

REPLY

A TWO-FRONT WAR

Saikrishna Prakash†

It seems I am fighting a two-front war, besieged by three superb scholars. Professors Robert Delahunty and John Yoo,¹ and Professor Michael Ramsey² have authored bracing and challenging responses to *Unleashing the Dogs of War (Unleashing)*.³ Though I have learned from these essays, their authors might say that I have not learned enough because I continue to adhere to the categorical theory's claim that any decision to wage war on behalf of the United States is an exercise of the Constitution's "declare war" power.⁴ Because under the Constitution only Congress may declare war, only Congress may decide whether the United States will wage war.

I

THE FORMALIST THEORY

In *Unleashing*, I argue that in eighteenth-century America and Europe, the "declare war" power was understood in two senses. The narrow, formal sense referred to the power to issue formal declarations of war. If a nation did not issue a formal declaration, it had not "declared war" at all, however destructive its war making might be.⁵ *Unleashing* does not try to establish this meaning because Professor Yoo's first-rate scholarship has clearly demonstrated that "declare war" could be read in a narrow, formal sense.⁶

† Herzog Research Professor of Law, University of San Diego. Yale Law School, J.D.; Stanford University, B.A.

¹ Robert J. Delahunty & John Yoo, Response, *Making War*, 93 CORNELL L. REV. 123 (2007).

² Michael D. Ramsey, Response, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007).

³ Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007). In large measure, *Unleashing* responds to the excellent war powers scholarship of Professors Yoo and Ramsey. See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 218–49 (2007); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 246–47 (1996).

⁴ See Prakash, *supra* note 3, at 49–50, 52–54 (describing the categorical theory).

⁵ See *id.* at 46–47.

⁶ See YOO, *supra* note 3, *passim*; Yoo, *supra* note 3, *passim*.

Instead, *Unleashing* substantiates a broader, categorical reading of the “declare war” power. In the eighteenth century, any decision to wage war was seen as a declaration of war, whether that decision was made in a formal declaration of war or was denoted by some hostile action that signified a resolve to wage war.⁷ For instance, one statesman noted that “hostilities are commonly considered as the strongest declaration of war”⁸ because general warfare made clear that a nation had declared war, albeit in an informal way. Hence, an entity with the “declare war” power was understood to have the power to declare war formally and informally.

In *Making War*, Professors Delahunty and Yoo admit that in the eighteenth century, people spoke of various hostile actions, such as the commencement of warfare, as declarations of war.⁹ Further, they agree that the “declare war” power was read to encompass all decisions to go to war, including decisions to wage general hostilities.¹⁰ Yet they deny that the Constitution incorporated that broad reading; instead, they contend that the Constitution employs the narrow, formal definition of “declare war.”¹¹

From this starting point, Professors Delahunty and Yoo draw three conclusions. First, they claim that the “declare war” power only grants Congress the power to issue formal declarations of war.¹² Second, they maintain that despite having the power to make formal declarations, Congress cannot command the President to actually fight a war.¹³ Third, they assert that the President can order uses of force that would have been regarded as informal declarations of war because the President has all the executive power not granted to Congress, and because the Constitution never grants Congress the powers to wage war and make informal declarations.¹⁴ In *Unleashing*, I label these propositions the “formalist theory” because the theory reads the “declare war” power as only permitting Congress to issue formal declarations of war and as granting no authority over informal declarations.¹⁵ *Making War* is an important piece of scholarship because it represents the latest and best explanation of the formalist theory of “declare war.”

⁷ See Prakash, *supra* note 3, at 53–54, 67–74.

⁸ 1 JACQUES NECKER, AN ESSAY ON THE TRUE PRINCIPLES OF THE EXECUTIVE POWER IN GREAT STATES 273 (London, G.G.J. & J. Robinson 1792).

⁹ See Delahunty & Yoo, *supra* note 1, at 133, 136, 146.

¹⁰ See *id.* at 133, 136.

¹¹ See *id.* at 124, 167.

¹² See *id.* at 127, 166–67.

¹³ See *id.* at 129.

¹⁴ See *id.*

¹⁵ See Prakash, *supra* note 3, at 47.

Besides making textual arguments found in Professor Yoo's earlier scholarship,¹⁶ *Making War* begins by critiquing various textual claims that I supposedly made in *Unleashing*: the attempt to place the burden of proof on opponents; the assertion that "virtually all constitutional provisions . . . are indeterminate"; the contention that "any reading is possible"; and the claim that "it is 'impossible' to arrive at a textual interpretation of" the "declare war" power.¹⁷

Let me dispel any cloud of confusion. *Unleashing* is hardly some sly deconstructionist attack on the determinacy of text. To the contrary, it makes rather ordinary textual arguments, most prominently, asserting that the Constitution adopted the broader sense of "declare war" that *Making War* admits existed in the eighteenth century.¹⁸ This is a claim about the meaning of text and not a claim that the Constitution is indeterminate or that "any reading is possible."¹⁹ Moreover, rather than insisting that "it is 'impossible' to arrive at a textual interpretation of" the "declare war" power,²⁰ I argue in *Unleashing* that it is "impossible to establish, from an examination of text alone, what 'declare war' means" because the two senses of "declare war" are equally plausible when looking at the text alone.²¹ Finally, I disavow any attempt, real or imagined, to foist a burden of proof on proponents of the formalist theory. I am happy to have anyone consider the merits of the various theories free from the burden of any lawyer's tricks.²²

Making War attempts to rebut a structural challenge that I issued in *Unleashing*.²³ *Unleashing* argues that the formalist theory renders formal declarations so inconsequential that there is no reason to believe that the Founders would not have granted the entire "declare war" power to the American executive, as it rested with the English Crown.²⁴ Indeed, if the formalist theory is correct and the President may start a war on his own authority, the power to make formal declaration (and the functions associated with formal declarations) could have been safely and more sensibly lodged with the President.

¹⁶ Readers seeking a response to *Making War's* analysis of the provisions that bear on the meaning of "declare war" should read *Unleashing's* textual section. See Prakash, *supra* note 3, at 54–59.

¹⁷ See Delahunty & Yoo, *supra* note 1, at 126.

¹⁸ See *id.* at 133.

¹⁹ *Id.* at 126.

²⁰ *Id.* at 125.

²¹ Prakash, *supra* note 3, at 54.

²² In truth, *Unleashing* differs little from Professor Yoo's work in this area. Professor Yoo's previous scholarship never claimed that the Constitution's text, when read in isolation, *mandates* the narrow reading of "declare war." Each work also examined history to help establish the formalist theory.

²³ Delahunty & Yoo, *supra* note 1, at 129–33.

²⁴ Prakash, *supra* note 3, at 62–65.

In *Making War*, Professors Delahunty and Yoo respond to the structural challenge by discussing the various functions of a formal declaration of war. Only Congress could provide notice of the war, propagandize by listing grievances against the enemy, set war aims,²⁵ regulate commerce, abrogate treaties, regulate enemy nationals,²⁶ and “clothe the bare state of general hostilities with appropriate legal characteristics.”²⁷ I believe that *Making War*’s functional discussion is accurate.²⁸ Yet this list of functions hardly makes the power to issue formal declarations consequential. Congress already enjoys power over some of these functions, while others are trivial.

Consider the establishment of war aims. *Making War* claims that the power to formally declare war includes the power to specify war aims.²⁹ Yet if the President may wage war at will, as the formalist theory avers, any war aims listed in a formal declaration are entirely superfluous because they are not legally binding. For instance, Congress might state in a formal declaration that “America fights this war to safeguard its commerce.” Nonetheless, under the formalist theory, the President is free to acquire enemy territory or to secure regime change, making the aims listed in the declaration irrelevant. Moreover, the formalist theory maintains that Congress cannot command the President to fight a war.³⁰ So Congress might declare war, proclaim that war’s aims, and yet the nation’s military might fight no war. In short, the ability to list empty war aims scarcely makes the “declare war” power consequential. In fact, this discussion underscores that it would make far more sense to give the power to determine a war’s aims to the President because under the formalist theory, the President can meaningfully pursue those aims. After all, under the formalist theory, the President has the sole power to decide to wage war.

In another bid to grant formal declarations some real consequences, *Making War* claims that in the late-eighteenth century, a formal declaration was necessary to ensure that the laws of war applied. Without a formal declaration, one had a “brute state of conflict” that was “lawless and unregulated.”³¹ But *Making War* mistakenly supposes that a formal declaration somehow had unique international law consequences.³² About a decade before the Framers drafted the Constitu-

²⁵ Delahunty & Yoo, *supra* note 1, at 151–52.

²⁶ *See id.* at 153, 155.

²⁷ *Id.* at 152.

²⁸ *See* Saikrishna Prakash, *Declarations of War: A Primer* 10–18 (Sept. 13, 2007) (unpublished manuscript, on file with author).

²⁹ Delahunty & Yoo, *supra* note 1, at 152.

³⁰ *See id.* at 128–29.

³¹ *Id.* at 150.

³² *See id.* at 151–56.

tion, England and France fought each other during the Revolutionary War without either nation formally declaring war.³³ Yet no one thought that this war was a “brute state of conflict” or that it was “lawless and unregulated.” To the contrary, an English court concluded that the laws of war applied because France and England had declared war by the mouths of cannons.³⁴

While at one time it may have been true that formally declared wars had different international law consequences for the warring nations, by the time of the Constitution, it did not matter whether a nation formally declared war or not.³⁵ Proving this point, *Making War* cites cases claiming that the Declaration of Independence regularized hostilities.³⁶ But if that informal declaration had this effect, why should we assume that other informal declarations lacked the same consequences? Informal declarations, no less than formal ones, indicated that a sovereign had chosen to wage war. Where that was true, the laws of war applied. Formal declarations were issued less frequently in the late eighteenth century³⁷ precisely because they did not have unique capabilities, properties, or consequences.

Even so, assume that it was “necessary, or at least advisable”³⁸ to formally declare war. Why not grant this power to the President? What explains why the Framers would have granted *Congress* the sole power to regularize warfare? The formalist theory awkwardly maintains that the President has the far-reaching power to wage war but cannot explain why the President was not trusted to invoke the laws of war. The President can start any number of lawless and unregulated wars, but cannot ensure that the laws of war will protect the soldiers and sailors who will wage them.

Making War disappoints by failing to discuss text found in all formal declarations of war: the command to use force to wage war. Such text made clear who acted with the sovereign’s command, and it was always distinct from the typical “declare war” language of formal declarations.³⁹ *Making War* admits that, because Congress has the “declare

³³ See Prakash, *supra* note 3, at 49.

³⁴ The *Maria Magdalena*, (1779) 165 Eng. Rep. 57, 58 (Adm.) (cited in Ramsey, *supra* note 3, at 1585).

³⁵ See Ramsey, *supra* note 3, at 1579–88.

³⁶ Delahunty & Yoo, *supra* note 1, at 152.

³⁷ See THE FEDERALIST NO. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁸ Delahunty & Yoo, *supra* note 1, at 155.

³⁹ See, e.g., King of Great Britain’s Declaration of War Against the King of Spain, in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN FROM 1727 TO 1783, at 340, 341–42 (Robert Beatson ed., London, Longman, Hurst, Rees, & Orme 1804) [hereinafter NAVAL AND MILITARY MEMOIRS] (reproducing England’s declaration of war against Spain in which England ordered the use of military force); Spanish Declaration of War Against England, in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN FROM 1727 TO 1783, *supra*, at 342, 343

war” power, Congress may exercise authority over all the other functions found in formal declarations: propaganda, wartime commerce rules, rules relating to resident aliens, treaty abrogation, etc.⁴⁰ But Professors Delahunty and Yoo never explain why, out of all the functions of a declaration of war, the power to command the military to wage war does not rest with Congress.⁴¹ If Congress enjoys the power to issue declarations that contain *all* the traditional functions of a formal declaration, this suggests that, contrary to the formalist theory, Congress *may order* the waging of war. It further suggests that the President lacks the power to wage war because this power rests with Congress. In *Making War*, Professors Delahunty and Yoo fail to consider this feature of formal declarations, leaving their analysis incomplete, if not inconsistent.

There remain the structural anomalies associated with the formalist theory. *Making War* asserts that the President can wage war and that only Congress can formally declare war. These assertions envision strange allocations of power.

First, the formalist theory correctly supposes that the President cannot exercise what the Constitution grants to Congress under the “declare war” power. But consider what this principle means in practice for providing notice and stating grievances. The formalist theory contemplates that the President may wage war against any nation but may not announce the war to the world because this would infringe on the congressional power of giving notice. The President certainly cannot say that he or she has “declared war.” Similarly, the President cannot justify the war by discussing the enemy’s belligerence because such complaints might notify the world of the war. Thus, the President is in a rather curious position: the Commander in Chief may start many wars but may not discuss any of them in public, lest the President infringe on Congress’s “declare war” power.

Second, suppose the President begins a war against Canada at a time when Canadian nationals are given certain treaty rights, such as the right to cross the border freely, and when Canada has most-favored-nation status. The formalist theory must imagine that these rights could continue because Congress might not change them. At

(containing Spain’s declaration of war against England in which Spain ordered the use of military force).

⁴⁰ See Delahunty & Yoo, *supra* note 1, at 151–55.

⁴¹ One cannot cite the Commander in Chief power as the answer, because Commanders in Chief did not have the power to wage war without authority from someone else. As Commander in Chief of the Continental Army, George Washington certainly could not elect to wage war against Russia or Sweden. Indeed, President Washington agreed that he could not make war merely because he was Commander in Chief. See *infra* text accompanying notes 47–49 (disclaiming his authority to wage war against the Creek Indians because Congress had the “declare war” power).

the very least, they would not change until Congress reconsidered them, sometimes long after a President began the war. Hence we could have Canadians freely crossing the border, and Canada would retain its most-favored-nation status at the same time that we are at war with Canada. In other nations, however, entities that could wage war could command the use of military force *and* alter the treaty rights of enemies because these entities also had the broader power to declare war.

Third, consider the mirror situation. Suppose Congress declares war, excoriates Canadian belligerence, orders Canadians to depart, and bans commerce with Canada. Apparently, because Congress does not have the power to command the use of military force, the President may order the troops to stay in the barracks and the navy in its ports. We would be in the risible position of having declared war with no prospect of fighting a war. And the President would have done nothing wrong, because under the formalist theory, Congress can declare war but cannot force the President to wage it.⁴²

These possibilities reveal why it is unlikely that the Founders would split the “declare war” power between two institutions, giving the power to start a war to the President and the power to formally declare war to Congress. Indeed, notwithstanding the edifying historical discussions found in *Making War* and its authors’ prior scholarship, none of these works cites any other constitution that mimics this division of war powers.

One might say that the formalist theory is not formalist enough because it unduly minimizes the significance of formal declarations. Formal declarations were not important merely because they created commercial rules or provided notice; they were vital documents primarily because they could signal the onset of conflict. When issued at a war’s outset, a formal declaration credibly proclaimed that war would ensue or had begun. By asserting that Congress can issue formal declarations but cannot dictate that warfare ensues, the formalist theory drains formal declarations of their most crucial feature.

Turning to American history, *Making War* observes that *Unleashing* does not show that the founding generation never used “declare war” in a narrow, formal sense.⁴³ True enough. I fully accept that “declare war” could be used in the formal sense, so much so that *Unleashing* cites such use in certain American treaties,⁴⁴ coupled with

⁴² In *Unleashing*, I also observed that the formalist theory makes it impossible for Congress to exercise two other traditional functions of a declaration: giving advanced notice of warfare and issuing conditional declarations. See Prakash, *supra* note 3, at 59, 63. *Making War* does not respond to these arguments.

⁴³ Delahunty & Yoo, *supra* note 1, at 158–66.

⁴⁴ Prakash, *supra* note 3, at 83 n.196.

more examples of the broader, categorical use in other treaties.⁴⁵ Yet the question is not whether the Founders ever used “declare war” in the narrow sense of that phrase, but whether the *Constitution* incorporates the formal or categorical definition.

To that end, *Unleashing* cites many Framers who, during the ratification struggle, read the Constitution’s “declare war” provision as authorizing only Congress to take the nation to war. Some of these statements are well-known and others are new discoveries.⁴⁶ In response, Professors Delahunty and Yoo do not cite anyone from the founding era who endorsed the formalist theory. Neither Federalists nor Anti-Federalists claimed that the Constitution granted the President the power to decide to wage war against other nations. Nor did anyone assert that the “declare war” power only granted Congress the power to issue formal declarations of war. Finally, no one maintained that congressional declarations would lack one of the principal and universal features of a formal declaration, namely the command to wage the war declared.

The same evidentiary pattern emerges when we look at early practice. The first four Presidents believed that they could not wage war without a formal or informal declaration of war. President George Washington noted that “[t]he Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken” against the Creek Nation “until after [Congress] shall have deliberated upon the subject, and authorized such a measure.”⁴⁷ Indeed, Washington said this after the Creek had already declared war.⁴⁸ Washington’s understanding of his own constitutional power is irreconcilable with the formalist theory.⁴⁹

His successors agreed. President John Adams went to Congress even though he thought France was at war with the United States.⁵⁰ Thomas Jefferson always publicly claimed that he could not wage war without a declaration, going so far as to seek authorization to wage war against Tripoli after the latter had already declared war.⁵¹ Finally, James Madison asked Congress for declarations of war against En-

⁴⁵ See *id.* at 81–84.

⁴⁶ *Unleashing* cites new evidence from, among others, James Madison, Rufus King, Nathaniel Gorham, and Robert Livingston. See *id.* at 86–88.

⁴⁷ Letter from George Washington to Governor William Moultrie (Aug. 28, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON 73, 73 (John C. Fitzpatrick ed., 1940).

⁴⁸ Prakash, *supra* note 3, at 97–98.

⁴⁹ *Making War* argues that Washington ordered a war against the Wabash without congressional authorization. See Delahunty & Yoo, *supra* note 1, at 158–62. But I agree with Sofaer that Congress impliedly authorized the war. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 122–23 (1976). In other words, Congress informally declared war.

⁵⁰ Prakash, *supra* note 3, at 101–02.

⁵¹ *Id.* at 103–05.

gland and Algeria, regarding himself incompetent to wage war without prior authorization.⁵²

These were hardly idiosyncratic views. Alexander Hamilton, Thomas Jefferson, Henry Knox, and many others agreed with these early Presidents.⁵³ Hamilton, hardly associated with narrow readings of presidential power, claimed that “it belongs to Congress only, *to go to war*.”⁵⁴ Moreover, early constitutional commentators, from James Kent to Joseph Story, believed that Congress could decide whether the nation would wage war and that the President could not take the nation to war.⁵⁵

In contrast to the post-ratification evidence supporting the categorical theory, *Making War* cites no one who argued that the President could decide to wage war and that Congress could only limit the President by defunding the war. Nor did anyone suggest that though Congress could formally declare war, it could not command the military to wage the war it declared. Abraham Sofaer’s exceptional book first mentions such arguments when discussing James Monroe’s tenure.⁵⁶ Those who spoke in favor of a presidential war power were roundly condemned.⁵⁷

Making War correctly observes that one should not add up evidential chits for various meanings and then choose the meaning with the most evidence merely because it has more.⁵⁸ Discerning original meaning is not so mechanical. Yet perhaps we ought to eschew theories that have few or no chits as compared to theories that have many. If so, we have good reason to doubt the formalist theory because it lacks founding-era support.

The formalist theory even has a hard time reconciling the documents that one might suppose should trouble it the least: formal declarations of war. Each of the nation’s formal declarations granted authority to the President to wage war.⁵⁹ For instance, the 1812 declaration of war not only declared war, it also “authorized” the President

⁵² *Id.* at 105–06.

⁵³ *Id.* at 97–107.

⁵⁴ Alexander Hamilton, Examination of Jefferson’s Message to Congress of December 7, 1801, No.1 (Dec. 17, 1801), in 8 THE WORKS OF ALEXANDER HAMILTON 246, 249 (Henry Cabot Lodge ed., 1904).

⁵⁵ See Prakash, *supra* note 3, at 92–93; see also JAMES KENT, DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 66 (New York, 1795) (noting that “war can only be commenced by an act or resolution of [C]ongress”).

⁵⁶ See SOFAER, *supra* note 49, at 359 (quoting Representative Alexander Smyth).

⁵⁷ See *id.* at 370–72.

⁵⁸ See Delahunty & Yoo, *supra* note 1, at 125.

⁵⁹ See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2062 (2005) (noting that all American formal declarations of war authorized the President to use force).

to use the military and the militia to wage the war.⁶⁰ Moreover, most formal declarations of war expressly *directed* the President to use military force to wage war.⁶¹

Advocates of the formalist theory must regard all these formal declarations as constitutionally dubious. Such declarations contained language granting the authority to wage war under what the formalist theory maintains is a false belief: that the President lacks such power absent congressional authorization. Moreover, those declarations that actually directed the President to wage war were certainly unconstitutional because they commanded something that the formalist theory claims is left to the President's utter discretion. Ironically, formalist theory proponents must suppose that many of the nation's formal declarations were unconstitutional because they *too closely resembled* traditional formal declarations of war in that they authorized or ordered the use of force.

In sum, *Making War* asks the correct question: What does it mean to "declare war"? When one focuses solely on international law treaties that preceded the Constitution's creation, Professor Yoo's scholarship yields a rather plausible answer: to "declare war" was to issue a formal declaration of war.

But if one delves deeper, one sees that the formalist theory suffers two problems. First, the formalist theory unduly minimizes formal declarations because it never admits that declarations ordered the use of force. Given this universal feature of formal declarations, Congress can command the use of force in its declarations, as it has done in the past two centuries. Moreover, if the "declare war" power rests exclusively with Congress, as the formalist theory admits, then Congress has the sole power to authorize the use of force in war, just as it has the sole power to create wartime commercial rules and invoke the laws of war. In supposing that Congress can issue formal declarations of war but cannot order the use of force, the formalist theory is at war with itself.

Second, the formalist theory cannot account for the evidence revealing a broader sense of "declare war," one that encompasses all decisions to wage war, however expressed. Kings and Parliaments, along with diplomats and scholars voiced the view that to wage war was necessarily to declare it. More importantly, early Americans read the

⁶⁰ Act of June 24, 1812, 2 Stat. 755 (obsolete) (declaring War between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories).

⁶¹ See, e.g., Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (declaring war against Spain and directing the President to use the military to wage war); Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1 (declaring war against Germany and directing the President to use the military to wage war); Joint Resolution of Dec. 8, 1941, ch. 561, 55 Stat. 795 (declaring war against Japan and directing the President to use the military to wage war).

“declare war” power consistent with the categorical theory’s claims. Those who considered the matter—including Presidents, Justices, Congresses, legal scholars, and Framers—agreed that Congress could decide to go to war and that the President could not. In the face of this evidence, it could be that the Constitution incorporated the formalist theory, but it seems unlikely.

II

RESPONDING TO DECLARATIONS OF WAR

Professor Ramsey and I share more common ground. We agree that when a nation began a war in the eighteenth century, it had declared war no less than if it had made a formal declaration.⁶² Because only Congress could declare war, only Congress could make statements or order actions that were regarded as declarations. Put another way, we agree that only Congress can issue initiation declarations of war. This was the central insight of Professor Ramsey’s excellent article, *Textualism and War Powers (Textualism)*.⁶³ *Unleashing* adds much evidence supporting that claim.

Yet we also have our differences. As a matter of original meaning, we disagree about who could decide to wage war after another nation had declared war against the United States and about whether it was possible to declare war in response to another nation’s declaration of war. In *Unleashing*, I advance the categorical theory’s claim that the same hostile actions and words that constituted an initiation declaration of war were declarations in the response context as well.⁶⁴ Moreover, some nations issued formal response declarations and others were said to have informally declared war against the first war declarant.⁶⁵ Because the “declare war” power included the power to decide to make war, *Unleashing* argues that even after another nation had declared war, Congress had to declare war if the United States was to wage it.⁶⁶

In contrast, Professor Ramsey asserts in *The President’s Power to Respond to Attacks (Power to Respond)*⁶⁷ that in the response context, the “declare war” power is irrelevant, that declaring war is impossible, and that the President may wage war at will. The following are the arguments that lead to these conclusions, as I understand them: First, by declaring war against the United States, by formal or informal means,

⁶² See Ramsey, *supra* note 2, at 169.

⁶³ See Ramsey, *supra* note 3.

⁶⁴ See Prakash, *supra* note 3, at 94–112.

⁶⁵ See *id.* at 94–107.

⁶⁶ See *id.* at 94–112.

⁶⁷ See Ramsey, *supra* note 2.

the declarant has ensured that both nations are in a state of war.⁶⁸ Second, because the United States is in a state of war and is thus already at war, there can be no war for the United States to “declare.” Hence, the “declare war” power has no bearing in the response context, and declarations of war are impossible.⁶⁹ Third, because declaring war is not possible in the response context, Congress’s “declare war” power is not implicated and the President may wage war. In *Unleashing*, I label this set of claims “the pragmatic theory” because it reasonably maintains that no response declaration is necessary to wage war once another nation has declared war. *Power to Respond* is a significant piece of scholarship because it stands as the most complete explication and defense of the pragmatic theory.

Power to Respond lays great stress on the first claim that, once a nation declared war on another, both nations were in a state of war. Yet this was hardly obvious. Steven Neff’s recent comprehensive historical treatment of the law of war indicates that this position was contested by theorists in the late-eighteenth century.⁷⁰ Indeed, during the founding era, both the Netherlands and Portugal took the view that they were not at war, despite declarations of war against them.⁷¹ More importantly, Presidents contradicted the state-of-war claim; both John Adams and James Madison said that while nations were at war with the United States, the United States was at peace with those nations, presumably because Congress had not declared war.⁷² In short, what *Power to Respond* concludes is true as a matter of logic and history was actually disputed quite a bit.

In any event, Professor Ramsey’s second claim that one could not “declare war” in response to another nation’s declaration is the most vital because while the Constitution says nothing about a “state of war,” it clearly states who has the power to “declare war.” If, contrary to the pragmatic theory, a nation *could* declare war, either formally or informally, after another nation had declared war against it, then only Congress enjoyed the power to issue this response declaration of war. Moreover, if the President took any responsive action that would constitute a formal or an informal declaration of war, such action would have usurped Congress’s “declare war” power.

Despite Professor Ramsey’s assertions to the contrary, there is no doubt that eighteenth-century nations made formal and informal response declarations of war. First, numerous formal declarations of the era were response declarations, issued in response to another nation’s

68 See *id.* at 173–74, 190.

69 See *id.* at 190.

70 STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 142–47 (2005).

71 See *id.* at 145–47.

72 See Prakash, *supra* note 3, at 108–09.

declaration.⁷³ This pattern continues to this day, as the United States has issued numerous formal response declarations over its history.⁷⁴ Second, individuals from the eighteenth century regarded both nations fighting a war as having declared war; no one distinguished between the first and second declarants. Indeed, *Textualism* itself cited Admiral Horatio Nelson's claim that Napoli and France had both declared war via their unconstrained warfare.⁷⁵ Similarly, *Unleashing* cited John Adams's description of France and England as having declared war via their general hostilities.⁷⁶ Third, much of the evidence from *Textualism* and *Unleashing* indicating that various hostile signals were regarded as declarations of war consists of generic statements that do not distinguish between the first and second declarant. None of them support the distinction that Professor Ramsey tries to draw in *Power to Respond*.⁷⁷ For instance, when Robert Walpole claimed that most recent declarations had been made via "the Mouths of Cannons," he never said that only the first nation to open fire declares war.⁷⁸ Fourth, the international-law scholars of the era discussed re-

⁷³ Neff cites two such response declarations, but claims that the practice was not common. See NEFF, *supra* note 70, at 143–44. But a review of numerous response declarations found in the multivolume sets reveals otherwise. See A GENERAL COLLECTION OF TREATYS, DECLARATIONS OF WAR, MANIFESTOS, AND OTHER PUBLIC PAPERS, RELATING TO PEACE AND WAR (London, 1710) [hereinafter A GENERAL COLLECTION]; NAVAL AND MILITARY MEMOIRS, *supra* note 39. There are about a dozen formal response declarations found within these volumes. See, e.g., 1 A GENERAL COLLECTION, *supra*, at 256, 259–60 (Netherlands declaring war against France and noting that France had declared war first); *id.* at 272, 273 (Spain declaring war against France and noting that France had declared war first); 3 NAVAL AND MILITARY MEMOIRS, *supra* note 39, at 13 (Spain declaring war against England after noting that England had declared war first); 3 *id.* at 45, 46 (England declaring war against France after noting that France had declared war first). Other declarations cite hostilities as a reason for declaring war. Given the prevailing sense that hostilities were declarations of war, declarations that complained about the other nation's hostilities were response declarations of war. See, e.g., 3 *id.* at 102 (England declaring war and complaining that France had commenced war against England).

⁷⁴ See Act of May 13, 1846, ch. 16, 9 Stat. 9 (declaring war against Mexico and noting that a state of war existed because of the "act of the Republic of Mexico"); Joint Resolution of Dec. 11, 1941, ch. 564, 55 Stat. 796 (declaring war against Germany and noting that Germany had already formally declared war); Joint Resolution of Dec. 11, 1941, ch. 565, 55 Stat. 797 (declaring war against Italy and noting that Italy had already formally declared war); see also Prakash, *supra* note 3, at 97 (discussing the 1812 declaration against England).

⁷⁵ See Ramsey, *supra* note 3, at 1596.

⁷⁶ See Prakash, *supra* note 3, at 49.

⁷⁷ In *Power to Respond*, Professor Ramsey claims that "*Unleashing* shows that declarations of war were sometimes associated with the decision to resist." Ramsey, *supra* note 2, at 176. Yet in *Unleashing*, I never showed that mere "decisions to resist" were viewed as declarations. Instead, I reveal that decisions to wage war, made in whatever context, were seen as declarations. Indeed, no one described the fending off of an attack, without more, as a declaration of war. Instead, individuals reserved that label for large-scale hostilities that made clear that the victim of the initial declaration had chosen to declare war.

⁷⁸ Prakash, *supra* note 3, at 48–49.

sponse declarations of war without ever suggesting that they were impossible.⁷⁹

In the face of this usage, *Power to Respond* itself offers no contrary evidence. It cites no government, diplomat, or scholar from the founding era (or otherwise) who claimed that a nation simply does not “declare war” when it either issues a formal response declaration of war or decides to wage war in response to a previous declaration of war.

What leads *Power to Respond* to adopt an argument that runs counter to the evidence? *Power to Respond* assumes that the “declare war” power only grants Congress the ability to create a state of war.⁸⁰ This is a mistake. The clause enables Congress to issue declarations of war, and declarations could accomplish far more than merely creating a state of war.

Contrary to Professor Ramsey’s crucial claim, there clearly was something to “declare” in the aftermath of another nation’s declaration of war. First and foremost, the victimized nation could “declare” whether it would wage war in response. The decision to fight a war was not an obvious choice by any means, as many nations chose not to wage war and instead pursued other options, such as peace negotiations or purely defensive measures.⁸¹ The United States declined to wage war in response to formal and informal declarations in its early years. Famously, the United States chose to pay tribute to several Barbary states rather than fight them.⁸² Less famously, Congress chose not to declare war against the Creek and Cherokee, and instead employed defensive measures to safeguard territory and settlers.⁸³

Second, declarations, whether formal or informal, commanded the use of force—something that must occur if a nation is to wage war.⁸⁴ As noted earlier, these were universal features of formal declarations. Third, formal declarations could serve many other war-related functions, such as declaring the wartime rights of enemy nationals and citizens, and declaring the continued status of treaties.⁸⁵ Thus, even if it were clear that response declarations could not create a state of war because an initiation declaration had already ushered in that state, it still would not follow that response declarations were im-

⁷⁹ See *id.* at 110–11.

⁸⁰ Ramsey, *supra* note 2, at 191–92.

⁸¹ See Prakash, *supra* note 3, at 66, 111–12. By not mentioning the many other alternatives to waging war discussed in *Unleashing*, Professor Ramsey mistakenly suggests that I posit that a nation must surrender if it does not fight. See Ramsey, *supra* note 2, at 171, 190.

⁸² Prakash, *supra* note 3, at 110.

⁸³ See *id.* at 100–01.

⁸⁴ See *supra* notes 59–60 and accompanying text.

⁸⁵ See *supra* notes 25–27 and accompanying text.

possible. Response declarations could declare quite a bit even if we assume that they could not create a state of war.⁸⁶

Consistent with these claims, formal response declarations of war sometimes had an additional or different locution. Occasionally they declared that a state of war existed by virtue of the enemy's initial declaration.⁸⁷ They then went on to command military force, make wartime rules, propagandize against the enemy, etc. This usage perhaps supports the pragmatic theory's first claim, but only at the cost of defeating its second and more vital claim. That some nations issued declarations of war stating that they were already at war fairly proves that nations could declare war even if they regarded themselves as already in a state of war.

In any event, for originalists of all stripes, usage determines the meaning of words. Despite making an originalist argument, *Power to Respond* never explains why it rejects the undisputed and clear usage of "declare war" and "declaration of war." *Power to Respond's* refusal to square its textual claims with actual usage is one of its shortcomings.⁸⁸

⁸⁶ Although *Power to Respond* does not discuss the many other functions of a declaration of war, Professor Ramsey recognized in his prior work that declarations did more than create a state of war. See Ramsey, *supra* note 3, at 1586–87.

⁸⁷ See Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaring that war existed between America and England); see also French Declaration of War against England and Holland, in THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789–1901, at 148, 151 (Frank Malloy Anderson ed., 1904) (noting that France "is at war" with England and Holland because the latter two informally declared war on France).

⁸⁸ In a bid to cast doubt on this incontrovertible usage, Professor Ramsey tries to make hay with my claim that nations that merely defended themselves had not declared war, while nations that embarked on offensive measures had declared war. See Ramsey, *supra* note 2, at 173. In *Unleashing*, I assert that the former was not a declaration of war because it did not signal that the nation ordering such force had decided to wage war generally. The latter—offensive measures—was a declaration because it indicated a decision to wage war, or so I argue. See Prakash, *supra* note 3, at 117–19. Consistent with this argument, both Washington and Jefferson repeatedly claimed that, while the President could order defensive measures, he could not order offensive measures because that would usurp the congressional power to declare war. See *id.* at 97–99, 103–05. Moreover, Neff's discussion of Portugal and the Netherlands suggests the same dividing line, for the latter certainly defended themselves against English attack even while insisting that they were not at war with England. See NEFF, *supra* note 70, at 145–47.

In *Power to Respond*, Professor Ramsey's attempted haymaking starts with an area of obvious agreement. All agree that not every use of force was a declaration of war. He then argues that because this is true and because (in his view) no one distinguished offensive from defensive operations, it somehow follows that no one could have thought that decisions to wage war made in the response context were declarations of war at all. See Ramsey, *supra* note 2, at 173–76.

Apart from the fact that the last claim flies in the face of actual usage, the argument is unsound. If we assume that (a) everyone agreed that certain uses of force in the response context were not declarations of war, (b) everyone agreed that other, more vigorous uses of force were declarations of war, and (c) (counterfactually) no one discussed the dividing line between these uses of force, then we face the difficult task of reconstructing the divid-

Turning to history, I argue in *Unleashing* that even though nations had declared war on the United States in formal and informal ways, Presidents Washington, Adams, Jefferson, and Madison believed that the President could not wage war in response. These Presidents understood that if the nation was to wage war, Congress would have to declare war, even when another nation already had declared war against the United States.⁸⁹

Consider the Washington Administration, the most crucial administration because it was closest in time to the Constitution's creation and because its views best reflect the Constitution's original meaning.⁹⁰ In *Power to Respond*, Professor Ramsey seems to admit that the Creek and Cherokee nations declared war against the United States.⁹¹ Further, he admits that the Washington Administration felt constitutionally limited to defensive measures precisely because Congress had not declared war.⁹² Rather than accepting the explanations that officials offered in almost a dozen letters (that notwithstanding the declarations of war, the President could not sanction offensive measures), Professor Ramsey asserts that these Indian nations were *not*

ing line. The undoubted difficulty in discerning the dividing line does not justify rejecting evidence that proves that response declarations were common.

In any event, Professor Ramsey fails to realize in *Power to Respond* that his argument, if taken seriously, applies equally to *Textualism's* claim about informal initiation declarations of war. Recall that in *Textualism*, Professor Ramsey argued that certain large-scale uses of force were initiation declarations of war because they signaled a decision to wage war. See Ramsey, *supra* note 3, at 1632. At the same time, in *Textualism*, he admits that not all initial uses of force were declarations of war. See *id.* at 1632–33. A cannonball fired by one nation's vessel upon another nation's vessel, without more, was surely not an informal declaration of war. Nor was a wayward bullet that happened to cross the border. Despite clarity at these extremes of the continuum, we cannot determine exactly what quantum of force was necessary to say that a nation had crossed the threshold and moved from a nondeclaratory use of military force to an informal initiation declaration of war. Indeed, neither *Textualism* nor *Power to Respond* offers any such threshold or “show[s] any cases where [initiation] declarations of war were associated with” raising the level of force from one level to another. See Ramsey, *supra* note 2, at 176.

Notwithstanding this evidentiary hole, Professor Ramsey confidently argues in *Textualism* that *some* level of force was sufficient to make clear that a nation had issued an initiation declaration of war. See Ramsey, *supra* note 3, at 1546. He reaches this conclusion by demonstrating, as do I in *Unleashing*, that numerous individuals said that a decision to wage war was a declaration of war. Professor Ramsey evinces no concern in *Textualism* about his failure to unearth evidence relevant to discerning the level of military force that distinguishes mere uses of force from initiation declarations.

What is true for initiation declarations holds equally true for response declarations. My alleged failure to show that “shifting from defense to offense” was a response declaration of war matters not a whit more than Professor Ramsey's failure in *Textualism* to show that shifting from one level of force to another was an initiation declaration of war.

⁸⁹ See Prakash, *supra* note 3, at 97–107.

⁹⁰ See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 295–96 (2001).

⁹¹ See Ramsey, *supra* note 2, at 177.

⁹² See *id.*

at war with the United States.⁹³ Relatedly, he claims that the Administration did not “fully support” the characterization that the Indian nations had declared war.⁹⁴

These assertions are mistaken. Washington himself spoke of the “predatory war” conducted by the southern Indians.⁹⁵ Similarly, Thomas Jefferson referred to the Creek’s actions as “wanton and unprovoked war,”⁹⁶ an “unequivocal war,”⁹⁷ and an “invasion.”⁹⁸ Moreover, several letters explicitly referenced the declarations without any hint that reports of the declarations were false.⁹⁹ Finally, Creek and Cherokee peace treaties made clear that the tribes were previously at war with the United States (and thus had declared war).¹⁰⁰ Contrary to the picture painted by *Power to Respond*, the Washington Administration took the declarations quite seriously, responding by ordering out the militia, warning governors, and seeking congressional authority for offensive measures.¹⁰¹

More importantly, Washington and his cabinet endorsed the view that only Congress could decide to wage war even after another nation had declared war. Immediately after receiving news that the Cherokee had formally declared war, cabinet members Henry Knox, Thomas Jefferson, and Alexander Hamilton concluded that the President could do no more than order defensive measures.¹⁰² Offensive

⁹³ See *id.* at 177–79.

⁹⁴ *Id.* at 177.

⁹⁵ Letter from George Washington to Timothy Pickering (Mar. 10, 1795), in 11 THE WRITINGS OF GEORGE WASHINGTON 18, 18 (Jared Sparks ed., Boston, Little, Brown, & Co. 1855); see also Letter from George Washington to John Sinclair (Feb. 20, 1796), in 2 THE CORRESPONDENCE OF THE RIGHT HONORABLE SIR JOHN SINCLAIR, BART. 22, 22 (London, Henry Colburn & Richard Bentley 1831) (noting that there were expenses related to the Indian “wars”).

⁹⁶ Letter from Thomas Jefferson to William Carmichael and William Short (June 30, 1793), in 9 THE WRITINGS OF THOMAS JEFFERSON 148, 155 (Albert Ellery Bergh ed., 1907).

⁹⁷ Letter from Thomas Jefferson to William Carmichael and William Short (May 31, 1793), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 101, 103.

⁹⁸ Letter from Thomas Jefferson to James Madison (June 2, 1793), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 105, 106.

⁹⁹ People were uncertain about whether hostilities would continue, not whether the Indian nations had declared war. Note that the letters quoted in *Power to Respond* point out that there had been no recent hostilities at the time the letters were written. Ramsey, *supra* note 2, at 178 (quoting Letter from Henry Knox to Edward Telfair (Sept. 5, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 365, 365 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832); Letter from Edward Telfair to Henry Knox (July 24, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra*, at 370, 370. But that is irrelevant under the pragmatic theory. When a nation declares war, as the Creek did in 1793, it does not matter whether any hostilities follow because the declaration supposedly creates a state of war, rendering the “declare war” power irrelevant.

¹⁰⁰ See Treaty with the Cherokee Indians, U.S.-Cherokee, June 26, 1794, 7 Stat. 43 (discussing the desire to “re-establish[] peace”); Treaty with the Creeks, U.S.-Creek, June 29, 1796, 7 Stat. 56 (describing the treaty as a peace treaty).

¹⁰¹ See Prakash, *supra* note 3, at 97–101.

¹⁰² See *id.* at 98–99.

measures would have to be approved by Congress precisely because Congress had the “powers of war.”¹⁰³ The cabinet reached these constitutional conclusions in a document evincing absolutely no doubts about whether the Cherokee had declared war.¹⁰⁴ Furthermore, Secretary of War Knox’s letters to governors referencing the Cherokee declaration of war noted that only defensive measures were appropriate and forbade offensive measures because Congress had the “declare war” power.¹⁰⁵ None of these letters suggested that the Cherokee had not declared war. To the contrary, Knox noted that the “details transmitted d[id] not admit of the least doubt of the authenticity” of the news that certain Cherokee tribes had declared war.¹⁰⁶

The President evidently concurred with his cabinet’s conclusions because he approved of the explanation that went to the governors.¹⁰⁷ Indeed, Washington himself told the governors that only defensive measures were appropriate because Congress had the “declare war” power.¹⁰⁸ Importantly, Washington reached these conclusions while believing that the Indian nations were at war against the United States.¹⁰⁹

Finally, Knox wrote one letter that stands out because it directly contradicts the pragmatic theory. Knox wrote that if “war actually exists,” nothing more than defensive measures could be implemented; if “more extensive measures” were necessary, Congress would have to approve.¹¹⁰ Clearly the Secretary of War did not imagine that the President had *carte blanche* to wage war merely because another nation had begun it.

Power to Respond has similar difficulties making sense of the constitutional views of Presidents John Adams and James Madison. In 1798,

¹⁰³ Letter from Henry Knox to George Washington (Oct. 9, 1792), in 11 PAPERS OF GEORGE WASHINGTON 212, 212 (Philander Chase & Christine Sternberg Patrick eds., 2002).

¹⁰⁴ *Id.*

¹⁰⁵ See Prakash, *supra* note 3, at 100–01.

¹⁰⁶ Letter from Secretary of War to the Governor of Virginia (Oct. 9, 1792), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 99, at 261, 261.

As *Unleashing* discusses, Knox wrote similar letters in the aftermath of the Creek declaration of war, none of which suggests that the Creeks had not declared war. See Prakash, *supra* note 3, at 100–01 (quoting Letter from Henry Knox to William Telfair (Sept. 5, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 99, at 365, 365).

¹⁰⁷ Knox had given Governor Blount’s letter to the President, apparently with the idea that the President would instruct Knox as to what response to give. Indeed, Knox’s letter to Blount noted that Washington might have to convey further directions, indicating that Knox’s letter reflected Washington’s views. See Letter from Secretary of War to Governor Blount (Oct. 9, 1792), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 99, at 261, 261.

¹⁰⁸ See Prakash, *supra* note 3, at 98, 100.

¹⁰⁹ See *supra* text accompanying note 95.

¹¹⁰ Letter of Henry Knox to Governor William Blount (May 14, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 99, at 429, 429.

Adams concluded that France was “at war” with the United States.¹¹¹ Despite his view that France had declared war against the United States,¹¹² Adams viewed his constitutional authority as limited. He did not consider himself at liberty to wage war merely because France was making war on the United States. Regarding the events preceding the 1812 declaration of war, *Power to Respond* denies that England had waged war by illegally seizing American ships and by impressing Americans.¹¹³ But what should matter under the pragmatic theory is how the President regarded these actions. In his address to Congress requesting a declaration, Madison said that Britain was in a “state of war” with the United States.¹¹⁴ Finally, even though Algeria declared war on the United States in 1812,¹¹⁵ Madison felt constrained to go to Congress in 1815 to wage war against Algeria.¹¹⁶ Congress obliged, noting that the Dey of Algiers had “commenced a predatory warfare,”

¹¹¹ ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE* 23 (1966). Abigail Adams also thought that France had been waging war against the United States for months before Congress declared a limited naval war. See JOHN FERLING, *JOHN ADAMS: A LIFE* 356 (1992). Finally, one should note that Hamilton advised James McHenry about Adams’s limited constitutional powers, see Prakash, *supra* note 3, at 102, within a month after Hamilton wrote that “[t]he despots of France are waging war against us,” see Titus Manlius, *The Stand*, N.Y. COMMERCIAL ADVERTISER, reprinted in 6 *THE WORKS OF ALEXANDER HAMILTON*, *supra* note 54, at 259, 265.

Power to Respond cites leading modern historians and the French government’s beliefs about whether France was at war with the United States. See Ramsey, *supra* note 2, at 183 n.58. Moreover, *Power to Respond* asserts that debates in Congress “reflected an understanding” that France was at peace with the United States. *Id.* at 183.

The former point is irrelevant because what matters under the pragmatic theory is not what France thought or what modern historians say but what President Adams thought. On the latter claim, Professor Ramsey is mistaken in supposing a general understanding. There clearly were some who agreed with President Adams, his wife, and Hamilton. See, e.g., 8 *ANNALS OF CONG.* 1327 (1851) (noting Representative Samuel Sewall’s statement that the present situation “ought to be considered as a state of war, not declared by us, but against us, by the French Republic”); *id.* at 1321 (noting Representative Abraham Baldwin’s comment that “some persons declare that the present state of things is already a state of war”). Shortly before enacting statutes pushing the United States into war, some representatives favored stating that there was a state of war between the United States and France. See DECONDE, *supra*, at 105. One representative, Robert Goodloe Harper, said, “War is made upon us.” *Id.*

¹¹² Both *Power to Respond* and *Unleashing* take the view that in the initiation context, a nation could only have been at war with another nation if the first nation had declared war, either formally or informally. Accordingly, Adams’s belief that France was at war with the United States necessarily implies that France had informally declared war. See Prakash, *supra* note 3, at 102–03.

¹¹³ See Ramsey, *supra* note 2, at 181–84.

¹¹⁴ Prakash, *supra* note 3, at 105. Consistent with Madison’s view, a congressional committee noted that England had declared war. *Id.*

¹¹⁵ 2 THEODORE LYMAN, JR., *THE DIPLOMACY OF THE UNITED STATES* 369 (2d ed., Boston, Wells & Lilly 1828).

¹¹⁶ See Prakash, *supra* note 3, at 106.

and authorized the President to wage a naval war.¹¹⁷ Under the pragmatic theory, the actions and views of Adams and Madison (and their respective Congresses) are inexplicable.

Discussing the Jefferson Administration's response to Tripoli's declaration of war, *Power to Respond* emphasizes the cabinet discussion and the orders issued to naval commanders.¹¹⁸ This is the first episode from the founding era that provides some support for the pragmatic theory.¹¹⁹

Nonetheless, consider what transpired in full public view.¹²⁰ According to the pragmatic theory, Jefferson could have waged war without any congressional statute. Yet Jefferson sought congressional authority to wage war.¹²¹ Moreover, Congress actually granted authority to "commit acts of hostility" against Tripoli.¹²² If the pragmatic theory held sway within Congress, members ought to have told Jefferson that the Constitution already granted him the authority he requested. The pragmatic theory cannot account for Jefferson's expressed view and the collective view of Congress that the Commander in Chief did not have the constitutional authority to wage war merely because Tripoli had declared war.¹²³ Jefferson was right to suppose that he could not order offensive measures against Tripoli without a congressional declaration of war.

In sum, Professor Ramsey cannot square his claims about the impossibility of response declaration of war and the irrelevance of the

¹¹⁷ Following Congress's declaration, Madison sent a letter to the Dey noting that Algeria had declared war first. See Letter from James Madison to the Dey of Algiers (Apr. 12, 1815), in 2 THE DIPLOMACY OF THE UNITED STATES, *supra* note 115, at 373, 373.

¹¹⁸ See Ramsey, *supra* note 2, at 184–85. *Power to Respond* also cites Hamilton's *The Examination*, in which Hamilton, writing as Lucius Crassus, criticizes Jefferson's claims about the "declare war" power. See *id.* at 187.

¹¹⁹ In *Unleashing*, I discuss this cabinet opinion, including some details that offer a more nuanced picture of the cabinet discussions. See Prakash, *supra* note 3, at 107 n.334 (discussing notes from the cabinet meeting). I also discuss how Alexander Hamilton's pointed criticisms of Jefferson are inconsistent with his prior writings and the advice he gave Washington and the Adams Administration. See *id.* at 109–10.

¹²⁰ See *id.* at 103–04.

¹²¹ See *id.*

¹²² *Id.*

¹²³ The view of the 1802 Congress was hardly isolated, as it was also reflected in the 1812 and 1815 declarations of war against England and Algeria. Moreover, individual members of Congress also voiced this view. See, e.g., 4 ANNALS OF CONG. 737 (1855) (noting the comments of Representative Dayton that if war should break out during congressional recess, it would make sense for the President to have the power to increase the size of the Army so that the Army would be "prepared to act the moment that hostilities should be declared by the constituted authority"). This comment assumes that Congress must declare war even after another nation has begun waging war. See also 8 ANNALS OF CONG. 2117 (1851) (noting the comments of Representative Sitgreaves that the country is in a state of war, but also arguing that "it is only competent for Congress to declare the country in war; therefore, until that declaration is made by this department, the Executive and Judiciary cannot act in the same way as if the country was at war").

“declare war” power in the response context with the practices of the first four administrations. Nations declared war numerous times, either formally or informally, against the United States. Yet in none of these cases did Presidents argue or claim that they had a free hand to fight these nations merely because the United States was the victim of a declaration of war. To the contrary, Presidents consistently went to Congress for the authority to wage war even after another nation had declared war against the United States. When Congress declared war, either formally or informally, Presidents then fought the war authorized by Congress. But when Congress did not authorize a war, as it did not do with respect to the Creeks and Cherokees or for three years after the Algerian declaration of war, Presidents understood that they could not wage war. In those situations, Commanders in Chief realized that they were limited to those steps falling short of a declaration of war, such as defensive measures. If the pragmatic theory is right, we must conclude that Presidents Washington, Adams, Jefferson, Madison, and several Congresses were quite mistaken in their constitutional beliefs.¹²⁴

The pragmatic theory’s textual and historical assertions yield three interesting ramifications worth highlighting. First, the pragmatic theory suggests that the nation’s formal-response declarations of war were unconstitutional because no declaration was possible. Likewise, the provisions authorizing the President to wage war—part of every formal-response declaration of war—were based on a flawed reading of the Constitution, for no congressional authority to wage war was necessary. Furthermore, from the pragmatic theory’s claims, it necessarily follows that the nation did not declare war against Japan, Germany, Italy, etc. because it was definitionally impossible for the United States to “declare war” after those nations had declared war first.

Second, the pragmatic theory suggests that because Congress has no power to issue response declarations of war, the President may exercise all the functions traditionally associated with declarations of war in the response context. While Congress can notify, propagandize, and announce the rights of enemy nationals in an initiation declara-

¹²⁴ *Power to Respond* also discusses the Monroe Administration and claims that after the Seminole had waged war against the United States, Monroe fought a war without congressional authorization. See Ramsey, *supra* note 2, at 188–89. I disagree with Professor Ramsey’s conclusion that Congress had not authorized action against the Seminoles. Rather, I agree with Sofaer that appropriations authorized the warfare. See SOFAER, *supra* note 49, at 360, 362–63, 377. If this explanation is correct, it too supports the view that even after another nation declares war on the United States, Congress must formally or informally declare war if the nation is to fight a war. Whether the declaration comes in a joint resolution with language expressly declaring war or in an appropriation informally declaring war does not matter.

tion of war, the pragmatic theory supposes that Congress lacks these rights in the response context because it cannot declare war. Because the President has all those Executive powers that Congress lacks, it follows that the President can exercise all the subsidiary “declare war” powers in the response context. Moreover, in the response context, the Constitution actually permits the President to issue a document falsely styled as a “declaration of war” because true declarations of war are impossible in that context. Thus, even if the President *purports* to declare war, such statements and actions cannot impinge on Congress’s allegedly nonexistent power to declare war responsively.

Third, *Power to Respond*’s attempts to narrow the scope of informal declarations have unacknowledged consequences for presidential power. Under the pragmatic theory, any use of military force that is not a declaration rests with the President as part of his executive power. But if invasions of territory (Creek), illegal capture of neutral shipping not carrying enemy contraband (England and France), and the kidnapping of thousands of foreign sailors (England) are not implied declarations of limited war when undertaken by other nations,¹²⁵ then the President likewise can order these uses of military force because it is not a declaration of war to do so. Indeed, the President may order every use of force that *Power to Respond* claims was not an implied declaration of war. One is left to wonder precisely what the President cannot do that would amount to a declaration of war.

All told, one might say that the pragmatic theory has three deficiencies. First, the theory is inconsistent. When starting a war, a decision to wage war is a declaration of war. Hence, marching troops across the border toward the enemy capital is an obvious declaration of war. But when deciding to wage war against another nation that has declared war first, marching troops across the same border toward the same capital is no longer a declaration of war. This claim is counterintuitive and unsupported.

Second, though the pragmatic theory insists that one cannot declare war in the response context, it never cites anyone who says as much. Thus, despite the many response declarations of war in the eighteenth century and the numerous scholars, diplomats, and executives who discuss them, the pragmatic theory leaves us with the bare assertion that it was definitionally impossible to issue a response declaration of war. If usage determines meaning, something is seriously amiss with the pragmatic theory.

Finally, the pragmatic theory cannot reconcile its claims with early American statements and practices. When another nation declared war, Presidents consistently went to Congress for authority to

¹²⁵ See Ramsey, *supra* note 2, at 177–84.

fight the war. They explained that they lacked the authority to order offensive operations because only Congress had the power to declare war. Moreover, Congress agreed with these constitutional views. Sometimes, Congress authorized Presidents to wage war in the response context. When Congress demurred, however, Presidents understood that they could order only defensive measures. Contrary to *Power to Respond's* central claim, early Presidents and Congresses repeatedly acted as if Presidents had *no* respond power to wage war.

CONCLUSION

Every legal scholar hopes that his or her scholarship will finally resolve something like a legal mystery or long-festering dispute. Reality is always less gratifying. Still, we labor on. Maybe we do so with the hope that those who consider the subject in the future will grapple with arguments and evidence found in our work. Whatever one may think of the arguments found in *Unleashing* and its admirable predecessors, *The Continuation of Politics by Other Means* and *Textualism and War Powers*, I can think of no better place to start to discern the original meaning of “declare war” than those works and the provocative responses they have inspired.

