writers who viewed war legalistically rather than practi-

¹⁷¹ See Hallett, *Lost Art* at 76 (cited in note 34) (describing this practice as the "degeneration of declarations of war from international negotiating instruments to domestic propaganda").

cally.¹⁷² Not even all European internationalists endorsed the view: Bynkershoek, the great Dutch jurist, was a conspicuous dissenter. In England, many leading names—including Molloy, Hale, Rutherford, and Lee—rejected the idea outright, and Blackstone, while remaining somewhat ambiguous, did not endorse it directly.¹⁷³ More importantly, practice was flatly against the idea of formal declaration as prerequisite, as early Americans well knew. The majority of eighteenth-century conflicts (including the Anglo-French hostilities accompanying the American Revolution) began without a formal declaration, though in many cases a formal declaration was issued during the course of hostilities.¹⁷⁴ In short, interpreting a formal declaration as a prerequisite to hostilities would not have seemed a common or reasonable reading to eighteenth-century Americans.¹⁷⁵

The same can be said for the second view, principally associated with Grotius, that the formal declaration was prerequisite to the invocation of the laws of war. Again, some European publicists—notably Grotius and to some extent Vattel—sought to attach this consequence to the formal declaration. However, this view enjoyed even less acceptance than the idea of formal declaration as prerequisite to hostilities, as some writers—including Wolff and Burlamaqui—accepted the latter view but not the former. Again, of critical importance, this view did not describe ordinary practice in England. As Matthew Hale showed, English law treated a legal state of war as arising from the fact of hostilities; a formal declaration was *evidence* that a legal state of war existed, but it was not *prerequisite* to a legal state of war.¹⁷⁶

¹⁷² In particular, this was the view of Burlamaqui, Wolff, and Vattel. See Part II.B.

¹⁷³ See notes 119–36, 151, 166–67 and accompanying text.

¹⁷⁴ See Part II.C.

¹⁷⁵ The Framers of the Constitution—and educated Americans generally—no doubt knew of the declaration-as-prerequisite view. Some, perhaps even a majority, may have privately endorsed it. But without constitutional language explicitly adopting it, there is little ground for embracing it as the natural implication of the constitutional language, since it was not the prevailing view in practice, nor even the consensus view in theory.

In fact, almost no one among the congressionalist scholars takes the position that a formal declaration of war necessarily preceded hostilities in the eighteenth century, or that it is constitutionally prerequisite to the commencement of hostilities. The exception is J. Gregory Sidak, who argues for the formal declaration as a constitutional necessity but without much inquiry into eighteenth-century meaning. See generally Sidak, 41 Duke L J 27 (cited in note 36). See also Hallett, *Lost Art* at 27–57 (cited in note 34) (arguing for a return to the use of formal declarations, more as a matter of political and democratic theory than constitutional law).

¹⁷⁶ Professor Yoo, to the extent he reaches a contrary conclusion, relies on three writers: Grotius, Vattel, and Blackstone. Yoo, 84 Cal L Rev at 205–07 (cited in note 2). Grotius did see the formal declaration as a prerequisite to invoking the laws of war, but as demonstrated he was an outlier even among European writers. Vattel is ambiguous on the point, as he initially endorses Grotius's view, but does not seem to insist on it in later, more detailed discussions of the law of war. Blackstone is also difficult to read, saying that a declaration is necessary to "perfect war" without explaining the practical implications of "perfect war." See note 167. Professor Yoo does not discuss the views of Burlamaqui, Wolff, Bynkershoek, Rutherford, and Lee, all of whom

Rather, the only eighteenth-century view that commanded any broad support in practice is the third sense of the formal declaration, discussed above. The formal declaration was a notification of a state of war, which might be convenient at times but ill-advised at others. It could have practical effects in that it could be used as evidence of the existence of war for legal purposes, and it informed neutrals and subjects that a war existed where they might not otherwise realize that it did.¹⁷⁷ It did not, however, have any indispensable legal or practical content, for the legal state of war could be (and usually was) triggered by hostilities, and a formal declaration was not prerequisite to hostilities. In short, this was the ordinary meaning of a formal declaration of war in the eighteenth century, however much some European writers sought—against all evidence of practice—to infuse the formal declaration with greater significance.

As a result, if the Declare War Clause is taken to refer to the power to issue a formal declaration, this is the sense of the formal declaration it must convey. Yet this interpretation of the phrase as a constitutional matter is problematic in several respects, as explored in greater detail in Part IV. It cannot be harmonized with post-drafting statements of numerous political leaders (many of them Framers) who indicated that Congress had all or most of the power to place the nation in a state of war, and argued that the President's lack of the declare-war power left the U.S. presidency weaker than the English monarchy.¹⁷⁸ It also does not provide a structural explanation of the Declare War Clause. As discussed, the idea of residual executive power in foreign affairs means that the President has the executive foreign affairs powers (including war powers) not conveyed to another branch by the text of the Constitution.¹⁷⁹ Put another way, the Declare War Clause should be viewed as a reassignment of previously executive war powers to Congress. Yet it is difficult to understand why the Framers would want to reassign an essentially rhetorical power to Congress, or why they would think that making such an assignment was a worthwhile limitation upon the President's executive power.¹⁸⁰

took the opposing view, nor does he consider actual English practice as summarized by Hale. See Yoo, 84 Cal L Rev at 205–07.

¹⁷⁷ Professor Yoo's account at times appears to shift between this third view of the formal declaration (that is, that it was merely an announcement of a preexisting legal status) and the view discussed earlier (that is, that it *triggered* a change in legal status). To the extent he views it as merely an announcement, I think he is largely consistent with eighteenth-century practice—but viewing the formal declaration in this way greatly undermines his attempt to explain the Declare War Clause. See Part IV.

¹⁷⁸ See Part I.A.

¹⁷⁹ Prakash and Ramsey, 111 Yale L J at 252–56 (cited in note 4) (outlining the theory of residual executive foreign affairs power in the President).

¹⁸⁰ See Part IV. For this reason, Professor Yoo strives to embrace Grotius's view that a formal declaration was needed to trigger a state of war. See Yoo, 84 Cal L Rev at 242–50 (cited in

These difficulties might not be enough to overcome the plain meaning of the Constitution's text, if no other reading were available. However, they do suggest a need to revisit the common assumption that "declare war" refers only to the issuance of a formal declaration.

III. DECLARING WAR BY "WORD OR ACTION"

Most discussions of war powers have been content, without elaborate analysis, to equate the constitutional phrase "declare war" with the eighteenth-century practice of issuing a formal proclamation of war. This approach misses an important alternate usage of the phrase that makes more sense as a constitutional matter. Review of eighteenth-century writings makes clear that a nation might "declare" war, not only by a formal announcement, but also by an act of hostility; as John Locke wrote, one may declare "by Word or Action."¹⁸¹

First, consider the dictionary definition. Samuel Johnson's Dictionary of the English Language, published near the time of the framing, does not define "declare war" as a phrase, but its individual definitions are consistent with the idea that "declaring war" could be done by pronouncement or by hostile act. Johnson defined war as "the exercise of violence under sovereign command against withstanders."¹⁸² This reflects the common view in both the seventeenth and eighteenth century that what distinguished war from ordinary violence was the sovereign authorization, or in Johnson's words, "sovereign command."¹⁸³

For "declare," Johnson listed as relevant definitions: "to make known; to tell evidently and openly"; "[t]o publish; to proclaim"; "[t]o shew in open view."¹⁸⁴ Since the "sovereign command" was the *sine qua non* of war (as opposed to other violence), one would expect this element to be the one the sovereign needs to "make known." A formal proclamation would, of course, accomplish the task, so issuing an official pronouncement would easily come within the definition of "declaring" war, as everyone at the time understood. But it seems difficult to say (as Grotius did) that this was the *only* way of making

note 2). This view would provide a structural explanation of the Declare War Clause—that it shifted control of the legal aspects of war to the legislative branch—without limiting the President's power to initiate hostilities. But, as discussed, Grotius's view hardly represented a common understanding of the formal declaration.

¹⁸¹ Locke, *Second Treatise* § 16 at 278 (cited in note 9).

¹⁸² Johnson, 2 *Dictionary of the English Language* (cited in note 129).

¹⁸³ We may presume that by "sovereign command" Johnson meant that the violence was done at the ultimate direction of the sovereign, not that the sovereign necessarily had to be present at the field of battle, since eighteenth-century monarchs typically were not battlefield leaders.

¹⁸⁴ Samuel Johnson, 1 *Dictionary of the English Language* (Arno 1979) (originally published by W. Strahan 1755).

the sovereign command known. Indeed, this was the central point of Grotius's critics.¹⁸⁵ Consider again, for example, King Gustavus Adolphus personally leading the Swedish army against the Holy Roman Empire in the Thirty Years War, or the Prussian regular army moving at the direction of Frederick the Great's generals in the Seven Years' War. In both cases the "violence under sovereign command" was "ma[d]e known" and "shew[n] in open view" by the hostile acts of the armies, though no formal proclamation was issued. Thus Johnson's definition is entirely consistent with "declaring" by action as well as by proclamation.

This view of "declaring" war is consistent with the way a legal state of war was understood to begin in the eighteenth century. As discussed, the state of war depended upon sovereign authorization, but not upon formal pronouncement.¹⁸⁶ The sovereign authorization had to be manifested in some public way (else one would not know that a legal state of war had commenced), but it did not have to be done in a formal document. One way authorization could be manifested was by the hostile attack of an army under sovereign direction, and since eighteenth-century armies were closely identified with the sovereign, this was a common way that a state of war began.¹⁸⁷ In such case, the act that made the sovereign authority manifest (that is, made it known or showed it in open view) was the hostile attack by the regular army, rather than a proclamation. In other words, what made the state of war known or shown in open view was the attack, and thus the attack would, in Johnson's definition, "declare" the state of war.

Such a reading is confirmed by the way the treatise writers actually used the term "declare" in conjunction with discussing a state of war. In John Locke's words:

The *State of War* is a State of Enmity and Destruction; And therefore declaring by Word or Action, not a passionate and hasty, but a sedate settled Design, upon another Mans Life, *puts him in a State of War* with him against whom he has declared such an intention.¹⁸⁸

Three key points are apparent from this passage. First, Locke gave "declaring" a broad meaning that included committing physical acts, as well as making spoken or written announcements, manifesting one's intent – hence, "declaring by Word or Action." Second, Locke directly linked this usage of "declare" to the creation of a state of war: As he said, "declaring by Word or Action . . . puts him [the declarer] in

¹⁸⁵ Parts II.A and II.B.

¹⁸⁶ See Part II.

¹⁸⁷ Id.

¹⁸⁸ Locke, *Second Treatise* § 16 at 278 (cited in note 9) (emphasis added).

a State of War.” Finally, the principal “Action” Locke presumably had in mind was an attack: Launching an attack would be the action most evidently manifesting a “setled Design upon another man’s Life.” In short, for Locke an attack “declared” the intention to enter into a state of war.

Locke was not speaking specifically about war between nations, but more figuratively about the state of mankind outside civil society. But there is no reason to think that he was using the words in an artificial way that would not translate directly to a war between nations. Indeed, the section in which the passage appears is not principally about how the state of war is declared but what its consequences are. His wording is therefore excellent evidence of an ordinary (as opposed to idiosyncratic) usage in which “declaring” could be done by “Word or Action.”¹⁸⁹

Similar usage is found in Blackstone over a half-century later. Though not primarily addressed to questions of international law, the *Commentaries*’ discussion of piracy uses “declare war” in a way that can only mean to announce through hostilities:

[T]he crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society. . . . As therefore [a pirate] has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him.¹⁹⁰

Plainly here Blackstone is speaking of declaring war by conduct, for pirates were not in the habit of announcing themselves with formalities, nor was society’s response expected to be delivered by an embassy.

Turning to the works of the international law writers, one may again find parallel usage, even among those authors who thought the formal declaration should be prerequisite to hostilities. Vattel, for example, wrote: “[W]hen one nation takes up arms against another, she from that moment declares herself an enemy to all the individuals of the latter, and authorizes them to treat her as such.”¹⁹¹

As in Locke and Blackstone, Vattel in this passage uses “declare” to mean an action (taking up arms) that itself makes a statement. Moreover, this is no casual usage, but is specifically addressed to the way in which a state of war is created. In the section from which this

¹⁸⁹ Locke’s writing, though remote in time from the Framers, was well known to them, and thus must be counted as influential upon their language. See Bailyn, *Ideological Origins* at 27 (cited in note 119) (noting the extent to which the Framers looked to Locke).

¹⁹⁰ Blackstone, 4 *Commentaries* at *71 (cited in note 65).

¹⁹¹ Vattel, *Law of Nations* at 399 (cited in note 8).

passage is lifted, Vattel was discussing the rights of subjects of a nation involved in hostilities to attack subjects of the opposing nation. This right, Vattel said, is given by the laws of war; in the passage quoted, he was saying that by taking up arms the aggressor nation invokes the laws of war. Thus, said Vattel, nations could trigger a state of war, and the application of the laws of war, by hostile acts. Similarly, Vattel said that those who ally with a nation's enemies in war are also subject to the laws of war "as their own conduct proclaims them [that nation's] enemies."¹⁹² In short, Vattel used "declare" (and "proclaim") to include the commission of hostile acts triggering a state of war.¹⁹³

Another example comes from Wolff. Speaking of alliances during war, Wolff wrote: "[H]e who allies himself to my enemy, as by sending troops or subsidies, or by assisting him in any other way, *declares by that very fact* that he wishes to be a participant in the war carried on against me."¹⁹⁴ Wolff, like Vattel, was prepared to find sovereign authorization of hostilities from a hostile act as well as from a formal announcement, and like Vattel he used the word "declare" to mean the commission of the hostile act.¹⁹⁵ Again, this is perfectly consistent with Johnson's dictionary definition of "declare" as meaning (among other things) to "make known" or "shew in open view." In the cases Wolff and Vattel were discussing, the state of war was made known by the sovereign's hostile act.

¹⁹² Id at 330. Note that Vattel generally used the word "enemy" as it appears in these quotes to denote the opposing party in a war. See, for example, id at 363 ("A State taking up arms in a just cause has a double right against her enemy."); id at 327 ("Whatever rights war gives me against my principal enemy, the like it gives me against all his associates: for I derive those rights from the right to security . . . and I am equally attacked by the one and the other party."). In giving an example from Roman history, Vattel said that "[t]he Galatians, in furnishing troops for an offensive war against the Romans, had declared themselves enemies to Rome." Id at 331.

¹⁹³ Vattel was not retreating from his view that the law of nations ordinarily required a formal declaration. But he was realistic enough to see that, however much the law of nations might require it, nations often would dispense with a formal declaration. In such case, he said, opening hostilities amounted to a declaration (though by actions rather than words), and one might treat the attacker as a wartime enemy just as if a formal declaration had been made. This usage suggests a way to reconcile Vattel's apparent endorsement of Grotius's view that the state of war was triggered only by a formal declaration of war with Vattel's subsequent discussion of the rights of war as applying in both formally declared and formally undeclared wars (so long as there was sovereign authorization). I think it plausible, on the basis of the passages quoted in the text, to read Vattel to say that a declaration is required, but for purposes of triggering the legal state of war the declaration may be made by words or by actions, so long as the sovereign authority is manifest.

¹⁹⁴ Wolff, 2 *Jus Gentium* at 377 (cited in note 142) (emphasis added).

¹⁹⁵ Or rather, Vattel used the French word and Wolff the Latin, but each is rendered, it would seem correctly, as "declare" in translation. See also Lee, *Captures in War* at 47 (cited in note 151) (stating "whoever declares himself my enemy, gives me a liberty to use violence against him," in a context clearly indicating that either a proclamation or an open attack was meant by "declares").

Further evidence of this usage lies in the constitutional precedent for the Declare War Clause. There seems little doubt that one forebear of the clause lay with the constitution of the United Provinces of the Netherlands. Beginning in the late sixteenth century, the rebellious districts in the Netherlands worked together to overthrow Spanish rule and formed something like a confederated state governed by a written constitution.¹⁹⁶ Outside of the ancient world, this was one of the few such written charters in existence at the time of the Constitution. The Netherlands Constitution had not been a great success in practice: The provinces found it too hard to work together, and ultimately the need for central authority led to domination by Holland, the strongest province, whose ruler came to occupy a position akin to king.¹⁹⁷ But it was a precedent of sorts, and was examined by early writers on American federated government such as Adams and Madison.¹⁹⁸

For present purposes, the key is that the Netherlands Constitution had a Declare War Clause. Article 9 of that constitution forbade the United Provinces “to declare war” without unanimous approval of all the provinces.¹⁹⁹ The leading eighteenth-century interpreter of that provision was Bynkershoek, the great Dutch scholar who, despite his internationalist orientation, devoted a fair bit of his work to domestic matters. Bynkershoek interpreted Article 9 to mean that the United Provinces could not *commence* war without unanimous approval. In explaining Article 9, he used the words “wage war” essentially interchangeably with “declare war”; he said, for example, that despite the unanimity requirement one province might “wage war” on its own behalf or on behalf of the Union, but that the Union could not collectively “wage war” without unanimity, since “it is possible for one province to dissent, and thus prohibit a common war or a war waged in the name of the whole federation.”²⁰⁰

As discussed above, Bynkershoek had elsewhere argued at length that a formal declaration of war was not necessary to commence war,²⁰¹

¹⁹⁶ Bynkershoek, 2 *Quaestionum Juris Publici* at 127–32 (cited in note 121) (discussing the political relationship between the several provinces of the United Netherlands and their written constitution).

¹⁹⁷ *Id.* See generally Federalist 20 (Madison), in Rossiter, ed, *Federalist Papers* 134 (cited in note 55) (discussing problems of the Netherlands constitution).

¹⁹⁸ See generally Federalist 20 (Madison) (cited in note 197); John Adams, 1 *A Defence of the Constitutions of Government of the United States of America* 22, 69 (De Capo 1971) (originally published 1787).

¹⁹⁹ See Bynkershoek, 2 *Quaestionem Juris Publici* at 128 (cited in note 121) (quoting Article 9 of the constitution of the United Provinces).

²⁰⁰ *Id.* at 132. Following Bynkershoek, Madison described the powers of the United Provinces as including the power to “make war,” although the actual language says only “declare war.” See Federalist 20 (Madison) at 134–36 (cited in note 197).

²⁰¹ See text accompanying note 130.

so he would not have thought that preventing a formal declaration would prevent a war. Instead, he must have thought that “declare war” encompassed both formal announcements and declarations by hostile act—otherwise the constitutional provision in question would not have amounted to a single-province veto of all warfare, which Bynkershoek plainly thought it did. Moreover, Bynkershoek was not taking a controversial position in this regard. In the passage in question, he was taking issue with what was apparently the more common view, which gave Article 9 an even *broad* reading. Specifically, the opposing view was that Article 9 prohibited any initiation of warfare by any province without the consent of the others. Bynkershoek argued that any province might declare/wage war on its own behalf without consulting the others; the restriction applied only to wars waged on behalf of the United Provinces as a whole.²⁰² Thus, both sides of this debate agreed that the Netherlands’ declare-war clause prevented nonunanimous initiation of hostilities, a result that depended on wars being declared by hostilities as well as by formal pronouncement.

Thus examples from English writers, international law writers, and prior practice show a usage persisting through the seventeenth and eighteenth centuries in which a state of war could be declared, as Locke put it, “by Word or Action.” It is perhaps worth noting that this usage continued well past the time of the Constitution into the late eighteenth and nineteenth centuries, in contexts unrelated to the U.S. Constitution. The English international law scholar William Hall wrote at some length on the subject of commencing war, and among other things said that “an act of hostility, unless it be done in the urgency or self-preservation or by way of reprisal, is in itself a full declaration of intention.”²⁰³ Another English writer, J.M. Maurice, gives two examples of this usage from the late eighteenth and early nineteenth centuries. When Napoleon invaded Russia, without any formal declaration, Tsar Alexander proclaimed:

For long we have observed the hostile proceedings of the French Emperor towards Russia, but we always entertained the hope of avoiding hostilities by measures of conciliation; but seeing all our efforts without success, we have been constrained to assemble our armies. Still we hoped to maintain peace by resting on our frontiers in a defensive attitude, without committing any act of aggression. All the conciliatory measures have failed: the

²⁰² Bynkershoek, 2 *Quaestionem Juris Publici* at 130 (cited in note 121) (“It is the war in behalf of the whole Union . . . which cannot be declared except by common consent. But this does not prevent any one from waging a war in its own behalf and at its own expense.”).

²⁰³ Hall, *International Law* at 444 (cited in note 119).

Emperor Napoleon, *by a sudden attack on our troops at Kowno, has declared war.*²⁰⁴

Similarly, Admiral Horatio Nelson wrote in 1798 of events during Napoleon's Italian campaigns:

I have been thinking all night of the General and Duke of Sangro's saying, that the King of Naples had not declared war against the French. Now, I assert that he has, and in a much stronger manner than the ablest minister in Europe could write a declaration of war. Has not the King received, as a conquest made by him, the Republican flag taken at Gozo? Is not the King's flag flying there and at Malta, not only by the King's absolute permission, but by his orders? Is not the flag shot at every day by the French, and returned from batteries bearing the King's flag? . . . If those acts are not tantamount to any written paper, I give up all knowledge of what is war.²⁰⁵

In sum, in the initiation of eighteenth-century war, actions spoke at least as loudly as words. There would have been nothing remarkable in using "declare war" to mean initiation of a state of war by sovereign action, as well as by proclamation. "Declare" meant, among other things, to make known or to show in open view. The military of the eighteenth century (unlike in some earlier times) was inherently and obviously a sovereign instrument in most European states; use of military force showed the sovereign's command of hostilities as surely as did a proclamation. Hostilities under sovereign command created the state of war. Thus hostilities under sovereign command declared the war, for they made known the sovereign's determination to settle a dispute by force. That the eighteenth century would view the term in this way is confirmed by numerous leading writers of the period who thought that a state of war could be created by actions as well as words. These authors described taking such actions (as well as speaking such words) as "declaring". As recounted, Locke, Blackstone, Vattel, Wolff, and Bynkershoek all used "declare" in this way. One might "declare" by issuing a formal pronouncement of war, but one might also "declare" by taking action that made manifest one's entry into a state of war.

²⁰⁴ Maurice, *Hostilities* at 44 (cited in note 35) (quoting Alexander's proclamation of June 25, 1812) (emphasis added).

²⁰⁵ Id at 32-33 (quoting Nelson to Wyndham, Nov 30, 1798). The situation, as recounted by Maurice, was that Napoleon had conquered much of Italy and forced Naples to remain neutral; but following Nelson's victory over Napoleon at the battle of the Nile, Naples entered the fighting against Napoleon (without any formal declaration) and seized territories held by the French. One of the Neapolitan generals, however, restrained Nelson from seizing certain French ships, on the grounds that Naples had not declared war on France; the quoted text is Nelson's comment upon the episode. Id at 32.

IV. THE CONSTITUTIONAL MEANING OF “DECLARE WAR”

The foregoing discussion shows that in the eighteenth century the phrase “declare war” had two common meanings. First, it was used narrowly to refer to a formal proclamation announcing the existence of a state of war. Second, it was used more broadly to refer to any act that created a state of war, whether that was done by “word or action.”

The question, therefore, is which meaning is the best reading of the Constitution’s text. In this Part, I argue that the narrow meaning is not consistent with the text and structure of the Constitution, nor with contemporaneous and near-contemporaneous readings of it; on the other hand, giving “declare war” its broader meaning provides a better harmonization with both the text and structure of the Constitution, as well as with the constitutional generation’s commentary upon it.

A. Text and Structure

This Part considers which of the two possible meanings of “declaring war” provides the best fit with constitutional text and structure. I begin by returning to the executive power over foreign affairs, as the textual basis for presidential war powers.²⁰⁶ Under this view, the President has all of the traditional executive powers over foreign affairs, by virtue of Article II, Section 1 of the Constitution, except for those powers expressly given to other branches. Put another way, grants of foreign affairs powers to other branches (such as to Congress) have two aspects: an affirmative component, giving power to Congress, and a negative component, taking power away from the President that would otherwise be part of the independent executive power over foreign affairs. For example, when the Constitution gives the *marque and reprisal* power—a traditional executive power—to Congress, that power is thereby transferred away from the President, although it would otherwise be part of the executive power encompassed in Article II, Section 1. The Declare War Clause presumably works the same way. It is generally accepted that the clause transfers the declare-war power from the President to Congress; the dispute is how broadly to read that power—or, in the terms that this Article has outlined, which of that clause’s two ordinary eighteenth-century meanings to adopt.

²⁰⁶ See Part I.B. One who rejects the theory of executive power over foreign affairs would also seem to have textual difficulties with the narrow reading of declare war. If the President has no textual claim to war-initiating power, and Congress’s war-initiating power can be exercised only by formal declaration, then no branch would seem to possess the power to create a state of war by armed attack. See *Sidak*, 41 Duke L.J. at 120–21 (cited in note 36) (suggesting this view). But very few congressionalist scholars consider this a viable interpretation, and in any event it goes against common eighteenth-century practice, in which wars routinely began without a formal declaration. See Part II.C.

Consider the broad meaning first. In this view, “declaring” war amounts to placing the nation in a state of war, either by proclamation or by military action. Viewed as a transfer of power away from the President, this provision is easy to understand. Despite the President’s executive power over diplomatic and military affairs, the President would not have the independent ability to proclaim a state of war (declaring by word) nor to signal the beginning of war by ordering an armed attack (declaring by action). Although the President has the general power to command the military (pursuant to the commander-in-chief power of Article II, Section 2), in this view the President would lack the more specific power to command the military in a way that signals the start of a war; similarly, while the President has the general power to communicate on behalf of the nation, through ambassadors or otherwise, the President lacks the more specific power to communicate on behalf of the nation in a way that signals the beginning of a state of war. This transfer of power away from the President is at least a plausible one. Given the deliberative policymaking elements of the decision to initiate a state of war, one might plausibly think that the decision should not rest with a single executive, and although leading eighteenth-century political theorists said otherwise, at least some of the Framers believed that war was best viewed as a legislative rather than executive function.

Viewed as an affirmative grant of power to Congress, the broad meaning of the clause requires some further explanation. Congress can of course issue a formal proclamation,²⁰⁷ but there is a practical limit on its ability to declare war by action, because Congress does not command an army. As to action, then, Congress has (in this view) no more than the power to direct the President, as commander-in-chief, to use the military in a way that inaugurates a state of war. Whether the President would be obligated to follow such a direction as a constitutional matter is unclear, just as it is unclear whether the President would be required to fight a war that Congress declared by proclamation. But as a practical matter, in either event Congress would surely have difficulty forcing a conflict on an unwilling commander-in-chief. Thus Congress’s war power is in this view necessarily a cooperative power that gives Congress a role—but not a sole voice—in the decision to go to war. Congress’s role is therefore not unlike the Senate’s role in treaty-making (another instance in which the Constitution departed from the traditional understanding of unified executive power in foreign affairs). Again, this is a plausible way to involve Congress in

²⁰⁷ I leave aside the question of whether a formal proclamation could be vetoed, or passed over a President’s veto.

the warmaking process.²⁰⁸ In short, one can tell a plausible story of how the Declare War Clause works and why it works that way by giving “declare” its broad meaning.

The broad meaning of “declaring war” also makes the clause fit with its immediate neighbor, the Marque and Reprisal Clause. In the eighteenth century, marque and reprisal referred specifically to the seizure of foreign property in satisfaction of a specific injury committed by the foreign state. As Blackstone wrote:

These letters are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words in themselves synonymous [sic] and signifying a taking in return) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made.²⁰⁹

The marque and reprisal power was, in short, a specific form of limited hostilities.

Blackstone also made clear that granting letters of marque and reprisal was an executive power of the monarch.²¹⁰ The Constitution’s text moves this power from the executive to the legislative branch, another instance of the Framers rejecting unified executive power in foreign affairs. We may presume, therefore, that the constitutional generation thought the decision to engage in this limited form of offensive hostility was better viewed as a congressional, rather than presidential, enterprise. Given this outlook, it seems quite plausible that the constitutional generation also thought the decision to enter into wider forms of hostility should also involve the legislature. Giving the Declare War Clause its broad meaning therefore fits with the Marque and Reprisal Clause: Both were efforts to shift decisionmaking about offensive war from the executive (where traditionally it had resided) to Congress. It particularly makes sense to shift the two powers together, since reprisals were often a prelude to open war.²¹¹

²⁰⁸ Among other things, using the broad meaning of “declare” allowed the Constitution to draw a line between offensive war (needing legislative involvement from the beginning) and defensive war (part of the President’s executive power). See Part VI.C (discussing President’s power over defensive war). This line is understandable in terms of putting power of action in the President and power of deliberation in Congress: Defense must be mounted quickly and decisively, and it is assumed that the nation must defend itself, whereas the decision to enter into offensive war is one that might encompass more studied deliberation.

²⁰⁹ Blackstone, 4 *Commentaries* at *250–51 (cited in note 65). See also Hale, 1 *Pleas of the Crown* at 161–62 (cited in note 119).

²¹⁰ See Blackstone, 4 *Commentaries* at *251 (cited in note 65). See also Vattel, *Law of Nations* at 285 (cited in note 8) (“[I]n every civilized state, a subject who thinks himself injured by a foreign nation, has recourse to his sovereign, in order to obtain permission to make reprisals.”).

²¹¹ An objection is that, if “war” is read broadly to encompass most hostilities among sover-

To be clear, all that is argued so far is that the broader meaning of declaring war is a plausible reading of the Declare War Clause, given its constitutional context. I do not argue (as some congressionalist accounts appear to) that this plausible description of the clause in itself establishes the meaning of the text. The Framers may have wanted to divide power in this way, but we cannot, on this basis alone, be sure that they did so. It remains to ask what other meanings of the clause are available.

Let us now turn to the narrow reading of declaring war. In this view, the power encompassed by the Declare War Clause is only the power to make an official announcement about the existence of a state of war. Set in its constitutional context, this view runs into immediate difficulties. First, it is hard to understand this provision in its role as a transfer of power away from the President. Plainly the power to issue an official proclamation regarding war was one of the traditional executive powers over foreign affairs, along with the traditional executive's broader powers to initiate and conduct hostilities. To read the Declare War Clause narrowly one must believe that of all the President's executive war powers, the Constitution singled out this particular communicative function to shift to Congress.

This seems an odd, and indeed inexplicable, allocation of power. The President is the communicative organ of the nation in foreign affairs, as to all other international subjects.²¹² Why would the President also not be the best communicator regarding war, particularly if wars might be started at presidential initiative? It is hard to see any separation-of-powers value served by this allocation. If the Declare War Clause, given its narrow reading, moved a substantive power away

eigns (as apparently it was in the eighteenth century, see Part V.A), and "declaring war" is read broadly to mean entering into a state of war, the Marque and Reprisal Clause may seem redundant. One might suppose that, even absent the Marque and Reprisal Clause, the branch with the power to declare war (read broadly) would have the power to grant letters of marque and reprisal, as this would constitute the initiation of a limited form of war. However, historical usage conflicts over whether marque and reprisal should be called a type of war or a type of hostilities short of war. Grotius, for example, noted the difference "between the taking of Prizes or Reprisals for the recovery of debts, or reparation of damages, and the making of War." Grotius, *Rights of War* at 447 (cited in note 96). See also Vattel, *Law of Nations* at 283–84 (cited in note 8) (describing reprisals as a method of redress short of war). Other authorities saw reprisal as a form of war. See Hale, 1 *Pleas of the Crown* at 161–62 (cited in note 119) ("[S]pecial kinds of war are that, which we usually call *marque* or *reprisal*"). Given this disagreement, the Marque and Reprisal Clause clarifies what would otherwise be an ambiguity as to the extent of Congress's power. Without the Marque and Reprisal Clause, one could plausibly argue, on the basis of eighteenth-century terminology, either that Congress had the marque and reprisal power (because it was a subset of the war power) or that the President had the marque and reprisal power (because it was part of the executive power over foreign affairs and was not included in the textual grant of war power to Congress).

²¹² See Prakash and Ramsey, 111 *Yale L J* at 317–24 (cited in note 4) (discussing the President's authority to speak for the nation as part of the executive power over foreign affairs).

from the executive (for example, if a formal declaration were a prerequisite to engaging in hostilities or to invoking the legal state of war), one might understand the shift; but, as argued above, the formal declaration would not have been understood in this way. As a result, the Declare War Clause, if given its narrow interpretation, essentially ends up meaning that the President can initiate a state of war but cannot formally say anything about it. This seems both inexplicable and counterproductive.²¹³

It is true, of course, that this narrow vision of the Declare War Clause would move one material war power away from the President: The President would not be able to begin a war by proclamation. The President would, however, be able to begin a war by attack. It is hard to see why the President should have one power but not the other. Presumably all of the reasons against the President having the power to begin war by proclamation would also apply to the power to begin war by attack.²¹⁴

Similarly, the narrow meaning of the Declare War Clause is hard to understand as an affirmative grant of power to Congress. The essence of the legislative branch is deliberative policymaking. One would expect that, to the extent that the Constitution shifted formerly executive powers to the legislative branch, the powers shifted would be deliberative functions. Indeed, the other executive powers transferred in whole or part by the Constitution are deliberative: for example, treaty-making, appointments, and *marque and reprisal*. Adopting the narrow meaning of the Declare War Clause makes it essentially a communicative and rhetorical power, which is not the role the Constitution envisioned for Congress.²¹⁵

²¹³ This system also seems unworkable in practice. The President controls the diplomatic channels of communication. Once the President initiates a state of war, how would we determine whether the President's statements about the conflict, made through ordinary diplomatic channels, rose to a level of a "declaration" such that Congress would need to be involved? And in any event, what would be the purpose of such an inquiry? Presumably it would be in everyone's interest, once a war actually began, for the President to make the state of war, and its goals and intents, manifest as soon as possible, in whatever way thought most effective, rather than waiting for Congress to act.

²¹⁴ It is important to distinguish the foregoing argument from the claim that the Declare War Clause must be read broadly, because otherwise Congress would lack sufficient overall checks upon presidential warmaking. As presidential advocates have pointed out, whatever the Declare War Clause means, Congress has some material checks on presidential warmaking through its appropriations and impeachment powers. It is extraordinarily difficult to tell whether the Framers thought these checks, standing alone, were strong enough, since we cannot know how strong the Framers thought they might be, or should be. In contrast, the argument made here is not based on an attempt to intuit how the Framers would have chosen among competing policy objectives about warmaking in general, but on the observation that no coherent set of objectives seems to explain the function of the Declare War Clause, if it is given its narrow meaning.

²¹⁵ The narrow reading of the Declare War Clause would transfer to Congress the delibera-

Additionally, the narrow meaning of the Declare War Clause does not fit well with the Marque and Reprisal Clause. As discussed, the Marque and Reprisal Clause reflects a decision to shift from the executive to Congress the policymaking power over a limited form of offensive hostilities. That decision makes the most sense if the policy-making power over wider hostilities is also shifted. In contrast, there is no satisfactory explanation for why the President should have comprehensive powers to initiate hostilities, excepting only marque and reprisal. Rather, belief that the lesser power should be shifted would seem to imply belief that the greater power should also be shifted. Other things being equal, one would expect more deliberation with respect to exercise of the greater power, not less. Further, the fact that the two shifts of power occur in the same part of Article I, Section 8 suggests that they are directed toward a similar goal. Finally, shifting the marque and reprisal power without shifting the war power is not likely to be effective as a practical matter. Presumably a President denied congressional authority to make reprisals could simply start a war (by attack) and direct property seizures as a wartime measure.

In sum, the narrow meaning of declaring war does not provide as satisfactory an account of the text and structural role of the Declare War Clause. Again, it is important to emphasize what is, and is not, argued here. This Article seeks to present a textual account of the Declare War Clause, not an account based on Framers' intent. Accordingly, its initial focus has been on identifying possible meanings of the phrase "declare war." Once two possible meanings of ambiguous text are identified, it is surely relevant that one meaning yields a plausible account of how the text fits into the overall structure of constitutional government while the other raises substantial difficulties. Whether this observation, standing alone, would be sufficient to establish the best constitutional meaning of the text need not be conclusively addressed. As discussed in subsequent sections, commentary from the ratification and post-ratification period also fits better with the broad rather than the narrow meaning of declaring war, and thus confirms that the broad meaning is the better one.

tive power of declaring war by proclamation in advance of hostilities. But this seems an odd power to transfer in isolation. First, formal declarations of war were rarely used in this way in the eighteenth century, so one would not expect the Framers to have this role of the formal declaration primarily in mind. Second, the reasons one would want to shift this power to Congress would also support shifting the power to begin a state of war by hostilities. Since the effect of a war declared by proclamation and a war declared by hostile act were the same, it seems odd to transfer one power and not the other.

B. Ratification

Commentary from *The Federalist* and the ratifying debates indicates that leading ratifiers understood the Constitution's "declare war" clause in its broader sense, to include declarations by action as well as by formal proclamation. While this commentary might not be sufficient to override clear constitutional text to the contrary, it is appropriate to consult it in attempting to pick between two competing textual meanings.²¹⁶

The power to declare war was not often discussed in the ratifying debates. On the occasions when it did arise, it was typically used by Federalists as an example of how the Constitution had reduced the power of the President/executive. Because Congress, and not the President, had the power to declare war, the President's power was not as great as some Anti-Federalists suggested. Although Anti-Federalists continued to object to the scope of presidential power, no one disputed the Federalists' characterization of the Declare War Clause as a material limit upon the executive. This strongly suggests that both sides accepted the broad rather than the narrow meaning of "declaring" war.

Hamilton, for example, observed in *The Federalist* that under the Constitution the President's power was less than the King of England's power because, among other things, the power of "the British king extends to the *declaring* of war . . . which, by the Constitution under consideration, would appertain to the legislature."²¹⁷ It is true, as advocates of presidential war power point out, that this observation does not in so many words equate declaring war with control over commencing hostilities.²¹⁸ But it is nonetheless entirely inconsistent with the narrow reading of "declare war." First, Hamilton's observation confirms the general view that allocations of traditional executive power over foreign affairs to Congress were understood to be exclusive—that is, that the Declare War Clause gives the power to Congress and denies it to the President. Second, Hamilton's observation is only consistent with a reading of "declare war" that in itself imposes a material reduction in executive war power. As discussed above, the narrow reading of "declare war" does not impose any material reduction, since the President would still be able to initiate a state of war by armed attack and there was no difference between a state of war begun by proclamation and a state of war

²¹⁶ See Scalia, *A Matter of Interpretation* at 38 (cited in note 41).

²¹⁷ Federalist 69 (Hamilton), in Rossiter, ed, *Federalist Papers* at 418 (cited in note 55).

²¹⁸ See Yoo, 84 Cal L Rev at 277–78 (cited in note 2) ("Hamilton did nothing to undermine the prevailing belief that a declaration of war was unnecessary for waging war Here, Hamilton emphasized formal constitutional powers and ignored the political process"). See generally Yoo, 70 U Colo L Rev 1169 (cited in note 42).

begun by armed attack. If the Declare War Clause is read narrowly to refer only to issuing formal proclamations, Hamilton would have had no basis to conclude that the President's power was materially less than that of the British monarch due to the President's inability to declare war. Indeed, Hamilton himself said earlier in *The Federalist* that "the ceremony of a formal denunciation of war has lately fallen into disuse."²¹⁹ On the other hand, if the Declare War Clause is read broadly to encompass declaring war by word or action, Hamilton's quote is perfectly understandable, for the Declare War Clause would create a substantial difference between the war power of the British executive and the war power of the U.S. executive.²²⁰

When the phrase "declare war" arose in the ratifying conventions, the context again shows that it was used broadly rather than narrowly. For example, James Iredell, a leading member of the convention in North Carolina, said that "[t]he President has not the power of declaring war by his own authority" but rather this and other powers "are vested in other hands."²²¹ In context Iredell, like Hamilton in *Federalist* 69, was describing the Constitution's limits on presidential power. Iredell's comment (like Hamilton's) is coherent only if the Declare War Clause produces some material constraint on the President. As discussed, only the broad reading of declare war provides such a constraint; under the narrow reading, no material constraint is imposed through the Declare War Clause because although the President could not issue a formal proclamation of war, the President could accomplish the same thing—creating a state of war—unilaterally by armed attack.

To the same effect, and in similar context, Charles Pinckney said in the South Carolina convention that "the President's powers did not permit him to declare war."²²² Again, taken as a description of the limits of presidential power, this makes sense only if "declare war" is given its broader meaning. If the effect of the Declare War Clause was only to prevent the President from issuing a formal proclamation, this would hardly seem worth mentioning. Only if the clause is read to include declaring war by word or action can we make sense of

²¹⁹ *Federalist* 25 (Hamilton) at 165 (cited in note 55).

²²⁰ That this was in fact Hamilton's view is confirmed by several of his later statements. See Part IV.C. The context of *Federalist* 69, in which this comment appears, is that Hamilton was trying to make the President seem less powerful, in response to critics who claimed the proposed Constitution gave the President too much power. Thus Hamilton had an incentive to understate the President's power. Yet he would not likely have taken a position that was manifestly incorrect. Nor is there any record of anyone objecting to Hamilton's interpretation.

²²¹ Elliot, 2 *Debates* at 287 (cited in note 20).

²²² *Id.*

Pinckney's emphasis on its role in reducing the executive power of the President.²²³

This is also the main lesson of James Wilson's often-cited remark at the Pennsylvania convention. Wilson said that "[i]t will not be in the power of a single man" to involve the nation in war, "for the important power of declaring war is vested in the legislature at large."²²⁴ Congressional advocates have been criticized for placing undue weight on this quotation standing alone, for Wilson did appear to be overstating in some respects,²²⁵ and Wilson was not representative of his generation on a number of key issues.²²⁶ But the preceeding quotations show that on this point, at least, Wilson was not an outlier, for he used "declare war" in essentially the same sense as Iredell, Pinckney, and Hamilton.

In a slightly different context Madison in *The Federalist* wrote: "Is the power of declaring war necessary? No man will answer this question in the negative."²²⁷ Again, this observation does not directly prove the extent of Congress's war power. However, it is only consistent with the broad meaning of "declare war." If "declare war" is read narrowly to mean only the power to issue a formal proclamation, it could hardly be thought so essential to government that "no man" would think it an unnecessary power. Since a state of war could be created by an armed attack without any accompanying formal proclamation, the formal proclamation was in fact regarded by many in the eighteenth century as an outdated and superfluous Roman ceremony. This was the view of a number of leading writers, including Hale, Bynkershoek, and Rutherford.²²⁸ It was also the implicit view of at least two great

²²³ These points show the importance of rejecting Professor Yoo's view of the formal declaration of war. In his account, there is a difference between a war declared by proclamation and a war begun only by armed attack: One creates a legal state of war and the other does not. See Part I.B. If this is correct, reading the Declare War Clause to mean only the power to issue a formal proclamation does cause the Declare War Clause to impose a material limit on the President (though not as broad a limit as congressional advocates would impose). The President would be free to use military force unilaterally, but could not invoke the laws of war without congressional approval. If that is correct, then the comments of Hamilton, Pinckney, Iredell, etc., might be understandable even if Congress had only the power of formal proclamation. As discussed above, I think Professor Yoo's view does not capture the ordinary eighteenth-century understanding of how a legal state of war was created. Professor Yoo's view follows Grotius, but on this point Grotius is not consistent with eighteenth-century international theory or eighteenth-century English practice. See Part II.

²²⁴ Elliot, 2 *Debates* at 528 (cited in note 20).

²²⁵ See Part VI. Even congressional advocates would agree, for example, that the President can take some actions that, while not creating a state of war in themselves, might lead to another country attacking the United States and thus involving the country in war.

²²⁶ See Yoo, 84 Cal L Rev at 286 & n 547 (cited in note 2) (criticizing reliance on Wilson).

²²⁷ Federalist 41 (Madison), in Rossiter, ed, *Federalist Papers* at 256 (cited in note 55). The context was Madison's justification of the grant of various powers, including the power to declare war, to the federal government. See id.

²²⁸ See Part II.

military leaders, Gustavus Adolphus of Sweden and Frederick the Great of Prussia, who waged their wars in the seventeenth and eighteenth centuries without formal proclamation.²²⁹ And as noted, Madison's coauthor Hamilton had, in an earlier number of *The Federalist*, already observed that "the ceremony of a formal denunciation of war has of late fallen into disuse."²³⁰ Plainly quite a few prominent people thought the formal declaration unnecessary, and if "declare war" is given its narrow meaning Madison's comment is inexplicable. On the other hand, if "declare war" is taken in its broader sense to mean declaring war by word or action, Madison's comment is entirely understandable, for in the eighteenth century it is likely that essentially everyone thought a nation must have the right to initiate war to insist upon its international rights.

C. Post-Ratification Commentary and Practice

I now turn to post-ratification commentary and practice. As discussed earlier, congressionalist scholarship points to an array of quotations and events apparently showing that U.S. leaders of the 1790s thought that Congress had very substantial control over the decision to go to war.²³¹ But congressionalist scholarship has been rightly criticized for invoking these post-ratification authorities without any satisfactory tie to the Constitution's text. Without a textual explanation of *why* post-ratification leaders might have thought Congress had substantial war powers, the post-ratification evidence is more puzzling than persuasive.

The foregoing discussion shows the problem to be the mistaken equation of the Declare War Clause with a formal proclamation of war. Once it is demonstrated that "declare war" could have a broad meaning of "initiate a state of war" as well as a narrow meaning of "issue a formal proclamation," the post-ratification evidence becomes both understandable and valuable.

To pick one example, Hamilton said in his 1793 *Pacificus* essays that "[t]he Legislature alone" can "plac[e] the nation in a state of war."²³² If "declare war" is equated with issuing a formal proclamation, there is a considerable skip in Hamilton's reasoning. Hamilton was surely familiar with the longstanding English practice holding that a state of war would be triggered by open hostilities.²³³ Hamilton himself

²²⁹ *Id.*

²³⁰ *Federalist* 25 (Hamilton) at 165 (cited in note 55).

²³¹ See Part I.

²³² *Pacificus* No 1, in Lodge, ed, 4 *Alexander Hamilton* at 443 (cited in note 23).

²³³ See Part III. One response would be that by the power to place the nation in a state of war, Hamilton meant only the formal legal state of war, not the condition of hostilities. However, as discussed above, I think it unlikely that Hamilton, or any other reasonable observer of the

had said earlier that the formal proclamation had fallen into disuse in recent times.²³⁴ It is hard to see, in light of eighteenth-century experience, how Hamilton could think that the formal declaration was the only way to place the nation in a state of war. Viewed in this way, Hamilton's statement seems simply incoherent.

Once the textual inquiry is framed properly, however, Hamilton's statement becomes much more useful. If Hamilton thought war could be declared by word or action, then the association of "declaring war" with "placing the nation in a state of war" is obvious. Hamilton was simply using "plac[e] the nation in a state of war" (Pacificus's term for Congress's war power) as a synonym for "declare war" (the Constitution's term). This is precisely consistent with the broad meaning of "declare war" identifiable in the works of the eighteenth-century treatise writers. Recovering the broad meaning of "declare war" allows us to make sense of Hamilton's statement.

This in turn renders Hamilton's statement important evidence of the original meaning of the Declare War Clause. The point, of course, is not ultimately what Hamilton himself thought, but what the Declare War Clause would have meant to an ordinary reader. Hamilton's view is highly probative of the ordinary meaning, however. Hamilton was a vigorous advocate for presidential powers in general, so his concession that the war-initiation power lay with Congress must be counted as substantial. In the Pacificus essays, for example, he argued that most foreign affairs powers other than war and treaty-making were presidential. Hamilton wrote the Pacificus essays, moreover, to defend President Washington's 1793 Proclamation of Neutrality against charges that it interfered with Congress's war power.²³⁵ If there were a plausible reading of the Constitution available that would have preserved some war-initiation power to the President, one would not expect Hamilton to concede the point. Yet he did so repeatedly, not just in Pacificus, but also earlier in Federalist 69 and later in the Lucius Crassus letters.²³⁶ One can only conclude that Hamilton thought reading the Declare War Clause narrowly to refer only to formal declarations, and thereby preserving substantial independent presidential power to initiate war, was not a tenable position in light of the common understanding of the Declare War Clause.

time, would have thought that the legal state of war was separable from officially commenced hostilities; this was a distinction that existed only in Grotius's theory, not in actual practice.

²³⁴ Federalist 25 (Hamilton) at 165 (cited in note 55).

²³⁵ On the context of the Pacificus letters, see Prakash and Ramsey, 111 Yale L.J. at 327–39 (cited in note 4); Stanley Elkins and Eric McKittrick, *The Age of Federalism* 337–45 (Oxford 1993).

²³⁶ See generally Federalist 69 (Hamilton) (cited in note 217); Examination of Jefferson's Message to Congress of December 7, 1801, No 1 at 249–50 (cited in note 23).

Similar observations apply to other leading post-ratification commentary. I do not propose to review the post-ratification commentary in detail, as it has been thoroughly canvassed by congressionalist scholars.²³⁷ However, the inability of prior accounts to tie the commentary to an ordinary meaning of "declare war" has greatly undermined the persuasiveness of the commentary. Viewed in the light of the textual argument made here, additional weight must be given to the argument for favoring a broad view of "declare war" over a narrow one. While I do not believe that a proper interpretation of the constitutional text must accord with every post-ratification statement,²³⁸ the explanatory power of the broad reading of "declare war" must count somewhat in its favor, especially as compared to the difficulties of competing versions.²³⁹

A second important point about the post-ratification period is that practice conformed to the broad meaning of "declare war." Again, congressionalist scholars have emphasized that early presidents generally deferred to Congress on the question of war, and early presidential advisors generally counselled such deference.²⁴⁰ But without a textual explanation for this deference, one could not know whether it should be counted as evidence of constitutional meaning, or merely as evidence that early presidents hesitated, for nonconstitutional reasons, to use force unilaterally. It cannot be doubted that the military weakness of the United States in the early years did contribute to a certain amount of presidential circumspection. But it is also somewhat significant that the United States faced questions of war in at least five contexts between 1789 and 1800, and in each case the President looked to Congress to decide whether war should be pursued.²⁴¹ Surely this practice standing alone

²³⁷ See Wormuth and Firmage, *To Chain the Dog of War* at 17–31 (cited in note 1); Reveley, *Who Holds the Arrows* at 100–15 (cited in note 1).

²³⁸ Consider Prakash and Ramsey, 111 *Yale L J* at 334–39 (cited in note 4) (sharply criticizing Madison's view of executive power as expressed in his 1793 response to Hamilton's "Pacificus").

²³⁹ Hamilton's statements are representative of other comments directed at war powers. As with Hamilton's observations, reading the Declare War Clause broadly to mean declaring war by word or action provides a way to explain these comments in terms of the constitutional text.

²⁴⁰ See Fisher, *Presidential War Power* at 13–28 (cited in note 1) (describing the actions of President Washington regarding the Indian Wars, Whiskey Rebellion, and Neutrality Act, President John Adams's actions in respect to the quasi-war with France, and President Jefferson's dealings with Tripoli); Casper, 30 *Wm & Mary L Rev* at 242–60 (cited in note 33) (discussing President Washington's dealings with Algiers).

²⁴¹ The five instances were: (1) the continuing hostilities with the tribes on the United States's western and southern borders; (2) the actions of Algiers in seizing U.S. shipping in the Mediterranean; (3) the Nootka Sound incident, in which an impending war between Britain and Spain appeared likely to involve the United States; (4) the neutrality crisis of 1793, in which war between Britain and France appeared likely to involve the United States; and (5) the naval war with France in 1798. See Sofaer, *War, Foreign Affairs, and Constitutional Power* at 100–24 (cited

cannot establish the meaning of the constitutional text, but taken with other evidence it is further indication that the broad rather than the narrow meaning of “declare war” should be preferred.

A third key fact about the post-ratification period is that it provides no evidence in support of the narrow meaning of “declare war.” Pro-executive scholars have argued at length that the post-ratification discourse does not conclusively establish congressional control over war initiation,²⁴² but they have adduced no post-ratification evidence of a belief in broad presidential war powers. This approach is perhaps sufficient so long as they can rely on the plain text of the Constitution to support their view. If the Constitution’s text unambiguously gave Congress only limited war powers, and reserved most war power to the President, the absence of confirming evidence from the post-ratification period would not count so heavily. As I have argued above, however, the phrase “declare war” had two ordinary meanings in the eighteenth century, and thus the Declare War Clause, standing alone, is at best ambiguous as to which was intended. Once the interpretive project is viewed as choosing between two possible meanings, the fact that one meaning was commonly ascribed to the constitutional text in the post-ratification period, while the other was never advanced, becomes an important factor.

As a result, post-ratification commentary and practice confirms that the broad reading of “declare war,” rather than the narrow one, was the meaning embraced by the constitutional generation in the Constitution’s Declare War Clause. Taken with the textual and structural evidence and the evidence from the ratification period, this evidence should be sufficient to show that the best original meaning of the Declare War Clause is that Congress (and not the President) has the power to place the nation in a state of war through words (a formal proclamation) or action (authorizing an armed attack).

V. WAR POWERS OF CONGRESS

A. The Scope of “War”

The preceding Part argues that the best original constitutional meaning of “to declare war” is to initiate a state of war by making a public commitment to hostilities. Crucially, this could be done either by official announcement or by the actual commencement of hostilities. In eighteenth-century practice, either a proclamation or a hostile act was sufficient to create a state of war, and as a result “declaring” war—that is, making the state of war manifest—could be done “by

in note 30).

²⁴² See Yoo, 70 U Colo L Rev at 1215–22 (cited in note 42).

Word or Action.”²⁴³ It is this power that Article I, Section 8 of the U.S. Constitution gives to Congress. Thus modern advocates of congressional war powers are generally correct to describe Congress’s power as the power to authorize U.S. entry into war. I would describe it more precisely as the power to place the United States in a state of war. As discussed in Part VI, this allocation of power is not as complete a limitation on presidential initiative as many congressional advocates suppose, but the basic congressionalist starting point—that Congress in general has war-initiation power—seems fully supported by the constitutional text.

Whether Congress’s power to place the United States in a state of war amounts to near-complete control over the use of military force depends in large part upon the scope of the term “war.” This Part shows that in the eighteenth century “war” had a broad meaning, encompassing most sovereign uses of the force of arms against another sovereign or quasi-sovereign entity. As a result, I conclude that Congress’s power to place the United States in a state of war, as an original matter, broadly encompasses the decision to initiate the use of force against a foreign nation.

At least two positions have been advanced that, while conceding the “war” power to Congress, argue that only some conflicts amount to “war,” and thus that Congress’s power embraces much less than the full range of hostilities. One view would apply the term “war” only to those conflicts in which war is formally declared, or at most to those in which the parties give the name of war to their contest. A second view would give the term “war” only to broad conflicts in which each nation is fully engaged against the other. In this view a lesser, limited conflict might not rise to the level of war.²⁴⁴

Nothing in the eighteenth-century literature gives any support to either view. The eighteenth-century writers (and their forebears) uniformly gave “war” a broad reading. According to Johnson’s dictionary,

²⁴³ Locke, *Second Treatise* § 16 at 278 (cited in note 9). See also Part III.

²⁴⁴ For example, the U.S. executive branch called both the Korean War and the Vietnam War “conflicts” or “police actions” rather than war, implying that they were not technically wars and thus did not trigger the Declare War Clause. See Sidak, 41 Duke L J at 39–43 (cited in note 36) (discussing and criticizing this approach). Similarly, Presidents have suggested that low-level engagements such as those the United States encountered in Grenada in 1983 and Panama in 1989 were not of sufficient scale to qualify as “war.” Some of Professor Yoo’s work also suggests that the Declare War Clause only refers to full-scale “total” war (akin to the eighteenth-century’s phrase “perfect” war), while lesser engagements are outside its scope. See Yoo, 148 U Pa L Rev at 1696–97 (cited in note 6) (“The power to declare war only gave Congress the authority to transform hostilities into a ‘perfect’ war under international law.”). These positions have been roundly criticized by academic defenders of congressional war powers, but without satisfactory textual explanation. See, for example, Fisher, *Presidential War Power* at 141–42, 145–48 (cited in note 1).

"war may be defined as the exercise of violence under sovereign command."²⁴⁵ Rutherford similarly wrote:

War is a contention by force. . . . Nations are said to be at war with one another, not only when their armies are engaged, so as to be in the very act of contending; but likewise when they have any matter of controversy or dispute subsisting between them, which they are determined to decide by the use of force, and have declared by words, or shewn by certain actions, that they are determined so to decide it.²⁴⁶

In Richard Lee's words, "war is the state or situation of those . . . who dispute by force of arms."²⁴⁷ European writers also spoke broadly. Bynkershoek defined war as "a contest of independent persons carried on by force or fraud for the sake of asserting their rights."²⁴⁸ For Vattel, "war is that state in which we prosecute our right by force. . . . Public war is that which takes place between nations or sovereigns, and which is carried on in the name of the public power, and by its order."²⁴⁹ Burlamaqui called war "the state of those, who try to determine their differences by the ways of force"²⁵⁰ and Wolff said it is war "if one enters into violent contest with another."²⁵¹ Thus by war the eighteenth century appeared to mean little more than violent conflict, with the usual connotation of sovereign approval.

Moreover, many of the eighteenth-century writers explicitly recognized the idea of limited war as opposed to general war. Burlamaqui, for example, said that:

[W]e may also distinguish [wars] into *perfect* and *imperfect*. A perfect war is that, which entirely interrupts the tranquillity of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that, which does not entirely interrupt the peace, but only in certain particulars, the public tranquillity being in other respects undisturbed.²⁵²

²⁴⁵ Johnson, 2 *Dictionary of the English Language* (cited in note 129).

²⁴⁶ Thomas Rutherford, 1 *Institutes of Natural Law* 470 (J. Bentham 1754).

²⁴⁷ Lee, *Captures in War* at 1 (cited in note 151) (emphasis omitted).

²⁴⁸ Bynkershoek, 2 *Quaestionum Juris Publici* at 15 (cited in note 121).

²⁴⁹ Vattel, *Law of Nations* at 291 (cited in note 8) (emphasis omitted).

²⁵⁰ Burlamaqui, 2 *Principles* at 157 (cited in note 131).

²⁵¹ Wolff, 2 *Jus Gentium* at 311 (cited in note 142).

²⁵² Burlamaqui, 2 *Principles* at 180 (cited in note 131). See also Lee, *Captures in War* at 35 (cited in note 151); Rutherford, 2 *Institutes* at 507 (cited in note 65). This terminology was picked up by the U.S. Supreme Court in *Bas v Tingy*, 4 US 37, 45 (1800), in speaking of the naval war with France as an "imperfect" war because it was limited in scope.

In this respect the theorists were not out of step with eighteenth-century reality. Both limited conflicts and conflicts begun without formal declaration were common, yet both were called wars.²⁵³

As a general matter, then, the eighteenth-century idea of war may be taken as the acts of a sovereign resolving its disputes by force.²⁵⁴ Accordingly, a declaration of war would be a manifestation, by word or action, of the sovereign intent to resolve a dispute by force.²⁵⁵ The framework that this Article has developed suggests that the President would not have independent authority to commit such an act, but would require an act of Congress pursuant to Article I, Section 8. The fact that the forceful contention was not formally announced, was lim-

²⁵³ As noted above, most of the major conflicts of the eighteenth century began without a formal proclamation, yet were promptly designated "war": For example, the War of Spanish Succession, the War of Austrian Succession, and the Seven Years' War (or French and Indian War to the American colonists) all fit this pattern. The leading example of limited war, from the colonists' perspective, was the American Revolution itself, in which England and France fought in the Americas but not in Europe. Despite the limited nature of the engagement, however, both the English and the French spoke of themselves as being at war. See Maurice, *Hostilities* at 24–25 (cited in note 35).

²⁵⁴ One question that seems difficult to answer on the basis of eighteenth-century sources is whether "war" meant only contentions *between* sovereigns, or whether sovereign force on one side was sufficient. Johnson's dictionary definition seems to require sovereign force only on one side. See Johnson, *2 Dictionary of the English Language* (cited in note 129) ("War may be defined [as] the exercise of violence under sovereign command against withstanders."). Blackstone spoke of "war" against pirates, who were generally not representatives of sovereign entities. Blackstone, *4 Commentaries* at *71 (cited in note 65). But other authorities thought that the term required two contending sovereigns. See Burlamaqui, *2 Principles* at 157 (cited in note 131) ("Common use has restrained the word *war* to that, carried on between sovereign powers."). See also Wolff, *2 Jus Gentium* at 311 (cited in note 142) (stating that "public war" is war "waged between nations, or by those leaders who have the supreme sovereignty"). Richard Lee said that war is "a contest between independent sovereigns" but defined "independent sovereigns" to mean "nations, or *private* men, where there is no community." Lee, *Captures in War* at 2 (cited in note 151). The seventeenth-century writers spoke more broadly of "private war" as a conflict which lacked sovereign authority on either side. See Locke, *Second Treatise* § 21 at 278–82 (cited in note 9); Grotius, *Rights of War* at 450 (cited in note 96). But as Johnson's dictionary indicates, that usage had passed out of common usage by the eighteenth century. See Johnson, *2 Dictionary of the English Language* (cited in note 129) (defining "war" and reflecting sovereign participation as a necessary element of war). Without intending to be definitive, my view is that the best eighteenth-century meaning of "war" would generally have connoted an armed struggle between sovereigns, but likely would also have included contests with quasi-sovereign entities such as pirates.

²⁵⁵ Despite the broad definition of war, the eighteenth-century writers did not consider every incident of sovereign violence to be a war. For example, there was considerable semantic debate over whether reprisals were a species of war. Many writers seemed to classify them separately: Vattel, Wolff, Grotius, and Bynkershoek discussed reprisals in entirely different sections of their work from their treatment of war, and Blackstone saw war and reprisal as distinct categories of sovereign prerogative. On the other hand, Burlamaqui, Hale, and Rutherford described reprisals as a special kind of war that, although technically within the definition, warranted special treatment. Practice confirms that not every incident of force was considered war: Reprisals often lead to war but sometimes did not, and occasional encounters between naval ships likewise did not rise to the level of war. On the relationship of reprisals to the Declare War Clause, see Part V.B.

ited in scope, or was given some other name by the sovereign, would not alter that conclusion.

B. Congress's Power over Marque and Reprisal

To this point, this Article has approached the inquiry as a matter of the meaning of the "declare war" power. That power, of course, is not the Constitution's only mention of warlike powers. By the same clause of Article I, Section 8, Congress has the power to "grant Letters of Marque and Reprisal."²⁵⁶ A full understanding of the Constitution's scheme of war powers also requires inquiry into the meaning of this power.

Professor Lofgren and others have suggested that the "declare war" and "marque and reprisal" powers, taken together, encompass all methods of commencing hostilities.²⁵⁷ If that is true, perhaps we need not be unduly concerned about the boundaries between the two—whatever is not a "declared war" (whatever that may mean) is a form of reprisal. Congress would thus have complete control over initiation of hostilities by Article I, Section 8, clause 11, regardless of the meaning of "declare war."

As set forth below, this view fails to take account of the common meaning of marque and reprisal. Examination of eighteenth-century writings reveals a surprising consensus on the meaning of the phrase. Usually shortened simply to reprisal, it meant a specific sort of hostility short of general war. In particular, it referred to the seizure or destruction of enemy property in retaliation for a past wrong. Reprisal did not encompass all hostilities not formally declared, since there could be general wars broader in scope than reprisals but still not commenced by formal declaration. Reprisal also did not refer only to private action, although privateers could be licensed by letters of marque and reprisal. By the eighteenth century the shift to modern professional standing armies and navies had already begun, and reprisals were as likely to be carried out by official forces as by private actors.

1. Reprisal as the seizure of property.

The common thread in all discussions of reprisal is the seizure of property in satisfaction of an injury. Grotius referred to "the taking of Goods between the People of divers Nations, which our Modern Lawyers call Reprizals, or a violent seizing and detention of each others Goods, which the English and the Saxons call Withernam and the

²⁵⁶ US Const Art I, § 8, cl 10.

²⁵⁷ See Lofgren, 81 Yale L J at 697 (cited in note 1) (suggesting that the Marque and Reprisal Clause meant that "Congress possessed whatever war-commencing power was not covered by the phrase 'to declare war'").

French . . . Letters of Marque.”²⁵⁸ Wolff, a century later, wrote similarly: “Reprisals are defined as the taking away of the goods of citizens of another nation or even of the ruler of a state in satisfaction of a right or by way of pledge.”²⁵⁹ In Vattel’s description:

Reprisals are used between nation and nation in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another,—if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it,—the latter may seize something belonging to the former, and apply it to her own advantage.²⁶⁰

Similarly, Burlamaqui wrote:

By reprisals then we mean that imperfect kind of war, or those acts of hostility, which sovereigns exercise against each other . . . by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice; with a view to obtain security, and to recover our right, and in case of refusal, to do justice to ourselves, without any other interruption of the public tranquillity.²⁶¹

This also was the English usage. In Blackstone’s description:

These letters are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words in themselves synonymous and signifying a taking in return) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made.²⁶²

From these sources can be discerned, not only what marque and reprisal were, but what they were not. Since the object of reprisal was to seize property, hostilities that do not have that intent were not reprisals. Thus, for example, an attack on a military force or fortified position for the purpose of weakening it would not be a reprisal (since it would not be for the purpose of seizing property), nor would any act done in anticipation of future hostilities or in order to induce future behavior (since reprisal was a response to a prior act).²⁶³ Importantly,

²⁵⁸ Grotius, *Rights of War* at 449 (cited in note 96) (emphasis omitted).

²⁵⁹ Wolff, 2 *Jus Gentium* at 302 (cited in note 142).

²⁶⁰ Vattel, *Law of Nations* at 283 (cited in note 8).

²⁶¹ Burlamaqui, 2 *Principles* at 180 (cited in note 131).

²⁶² Blackstone, 4 *Commentaries* at *250–51 (cited in note 65). See also Hale, 1 *Pleas of the Crown* at 161–62 (cited in note 119).

²⁶³ See Rutherford, 2 *Institutes* at 511 (cited in note 65):

If one nation seizes the goods of another nation by force, upon account of some damages,

reprisal was not simply a word for undeclared war. Indeed, the writers distinguished between reprisal and war; Grotius, for example, noted the difference “between the taking of Prizes or Reprizals for the recovery of debts, or reparation of damages, and the making of War.”²⁶⁴ Hale is particularly clear on this point, noting: “We may observe in the wars we have had with foreign countries, that they have been of two kinds, viz. Special and general.” In his view “special kinds of war are that, which we usually call marque or reprisal” while “[a] general war is of two kinds . . . when war is solemnly declared or proclaimed by our king . . . [and] when two nations slip suddenly into a war without any solemnity.”²⁶⁵

2. Sovereign authorization of marque and reprisal.

It was of course common ground that piracy and robbery were outlawed and severely punished. Reprisal, being the seizure of goods by force, could look a bit like piracy and robbery, especially if conducted by a private party. The critical difference, obviously, was the sovereign authorization. Vattel wrote: “It belongs therefore to sovereigns alone to make and order reprisals.”²⁶⁶ In Burlamaqui’s view, “As reprisals are acts of hostility, and often the prelude or forerunner of a complete and perfect war, it is plain that none but the sovereign can lawfully use this right, and that the subjects can make no reprisals, but by his order and authority.”²⁶⁷ With sovereign authorization, a person engaged in reprisals would not (or at least should not) be treated like a pirate.

A particular sort of authorization was that given to a private subject who had himself been injured by the foreign nation.²⁶⁸ Blackstone referred to the statute of 4 Hen V ch 7, which declared “that, if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves grieved.”²⁶⁹ This authorization distinguished the bearer from a pirate;

which the former has suffered from the latter; such contentions by force are called reprizals. There may likewise be other acts of hostility between two nations, which do not properly come under the notion of reprizals, such as the besieging of each others towns, or the sinking of each others fleets, whilst the nations in other respects are at peace with one another.

²⁶⁴ Grotius, *Rights of War* at 447 (cited in note 96). See also Vattel, *Law of Nations* at 283–84 (cited in note 8) (describing reprisals as a method of redress short of war).

²⁶⁵ Hale, 1 *Pleas of the Crown* at 161–62 (cited in note 119).

²⁶⁶ Vattel, *Law of Nations* at 285 (cited in note 8).

²⁶⁷ Burlamaqui, 2 *Principles* at 182 (cited in note 131).

²⁶⁸ See Vattel, *Law of Nations* at 285 (cited in note 8) (“[I]n every civilized state, a subject who thinks himself injured by a foreign nation, has recourse to his sovereign, in order to obtain permission to make reprisals.”).

²⁶⁹ Blackstone, 4 *Commentaries* at *251 (cited in note 65). See also Hale, 1 *Pleas of the Crown* at 161 (cited in note 119) (also referring to this statute and calling such proceedings “spe-

the foreign nation's remedy was not a criminal proceeding against the person executing the reprisal, but retaliation against the sovereign who authorized it, by way of war or otherwise. This form was commonly called "special" reprisal, as it was accorded to a specific injured person, or as Hale said, to "some particular persons upon particular occasions to right themselves."²⁷⁰

This practice became less common in the eighteenth century, being gradually replaced by "general" reprisals, in which "a state which has received . . . an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found."²⁷¹ In this case, the persons authorized to make seizures were typically not the ones injured; the injuries were as likely to be injuries to the sovereign or to the rights of the nation as injuries to particular subjects, and the seizures were made both by privateers and by regular military forces. What remained key was the specific authorization, however, for since the nations technically remained at peace there was risk of being treated as a pirate without clear sovereign authorization. Thus, said Hale, during periods of "general marque or reprisal . . . it is not lawful for any person by aggression to take the ship or goods of the adverse party, unless he hath a commission from the king, the admiral, or those that are specially appointed thereunto."²⁷²

3. The constitutional meaning of letters of marque and reprisal.

From the foregoing, the constitutional meaning of letters of marque and reprisal in Article I, Section 8, may be ascertained. First, "marque" and "reprisal" did not appear to mean different things. Blackstone specifically stated that they were synonymous; Hale used them as synonyms and both Grotius and Vattel described "marque" as a French version of "reprisal." It seems fair to conclude that the Constitution used "marque and reprisal" as a unified phrase, meaning what the international writers more commonly shortened simply to reprisal.²⁷³

cial reprisals").

²⁷⁰ Hale, 1 *Pleas of the Crown* at 161 (cited in note 119) (describing "particular" as opposed to "general" reprisal). See also Wheaton, *Elements* at 210 (cited in note 127) (confirming this usage in the early nineteenth century).

²⁷¹ Wheaton, *Elements* at 210 (cited in note 127) (paraphrasing Bynkershoek, 1 *Quaestionum Juris Publici*). See also Hale, 1 *Pleas of the Crown* at 162 (cited in note 119) (making this distinction in the seventeenth century).

²⁷² Hale, 1 *Pleas of the Crown* at 161 (cited in note 119).

²⁷³ A tempting suggestion is that "marque" referred to special reprisals while "reprisal" encompassed what later came to be called general reprisals, thus giving independent meaning to both terms. However, this usage is contradicted by all the leading writers who discuss both terms, including Blackstone, Hale, Vattel, and Grotius.

Second, the common meaning of *marque* and *reprisal* was the seizure of property (or sometimes persons) of foreign states to redress an injury committed by that state. This specific meaning runs through all the commentary, both the theoretical work of the European internationalists and the more practical work of the English treatise writers. I am not aware of any usage of *reprisal* in a broader sense to signify undeclared war or low-level hostilities in general.

Third, the “letters” of *marque* and *reprisal* in the constitutional language were undoubtedly the “commissions” given by the government to show the sovereign authority to make seizures in *reprisal*. As noted, specific sovereign authorization was thought necessary to distinguish peacetime *reprisals* from piracy, particularly if committed by private parties. There is no reason to suppose the “letters” referred only to the ancient practice of specific *reprisals*, since private pursuers of general *reprisals* also required a specific authorizing letter. Moreover, the use of specific *reprisal* was waning in the eighteenth century while the use of general *reprisals* was quite common, so there is no reason to read the constitutional language to refer only to the outdated practice.²⁷⁴

The only serious interpretive difficulty is whether the Constitution’s “letters” referred only to the authorizations (whether specific or general) given to private parties, or whether they also encompassed authorizations to public forces. This, of course, is a key question, for if public *reprisals* are not encompassed, that power would seem to lie with the President rather than Congress.²⁷⁵ Moreover, public *reprisals* are the only ones with modern significance, the practice of *privateering* having been largely abandoned in the nineteenth century.

The international law writers of the seventeenth and eighteenth centuries are not specific enough on this point to draw any satisfactory conclusions. In practice, it appears that public forces engaged in *reprisals* operated under “orders” rather than “letters”; I am not aware of any common reference to public orders as letters, but that usage is not

²⁷⁴ Professor Lofgren suggests but rightly rejects the narrower interpretation. See Lofgren, 81 *Yale L J* at 696–97 (cited in note 1):

While the wording in question admittedly spoke broadly of granting “letters of *marque* and *reprisal*,” issuance of the *special* variety had passed out of fashion in peace time. The clause thus could easily have been interpreted as serving as a kind of shorthand for vesting in Congress the power of *general* *reprisal* outside the context of declared war.

²⁷⁵ Per Blackstone, *reprisals* (public and private) lie under the executive authority of the monarch, and thus are likely encompassed by the U.S. President’s executive power unless conveyed to another branch of government by the Constitution. Since *reprisal* was a use of force short of war, it would not be encompassed by the Declare War Clause, even if read broadly. If public *reprisal* was not part of the *Marque and Reprisal* Clause, it would not appear to be a power of Congress, and thus would remain with the President. See Part VI.D (discussing hostilities short of war).

obviously foreclosed either. Post-ratification usage suggests, however, that the broader definition was understood. For example, Jefferson as Secretary of State advised President Washington that Congress had all of the reprisal power. In particular, Washington was considering possible responses to the seizure for ransom of American mariners by Algiers. Reprisal, by seizing Algerian ships, would have been a possible response under international law. Jefferson advised (and Washington appeared to accept) that any such reprisals (public or private) would have to be authorized by Congress, suggesting a broad interpretation of the Marque and Reprisal Clause.²⁷⁶ Thus, absent more conclusive evidence of eighteenth-century usage, the better interpretation appears to be a broad one, encompassing both public and private reprisals.

This still leaves the Marque and Reprisal Clause with relatively narrow operation, since it refers to the specific measure of forcible seizure of foreign property in redress of a prior wrong.²⁷⁷ Although common enough in the eighteenth century, that particular means of redress—even by public forces—has waned in modern times. Thus the most important interpretive consequence of the clause in modern context is what it suggests about other military measures short of war. If the marque and reprisal power had to be conveyed separately to Congress, presumably it was not encompassed within the Declare War Clause (else it would be redundant).²⁷⁸ That suggests that other military measures short of war that were *not* conveyed to Congress specifically are also not encompassed within the Declare War Clause, and thus are not powers of Congress. In the ensuing Part, I turn to the implications of this conclusion.

²⁷⁶ On the Algiers incident and Jefferson's advice, see Casper, 30 Wm & Mary L Rev at 242–60 (cited in note 33). True, Washington did not have any public ships to make reprisals, so it may have been that he and Jefferson assumed that any reprisals would have to be private, a power that plainly lay with Congress. However, in subsequent dealings with Tripoli, another hostage-taking North African state, Jefferson as President adopted a similar view. Jefferson had public naval ships in Tripoltanean waters, but ordered them to confine themselves to defensive measures and not to take Tripoli's ships as prizes, unless Congress authorized offensive action. Apparently, therefore, Jefferson thought he lacked power to order public reprisals. Hamilton, criticizing Jefferson's restraint, argued that the U.S. was in effect already at war so no further Congressional authorization was needed; he did not argue, however, that Jefferson had the authority to order public reprisals. See Sofaer, *War, Foreign Affairs, and Constitutional Power* at 208–16 (cited in note 30).

²⁷⁷ See Yoo, 70 U Colo L Rev at 1188–89 (cited in note 42) (reaching the same conclusion).

²⁷⁸ More precisely, I would say that eighteenth-century terminology was ambiguous as to whether the marque and reprisal power was part of war power or was something lesser and separate. The Marque and Reprisal Clause therefore clarifies what would otherwise be an ambiguity as to the extent of Congress's power.

VI. WAR POWERS OF THE PRESIDENT

The final step in assembling a textual theory of war powers is to ask what powers remained with the President after the allocation to Congress of the power to declare war and issue letters of marque and reprisal. In the foregoing Part, I have argued that the eighteenth-century meaning of these phrases encompassed the power to initiate a state of war by word or action (“declare war”) and the power to authorize forcible seizure of foreign property in peacetime (“marque and reprisal”). The residual executive power over foreign affairs held by the President would give the President any remaining unallocated power over the international use of force.²⁷⁹ The question considered in this Part is what war-related powers remain after the allocation to Congress. I consider this in four parts: the power to use force in a declared war, the power to declare war if empowered by Congress, the power to respond to attacks, and the power to use force short of war.

A. The President’s Power to Use Force in War

Everyone agrees that the President has the authority to direct the use of force once war is begun. While I join that consensus, I shall make two additional points from the perspective of a textual theory of war powers: First, that the President’s strategic and tactical control of warmaking is confirmed by the textual theory of this Article; and second that, notwithstanding this presidential power, the textual theory demands that Congress retain some substantial ability to set war goals through its declare-war power.

As to the first point, much of the consensus as to the President’s power arises from two sources: the Commander-in-Chief Clause, and the debate over the Declare War Clause at the Philadelphia convention.²⁸⁰ But even without these authorities, the President would have the power to direct the war effort, as part of the residual executive power. Wartime command of the military was a traditional executive function, and while the declare-war power might encompass some ability to set strategic goals, as argued below, it cannot be stretched to cover management of the war effort as a whole. Since direction of the war effort was a traditional executive power not given

²⁷⁹ See Prakash and Ramsey, 111 Yale L J at 272–78 (cited in note 4).

²⁸⁰ It will be recalled that the Convention changed an earlier draft giving Congress the power to “make war” to the present “declare war.” See Part I. See also Farrand, ed, 2 *Records* at 318–19 (cited in note 25). The view was expressed that the “make war” phrasing might encompass the power to direct the course of hostilities once the war was begun, and that this power should belong to the President, not Congress. *Id* at 319.

to Congress by the Constitution's text, it remains with the President as part of the residual executive power.²⁸¹

As to the second point, however, it needs be added that Congress can exercise some strategic direction of a war through its declare-war power. Whether considered from a practical or theoretical angle, the eighteenth-century idea of the declaration included the idea of setting forth the reasons and objectives of the war. For the theorists, this was the principal reason for the formal proclamation.²⁸² In practice, formal announcements of war frequently stated limited objectives or intentions. Although a war declared purely by actions was obviously less subject to such limitations, it was not unusual for nations to fight limited wars without formal proclamation. One nation might make a limited incursion that would be read by the other nation as opening hostilities in a certain theater (at sea, for example) but not as a declaration of war on all fronts. A leading example, well known to early Americans, was the Revolutionary War, in which Britain and France fought a naval war in the Americas but did not escalate to full hostilities in Europe. This was accomplished not by formal declaration, but by France's limited initiation of hostilities, and Britain's tacit acceptance of the limitation by not responding in the Europe theater.²⁸³

This point was a key element of a series of Supreme Court decisions in the first few years of the nineteenth century, confirming the constitutionality of the "quasi-war" with France. Congress had authorized attack on the French at sea, but had not authorized a full-scale war (which might have included, for example, seizing French land territories).²⁸⁴ As the Court held, Congress's decision to declare war was not a binary choice, involving total war or nothing; rather, Congress was entitled to set limited goals for the hostilities.²⁸⁵ That is perfectly consistent with the eighteenth-century understanding of "declare war," which included the concept of limited declarations.

²⁸¹ See Prakash and Ramsey, 111 Yale L J at 263 (cited in note 4). One might plausibly object, if this is true, that the Commander-in-Chief Clause is redundant. As I have argued elsewhere, I think the best way to understand that clause is as a clarification that Congress's power to "make Rules for the Government and Regulation of the land and naval forces," US Const Art I, § 8, cl 14, does not permit Congress to command the military. See Prakash and Ramsey, 111 Yale L J at 259 (cited in note 4).

²⁸² See Part II.A.

²⁸³ See Maurice, *Hostilities* at 24–26 (cited in note 35).

²⁸⁴ See Alexander De Conde, *The Quasi-War: The Politics and Diplomacy of the Undeclared War with France 1797–1801* 105–08 (Scribner 1966) (describing Congress's act permitting the Navy to take armed French ships anywhere and authorizing the President to commission privateers).

²⁸⁵ *Bas v Tingy*, 4 US 37, 43 (1800) ("Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects and in time."); *Talbot v Seeman*, 5 US 1, 28 (1801); *Little v Barreme*, 6 US 169, 179 (1804).

B. The President's Power to Declare War if Empowered by Congress

Rather than formally declaring war itself, Congress has at times authorized the President to commence hostilities in a given situation. Indeed, if Congress is to exercise power to declare war by action, it must act in this way, as Congress itself does not command military force. Were Congress to instruct the President to take military action, this would be an unqualified use of Congress's declare-war power; but Congress historically has not acted so conclusively, and doing so might raise constitutional questions under the Commander-in-Chief Clause. Instead, Congress's authorizations are phrased to allow but not require military action, as the President sees fit. In terms of the theory presented in this Article, it should be clear that what Congress is doing in such situations is delegating to the President its power to declare war (by word or action). Thus recent engagements such as the Persian Gulf War and the conflict with Afghanistan's Taliban should be viewed as wars declared by the President, pursuant to a delegation from Congress.²⁸⁶

This of course raises the question of whether (and to what extent) Congress's war powers are delegable to the President, especially as some congressional authorizations have been quite broad.²⁸⁷ I do not propose to discuss this question in detail, as I doubt that any particular insight can be gained from consideration of war powers in isolation. Rather, any theory of war powers delegation must fit within a larger theory of delegation of congressional powers generally. I note three general positions, each of which has a range of refinements. First, one might say that war powers are delegable to the same extent other congressional powers are delegable. This, of course, produces a broad spectrum of views, since the permissible extent of congressional delegation in general has been variously urged to be extremely narrow, intermediate, or extremely broad.²⁸⁸ Second, one might say that war powers are particularly nondelegable, based on a theory that would limit delegations in particularly sensitive areas (of which war powers might be one).²⁸⁹ Third, one might say that war powers are

²⁸⁶ In contrast, if one views Congress's power as only the power to issue a formal declaration, it may be hard to fit congressional authorizations of "undeclared" presidential wars into the constitutional scheme. See Sidak, 41 Duke L J at 63-73 (cited in note 36).

²⁸⁷ See Gulf of Tonkin Resolution, 88th Cong, 2nd Sess, in 78 Stat 384 (Aug 10, 1964) ("[T]he Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.").

²⁸⁸ See Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich L Rev 303, 330-46 (1999) (discussing theories of nondelegation). See generally Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721 (2002).

²⁸⁹ See Wormuth and Firmage, *To Chain the Dog of War* at 197-217 (cited in note 1) (argu-

more subject to delegation than ordinary congressional powers, because the field of foreign affairs allows broader delegations. As often noted, the early practice was to afford much greater delegations in foreign affairs than in ordinary legislative affairs,²⁹⁰ and my colleague Michael Rappaport has suggested a theory based on the Constitution's text and its eighteenth-century understanding that might explain this relaxed standard.²⁹¹

In any event, where Congress has authorized the President to begin a war at the President's discretion, the question is properly seen as a question of delegation, not as a question of war powers *per se*. Accordingly, it calls for discussion far beyond the scope of this Article.²⁹²

C. The President's Power to Fight a Defensive War

Essentially everyone in the war powers debate agrees that the President has some independent power to fight a defensive war without authorization from Congress. This was one of the stated reasons for the constitutional convention's celebrated change from "make" to "declare" in the Declare War Clause;²⁹³ the President's ability to, in Madison's words, "repel sudden attacks"²⁹⁴ has long been taken for granted. Whatever the ebb and flow of presidential claims to war power may have been over the ensuing centuries, every administration has claimed at least this power, and no one has

ing for a narrow interpretation of Congress's ability to delegate war power, while admitting Congress's ability to delegate power in other fields such as foreign commerce).

²⁹⁰ See Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications* for Clinton v. City of New York, 76 Tul L Rev 265, 347 n 292 (2001) (compiling early examples of foreign affairs delegations); David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801* 186–87 (Chicago 1997) (discussing delegation debates in the early Congresses).

²⁹¹ Rappaport, 76 Tul L Rev at 320–40 (cited in note 290) (arguing that the Constitution does not restrict Congress from conferring discretion on the executive as to appropriation laws). This view was also suggested by the Supreme Court in *United States v. Curtiss-Wright Export Co.*, 299 US 304, 320 (1936). However, the Court's rationale—that foreign affairs powers arise outside the Constitution and thus are not subject to the same constitutional limits on delegation—is not consistent with the text and history of the Constitution. See Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 Wm & Mary L Rev 379, 379–81 (2000).

²⁹² This framework reveals a misnomer embedded in much popular discussion of the issue. Wars such as the Korean War, which arguably were not approved by Congress as required by the Constitution, are frequently called "undeclared wars." This is not accurate in the eighteenth-century sense, for President Truman assuredly declared a state of war between the United States and North Korea, both by words and actions. The question is whether he was constitutionally authorized to do so. Thus the appropriate inquiry, put in eighteenth-century terms, is not whether the President has the power to fight "undeclared wars," but whether the President has been sufficiently authorized by Congress to make a declaration (by word or action).

²⁹³ Farrand, ed, 2 *Records* at 318–19 (cited in note 25).

²⁹⁴ *Id* at 318.

seriously contested it.²⁹⁵ Washington, for example, though quite circumspect about uses of military power without congressional authorization, assumed that defensive measures were within his independent control and no objections were recorded to this assumption.²⁹⁶

The President's power to fight a defensive war remains incompletely understood in two respects, one practical and one theoretical. As a theoretical matter, no one has fully explained *why* the President has the power to fight a defensive war. As practical matter, no agreement has been reached as to the scope of the "defensive" war the President may fight. I explore each of these points below.

1. The source of the President's power.

Among modern academic theories of war power, even the most committed congressionalists accept the President's independent power over some defensive measures. At minimum, the President must have the power to "repel sudden attacks"—not only would it be absurd not to make this a presidential power, but Madison specifically said that the President would have the power.²⁹⁷ War powers theorists have not worked out how this arises from the constitutional text, however. Rather, Madison's statement is often treated as if it *were* part of the text, rather than a statement in a private meeting whose minutes were not published until long after ratification. But in pursuing a textual theory of war powers, it is important to trace the source of the power, not from the private comments of one of the drafters, but from the actual language.

To do so, I return first to the idea of the President's residual executive power over foreign affairs. As explained above, the claim is that the phrase "executive power" in the eighteenth century included power over relations with foreign nations, and in particular the use of force against foreign nations.²⁹⁸ As used in Article II, Section 1 of the Constitution, this phrase gave the President the traditional executive powers over foreign affairs, subject, however, to other specific allocations made in the Constitution's text. The most relevant specific

²⁹⁵ See Fisher, *Presidential War Power* at 13–69 (cited in note 1). Fisher argues, for example, on the basis of Madison's language, that the President is limited to repelling sudden attacks. See *id.* at 11.

²⁹⁶ See *id.* at 13–16 (describing how President Washington understood the executive branch's military operations to be limited to defensive actions); Sofaer, *War, Foreign Affairs, and Constitutional Power* at 61–129 (cited in note 30).

²⁹⁷ See Farrand, ed., 2 *Records* at 318 (cited in note 25). Hamilton also thought the President had this power, as is clear from Federalist 25.

²⁹⁸ See Part I.B.3.

allocation, of course, is the Declare War Clause, which gave the declare-war power to Congress. The President, though, retains power over aspects of the use of force not encompassed by the Declare War Clause.

The second key step is the one presented in earlier sections of this Article—namely, the identification of the appropriate eighteenth-century meaning of the Declare War Clause. As argued above, the best way to read that clause is to give Congress (and not the President) the power to place the United States in a state of war with another nation. This could be done either by formal proclamation (as preferred by many international law writers)²⁹⁹ or by open hostilities (as frequently happened in practice).³⁰⁰ Because the creation of a state of war by open hostilities, as well as by formal written instrument, was called “declaring” war, it makes sense to read the Declare War Clause to cover all instances of creation of a state of war by the United States, whether by formal declaration or by armed attack.³⁰¹ Therefore, the Declare War Clause gives Congress all of the country’s power to create a state of war.

Now return to the idea of defensive war. Eighteenth-century international law writers agreed that a formal proclamation was not necessary in a defensive war, even if they would require it for an offensive war. The reason was that a defensive war presupposed a declaration by an enemy, either formally or by hostile act. This prior declaration in itself created a state of war; no reciprocal manifestation of intent was needed, since it was assumed that a nation under attack would defend itself. As Vattel wrote, “He who is attacked and only wages defensive war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy’s declaration, or open hostilities.”³⁰² Wolff explained somewhat more laboriously that a declaration “is superfluous for the party waging the defensive war” because “the supreme power owes defence to its citizens, who have united into a state for the purpose of defending themselves against the forces of outsiders” and “therefore, since the supreme power necessarily wages defensive war as part of its duty, it certainly seems incongruous to announce to another that we intend to

²⁹⁹ See Parts I.A–I.B.

³⁰⁰ See *id.*

³⁰¹ See Part III.

³⁰² Vattel, *Law of Nations* at 316–17 (cited in note 8). See also Burlamaqui, 2 *Principles* at 187 (cited in note 131) (“[D]eclaration takes place only in *offensive wars*; for, when we are actually attacked, that alone gives us reason to believe, that the enemy is resolved not to listen to an accommodation.”).

do what we cannot omit without neglect of duty, nor without injury to our citizens.”³⁰³

The international law writers of course greatly overstated the role of the formal proclamation, for in practice the formal proclamation rarely preceded even an offensive war, and the legal state of war might arise by enemy act as well as by formal proclamation.³⁰⁴ However, the practice reinforces the theorists’ idea that declaration was not a part of defensive war. According to writers describing actual practice, the state of war might be triggered by attack.³⁰⁵ But they focused on the attack—not the response to attack—as creating the state of war. As the British admiralty court held, the state of war could be “announced by royal ships, and whole fleets, at the mouths of cannons”—plainly suggesting that the initial attack created the state of war.³⁰⁶ (This is consistent with Vattel’s observation that “the state of warfare” is created by the *enemy’s* “open hostilities.”) Thus, neither the theoretical writers nor the practical writers thought a declaration was needed in response to the enemy’s formal declaration or declaration by action.

Applied to the Constitution, this explains the President’s ability to wage defensive war without congressional declaration. The United States could be placed in a state of war in three ways: by a formal U.S. declaration, by a U.S. declaration by armed attack, *or* by declaration (formal or by armed attack) of a foreign power. The President could not create the state of war, since all of the United States’s ability to create a state of war was vested in Congress by the Declare War Clause. But the President, by virtue of the executive power, could wage war once the state of war was created. If the foreign nation created the state of war, no reciprocal formal declaration or declaration-by-act was needed on the part of the United States. Responding to attacks did not count as a declaration, since responding was assumed to be part of the sovereign duty, and since the state of war had already been created by the aggressor. Therefore, Congress’s declare-war power did not apply, and the President could use the executive power to fight the war created by the other side. Plainly, then, the President would have the power to “repel sudden attacks”—not because Madison privately said so, but because that was part of

³⁰³ Wolff, 2 *Jus Gentium* at 368 (cited in note 142). See also Lee, *Captures in War* at 34 (cited in note 151).

³⁰⁴ See Part III.

³⁰⁵ Hale, 1 *Pleas of the Crown* at 162 (cited in note 119) (“[I]f a foreign prince invades our coasts, or sets upon the king’s navy at sea, hereupon a real, tho not solemn war may and hath formerly arisen, and therefore to prove a nation to be in enmity to *England* . . . there is no necessity of showing any war proclaimed.”).

³⁰⁶ *The Maria Magdalena*, 165 Eng Rep 57, 58 (Adm 1779).

the President's executive power that was not conveyed to Congress in the Declare War Clause.³⁰⁷

2. The scope of the President's power to fight a defensive war.

Although everyone concedes the President some power to fight a defensive war, much debate persists as to the scope of this power. There are two dimensions to this debate: first, what counts as a defensive war, and second, what measures are permitted in a defensive war. The framework suggested above—namely, conceiving of Congress's power as the authority to create a state of war—provides a useful approach to begin answering these questions. In particular, I find that it provides the basis for rejecting the more extravagant claims of both the President and Congress.

a) What counts as a defensive war? Although there is general agreement, in the abstract, that the President can fight a defensive war without congressional authorization, there is considerable dispute as to what makes a war "defensive." Executive advocates have naturally sought to define the term broadly, as encompassing attacks on or threats to allies and threats to U.S. "national interests," loosely described. Congressional advocates dispute this claim, but largely as a matter of policy, on the ground that it would give too much power to the President. A stronger response may be given, however, if one remembers why, as a textual matter, the President has the power to fight defensive wars, and proceeds from there.

The word "defensive" does not appear in the Constitution; rather, the textually precise formulation is that the President has the power to fight wars that do not involve a declaration of war by the United States. Wars that did not involve a declaration by the United States were those that the eighteenth-century terminology called "defensive"—by which was meant a very specific thing: No declaration was required because the state of war had already been created ("declared") by the other side. Thus, to put it back into U.S. constitutional terms, the President had the authority to fight wars in which the United States was placed in a state of war by an opposing power, either by formal announcement or by armed attack by that power.

Once framed in this manner, it should be clear that the power is not nearly as broad as presidential advocates would have it.

³⁰⁷ Of course this would not foreclose Congress from issuing a formal declaration of war in response to an attack, as Congress has sometimes done. As noted, in the eighteenth century formal declarations were issued in response to attack for rhetorical purposes, and I see no constitutional barrier to this modern practice. The point is that these formal declarations are not constitutionally required to authorize the President to respond militarily (or to create a state of war). They may, however, be useful for other practical purposes.

Eighteenth-century writing defined “defensive” war narrowly as one in which a country was actually attacked, or in which war was formally declared. Importantly, a war undertaken in defense of a national right, such as trading rights, treatment of subjects or ambassadors by a foreign power, etc., was offensive (though justified) rather than defensive. Burlamaqui, who wrote most extensively on the point, made plain that the distinction between offensive and defensive war should not be confused with the distinction between just and unjust war. “Defensive” simply meant responding to attack (whether or not justified). Conversely, “offensive” meant initiating the attack (which could occur with or without good reason).³⁰⁸

Acts that declared war should not be confused with acts that gave rise to a just cause of war. Of acts declaring war, leading writers typically referred only to two: actual invasion of territory, or attack upon military forces.³⁰⁹ On the other hand, many acts might constitute a cause of war (including, for example, seizure of private property by reprisal). The difference was that war *necessarily* resulted from the former, but not the latter. A cause of war might or might not be acted upon, depending upon the circumstances, and therefore one could not say that a state of war automatically arose from it. The cause of war did not create a war. Instead, the *response* to the cause of war (whether by formal declaration or armed attack) was what created the war (and if no response was made in spite of a just cause—a perfectly reasonable result under some circumstances—then no state of war occurred).³¹⁰ Eighteenth-century writers said that in a defensive war no declaration was required to create a state of war. The previous analysis shows that “defensive” in this context meant war undertaken in response to attack upon forces or territory, not broadly speaking undertaken in response to some threat or offense under the law of nations.

Further, a state of war existed, not in the abstract, but between contending nations; non-contending nations were neutrals. For a

³⁰⁸ Burlamaqui, *2 Principles* at 174 (cited in note 131) (“We must therefore affirm in general, that the first, who takes up arms, whether justly or unjustly, commences an offensive war; and he, who opposes him, whether with or without a reason, begins a defensive war.”). See also Vattel, *Law of Nations* at 293 (cited in note 8) (“He who takes up arms to repel the attack of an enemy, carries on a defensive war. He who is foremost in taking up arms . . . wages offensive war.”).

³⁰⁹ See Burlamaqui, *2 Principles* at 173 (cited in note 131); Vattel, *Law of Nations* at 293 (cited in note 8).

³¹⁰ See Vattel, *Law of Nations* at 328 (cited in note 8). See also Burlamaqui, *2 Principles* at 173 (cited in note 131) (“Offensive wars are those, which are made to constrain others to give us our due, in virtue of a perfect right we have to exact it of them; or to obtain satisfaction for a damage unjustly done us, and to force them to give caution for the future.”). But see Lee, *Captures in War* at 32–33 (cited in note 151) (arguing that a military response to a threat is defensive rather than offensive).

previously uninvolved nation to join the hostilities in support of one side was a declaration by that nation that it was no longer to be regarded as a neutral, but as a belligerent. Thus assisting an ally militarily, even as a defensive matter, constituted a declaration.³¹¹ In constitutional terms, if the United States gave military assistance to an ally under attack this would create a state of war between the United States and the ally's attacker where none previously existed; this would, in eighteenth-century terms, amount to a declaration of war by the United States.³¹²

A defensive war, then, was a response to an attack that standing alone created a state of war. It should be clear that this is quite a bit less than executive advocates have claimed. For example, prior to the Persian Gulf War, the executive branch asserted that no authorization from Congress was necessary prior to U.S. forces moving against Iraqi forces in Kuwait, either because Iraq's invasion of Kuwait threatened U.S. strategic interests or because the U.S. was acting only defensively in support of Kuwait.³¹³ The foregoing review of eighteenth-century terminology shows that these claims exceed presidential powers granted by the original meaning of the Constitution's text. Although in eighteenth-century terms the U.S. war against Iraq may have been "justified," it assuredly was not "defensive."³¹⁴ Prior to the U.S. move against Iraqi forces, no state of war existed between the United States and Iraq; the U.S. attack amounted to a declaration of war that created a state of war where none previously had existed.³¹⁵

b) *How far can the President go in fighting a defensive war?*
The next question is how far the President may go in waging a

³¹¹ See Wolff, 2 *Jus Gentium* at 377 (cited in note 142) ("Since the same thing is allowable against one who allies himself to my enemy and against his property, as against an enemy and the property of an enemy, it is allowable to enter his territory with an armed force, and to conduct hostile operations there, or bring war upon him.").

³¹² I speak here of direct U.S. military intervention in the war. As Vattel made clear, eighteenth-century practice permitted countries to go some distance in assisting a nation at war without actually being deemed to enter the war themselves. In the case of such low-level assistance, it was for the country against whom the assistance was given to decide if the assistance should be made a cause for war. See Vattel, *Law of Nations* at 328–29 (cited in note 8).

³¹³ See Fisher, *Presidential War Power* at 148–51 (cited in note 1) (discussing the executive branch position). See also Crisis in the Persian Gulf Region: U.S. Policy Options and Implications, Hearings before the Senate Committee on Armed Services, 101st Cong, 2d Sess 701 (1990) (testimony of then-Secretary of Defense Richard Cheney).

³¹⁴ See Burlamaqui, 2 *Principles* at 174 (cited in note 131) (making this distinction).

³¹⁵ It was likely not constitutionally problematic because Congress ultimately passed a resolution authorizing the President to use force against Iraq. Authorization for Use of Military Force against Iraq Resolution, HR J Res 77, 102nd Cong, 1st Sess, in 105 Stat 3 (Jan 14, 1991). I would view this as a delegation to the President of the power to initiate a state of war with Iraq, and that delegation seems constitutional under most leading theories of the nondelegation doctrine. But see Sidak, 41 *Duke L J* at 32–33, 108–09 (cited in note 36) (arguing that the Gulf War resolution was not sufficient for constitutional purposes).

defensive war without congressional approval. This question was debated from the beginning of constitutional history, perhaps most famously during the Jefferson administration's dealings with the Barbary powers. In 1801, Tripoli, one of the Barbary powers, began attacks on U.S. shipping, and eventually issued a formal declaration of war against the United States. Jefferson sent the U.S. Navy to the Mediterranean without consulting Congress.³¹⁶ Because the President had the authority to repel attacks, most everyone agreed that the U.S. naval vessels could defend themselves if attacked by Tripoli's navy. The more difficult question was whether they could initiate attacks on Tripoli's ships.

For the most part, Jefferson's cabinet seemed to think they could, and Jefferson's orders to the fleet had no limitations on offensive activity.³¹⁷ But when an engagement actually occurred, and Jefferson had occasion to report it to Congress, he emphasized the defensive nature of the fight and went so far as to say that offensive actions required the assent of Congress.³¹⁸ This drew a sharp response from Alexander Hamilton, who argued that once war had been begun by the other side, the President was authorized to use all available force in response.³¹⁹ This, in fact, was exactly what Jefferson's cabinet had advised him, and what Jefferson's orders to the fleet appeared to contemplate (although these facts were not known to Hamilton).³²⁰

The textual theory of war powers suggests that Hamilton and Jefferson's cabinet had it right. When international law writers referred to a defensive war, they focused on how the war began: A defensive war was one initiated by attack or formal declaration by the other side. However, once the war started, they did not distinguish

³¹⁶ The episode is recounted in Sofaer, *War, Foreign Affairs, and Constitutional Power* at 208–21 (cited in note 30) (describing actions by Barbary powers against the United States and President Jefferson's decision to send naval units to the Mediterranean). See also Gary J. Schmitt, *Thomas Jefferson and the Presidency*, in Thomas E. Cronin, ed., *Inventing the American Presidency* 326, 336–37 (Kansas 1989).

³¹⁷ Sofaer, *War, Foreign Affairs, and Constitutional Power* at 209–10 (cited in note 30). Of the cabinet, only Levi Lincoln expressed the opposing view, that defensive measures were limited to repelling an immediate attack. Id. Jefferson's instructions to Commodore Richard Dale, the commander of the expedition, directed that "in case of their [the Barbary powers] declaring War or committing hostilities" the expedition should retaliate fully, without defensive limitations. Id. at 210.

³¹⁸ Jefferson reported that because the U.S. force was "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the [enemy] vessel, being disabled from committing further hostilities, was liberated by its crew." 11 *Annals of Congress* 11 (Gales and Seaton 1851).

³¹⁹ See Examination of Jefferson's Message to Congress of December 7, 1801, No 1 at 249–50 (cited in note 23) ("[W]hen a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.").

³²⁰ See Sofaer, *War, Foreign Affairs, and Constitutional Power* at 212–13 (cited in note 30).

between defensive and offensive wars with respect to the way they could be fought. Either kind of war triggered the rights of war, which included doing whatever necessary (with the barest humanitarian limitations) to destroy the enemy. It was not thought that a "defensive" war was one in which the only object was to avoid being overwhelmed by attack. Nor did taking the "offensive" in a tactical sense convert the war from a defensive to an offensive war, such that a new declaration was required. In short, the power to wage a defensive war included both the tactical defensive and tactical offensive: The key question was how it was begun, not how it was fought.³²¹

If that is correct, then once a state of war is created by the opposing side, the President has full power to fight the war to its conclusion.³²² Accordingly, the only question in the Tripoli situation was at what point Tripoli's actions created a state of war. Once Tripoli formally declared war, a state of war obviously existed (so Hamilton's claim seems correct). On the other hand, Jefferson's cabinet may have slightly overreached. Prior to the formal declaration, a state of war could have existed only by Tripoli's declaration-by-action. Yet it is not

³²¹ See Burlamaqui, 2 *Principles* at 173 (cited in note 131); Vattel, *Law of Nations* at 293 (cited in note 8) ("He who takes up arms to repel the attack of an enemy, carries on a defensive war. He who is foremost in taking up arms, and attacks a nation that lived in peace with him, wages offensive war."). See also Lee, *Captures in War* at 47 (cited in note 151) ("[W]hoever declares himself my enemy, gives me a liberty to use violence against him in infinitum, or as far as I please; and that, not only till I have repulsed the danger which threatened me.").

³²² As noted, this was the dominant view among the leading American statesmen who considered the matter during the Tripoli incident, including Hamilton, Jefferson, Madison, and Albert Gallatin. Gallatin said "The exve [executive] cannot put us in a state of war, but if we be put into that state either by the decree of Congress or of the other nation, the command and direction of the public force then belongs to the exve [executive]." Sofaer, *War, Foreign Affairs, and Constitutional Power* at 209 (cited in note 30). Madison later wrote: "The only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has 'been actually' produced by the conduct of another power . . . Such a case was the war with Tripoli during the administration of Mr. Jefferson." Letter from Madison to Monroe (Nov 16, 1827), in 3 *Letters and Other Writings of James Madison* 600 (Lippincott 1867).

The allocation of powers suggested here is also precisely consistent with the view of Framer and Supreme Court Justice William Paterson, expressed in 1806:

If, indeed, a foreign nation should invade the territories of the United States, it would I apprehend, be not only lawful for the [P]resident to resist such invasion, but also to carry hostilities into the enemy's own country; and for this plain reason, that a state of complete and absolute war exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other. . . . There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of [C]ongress to change a state of peace into a state of war.

United States v Smith, 27 F Cas 1192, 1230 (Cir Ct D NY 1806) (Paterson).

Professor Sofaer says only that "[o]ne might reasonably infer . . . from the power to defend against attacks on the United States . . . a power to act offensively against any nation that declared and made war." Sofaer, *War, Foreign Affairs, and Constitutional Power* at 213 (cited in note 30). I would say, instead, that the text makes this more than just a reasonable inference, by giving Congress the power over war declaration and leaving residual war powers with the President.

clear that anything Tripoli did (prior to the formal declaration) would have counted as a declaration-by-action. Arguably, seizing U.S. merchant ships would not. As recounted above, seizure of private property, including ships, was called reprisal: If done without justification, it was a cause for war, but it was not in itself an act of war. In general, eighteenth-century writings described reprisal as something less than war, though often leading to war. Thus, if it were simply a case of Tripoli seizing U.S. merchant ships and the United States responding with a naval assault, the state of war would be initiated not by the Tripoltanean seizures, but by the U.S. response.³²³ On the other hand, once Tripoli attacked U.S. naval ships, Jefferson would be on stronger ground in saying that the state of war arose from Tripoli's acts, and that he was thereafter entitled to wage a war on his own authority.

In sum, then, the President's executive power over foreign affairs includes the power to wage war once it is declared. This includes not only a war declared (by word or action) by Congress and a war declared (by word or action) by the President upon the properly delegated authority of Congress, but also a war declared (by word or action) by a foreign power. Once the state of war is created in any of these three ways, the President has full power to pursue it to the end.³²⁴

D. The President's Power to Act Short of War

The presidential powers to be discussed in this Part are not, strictly speaking, war powers, but consist of hostile actions short of war. Some modern congressionalist scholars have loosely described Congress's power as a power over hostilities in general. The constitutional text, however, gives Congress power over war only (plus letters of marque and reprisal); by the theory of the executive power over foreign affairs, uses of force and other matters not included in these two categories are presidential powers.

³²³ As Burlamaqui explained, this conclusion would not imply any misdeed on the part of the United States. The Tripoltanean seizures were plainly done without good cause, and thus were illegal under the law of nations and constituted a just cause for war; thus the United States would be acting appropriately to begin a war in response, but it would, nonetheless, be an offensive war on the part of the United States. See Burlamaqui, 2 *Principles* at 173–74 (cited in note 131).

³²⁴ This conclusion shows that advocates of congressional war powers, like their presidential counterparts, have substantially overreached. Louis Fisher, for example, refers to “the expectation of the Framers that Congress, as the people’s representative, would have to approve in advance any use of U.S. forces against foreign government[s].” Fisher, *Presidential War Power* at 161 (cited in note 1). Whether or not some individual Framers had such an expectation, the Constitution’s text labels only declaring war, not all uses of U.S. forces against a foreign power, as a congressional power.

As discussed, eighteenth-century terminology defined war as including essentially all sovereign contentions by force.³²⁵ While broad, this definition leaves considerable power to the President. I do not propose to enumerate all of the ways the President might act in the shadow of the war power without actually claiming power constitutionally conveyed to Congress. However, the range of this power may be suggested by considering a few prominent categories and examples.

First, consider military deployments. Under the executive power, the President may direct the movements of the military, subject only to the restriction that the President cannot use the military to attack another sovereign or invade another sovereign's territory (since that would amount to a declaration of war). A number of controversial deployments would still be within the President's power under this scheme. For example, a peacekeeping mission approved by the relevant territorial sovereign or sovereigns would not be a declaration of war against anyone.³²⁶ Indeed, no deployment invited by the territorial sovereign amounts to a declaration of war.³²⁷

Second, military incursions, even without the consent of the territorial sovereign, do not amount to declarations of war (in the eighteenth-century constitutional sense) if they are not targeted against the territorial sovereign and the territorial sovereign does not oppose them. A common example from the nineteenth and early twentieth centuries involved the U.S. border with Mexico, which U.S. forces crossed on a number of occasions in pursuit of bandits and other irregular forces.³²⁸ Crossing the border with hostile intent toward the government or territory of Mexico would amount to a declaration

³²⁵ See Part IV.

³²⁶ A useful example here is President Clinton's deployment of troops to Bosnia under the Dayton Accords. See Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 L & Contemp Probs 125, 135–36 (2002). Numerous voices in Congress suggested that congressional approval was required for this deployment. See id at 135. As a constitutional matter, though, it seems that the deployment did not constitute a declaration of war against anyone, as it was approved by all of the contending forces. True, it placed U.S. troops in a potentially hostile environment, but the congressional war power is specifically that of declaring war, not generally that of managing the military's involvement in hostile situations.

Professor Damrosch says that the deployment was constitutional "on the ground that the troops were not expected to become involved in hostilities." Id at 135 n 58. As the foregoing discussion suggests, I find this too narrow a view of the President's deployment power. The relevant question is not whether hostilities are "expected," but whether the deployment amounts to a declaration of war.

³²⁷ To the extent the deployment was made to join in hostilities against a third force—for example, in an intervention in a civil war—the joinder of hostilities would amount to a declaration of war that would require congressional authorization.

³²⁸ Most famously, General Pershing pursued Pancho Villa in northern Mexico after Villa's raid on Columbus, New Mexico in 1916. See Wormuth and Firmage, *To Chain the Dog of War* at 130–31 (cited in note 1).

of war, but it is hard to accord these border incursions such status. The U.S. government typically had no quarrel with Mexico or its government, only with the private bands of plunderers who were the objects of the pursuit. Mexico did not oppose the crossing with force. Although arguably a violation of international law, depending on the circumstances and the authorities consulted, these acts did not constitute a declaration of war against Mexico since there was no intent to settle a dispute between sovereigns with violence.³²⁹ Mexico might well have chosen to treat these incursions as *causes* of war (had the military disparity between the two countries not been so great), but, as argued above, there was a sharp distinction in eighteenth-century thought between an act that created a just cause and an actual declaration of war.

A related example is the President's commonly asserted power to rescue U.S. citizens abroad. As with the incursions in pursuit of bandits, rescues (at least where the menace does not come from the foreign sovereign) are not instances of force directed at the foreign sovereign, and thus not declarations of war. It would be a different case, of course, if the Americans were to be rescued from a hostile sovereign, for such an effort would plainly amount to a use of force between nations.

Similarly, a military deployment that appeared hostile or threatening to another sovereign would not amount to a declaration of war, since the eighteenth-century writers are clear that a mere threat does not begin a war (indeed, some writers argued that a threat was not even a just cause of war).³³⁰ This conclusion leaves the President with considerable power to provoke a war by a threatening deployment to which the foreign country responds with force.

The most famous U.S. incident of war provoked by deployment was President Polk's deployment of U.S. troops into territory disputed between the United States and Mexico in 1846, leading to a Mexican attack on those troops and Polk's claim that Mexico had declared war against the United States.³³¹ Some congressmen objected on

³²⁹ To the extent the raiders constituted organized forces against whom war could be declared (as Villa, at least, probably did), there would be a question of the authority to make such a declaration. But in the typical case (as in the Villa episode), the U.S. incursion was made in response to an attack by the Mexican raiders, and thus would be constitutionally authorized as a defensive measure. See Wormuth and Firmage, *To Chain the Dog of War* at 130 (cited in note 1).

³³⁰ See Burlamaqui, 2 *Principles* at 163 (cited in note 131) ("[T]o have a just reason for war, it is not sufficient, that we are afraid of the growing power of a neighbour We cannot for instance justly declare war against a neighbor, purely because he orders citadels or fortifications to be erected, which he may sometime or other employ to our prejudice."); Wolff, 2 *Jus Gentium* at 329 (cited in note 142); Vattel, *Law of Nations* at 308–09 (cited in note 8).

³³¹ Fisher, *Presidential War Power* at 31–32 (cited in note 1).

constitutional grounds at the time;³³² the House—with the support of then-Congressman Abraham Lincoln—later passed a resolution censuring Polk for “unconstitutionally beg[inning]” the war.³³³

Although I do not propose to resolve the specific question here, the framework suggested in this Article makes the constitutionality of the Mexican-American War somewhat more manageable. The question is whether any of Polk’s actions constituted a declaration of war (since it is that power, specifically, that is given to the Congress and denied to the President). If not, Polk was on firm constitutional ground in claiming the right to direct a military deployment as part of his executive power.

Ordinarily, a military deployment—even a threatening one—was not thought in the eighteenth century to create a state of war.³³⁴ Thus if Polk had deployed General Taylor’s army in a threatening manner along the Mexican border in unambiguously American territory, that would have been well within Polk’s constitutional power. Conversely, if Polk had ordered Taylor to invade Mexico, that would have been an unconstitutional presidential declaration of war. The difficulty arises because the case is somewhat in the middle—Polk directed Taylor to occupy territory disputed between the United States and Mexico. The proper question, therefore, is not whether Taylor’s move was provocative (surely it was, but that does not matter), or even whether it violated international law, but whether Taylor’s move would count as a declaration of war by eighteenth-century standards.

The foregoing discussion suggests a broader category of presidential power: The President has considerable latitude to provoke a war. Many acts may cause another nation to go to war against the United States, including insults, threats, and the incursions short of war mentioned above. The eighteenth-century writers clearly distinguish between acts giving rise to war and acts creating a state of war.³³⁵ Only the latter are given to Congress by the Declare War Clause. To the extent the others are part of the residual executive

³³² Id at 32–33. Senator Calhoun, for example, argued that “[i]f we [the Congress] have declared war, a state of war exists, and not till then.” *Cong Globe*, 29th Cong, 1st Sess 784 (1846). As discussed above, such a conclusion is flatly contrary to eighteenth-century usage, which recognized first that a state of war could be created by the actions of one side, and second that a state of war could be created by hostile act. The final form of Congress’s resolution recognized that “a state of war exists” as a result of Mexico’s actions, *War with Mexico: Recognition and Prosecution of Mexican War Act*, 29th Cong, 1st Sess, in 9 Stat 9 (May 13, 1846), a view consistent with Polk’s understanding and with eighteenth-century usage.

³³³ *Cong Globe*, 30th Cong, 1st Sess 95 (1848). The censure occurred in a confusingly back-handed way: The resolution was added as an amendment to a resolution honoring Mexican War veterans for their services. See *id.* The final resolution passed the House on February 7, 1848. See *Cong Globe*, 30th Cong, 1st Sess 304 (1848).

³³⁴ See note 330 and accompanying text.

³³⁵ See Part VI.C.2(a).

power, the President may undertake them (even though the likely result may be a declaration of war by the other side, which in turn entitles the President independently to fight an unlimited war.) As then-Congressman Lincoln noted in reflecting on the Mexican-American War, the combination of these two powers—the power to act provocatively and the power to fight a war to its conclusion once it is begun by the other side—produces enormous presidential war powers.³³⁶ Unlike Lincoln, however, I have no constitutional reservations about the matter, as the constitutional text seems quite clearly to point in this direction.

This observation leads back to Professor John Yoo's work on war power. While I disagree in this Article with a number of aspects of Professor Yoo's analysis, I think he is correct in his larger point that the Declare War Clause is not the only constitutional protection (and perhaps not even the primary constitutional protection) against presidential overreaching in war powers.³³⁷ As the early Americans knew from the English experience, the power over appropriations is a powerful check on presidential war ambitions, for wars cannot be fought without money. The Mexican-American War, of which Lincoln complained, is a leading example. Had Congress wished to limit President Polk to defensive operations against Mexico, it could easily have done so by appropriations limited to that purpose. Instead, Congress voted money for two major offensive expeditions against Mexico, with the result that essentially all of the fighting in the war after the initial battles was done on Mexican territory, fully funded by Congress. Lincoln was incorrect to say that the Constitution provided no means of checking presidential war powers in a case such as Mexico—but the check came through provisions other than the Declare War Clause.³³⁸

CONCLUSION

This Article has sought a textual theory of the constitutional allocation of war powers, by attempting to recover the eighteenth-

³³⁶ See Roy P. Basler, ed, 1 *Collected Works of Abraham Lincoln* 451–52 (Rutgers 1953).

³³⁷ See Yoo, 70 U Colo L Rev at 1175–91 (cited in note 42) (arguing that the Framers expected the branches to exercise their powers to cooperate and, at times, to struggle for control over war); Yoo, 84 Cal L Rev at 1197–1240 (cited in note 2) (discussing how the tradition of war powers that began in England in the 1620s and continued through to the American states in the 1780s shaped the Founders' decision to create a stable system supported by two pillars: executive initiative in the commencement and management of war, and legislative participation by means of the funding and impeachment powers).

³³⁸ As Professor Yoo also emphasizes, in addition to appropriations Congress has a potential check through the impeachment power, although this is a more difficult weapon to wield. See Yoo, 84 Cal L Rev at 1197–1240 (cited in note 2). No one seriously proposed this remedy with respect to Polk, and indeed Lincoln's practical problem in finding a check against Polk was that Congress generally supported the war.

century meaning of the phrase “declare war.” It concludes that such a textual approach shows a division of war powers between the President and Congress, rather than a complete or near-complete allocation of war powers to a single branch. This conclusion arises from three basic propositions.

First, study of the eighteenth-century usage of “declaring” war shows that the phrase had two common meanings. It could mean a formal proclamation or announcement of war, which is the meaning typically assigned to the phrase in the modern war powers debate. But in eighteenth-century terms war could be declared by “word or action.” A hostile attack, as well as a formal proclamation, would trigger a state of war between nations, and launching such an attack could be called “declaring” war. As a result, the Declare War Clause, standing alone, is ambiguous: It could have a narrow meaning that refers only to a formal proclamation, or it could have a broad meaning that refers to any words or actions that create a state of war.

Second, the broader meaning of “declaring” war fits better with its constitutional context, and with discussions of the phrase during the ratifying debates, than does the narrow meaning. Both the constitutional context, and the ratifying debates, show that the Declare War Clause was understood to describe an important power: The Constitution goes out of its way to take this power away from the President and give it to Congress, and the Federalist ratifiers emphasized this provision (without contradiction) as an important reduction in presidential power. Yet the formal proclamation of war, in eighteenth-century practice, was not prerequisite to initiating hostilities, nor to a legal state of war. As commonly used and understood, it was a communicative and rhetorical tool, but not a necessary element of international military relations. If the Declare War Clause referred only to the formal proclamation, one cannot understand why it should be re-allocated from the President to Congress, nor why the ratifiers thought this reallocation was worthy of emphasis. The President did not lose any essential power in losing the power to issue a formal proclamation. On the other hand, if the Declare War Clause referred to declarations by proclamation *and* declarations by hostile attack, both elements are readily understandable: The Constitution sought to reallocate the whole of the power to create a state of war from the executive (where it lay in the English system) to the legislature.

Third, the broad meaning of “declaring” war provides a way to harmonize the Constitution’s text and the post-ratification comments and practices of the constitutional generation. As discussed, one of the enduring puzzles of the war powers debate is that the political leaders of the 1790s seemed almost universally to believe that Congress had an exclusive power to initiate a state of war—even though the Consti-

tution's text says only that Congress has the power to "declare" war, and no one in the 1790s would have thought that a formal declaration of war was prerequisite to initiating hostilities. This incongruity has led prior theories of war power either to emphasize the text at the expense of the Framers' comments (producing a narrow view of Congress's war power) or to emphasize the Framers' comments at the expense of the text (producing a broad view of Congress war power). A fuller understanding of the eighteenth-century meaning of "declaring" war, as pursued in this Article, shows that neither the text nor the commentary need be sacrificed in finding a satisfactory meaning of the Declare War Clause. Rather, when the Framers wrote that Congress had the power "to declare War" they were giving "declare" its broad eighteenth-century meaning, and thus giving Congress the power over words *or* actions that created a state of war.

Though broad, this power does not extend as far as modern advocates of congressional war power would have it. Once eighteenth-century war was begun by one side's actions or words, a state of war was understood to exist and no declaration by the other side was needed to sustain it. Accordingly, carrying on a war begun by another nation is not part of the declare-war power. It therefore remains part of the President's executive power. While a portion of this power is commonly recognized in the President's conceded ability to "repel sudden attacks," the President's power under the original meaning of the Constitution is considerably broader, for the eighteenth-century meaning would have also included the ability to carry hostilities into the enemy's own country in response to an attack. In addition, taking potentially provocative actions that might incite another nation into war with the United States should not be read as part of the declare-war power. Insults, threats, hostile military deployments, etc., might have been just causes of war in the eighteenth century, but they would not have been described as actions "declaring" war. They are not, then, part of Congress's declare-war power under an eighteenth-century meaning of the text, and instead fall to the President under the executive's diplomatic and military powers. As a result, while the President cannot strike the first blow, the President has broad power to respond to a blow struck by the other side, and broad power to incite the striking of such a blow.

Yet these presidential powers are in turn checked by further important powers of Congress. It is a mistake to think of the Declare War Clause as the sole check upon a President's warlike ambitions, for Congress retains the power of appropriations and, in extreme cases, impeachment. Even a weaker version of these powers allowed the eighteenth-century English Parliament to claim a substantial role in warmaking decisions, despite the English monarch's power to declare

war. Although the Constitution leaves some war powers to the President as an initial matter, it provides these further checks to Congress. In this way, the text of the Constitution, given its original meaning, produces complex layers of checks and balances in war powers, rather than entrusting war wholly to a single branch.