

# RESPONSE

## MAKING WAR

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Presidents have long initiated military conflict without specific congressional authorization. For large wars this practice extends at least as far back as the Korean War if not further, and for smaller conflicts the practice can be traced to the very first administrations.<sup>1</sup> During the Vietnam War, academic critics turned to the original intent of the Constitution's Framers to argue that this form of war making was illegal.<sup>2</sup> This view became the governing consensus through the 1970s and 1980s and reached its culmination in books by John Hart Ely, Louis Fisher, Michael Glennon, and Harold Koh, among others.<sup>3</sup> Simply put, these authors conclude that Congress's power to "declare war" gives it the full and plenary authority to decide whether to initiate military hostilities abroad, except in cases of self-defense.<sup>4</sup>

Originalists have quarreled about war powers ever since. We have argued that the original understanding does not prove that the modern practice is illegal.<sup>5</sup> If anything, the best reading of the text finds significant support for presidential initiative in war. *Unleashing the Dogs of War* represents the latest step in the originalist discourse.<sup>6</sup> Pro-

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<sup>1</sup> See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 177–82 (1996).

<sup>2</sup> See *id.* at 188–94.

<sup>3</sup> See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3–5 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 185–206 (2d ed., rev. 2004); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 80–84 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 109 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158–61 (1990); CHARLES A. LOFGREN, "GOVERNMENT FROM REFLECTION AND CHOICE": *CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM* 3–38 (1986).

<sup>4</sup> See, e.g., ELY, *supra* note 3, at 3.

<sup>5</sup> See, e.g., Robert J. Delahunty & John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002).

<sup>6</sup> Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007).

fessor Prakash maintains that we can infer the Constitution's allocation of war powers through a broad survey of the eighteenth-century use of the phrase "declare war." This approach, he claims, yields more support for the conventional wisdom than originalists have commonly thought. Prakash has made an important contribution by bringing more historical sources to bear on the question of the original understanding of war powers.

In this Response, we will carry the dialogue further. First, we will argue that Prakash's interpretive approach imposes an unexplained burden of proof that places little to no importance on the starting point of constitutional interpretation: the text. The best reading of the text rejects Prakash's claim about Congress's power to declare war. We supplement our textualist reading by exploring constitutional structure, which should not tolerate the redundancies created by Prakash's approach. The key point here is that the constitutional structure already gives Congress more than enough constitutional authority through the creation and funding of the military, a power that was all the greater in the eighteenth century when the United States had no standing Army or Navy. Second, we address Prakash's use of the historical sources and argue, in short, that he has thrown his net too wide. Accumulating statements where some diplomats and government officials used the phrase "declare war" in a broad sense ignores the use of the phrase in a constitutional setting. Examination of the important antecedents to the Constitution, developments in eighteenth-century American constitutional thought, and the broader intellectual understanding of war and international law during the ratification period shows that "declare war" does not bear the meaning that Prakash claims. We close with a more complex account of early war making under the Washington and Jefferson administrations, an account that yields lessons which are different from those that Prakash has elicited.

*Unleashing the Dogs of War's* strength is its sheer effort, combing a broad range of sources on the eighteenth-century use of "declare war." But it could benefit from a more sophisticated approach to analyzing historical data. Prakash essentially attempts to assemble every mention of the phrase "declare war" to show that it was universally understood to mean "begin" hostilities. But he cannot deny that important historical figures of the period both used "declare war" in its narrower sense under international law and used other phrases, such as "make," "engage," or "levy," to refer to beginning military conflict. In the face of conflicting historical material, the right way to reconstruct the original understanding is to place the evidence in the right context. Such contexts include the constitutional development during the Critical Period in favor of a stronger executive, the declining

significance of declaring war in international legal thought, and the nature of warfare during the late eighteenth century. Arriving at the best reading of the original understanding is not just a matter of piling more chits on one side of a scale but of also bringing the right historical analysis to the material. We think that when analysis is applied to evidence, the historical data weigh against the modern approach to war powers.

## I

### BURDEN OF PROOF/TEXTUALISM

Prakash's argument depends on an unstated burden of proof. He argues that it is "impossible" to arrive at a textual interpretation of the Constitution's power to declare war and that, because of this textual ambiguity, historical evidence must determine the Constitution's allocation of war powers. In other words, Prakash believes that the constitutional text does not count for all that much; the operation of war powers must be deduced from the original understanding of the Constitution held at the time of its ratification.

For Prakash, uncertainty in the text is so pervasive that it is permissible to read constitutional provisions to be redundant, inconsistent, or superfluous. His reading, for example, makes superfluous Article I, Section 8's vesting in Congress of the power to "grant Letters of Marque and Reprisal."<sup>7</sup> If the Declare War Clause already gives Congress the complete power to decide whether to start military hostilities of all kinds, there is little point in also giving it the lesser power of authorizing a limited naval war. That would clearly be part of Prakash's broad reading of the Declare War Clause. The same goes for the companion clause giving Congress the authority to "make Rules concerning Captures on Land and Water."<sup>8</sup> If the Declare War Clause already means that Congress can define the nature of any war, including its goals, limits, and methods, it is redundant to give the Legislature the power to set rules of capture. Prakash can point to no other place where the Constitution grants both a broad power followed by several lesser included (but unnecessary) versions of the same power in the same sentence. One should resist any reading of the Constitution that renders any of its provisions meaningless.

Prakash's approach to the text also causes problems by giving different words in the Constitution the same meaning. Under his approach, the power to declare war encompasses all forms of starting war. Article I, Section 10 prohibits the states from having the ability to "engage in war, unless actually invaded, or in such imminent Danger

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<sup>7</sup> U.S. CONST. art. I, § 8.

<sup>8</sup> *Id.*

as will not admit of delay” without the consent of Congress.<sup>9</sup> If “declare war” has the meaning that Prakash attributes to it, the Framers should not have used “engage.” Article III defines “treason” as “levying war.”<sup>10</sup> If “declar[ing] war” encompasses all forms of beginning war, the Framers should likewise have made treason the crime of “declaring war” against the United States. Prakash admits that “declare” and “levy” overlap but claims that using “levy” twice would have lessened the power given to Congress. It is difficult to see why—if the Framers sought to give Congress the broadest possible power over war, “levy” would have been, like “engage,” the more appropriate choice.

These arguments assume that the Framers were “crystal clear” in their use of language, for otherwise they do not negate Prakash’s alternative reading. But the critical question is about more than whether “declare,” “engage,” and “levy” were synonyms in the eighteenth century. Article I, Section 10 establishes the precise process for making war decisions that Prakash reads into the far different Declare War Clause. The states require the “Consent of the Congress” before they can begin hostilities, unless they are actually attacked.<sup>11</sup> States cannot even engage in war if someone else declares war against them first. If the Framers wanted to create the identical process between the President and Congress, as Prakash claims, we have proof that they knew how to write it out. Yet, Prakash would read the brief Declare War Clause as encompassing the very same meaning and process as the more detailed and extensive Article I, Section 10.

Prakash brushes aside these arguments simply because they do not meet his allocation of the burden of proof. The rule that he assumes is never clearly stated but appears to be this: unless there is a clear textual rejection of his theory, such as a narrow definition of the phrase “declare war,” then any reading is possible. Prakash never explains why he reverses the traditional approach to interpretation (which gives primacy of place to the text), why he has set the standard so high, or even what level of textual evidence would satisfy him. One could just as easily reverse the burden and argue that unless the historical evidence is compelling, it cannot overcome the best reading of the text. Prakash must assume that virtually all constitutional provisions are too textually indeterminate to provide much meaning because the Constitution rarely defines its own terms. This seems quite

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<sup>9</sup> *Id.* art. I, § 10.

<sup>10</sup> *Id.* art. III, § 3.

<sup>11</sup> *Id.* art. I, § 9.

inconsistent with Prakash's approach to other aspects of executive power.<sup>12</sup>

Our alternative, by contrast, does not create these textual anomalies. In our view, the Declare War Clause gives Congress the power to define the legal state of our relations with another country under international law. It makes perfect sense for the Declare War Clause to stand aside the Letters of Marque and Reprisal Clause and the Captures Clause.<sup>13</sup> All three involve the power of Congress to define the status of actions by the United States and its nationals under international law. The Letters of Marque and Reprisal Clause, for example, allows Congress to choose whether to give legal protection to hostile actions by private parties.<sup>14</sup> The Captures Clause seems almost self-evident on this score. The three clauses immediately follow Article I, Section 8's grant of power to Congress to define and punish felonies and piracy on the high seas and offenses against the laws of nations.<sup>15</sup> Together, these clauses vest Congress, which for most purposes can enact only domestic law, with the authority to make specialized kinds of international law.

What the text of the Declare War Clause does not do is give the authority to start military conflicts solely to Congress. The Constitution's language of "engage" in war and "levy" war demonstrates that the Framers employed other words for beginning wars. Indeed, it seems that those other clauses include broader forms of military conflict than "declar[ing] war," thus reversing Prakash's theory that the Declare War power is all inclusive (or, as he says, "unitary"). For example, the ban on state military activity is far more comprehensive than anything limiting the President. Article I, Section 10 prohibits states from keeping troops or ships in "time of Peace" or making any agreements or compacts with foreign powers.<sup>16</sup> With these disabilities

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<sup>12</sup> For example, Prakash co-authored an influential article taking the Hamiltonian view that the constitutional text vests all of the executive power, except for specific textual exceptions, in the President. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). His earlier work never expressed concern that the text of the executive power vesting clause was too indeterminate to draw conclusions about constitutional meaning, nor has his more recent work claiming broad presidential power in foreign affairs. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

<sup>13</sup> See U.S. CONST. art. I, § 8 ("To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. . .").

<sup>14</sup> See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 147-48 (2005).

<sup>15</sup> See U.S. CONST. art. I, § 8 ("To define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations. . .").

<sup>16</sup> Interestingly, according to the Jeffersonian legal scholar St. George Tucker, a congressional declaration of war would lift the constitutional prohibition on a state's maintaining an Army or Navy so that once a declaration was issued, "any state may adopt such additional measures for it[']s own peculiar defence as it[']s resources will enable it to do." 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE*

in mind, it appears that the Framers sought to impose the most complete limitation possible on the states; hence the ban on “engaging” in war. Similarly, it would seem that the Framers would want to punish for treason anyone who undertook any hostile military activity against the United States. In both cases, the Framers’ choice of words suggests that declaring war was a narrower action than the waging of war.

A provision central to the modern practice of war powers raises a final textual issue: the President’s role as Commander in Chief. Prakash ignores it, except for his claim that the Clause only prevents Congress from appointing someone to head the nation’s armed forces. The rest of the war power, presumably, remains with Congress. However, nothing in the constitutional text supports such a narrow reading. First, it makes little sense to read the Commander in Chief Clause as merely a limitation on Congress when it appears in Article II rather than Article I. It makes more sense to understand the Commander in Chief Clause’s location in Article II as a result of a division of the war power, which was once unitary under the British Constitution, into legislative and executive components. That alone, however, does not produce a narrow reading of the commander-in-chief power. Second, even where Article I assigns Congress power with respect to a particular military matter, it does not necessarily vest it with *exclusive* authority over that matter. Rather, the President as Commander in Chief may be able to exercise authority over the same matter *concurrently* with Congress. For example, although Article I, Section 8, Clause 14 vests Congress with the power to “make Rules for the Government and Regulation of the land and naval Forces,”<sup>17</sup> the President as Commander in Chief may unilaterally prescribe military punishments, at least in default of congressional action.<sup>18</sup> Likewise, in the absence of applicable legislation, the President as Commander in Chief may provide, by such measures as the establishment of civil courts, for the administration of the government of a territory conquered by and ceded to the United States.<sup>19</sup> Third, Prakash’s reading reverses the traditional rule of interpretation of Article II. Hamilton and Madison argued, at different times and on different subjects, that Article II generally vests the federal executive power in the President alone. Exceptions in favor of the Legislature are to be read narrowly.

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CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. 271 (Phila., William Young Birch & Abraham Small 1803). Tucker’s analysis underscores that formal declarations of war were understood to carry substantive legal consequences, even under domestic law—a point to which we return in Part IV, *infra*.

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>18</sup> See *Loving v. United States*, 517 U.S. 748, 767 (1996) (noting that the Constitution vests Congress with “a power of precedence over, not exclusion of, Executive authority” with respect to military punishments).

<sup>19</sup> See *Santiago v. Nogueras*, 214 U.S. 260, 266 (1909).

If the power to make war was traditionally part of the executive power, which no one seriously disputes, then it is the Declare War Clause, rather than the commander-in-chief power, that is to be read as a narrow exception.

If anything, the Commander in Chief Clause is a grant of power that makes clear that the Executive still retains the bulk of the war power, minus whatever Article I, Section 8 conveys to Congress. One can see this by examining the interaction of the Commander in Chief and Declare War Clauses. According to Prakash, Congress has the complete authority to set all of the parameters of a war. What happens if a President disagrees with Congress on the merits of a war or on the methods dictated by Congress? Suppose Congress had ordered President Franklin Roosevelt to ignore the Pacific theater entirely, to leave Italy alone, or to avoid a direct invasion of France. It seems that, under Prakash's approach, the President would be in violation of his constitutional duty if he refused. Under our reading, the President can use his authority as Commander in Chief to block congressional wartime decisions (including its decision to declare war), just as Congress can block the President through the funding power. The President can refuse to carry out congressional orders to implement a particular strategy or tactic, or even to conduct hostilities against another nation. Under Prakash's reading of the text, a President would have to carry out Congress's demands that the nation wage war, just as he would any other statute.

## II

### STRUCTURAL READING

Prakash invents a "unitary war power" that resides in Congress. Congress must have the power to decide when to wage war, the "general outlines of the war" (by which he appears to mean the time, place, and objects of the war), and even the level of force to use. Prakash claims that placing all of these powers in Congress is "fundamentally sound" as a matter of constitutional structure because it concentrates responsibility and accountability in Congress.

Prakash never justifies his standards for good constitutional structure. Responsibility and accountability are important constitutional values, but so are efficiency and effectiveness. Even if the former are the dominant goals, one could just as easily construe any ambiguity in the Constitution to centralize war-making power in the President. The Framers believed that giving authority to the President increased government accountability and responsibility due to his election by the nation as a whole and their concerns about legislative excess. As Alexander Hamilton wrote in *The Federalist No. 76*, "[t]he sole and un-

divided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.”<sup>20</sup>

Certainly the Framers believed that the attributes of the executive branch were particularly suited for the successful waging of war. “Good government” required “energy in the executive,” Hamilton wrote in *The Federalist No. 70*.<sup>21</sup> A vigorous President was “essential to the protection of the community against foreign attacks.”<sup>22</sup> In *The Federalist No. 74*, Hamilton was even more explicit about the functional superiority of the executive branch in war. “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”<sup>23</sup> Hamilton believed that the power of “directing and employing the common strength” of society in war “forms an usual and essential part in the definition of the executive authority.”<sup>24</sup> This has been the judgment of others since the Framing. With little variation, constitutional practice over two centuries has seen the President taking the lead in deciding whether to initiate international conflict. We have a war powers system in which the initiative in deciding on war lies with the President, with Congress exercising an ex post check on executive decisions.

In fact, the constitutional structure seems to favor locating in the Executive a power to initiate hostilities because of the changes in technology and warfare that place more emphasis on speed and secrecy. As Hamilton observed, “[d]ecision, activity, secrecy, and dispatch will generally characteri[z]e the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number . . . .”<sup>25</sup> These functional considerations have led the Supreme Court to approve centralized presidential control over foreign policy and diplomacy.<sup>26</sup> Prakash never explains how his abstract structural values favor his reading of war powers or why his view is superior to those of the Framers or of government leaders since.

Prakash also fails to explain why the unification of war powers in one branch is in keeping with the constitutional structure. His claim runs directly counter to the Constitution’s structure in the very subjects—war and foreign affairs—which he addresses. Even under Prakash’s theory, the war power is already divided. The Constitution,

<sup>20</sup> THE FEDERALIST NO. 76, at 510–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>21</sup> THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>22</sup> *Id.* at 471.

<sup>23</sup> THE FEDERALIST NO. 70, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>24</sup> *Id.*

<sup>25</sup> THE FEDERALIST NO. 70, *supra* note 21, at 472.

<sup>26</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“[T]he President alone has the power to speak or listen as a representative of the nation.”).

for example, vests the commander-in-chief power in the President while it gives Congress the power to declare war and to raise the military—three powers that were unified in the British Crown. The Constitution also divides other elements of the foreign affairs power (as it was known in the eighteenth century). Treaties are the most obvious example. Under the British Constitution, the Crown held full control over treaty making, though the Parliament exercised a check through its power over domestic implementation.<sup>27</sup> The Constitution divides the treaty power between the President and the Senate.<sup>28</sup> The British Crown similarly held plenary authority over setting foreign policy.<sup>29</sup> Under the Constitution, however, Congress has significant powers of its own, such as the authority over international commerce, which allow it to set an alternative foreign policy.<sup>30</sup>

The constitutional structure divides the war power but not in the legalistic manner that Prakash favors. Some who support reading the Declare War Clause as the exclusive right to begin conflicts worry about unchecked power in the hands of the President.<sup>31</sup> This appears to be Prakash's concern as well. But that worry is misplaced because it ignores the deeper constitutional structure underlying the bare text. Even if the Declare War Clause were struck from the Constitution, Congress would already have ample ability to check presidential war making through its power to raise and fund the military. Congress can refuse to create units necessary to carry out the Executive's plans, terminate funding for units engaged in combat, and limit the overall size and shape of the military in a way that forecloses some options and opens up others.<sup>32</sup> As one important eighteenth-century student of the British Constitution put it, the King's power to declare and wage war "is like a ship completely equipped but from which the Parliament can at pleasure draw off the water, and leave it aground,—and also set it afloat again, by granting subsidies."<sup>33</sup> And in *The Federalist No. 58*, Madison states that Parliament's use of "the engine of a money bill" had secured for centuries its "continual triumph . . . over the other branches of the government."<sup>34</sup>

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<sup>27</sup> See John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1998–2003 (1999).

<sup>28</sup> See *id.* at 2024–25.

<sup>29</sup> See *id.* at 1998–2003.

<sup>30</sup> See *id.* at 2054–55.

<sup>31</sup> See, e.g., GLENNON, *supra* note 3, at 80–84.

<sup>32</sup> See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces. . . .").

<sup>33</sup> J.L. DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 71 (N.Y., Hodge & Campbell 1792) (n.d.).

<sup>34</sup> *THE FEDERALIST NO. 58*, at 395 (James Madison) (Jacob E. Cooke ed., 1961).

The President, lacking the King's powers both to raise a military and to declare war, is even more at the mercy of Congress's funding decisions. In enacting funding bills for the military, Congress has a full and fair opportunity to discuss the merits of a military conflict. This was especially true at the time of the founding of the Republic. In 1789, there was no United States Navy and the Army of less than 1000 troops was barely suitable for border defense.<sup>35</sup> Although the militia might have provided an alternative fighting force, Article I, Section 8, Clause 15 reserved to Congress whether to place it at the President's disposal, and the power probably could not have been used offensively in any case.<sup>36</sup> To fight the Quasi War with France, or the Wars of 1812 and 1848, Congress had to create an ad hoc military force for the specific conflict.<sup>37</sup> It would have been impossible for any President to conduct significant military operations in those conflicts without congressional approval because there would have been no military otherwise.<sup>38</sup> In the eighteenth century, as now, Congress's powers over the purse "constitute[d] a low-cost vehicle for effective legislative control over executive activity."<sup>39</sup> As Walter Russell Mead has written, the President loses much of his power to accomplish his military and political objectives without congressional funding and other support and "must govern like a Stuart king."<sup>40</sup>

The United States did not have a standing military during peacetime until the post-1945 period. Critics might argue that this develop-

<sup>35</sup> See Morris J. MacGregor, *The Formative Years, 1783–1812*, in AMERICAN MILITARY HISTORY 101 (Maurice Matloff ed., 1969).

<sup>36</sup> Sir William Blackstone had observed that forces in the militia "are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm, . . . nor in any case compellable to march out of the kingdom." WILLIAM BLACKSTONE, 1 COMMENTARIES \*412. Thus the King—and, likely, the President—could not have deployed the militia abroad for offensive war. *But see* *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990) (noting that the Constitution permits Congress to authorize National Guard members to be ordered to active federal duty outside of the United States).

<sup>37</sup> See HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF JAMES MADISON (Earl N. Harbert ed., 1986); PAUL H. BERGERON, THE PRESIDENCY OF JAMES K. POLK 80 (1987); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993).

<sup>38</sup> Throughout most of its history, the United States maintained comparatively meager military forces. See WALTER RUSSELL MEAD, SPECIAL PROVIDENCE: AMERICAN FOREIGN POLICY AND HOW IT CHANGED THE WORLD 202 (2001) ("In the decade preceding the Civil War, the United States had 27,958 men under arms, compared to 293,224 for Great Britain, 390,000 for France, 350,000 for Austria, 220,000 for Prussia, and 550,000 for Russia. Although American military strength rose to unprecedented levels during the Civil War, the demobilization afterward was thorough and swift. In 1877, the year in which federal troops were finally removed from the South, army enrollment had fallen back to 34,094. In 1881 the U.S. Navy was widely believed to be inferior to the naval forces of Chile.")

<sup>39</sup> Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1360 (1988); see E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at xiv–xv (1961).

<sup>40</sup> MEAD, *supra* note 38, at 306.

ment has allowed modern Presidents to undermine Congress's control by launching quick wars. There are two main reasons to doubt this argument. First, even now the high cost of modern warfare requires Presidents to seek congressional funding. Even during the Kosovo war, which involved no ground troops and only a limited portion of the air force, President Clinton had to seek special appropriations from Congress to allow the American military intervention to continue.<sup>41</sup> Second, Congress has exercised its authority to allow Presidents to use military force quickly. If it wanted to limit the President to purely defensive uses of force, it could leave aside the large carrier groups, strike bombers, and armored divisions that are primarily designed for offensive warfare. Congress allows quick wars because the President will bear more of the political responsibility should the conflict go badly, which is an unsurprising legislative response to wars that are both unpredictable and put a lot at stake. That Congress has not used its funding power more often to prevent or halt military hostilities reveals no flaw in the constitutional structure. It only reflects the political incentives of the Executive and the Legislature.

### III

#### RATIFICATION HISTORY

Prakash's contribution is to expand the amount of historical material that bears on the meaning of "declare war" at the time of the Constitution's ratification. He is to be commended for shedding light on unexploited documents, such as statements by both foreign and American diplomats and officials. Two main problems, however, arise in his analysis of these materials. First, it lacks a contextual setting in the history of the ratification and in fact runs counter to what we know about the course of American constitutional development during this period. Second, his analysis ignores the language that Americans actually used in the constitutional texts of the time. Prakash has shown that Americans and others in the eighteenth century, as now, could use the phrase "declare war" to refer to beginning military hostilities. But there are more important examples where the Framing generation used "declare war" in the narrower sense of setting international legal relations and employed more precise phrases to refer to the beginning of hostilities.

American constitutional development during the period between the Declaration of Independence and the Constitution's ratification

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<sup>41</sup> See Yoo, *supra* note 14, at 157–59. The United States' intervention in Lebanon in the early 1980s provides another relatively recent instance to underscore the President's critical dependence on congressional funding when taking and sustaining military operations. See Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983); see also DAVID K. NICHOLS, *THE MYTH OF THE MODERN PRESIDENCY* 122 (1994).

avored the expansion of executive power.<sup>42</sup> In the burst of constitution making after Independence, the Framers adopted one national charter—the Articles of Confederation—which was crippled by a lack of executive organization and leadership and by state constitutions which distinctively sought to undermine executive unity and energy. The result was legislative abuse, special interest laws, and weak governments. Dissatisfaction with this state of affairs, even during a time of relative peace and prosperity, led American leaders to seek a new Constitution that would create a stronger and more independent executive branch wrapped within a more powerful national government. Prakash does not explain why those who generally favored broader executive power would act in this critical instance to limit it.

The Articles of Confederation provide an important counterexample that goes unaddressed in Prakash's analysis. Congress inherited the Crown's imperial powers in the colonies while the states retained their legislative powers.<sup>43</sup> It kept "the sole and exclusive right and power of determining on peace and war," to enter into treaties, and to conduct foreign relations.<sup>44</sup> Article IX required the approval of nine states before the nation could "engage in a war."<sup>45</sup> Article VI made clear that "[n]o state shall engage in any war" without the consent of Congress, unless under threat of invasion or imminent danger.<sup>46</sup> Prakash does not explain why the Framing generation used these phrases, especially the word "engage," to clearly refer to the beginning of military hostilities instead of using his favored "declare." Indeed, the word "declare" does not appear at all in the Articles of Confederation in connection with war. The only interpretation that makes sense is that "engage" in war or "determine on war" were the broadest possible grants of power to Congress to begin hostilities as they reflect the intention to vest all of the war power in the national government. "Declare" refers to a narrower subset of the war power that does not even make an appearance in our nation's first constitution.

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<sup>42</sup> See, e.g., WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 271–75 (Rita Kimber & Robert Kimber trans., exp. ed., Madison House 2001) (1973); MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 109–30 (1997); FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 98–153 (1994); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 138, 393–429, 434 (1998).

<sup>43</sup> On this point, see JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774–1776*, at 297–309 (1987); JENNINGS B. SANDERS, *EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774–1789*, at 3 (1935); and CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 576 (1969).

<sup>44</sup> ARTICLES OF CONFEDERATION art. IX (1777).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* art. VI.

Under the Articles of Confederation, Congress's problem was not a lack of formal executive power but its organization and support. Governing by committee proved disastrous during the War of Independence. In 1781, Congress replaced committees with executive departments that individual secretaries headed—an improvement, but a small one. Congress continued to try to micromanage policy, and the Executive still lacked what a young Alexander Hamilton termed “method and energy.”<sup>47</sup> The states refused to supply revenue to the national government or comply with its requests.<sup>48</sup> Once peace arrived, Congress proved utterly unable to handle its executive duties.<sup>49</sup> It could not establish even a small military to protect northern forts near the Canadian border which the British refused to hand over in violation of the 1783 peace treaty.<sup>50</sup> Britain and France imposed harmful trading rules against American ships while Spain closed the critical port of New Orleans to American commerce.<sup>51</sup> American ambassadors could do nothing to reverse British and French policies because Congress had no authority over commerce with which to threaten retaliatory sanctions.<sup>52</sup>

Experimentation in weakening the executive power, mostly with poor results, went further in the states. The assembly elected the governor in all but one state, making clear who served whom.<sup>53</sup> Some states tried multimember executives or required the governor to receive the blessing of a council of state which was also appointed by the legislature.<sup>54</sup> As Gordon Wood has observed, the councils often made the governors “little more than chairmen of their executive boards.”<sup>55</sup> States limited the governor's term and eligibility.<sup>56</sup> Most states either provided for the annual election of the governor, restricted the number of terms a governor could serve, or both.<sup>57</sup> Pennsylvania reached the outermost orbit of radicalism by replacing the single governor

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<sup>47</sup> 1 THE WORKS OF ALEXANDER HAMILTON 219 (Henry Cabot Lodge ed., 2d ed. 1904).

<sup>48</sup> See, e.g., FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 52–95 (Scholarly Res. Inc. 1986) (1973).

<sup>49</sup> See, e.g., JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 199–205 (Johns Hopkins Univ. Press 1982) (1979).

<sup>50</sup> For a discussion of the problems in American foreign policy during the critical period, see MARKS, *supra* note 48; McDONALD, *supra* note 42, at 143–53; and YOO, *supra* note 14, at 73–79.

<sup>51</sup> See, e.g., YOO, *supra* note 27, at 2011–12.

<sup>52</sup> See MARKS, *supra* note 48, at 52–95.

<sup>53</sup> See McDONALD, *supra* note 42, at 133.

<sup>54</sup> See WOOD, *supra* note 42, at 138.

<sup>55</sup> *Id.*

<sup>56</sup> See *id.*

<sup>57</sup> See McDONALD, *supra* note 42, at 131–33.

with a twelve-man executive council elected annually by the legislature.<sup>58</sup>

One of the more anti-executive state constitutions, that of South Carolina, provides an instructive aid. South Carolina's 1776 Constitution declared that the state president "shall have no power to make war or peace" without legislative consent.<sup>59</sup> Here, the South Carolina Framers were quite clear in structuring the decision-making process in war to require legislative approval, along the lines that Prakash would want, and did not use "declare" war. In its 1778 Constitution, South Carolina was even clearer: the governor "shall have no Power to commence War" without legislative consent.<sup>60</sup> As with the Articles of Confederation, when the Framing generation wrote documents of constitutional significance they did not refer to the control of military hostilities with the phrase "declare war" but instead used clear terms that were either more precise (such as "commence") or broader (such as "make" or "engage"). It also appears that no state constitution from 1776–1787 used the word "declare" war broadly to refer to the initiation of hostilities.

Prakash has produced evidence that eighteenth-century actors sometimes used the word "declare" to refer to beginning hostilities, but he cannot show that the Framers used that phrase exclusively for that purpose. Nor has Prakash explained why "declare war" never appears in any of the constitutionally significant enactments of the pre-ratification period. When the Framers wanted to check the possibility of unilateral military action with legislative consent, they referred to beginning a war with different, broader words that consistently appear in the Articles of Confederation, state constitutions, and the Constitution itself.

Federalists rejected the progressive weakening of the Executive. They modeled the federal Constitution on that of New York, which had freed the governor of legislative dependence, given him significant constitutional authority, and vested him with the sole power of leading the state's military.<sup>61</sup> During the Philadelphia Convention, initial proposals for the Presidency would have rendered the Executive the servant of Congress and little else.<sup>62</sup> But by the end, the Executive

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<sup>58</sup> See PA. CONST. § XIX (1776), reprinted in 5 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, 3081, 3086–87 (William S. Hein & Co., Inc. 1993) (1909).

<sup>59</sup> S.C. CONST. art. XXVI (1776).

<sup>60</sup> *Id.* art. XXXIII (1778).

<sup>61</sup> See THACH, *supra* note 43, at 34–35.

<sup>62</sup> Initial proposals would have made Congress elect the President. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18–21 (Max Farrand ed., rev. ed. 1966) (outlining the Virginia Plan provisions for a National Executive).

became institutionally independent and possessed “the Executive rights vested in Congress by the Confederation,” which were presumably those in foreign affairs.<sup>63</sup> Even the well-known but confused debate in the Philadelphia Convention on August 17, 1787, indicates that “declaring” war was understood to be a narrower subset of the broader power to “make” war, which appears to have referred to the power both to initiate and conduct hostilities.<sup>64</sup> Throughout the Convention, delegates approved significant transfers of authority to the President.<sup>65</sup> Prakash does not explain why the Framers would have acted against the historical trend and weakened presidential authority in war nor why they would have thought that the traditional check on the Executive that the funding power provided was insufficient.

Prakash’s analysis also fails to ask how the Framers believed the Constitution would work in practice. He provides no statements from the ratification period where the Federalists, for example, claimed that Congress’s Declare War power would serve as a check on executive decisions in favor of war. Certainly no Federalist or Anti-Federalist bestowed upon the Declare War power the broad sweep that Prakash gives it as the authority to decide on the start, means, and ends of a war. Prakash comes closest to *The Federalist No. 69*, in which Hamilton portrays the President’s powers in war as incomparable to the British King’s because Article II does not vest in the former the powers to declare war or raise armies.<sup>66</sup> Hamilton, however, never defines the power to declare war, nor does he ever discuss it as a legislative check on the Executive. Further, Hamilton does not contest the assumption that the President, like the King, could *deploy* troops and ships as seen fit once the Legislature had provided them.<sup>67</sup>

What is surprising about this absence of interest in the “declare war” power is that the Framers at times *did* discuss how the executive and legislative powers in war would interact. In these discussions, the Federalists never raised the declare war power as a limitation on the Executive but instead predicted that Congress’s power over funding would serve as the primary control. The most direct confrontation over the issue was at the ratifying convention in Virginia, probably the most politically significant state in the ratification struggle.<sup>68</sup> Patrick Henry, leader of the Virginia Anti-Federalists, argued that the President would use his command over the military to centralize his

<sup>63</sup> *Id.* at 21.

<sup>64</sup> See YOO, *supra* note 14, at 96–100.

<sup>65</sup> See McDONALD, *supra* note 42, at 160–81 (describing the shift in powers).

<sup>66</sup> See THE FEDERALIST NO. 69, at 470 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>67</sup> See Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021, 1037–43 (2003).

<sup>68</sup> See 2 THE DEBATE ON THE CONSTITUTION 1067 (Bernard Bailyn ed., 1993).

power.<sup>69</sup> Federalists did not respond with Congress's power to declare war as a check on the Executive. Instead, they hearkened to the traditional legislative control over executive war making through the power of the purse. Federalist George Nicholas replied to Henry that:

[N]o appropriation of money, to the use of raising or supporting an army, shall be for a longer term than two years. The President is to command. But the regulation of the army and navy is given to Congress. Our Representatives will be a powerful check here. The influence of the Commons in England in this case is very predominant.<sup>70</sup>

Henry claimed that the proposed constitution violated the maxim that the purse and sword ought to rest in the same government. Madison responded that the maxim meant "that the sword and purse are not to be given to the same member."<sup>71</sup> Under the British Constitution, which Henry had praised, "[t]he sword is in the hands of the British King. The purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist."<sup>72</sup> Here, the Federalists explicitly relied on the Legislature's power to fund and raise the military as a check on the Executive.

Prakash seems to think that this dialogue has limited relevance because it centers on concerns of a domestic military tyranny rather than foreign military adventures. But the Federalists would have had every incentive to turn to the Declare War Clause in the crucial state of Virginia, where they directly faced arguments about the lack of controls on the Executive. That they did not is consistent with the evidence from the rest of the ratifying process. It appears that no Federalists used the Declare War Clause to respond to fears of an aggrandizing executive in war. In large part this was because the Presidency itself did not sit high on the list of Anti-Federalist criticisms, which focused far more sharply on the Senate's powers and the balance between the national government and the states. But a few off-hand comments using "declare" war to refer to beginning war have much less relevance to the question at hand than do Federalist explanations of how the separation of powers would work in practice.

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<sup>69</sup> See 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 964 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

<sup>70</sup> 10 *id.* at 1281.

<sup>71</sup> *Id.* at 1282.

<sup>72</sup> *Id.*

## IV

“DECLARING WAR” IN THE JURISPRUDENCE OF THE EARLY  
MODERN AND FRAMING PERIODS

Prakash’s collection of eighteenth-century materials, while useful and instructive, does not properly account for the broader jurisprudential trends underway at the time. These trends are reflected in the writings of those whom the Framers would have considered the leading authorities on international law (or, as they called it, the Law of Nations). Understanding what the Constitution means by “declar[ing] War” requires us to examine these authorities and to focus in particular on one of the most fundamental shifts in early modern jurisprudential thought about war—the gradual abandonment of the substantive conception of “just war” in late medieval natural law doctrine and its displacement by a less substantive, more formalistic conception.<sup>73</sup>

The idea of a “declared” war, which was incidental in natural law thinking about just war, became increasingly prominent as the justice of war became conceptualized in purely formal or procedural terms. In the later conception, the “justice” of war was to be measured chiefly by the procedural test of whether the war had been “declared” in proper form. Underlying this transformation was the dissolution of the medieval political order and the emergence of the early modern nation state, with the accompanying concentration of lawful violence in its hands and the rejection of any claims of ecclesiastical supremacy.<sup>74</sup>

By the late Middle Ages, the doctrine of just war had undergone centuries of development at the hands of the theologians, philosophers, and jurists.<sup>75</sup> In general, theorists understood war to be a divine punishment visited on a sinful world; some wars, however, were considered permissible because they were providentially ordained. The criterion for a war’s permissibility was whether it was “just” in a substantive sense: in essence, if waged to redress a wrong.<sup>76</sup> Originating

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<sup>73</sup> On this transformation, see WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 204, 219 (Michael Byers trans. & rev. 2000); JAMES TURNER JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS 1200–1740*, at 15–16, 25 (1975); Peter Haggemacher, *Mutations du Concept de Guerre Juste de Grotius a Kant*, in 10 *CAHIERS DE PHILOSOPHIE POLITIQUE ET JURIDIQUE: LA GUERRE—ACTES DU COLLOQUE DE MAI 1986*, at 105, 107–10 (1986).

<sup>74</sup> See, e.g., BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN POLITICS* (1994).

<sup>75</sup> See Jonathan Barnes, *The Just War*, in *THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY FROM THE REDISCOVERY OF ARISTOTLE TO THE DISINTEGRATION OF SCHOLASTICISM 1100–1600*, at 771, 771–84 (Norman Kretzmann et al. eds., 1992).

<sup>76</sup> See Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 *AM. J. INT’L L.* 665, 668 (1939).

in systematic form with Augustine of Hippo,<sup>77</sup> the “just war” doctrine was refashioned by Thomas Aquinas and others to incorporate three fundamental requirements:<sup>78</sup> to be just, a war had to be waged (1) under the authority of a prince as a public rather than a private figure, (2) for a just cause, and (3) with a right intention.<sup>79</sup> War so conceived was essentially punitive in character—the justification for going to war was the culpability of a wrongdoer.<sup>80</sup> A just war did not seek victory but reestablishment of “ordered harmony” or peace.<sup>81</sup> On this theory, waging war unjustly was, or was akin to, a crime and liability for such conduct attached not only to the princes and other leaders of the wrongdoing state but also to the individuals who served in their armies and navies.<sup>82</sup> On the other hand, “[t]he justice of a war could not only render acts, which would otherwise be crimes, legitimate, but it could also endow them with legal consequences.”<sup>83</sup>

We cannot attempt to provide here a detailed account of the decline of the late medieval doctrine of just war and the rise of a more proceduralist account in its stead, but we can note some points in this development that are especially relevant to understanding “declarations of war”—an element of just war doctrine that is traceable to the sixth-century writer Isidore of Seville.<sup>84</sup> We shall focus here on six prominent treatise writers on international law—Balthazar Ayala, Hugo Grotius, Alberico Gentili, Cornelius van Bynkershoek, Christian

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<sup>77</sup> For the classic study, see ROLAND H. BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 95–99 (1960). *But see* JOHNSON, *supra* note 73, at 7–8 (distinguishing “classic” just war theory from Augustinian teaching).

<sup>78</sup> This is a simplification—the number and nature of the requirements varied from author to author. *See* Barnes, *supra* note 75, at 773–82.

<sup>79</sup> *See* Arthur Nussbaum, *Just War: A Legal Concept?*, 42 *MICH. L. REV.* 453, 457 (1943).

<sup>80</sup> *See* von Elbe, *supra* note 76, at 669; *see also* G.I.A.D. Draper, *The Just War Doctrine*, 86 *YALE L.J.* 370, 374 (1976) (reviewing JOHNSON, *supra* note 73). Richard Tuck notes that it was chiefly the medieval theologians and canonists, not the civil lawyers, who tended to accept a penal or juridical view of just war. *See* RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 57 (1999).

<sup>81</sup> von Elbe, *supra* note 76, at 669.

<sup>82</sup> *See* STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 101, 111–12 (2005). Our treatment of the decline of the just war doctrine and its relationship to the constitutional understanding of “declarations of war” is deeply indebted to Neff’s work.

<sup>83</sup> M.H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 65 (1965). As Keen explains, even in the late Middle Ages the “justice” of a war was in practice considered more a legal than a moral matter and hinged largely on the existence of “sovereign” authority in the person declaring it. *See id.* at 71, 80–81, 83–85.

<sup>84</sup> *See* JOHNSON, *supra* note 73, at 36 (quoting Isidore’s definition of a “just war” as arising “when, by a formal declaration, it is waged in order to regain what has been stolen or to repel the attack of enemies” (citation omitted) (emphasis added)). For the practice of “declaring” war in classical Antiquity, *see* WILLIAM BELCHER BALLIS, *THE LEGAL POSITION OF WAR: CHANGES IN ITS PRACTICE FROM PLATO TO VATTEL* 12–31 (1937).

Wolff, and Emmerich de Vattel—all of whom (excepting Ayala) were known to and might have influenced the Framers.<sup>85</sup>

Our starting point is the publication in 1582 of Balthazar Ayala's *De Jure et Officiis Bellicis et Disciplina Militari Libri III*.<sup>86</sup> Ayala, an officer in the Spanish Army that sought (unsuccessfully) to crush the rebellion in Spain's Dutch possessions, was particularly concerned with establishing that rebels, unlike true "enemies" or belligerents, had no rights against their rightful prince under the laws of war and captivity any more than pirates or robbers did and that their prince was therefore justified in "all measures allowed in war . . . against them."<sup>87</sup> Implicit in Ayala's treatment is a distinction between "war" as a *legalized* condition, in which combatants on both sides had certain legal privileges and liabilities, and "war" (such as civil wars or wars of rebellion) in which this was not the case.<sup>88</sup> That distinction in itself marks an important step away from the substantive conception of just war and toward a more formalist account. Further, Ayala also broke with the natural law tradition by holding that nothing more was needed to bring the laws of war into operation "than that the war should be waged by parties who are within the definition of 'enemies' and who have the right to wage war"—from which it follows that "there can be a just war on both sides."<sup>89</sup> That consequence was clearly impossible on the older theory; it embodied a "thoroughly statist view," as Philip Bobbitt has noted.<sup>90</sup> Again, the underlying tendency at work was to treat the question whether a war was "just" as effectively a question of whether certain procedural tests had been satisfied.

Later publicists and treatise writers followed Ayala in thinking that war might be "just" on both sides, assuming good faith of all parties to the conflict. The sixteenth-century Spanish Dominican, Francisco de Victoria, was one such thinker. In his view, both the Spanish invaders of the Americas and the native peoples fighting against them

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<sup>85</sup> The *Journals of the Continental Congress* for January 24, 1783, reported a "list of books proper for the use of Congress" that included works by Grotius, Gentili, Bynkershoek, Wolff, and Vattel. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 83–92 (Gailard Hunt ed., Wash. Gov't Printing Office 1922) (1783); see also LOFGREN, *supra* note 3, at 23–25 (noting the influence of publicists on Framers and other late eighteenth century leaders of American public opinion). Only Ayala's work is missing.

<sup>86</sup> 2 BALTHAZAR AYALA, THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE (John Westlake ed., John Pawley Bate trans., 1912).

<sup>87</sup> *Id.* at 11–12.

<sup>88</sup> The distinction, although merely adumbrated by Ayala, matured by the late nineteenth century. See Arnold D. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 TRANSACTIONS GROTIUS SOC'Y 29, 33 (1925).

<sup>89</sup> AYALA, *supra* note 86, at 23.

<sup>90</sup> PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 496 (2002).

were engaged in a “just” war.<sup>91</sup> But it was largely left to Protestant writers to take the disintegration of the medieval doctrine a stage further. Here we must note the great Dutch jurist Hugo Grotius, whose *De Jure Belli ac Pacis*, or *The Rights of War and Peace*,<sup>92</sup> appeared in 1625. Although Grotius retained strong ties to the medieval “just” war outlook, he made certain critical innovations that fundamentally reorientated the Law of War and carried the process of the demoralization (and consequent formalization) of “just” war to a further stage. He wrote:

Public war, according to the law of nations, is either SOLEMN, that is FORMAL, or LESS SOLEMN, that is INFORMAL. The name of lawful war is commonly given to that is here called formal, in the same sense in which a regular will is opposed to a codicil, or a lawful marriage to the cohabitation of slaves.<sup>93</sup>

Grotius emphasized that although war could be made without formalities (just as slaves could cohabit without formalizing a marriage), nonetheless the formalities were needed under the Law of War to attach certain legal “privileges and effects” to war.<sup>94</sup> He identified two conditions that were necessary to give war the “formality” required by the Law of War: “In the first place it must be made on both sides, by the sovereign power of the state, and in the next place it must be accompanied with certain formalities.”<sup>95</sup> War that satisfies these two conditions, even if not just in a substantive sense, may be considered “just” or “lawful” in a legal sense: a sovereign state that wages a substantively unjust war nevertheless stands on a different legal plane from mere robbers or pirates, and its soldiers, as “public enemies,” are entitled if captured to treatment as lawful prisoners of war.<sup>96</sup> To make war just in this morally nonsubstantive (but formal and legal) sense, Grotius says, “[I]t must not only be carried on by the sovereign au-

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<sup>91</sup> See NEFF, *supra* note 82, at 99; Nussbaum, *supra* note 79, at 458–60; von Elbe, *supra* note 76, at 675–76. A detailed account of Victoria’s somewhat elusive views can be found in JOHNSON, *supra* note 73, at 187–93.

<sup>92</sup> HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (A.C. Campbell trans., M. Walter Dunne 1901) (n.d.).

<sup>93</sup> *Id.* at 57.

<sup>94</sup> *Id.*; see also NEFF, *supra* note 82, at 100 (explaining that the voluntary law required certain formalities to designate a war as “just”).

<sup>95</sup> GROTIUS, *supra* note 92, at 57. Grotius is followed here by the later seventeenth-century German publicist Samuel Pufendorf, who states in *On the Duty of Man and Citizen According to Natural Law* that

[w]ar is normally divided into two forms: declared and undeclared. There are two necessary conditions of a declared war: first that it be waged by the authority of the sovereigns on both sides, and secondly that it be preceded by a declaration. Undeclared war is either war waged without formal declaration or war against private citizens. Civil wars also are in this category.

SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 169 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673).

<sup>96</sup> See GROTIUS, *supra* note 92, at 314–16.

thority on both sides, *but it must also be duly and formally declared, and declared in such a manner, as to be known to each of the belligerent powers.*<sup>97</sup> Grotius's view that war may be just on both sides in a legal sense, provided that a sovereign belligerent observes the formality of declaring war, "amounts practically . . . to ejecting the *justa causa* [just cause] from international law."<sup>98</sup> Thus, in Grotius's treatment, the substantive account of "just war" yields to a newer, proceduralist account. In the latter, a "declaration of war" plays a pivotal role: it provides the formal means by which a sovereign clothes a war with a character that brings it under the Laws of War and makes it (legally) "just."<sup>99</sup>

Grotius's explanation of the function of a declaration of war stems from his distinction between an unalterable "natural" law that regulated the dealings of states with each other and a volitional law that originated in the collective will of states and that could be adjusted to changing conditions.<sup>100</sup> For our purposes, the crucial difference between these two forms of law was that "natural-law rules dealt with questions of intrinsic justice," whereas voluntary law "was held to control only the external features of life."<sup>101</sup> Each body of rules thus carried with it a separate set of tests for measuring the justice—or as it was also called, the "perfection"—of war. From a natural law standpoint, the inquiry focused on whether the traditional conditions for substantive justice were met. From the voluntary law standpoint, questions such as the purpose of the war or the intentions of the party that had initiated it were irrelevant. "The most obvious mark of a perfect war from the voluntary-law standpoint was the issuing of an express declaration of war."<sup>102</sup>

Yet another influential seventeenth-century treatise writer, the Italian Protestant Alberico Gentili, underscored the centrality in the

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<sup>97</sup> See *id.* at 317 (emphasis added). Grotius later explained why this formality is necessary under the Law of Nations: the reason lies

in the necessity that it should be known for CERTAIN, that a war is not the PRIVATE undertaking of bold ADVENTURERS, but made and sanctioned by the PUBLIC and SOVEREIGN authority on both sides; so that it is attended with the effects of binding all the subjects of the respective states;— and it is accompanied also with other consequences and rights, which do not belong to wars against pirates, and to civil wars.

*Id.* at 321.

<sup>98</sup> Nussbaum, *supra* note 79, at 464.

<sup>99</sup> See James Turner Johnson, *Historical Tradition and Moral Judgment: The Case of Just War Tradition*, 64 J. RELIGION 299, 308 (1984) (observing that early modern state-centered thought "led already in Grotius to a kind of *compétence de guerre*, the doctrine that the sovereign alone can determine whether a just cause exists and can declare war on his own authority, based on that judgment. In its worst form the doctrine of *compétence de guerre* tended to make for arbitrariness: if the sovereign declared war and observed the legal requirements in doing so, the war was to be regarded as legitimate").

<sup>100</sup> See GROTIUS, *supra* note 92, at 25; NEFF, *supra* note 82, at 98.

<sup>101</sup> NEFF, *supra* note 82, at 99.

<sup>102</sup> *Id.* at 103.

new scheme of formal declarations of war. Gentili's work "largely stripped international law of the moralizing basis it had previously had, in favor of a juridical one."<sup>103</sup> In his 1612 *De Iure Belli Libri Tres*,<sup>104</sup> Gentili affirmed that a "just" war had to be "perfect in all its parts," i.e., it had to exhibit certain formal characteristics.<sup>105</sup> He devoted two lengthy chapters of his book ("Of Declaring War" and "When War Is Not Declared") to explaining the necessity of a formal declaration:

Now, just as you ought to observe justice in beginning a war, so you should wage it and carry it on justly. . . .

And this justice of which we speak seems in the first place to consist in this: that we should inform of our deliberations the one against whom we have decided to make war. . . .

. . . "It seems that no war can be regarded as just, unless it has been announced and declared, and unless satisfaction has been demanded," as Cicero writes . . .<sup>106</sup>

Like Grotius, Gentili conceptualized "war" as a legal condition: war was "no more secret a strife than are the legal contests of the Forum and the courts," and in war, just as in "a peaceful suit at law," it is essential to make a "request and denunciation."<sup>107</sup> While allowing for certain exceptional cases in which the need for a formal, antecedent declaration was obviated, Gentili insisted on the general rule:

But if war is not declared when it ought to be declared, then war is said to be carried on treacherously; and such a war is unjust, detestable, and savage. Namely, because it is waged according to none of the laws of war, but according to caprice, and in it all the laws of war justly seem to be set aside.<sup>108</sup>

For Gentili, as for Grotius, therefore, a formal declaration appeared to be a necessary (or at least a reliable) means of transforming the brute existence of armed conflict into a condition governed and regulated by rules of law.<sup>109</sup>

<sup>103</sup> BOBBITT, *supra* note 90, at 498.

<sup>104</sup> 2 ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* (John C. Rolfe trans., Clarendon Press 1933) (1612).

<sup>105</sup> *Id.* at 13. The situation was analogous, Gentili argued, to the disposition of one's property after one's death. A "full and complete disposal" required a will, or "a full and formal expression of desire and one relating to all the [testator's] property," while mere "codicils and all one's last wishes," though they might be "approved by the law," fell short of the standard of justice or perfection. *Id.*

<sup>106</sup> *Id.* at 131.

<sup>107</sup> *Id.* at 132.

<sup>108</sup> *Id.* at 140.

<sup>109</sup> On the other hand, Gentili takes the position that if it is doubtful where substantive justice truly lies and both belligerents claim in good faith to be aiming at it, neither side can be said to be waging an "unjust" war. As von Elbe notes, and as we shall see again, that position seems to entail that even an undeclared war may have the attributes of legality. See von Elbe, *supra* note 76, at 677-78.

Some eighteenth-century publicists sought to relax Gentili's strenuous demand for an antecedent formal declaration either by permitting informal methods of "declaring" war or more sweepingly by dispensing with the requirement of a "declaration" altogether. This development, which consciously reflected state practice, also evidenced the continuing breakdown of the medieval just war tradition. For Cornelius van Bynkershoek, writing *Questions of Public Law* in 1737, war was in essence "a contest 'by force.'"<sup>110</sup> He stated:

I did not say 'lawful force'; for in my opinion every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin, or incendiary bombs, though he is not provided with such things: in short everything is legitimate against an enemy.<sup>111</sup>

If war were simply a contention by force rather than by lawful force, the question of its justice—even in a narrow legal sense—would evaporate and, with it, any need for a "declaration," formal or otherwise. Bynkershoek accordingly drew the inescapable conclusion that "a declaration is not demanded by any exigency of reason, that while it is a thing which may properly be done, it cannot be required as a matter of right. War may begin by a declaration, but it may also begin by mutual hostilities."<sup>112</sup>

Bynkershoek had put his finger on a key weakness in the account of "just" or "perfect" war that Grotius and Gentili had given: they had failed to explain the practical consequences for belligerents who waged an *undeclared* inter-state war. Bynkershoek asked, "[W]hat difference there is, or has ever been, between a war that has and one that has not been declared, and whether there is a different law for the one and for the other."<sup>113</sup> The answer that Grotius and Gentili should have given was that without a formal declaration, there would be nothing to distinguish a conflict that legal rules governed from a conflict in which "everything is legitimate against an enemy."<sup>114</sup> But both the earlier writers wavered on this critical point,<sup>115</sup> and indeed some of their own admissions told against that conclusion.<sup>116</sup> In light of such

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<sup>110</sup> 2 CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 16 (Tenney Frank trans., Clarendon Press 1930) (1737).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 19. Bynkershoek demonstrates that this conclusion accords with the state practice of his period. *See id.* at 21–25.

<sup>113</sup> *Id.* at 18.

<sup>114</sup> *Id.* at 16.

<sup>115</sup> *See* NEFF, *supra* note 82, at 104, 111.

<sup>116</sup> If, as Gentili says, the law will give effect to a dying person's oral dispositions of his or her property, the fact that the decedent lacked a written will executed with all due formalities would seem to make no practical difference. Likewise if, as Grotius says, the law will recognize the unformalized cohabitation of slaves as a "marriage," the absence of formalities will carry no tangible consequences.

uncertainty, Bynkershoek reasonably concluded that an antecedent declaration might be an act of “mere humanity” or of “generosity” but it could not be a requirement of (legal) “justice.”<sup>117</sup>

Christian Wolff, the eighteenth-century German philosopher and jurist, also disputed the necessity for an antecedent “formal” declaration in *The Law of Nations According to a Scientific Method*. Wolff defined a “declaration” as “a public announcement of war made against a nation or its ruler by another nation or its ruler.”<sup>118</sup> A “declaration” was to include “both an announcement of our desire to bring war and an indication of the reason why we have decided to bring war.”<sup>119</sup> But such an “announcement” could be made in any number of different ways:

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 it has been done, consequently nothing else is required than that this should come to the notice of the other; the method of announcing war will naturally depend upon the will of the one announcing it, nor does it require special solemnities . . . .<sup>120</sup>

Although, like Bynkershoek, Wolff did not prescribe any specific formalities for “declaring” war, he differed in maintaining that an “announcement” of some kind was necessary before an “offensive” war, at least where making one was feasible:

In an offensive war there is always need of an announcement. For an offensive war is brought against another who was not thinking of bringing war against us . . . . [I]t 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.<sup>121</sup>

Moreover, Wolff, by arguing that a declaration of war triggered certain definite consequences, seems at first to provide an answer to the question that Grotius and Gentili had left unsettled. A declaration had the effect of making all the individual subjects of one belligerent the “enemies” of all the individual subjects of the other belligerent.<sup>122</sup>

<sup>117</sup> BYNKERSHOEK, *supra* note 110, at 18–19.

<sup>118</sup> 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 364 (Joseph H. Drake trans., Clarendon Press 1934) (1749).

<sup>119</sup> *Id.* at 364–65.

<sup>120</sup> *Id.* at 365.

<sup>121</sup> *Id.* at 366–67. Wolff allows an announcement of an offensive war to be omitted where making one is not feasible. *See id.* at 369.

<sup>122</sup> *See id.* at 373. Formally signaling the outbreak of war—as by displaying the King’s banner—had long been taken to authorize hostilities on the part of all enemy subjects. In 1322, King Edward II of England was advised not to unfurl his banner for fear of provoking exactly such consequences. *See KEEN, supra* note 83, at 106–07.

The nation declaring war had to give subjects of the other nation who resided in the former a definite time to depart safely or risk being detained as captives.<sup>123</sup> The property of an enemy within the territory of a nation waging a just war was also subject to confiscation.<sup>124</sup> Further, declarations of war also created a rule of domestic law binding on the subjects of the power that issued the declaration, requiring them to do what the declaration enjoined and forbidding them to do what it prohibited.<sup>125</sup> Finally, insofar as a declaration, however informal, was essential to the “justice” of an offensive war, it was necessary if the use of force in conducting that war was to be governed by law:

Since he who wages an unjust war has no right in war, all force in an unjust war is illegal, and those whom an unjust belligerent kills, he kills without right, the things which he takes from an enemy, he takes with unrighteous force, and whatever loss he causes him, he causes wrongfully . . . .<sup>126</sup>

One who waged an undeclared (and therefore unjust) war stood outside the law and was no better than “a robber, an invader, and a bandit.”<sup>127</sup> Such a belligerent incurred the obligation to “restore property taken by force from another whose war is just, and to repair losses caused in any way”<sup>128</sup> and was moreover “bound to pay a penalty to the other for the hostilities which he commit[ted].”<sup>129</sup>

Yet Wolff seemed to temper these conclusions when discussing the “voluntary” law of nations.<sup>130</sup> From that perspective, he said that “war is to be considered as just on either side.”<sup>131</sup> And so a rule of parity followed: “[W]hat is rightly allowable for one belligerent in war is also allowable for the other.”<sup>132</sup> Thus the violence and predation that either side in a war committed could not be considered illegal (except from the natural law standpoint): “The voluntary law of nations does not give to one waging an unjust war a true right to warlike acts, but simply immunity from punishment for the action.”<sup>133</sup> Therefore, the justice or injustice of a war seemed to be functionally irrelevant—even though the acts of an unjust belligerent might be objectively wrongful, no sanction could attach to them because “immunity from punishment” covered them. This analysis revives Bynker-

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<sup>123</sup> See WOLFF, *supra* note 118, at 435.

<sup>124</sup> See *id.* at 436.

<sup>125</sup> See *id.* at 381.

<sup>126</sup> *Id.* at 402.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 407.

<sup>129</sup> *Id.* at 408.

<sup>130</sup> See Nussbaum, *supra* note 79, at 469–70.

<sup>131</sup> WOLFF, *supra* note 118, at 454.

<sup>132</sup> *Id.* at 455.

<sup>133</sup> *Id.* at 456.

shoek's question of whether there was any consequential difference between a declared and an undeclared war.

The teachings of the eighteenth-century publicist who was probably most familiar to the Framers, Emmerich de Vattel, were closely aligned with (indeed they were derived from) those of Wolff.<sup>134</sup> Vattel's *The Law of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* followed traditional natural law doctrine by delineating two substantive conditions for the "justice" of war: "1. That we have a just cause of complaint. 2. That a reasonable satisfaction has been denied us."<sup>135</sup> From the latter condition, he deduced an obligation to "declare" war, which was nothing other than "to declare to this unjust nation, or its chief, that we at length are going to have recourse to the last remedy, and make use of open force, for bringing him to reason"<sup>136</sup> coupled with a statement of "the cause of that resolution."<sup>137</sup> Declaring war required no specific formalities except such as arose from customary state practice: "The declaration of war must be known to the state against whom it is made. This is all which the natural law of nations requires."<sup>138</sup> Other than helping ensure the justice of a war, a declaration performed three main functions: it informed and directed the belligerent's own subjects, it fixed the date at which the effects of war would begin to accrue (which would provide the measure of reparative damages when peace was later made), and it brought about "certain effects which the voluntary law of nations attributes to a war in form."<sup>139</sup> In particular, Vattel emphasized, a declaration had to notify neutral powers "that such or such a people is [the declarant's] enemy, [in order] that they may conduct themselves conformable to [the declarant's] advice."<sup>140</sup>

Side-by-side with Vattel's substantive, natural-law-based account of just war was a distinct, proceduralist account that was confessedly indebted to Grotius. Vattel's two accounts were not successfully harmonized and the significance he attributed to declarations of war in each account differed. Under his proceduralist analysis, a war is "just" if it is made by sovereign authorities on both sides and is "accompanied with certain formalities," specifically including (in the case of an of-

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<sup>134</sup> See BOBBITT, *supra* note 90, at 532, 536–37; Nussbaum, *supra* note 79, at 470; Nicholas Greenwood Onuf, *Civitas Maxima: Wolff, Vattel and the Fate of Republicanism*, 88 AM. J. INT'L L. 280, 296–97 (1994); von Elbe, *supra* note 76, at 682–83.

<sup>135</sup> 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS*, Book III, at 21 (London, J. Coote 1759).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* § 52.

<sup>138</sup> *Id.* § 55.

<sup>139</sup> *Id.* § 56.

<sup>140</sup> *Id.* § 64.

fensive war) a “declaration of war.”<sup>141</sup> Vattel (like Grotius, Gentili, and Wolff before him) indicated that such formality was required in order to distinguish a “legitimate” or “regular” war in which “certain rules, either prescribed by the law of nature, or adopted by custom, [are] being observed,” from brute, unregulated violence.<sup>142</sup> Vattel characterized the latter as subsuming “unlawful war[s] entered on without any form, or rather . . . those incursions which are committed either without lawful authority, or apparent cause, as likewise without formalities, and only for havock and pillage.”<sup>143</sup> Vattel appears here to be conflating two different kinds of warfare: an undeclared offensive war that one sovereign initiates against another and an armed conflict between a sovereign and “irregular” belligerents such as robbers and pirates. On the face of it, he seems to assign to a “declaration” of war the important function of preventing a war between sovereigns from having the lawless character of a war between a sovereign and an irregular force. But because he, like Wolff, accepts the rule of parity between sovereign belligerents even in an undeclared war,<sup>144</sup> he also holds that the formality of a declaration is *not* indispensable to securing the legality of an ensuing war. War between sovereigns can be (and usually is) law-governed—even if undeclared.<sup>145</sup>

This completes our brief survey of the pre-constitutional understanding of “declarations of war” in the leading European writers on international law. Clearly, the doctrine was in state of confusion—or, more charitably, its evolution from the natural law conception of just war to a proceduralist (or, we would say, positivist) one was still incomplete.<sup>146</sup> Yet some general conclusions can be distilled from the welter of conflicting teachings.

First, contrary to Professor Prakash, all the writers we have surveyed distinguished between declared and undeclared wars, even when they acknowledged that hostile acts or threats could *function* much like declarations. Second, most of the writers (Bynkershoek being the exception) who considered the question agreed that a “declaration” (or at least an “announcement”) of war was necessary (or at least advisable) for securing the legitimacy or lawfulness of an offensive war. (And even Bynkershoek found *some* use for the practice of

<sup>141</sup> *Id.* § 66.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* § 67.

<sup>144</sup> *See id.* § 39.

<sup>145</sup> Such, indeed, was the conclusion of the English courts that addressed the question in the early nineteenth century. *See* The Eliza Ann, 1 Dods. 243, 165 Eng. Rep. 1298, 1300 (1813); The Nayade, 4 C. Rob. 251, 165 Eng. Rep. 602, 603 (1802); G.G. Phillimore, *What Is a State of War in Law*, 4 J. SOC. COMP. LEGIS. 128, 128 (1902).

<sup>146</sup> *See* NEFF, *supra* note 82, at 108 (“International lawyers did not succeed, however, during this period—or any other . . .—in crafting a rigorous definition of a declaration of war.”).

“declaring” war, if only that of expressing generosity towards an intended foe.) These writers believed—albeit not consistently—that a declaration or announcement of (offensive) war attached legal consequences to what would otherwise be a brute state of conflict and, in particular, distinguished it from the lawless and unregulated violence of conflicts with pirates or bandits. Third, for that very reason, Professor Prakash is wrong to conclude that the “formalist theory” of the Declare War Clause renders it “rather inconsequential.”<sup>147</sup> Even if late eighteenth-century statesmen and legal theorists would have found it perplexing to say exactly what a “declaration of war” was, what functions it served, or whether it was truly necessary to justify and legalize a state of hostilities, the Framers would have had to deal somehow with the power of declaring war.

Prakash makes far too much of the fact that some of the treatise writers held that the bare incidence of hostilities could *function* as a declaration of war. Even if some “undeclared” wars *were* clearly public, state-to-state wars (whether because of the nature and scale of hostilities, their duration and extent, or other reasons), the mere occurrence of hostile exchanges between states would often fall into an area of ambiguity in which it would be uncertain whether a state of war actually existed and whether the legal consequences that would flow from a “declaration” had in fact arisen. It would have seemed extremely useful to the Framers to enable Congress to dispel such ambiguities, which, if unaddressed, could readily lead to broader hostilities.

Prakash’s theory has the incongruous consequence that the Framers designed a constitution that was exceptionally, and dangerously, war-prone. Prakash says that not only the actual commencement of open warfare but also such events as “the recall or dismissal of ambassadors, the cutting down of another nation’s flag, [or] scalping” could be, and sometimes were, understood as “declarations of war,” and he believes that the Declare War Clause should be read in light of that sweeping usage. But if armed conflict between two sovereigns at *any* level was (or could be considered) tantamount to a “declaration of war,” then any brief exchange of fire on the Canadian border between American and British troops or between American and French naval vessels in the Caribbean would constitute a bilateral “declaration of war.” Such an interpretation would make usurping Congress’s purported monopoly over war making too easy: virtually any military officer, acting unilaterally against a foreign or Indian nation, could “declare war.” Far from serving as a bulwark against presidential aggrandizement of the war power, the Declare War Clause would be an

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<sup>147</sup> Prakash, *supra* note note 6, at 64.

open invitation to low-ranking field personnel to involve the United States in full-scale hostilities. Furthermore, if *only* Congress can authorize *any* of the actions that *might* be taken to be “declarations” of war, then even diplomatic decisions that are unquestionably within the Executive’s constitutional authority, such as President George Washington’s 1793 decision to have the French Ambassador “Citizen” Genet recalled, would have constituted “declarations of war”—they would thus have fallen *outside* the President’s power. Other military and diplomatic actions that have always been regarded as core presidential prerogatives, such as mobilizing troops during a diplomatic crisis, deploying naval forces into strategically sensitive locations, furnishing armed escorts for neutral shipping in waters where military operations were taking place, or even issuing warnings to potential foreign enemies, would have to be considered unconstitutional usurpations of congressional power. For example, the 1948 Berlin airlift, the protection that the United States Navy extended to neutral vessels in the Persian Gulf during the Iran-Iraq War, and the 1990 deployment of American troops into Saudi Arabia in Operation Desert Shield (to cite three relatively recent examples) would have been plainly unconstitutional acts. As the writings we have surveyed attest, however, the term “declaring war” *need* not entail such bizarre consequences.

Furthermore, the early modern jurisprudential background of the Declare War Clause brings out the strengths of the formalist theory in two ways. First, it sheds light on how the Framers were likely to have understood the power to declare war. Second, it helps explain why the Framers would have chosen to assign the power to Congress instead of leaving it (as in the British Constitution) with the Executive.

First, especially in light of this pre-constitutional jurisprudence, our formalist theory provides satisfactory explanations of how the Framers likely understood the Declare War Clause and why they would have thought that enumerating the power of declaring war served a significant purpose, even if the clause was not intended (as Prakash argues) to concentrate all war-making power solely in Congress’s hands.

The Declare War Clause, like the adjacent grants of powers to define and punish “Offences against the Law of Nations,” to issue “Letters of Marque and Reprisal,” and to regulate “Captures on Land and Water,” is exceptional in vesting Congress, ordinarily a body with jurisdiction only over domestic matters, with the authority to speak to and to intervene in international affairs. By granting Congress the power to declare war, the Framers would have enabled Congress to serve notice on American citizens, neutral nations, and intended or actual foreign enemies of the existence of a state of war between the

United States and another power or powers. Further, Congress would have had the authority to set forth the grievances that impelled the United States to war and to define the United States' peace terms and strategic objectives. All of these functions—giving notice, providing justification, stating war aims—are superbly exemplified in the United States' first declaration of war—the Declaration of Independence.<sup>148</sup> Further, even if the legal consequences of a “declaration” under international law were uncertain and disputed, vesting the power to declare war in Congress would ensure the federal government's ability to clothe the bare state of general hostilities with appropriate legal characteristics and to subject it, so far as it lay in our government's power, to the Laws of War. Again, the Declaration of Independence can serve as a paradigm: it was largely intended to effect a transformation in international law, changing the ongoing American Revolution from a mere civil war or rebellion into a public war between two states and, by so doing, to make the American soldiery legitimate combatants in a regular war rather than leaving them to be treated as mere traitors or rebels.<sup>149</sup> In his 1796 opinion in *Ware v. Hylton*, Justice Samuel Chase attributed precisely such legal effects to the Declaration of Independence (which he likened to a declaration of war) when he said that upon its issuance the Revolution became

a PUBLIC war between independent governments; and immediately thereupon ALL the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; . . . and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France.<sup>150</sup>

Likewise, in his 1819 opinion in *Griswold v. Waddington*, Chancellor James Kent (also a leading authority on international law) noted that hostilities in the American Revolution “had actually commenced” a year before “our independence was . . . declared [and] the war . . .

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<sup>148</sup> See David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 46–47 (2002); see also BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* (1998) (viewing the Declaration of Independence as a declaration of war).

<sup>149</sup> See Armitage, *supra* note 148, at 48. The British government refused to respond officially to the Declaration for fear of lending credence to those conclusions. See *id.* at 52.

<sup>150</sup> 3 U.S. (3 Dall.) 199, 224 (1796). David Ramsay, the eighteenth-century American historian of the Revolution, likewise observed that after the promulgation of the Declaration, “every thing assumed a new form. The Americans no longer appeared in the character of subjects in arms against their sovereign, but as an independent people, repelling the attacks of an invading foe.” 1 DAVID RAMSAY, *THE HISTORY OF THE AMERICAN REVOLUTION* ch. XIII, at 322 (Lester H. Cohen ed., Liberty Classics 1990) (1789). Further, Ramsay noted, the American soldiery understood the Declaration in this sense, finding “particular satisfaction” in its publication because “[a]s far as it had validity, so far it secured them from suffering as rebels.” *Id.*; see ERIC ROBSON, *THE AMERICAN REVOLUTION IN ITS POLITICAL AND MILITARY ASPECTS 1763–1783*, at 74 (1965).

then attained that solemn form recognized by public law between independent nations.”<sup>151</sup>

In a major treatise on constitutional and international law, Chancellor Kent followed what we have seen to be the dominant trend in early modern jurisprudence regarding the meaning and function of “declarations of war.” According to Kent, a “solemn declaration” of war, understood as “a formal official notice to all the world,” generally triggers significant legal consequences:

When war is duly declared, it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations, is a war between all the individuals of the one, and all the individuals of which the other nation is composed. . . . [T]he best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one, are enemies to all the subjects of the other. Very important consequences concerning the obligations of subjects, are deducible from this principle.<sup>152</sup>

Among the “important consequences” Kent deduces are several bearing on the legal liabilities of enemy aliens and enemy alien property found within a belligerent’s territory at the outbreak of a declared war, the “absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing, between the subjects of the two [belligerents],” and the “void[ing]” of “all contracts with the enemy, made during war.”<sup>153</sup>

Moreover, it is not only the writings of European and American publicists that support a formalist account of “declaring war.” The practice of states and judicial decisions between the 1750s and the early nineteenth century also show that a formal declaration of war was frequently thought to import legal consequences that the outbreak of hostilities in itself did not necessarily encompass. For instance, the Seven Years War of 1756–1763 between Britain and France had witnessed hostilities in North America before formal declarations of war in 1756.<sup>154</sup> A controversy that later arose in the peace negotiations over the validity of predeclaration captures suggested that these “declarations” were thought to have legal consequences that the preceding hostilities alone had not triggered. The French Cabinet vigorously maintained that legal war had strictly begun only *after* the declarations—with the consequence that the predeclaration British

<sup>151</sup> 16 Johns. 438 (N.Y. Sup. Ct. 1819).

<sup>152</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 53 (New York, O. Halsted 1826).

<sup>153</sup> *Id.* at 63–64.

<sup>154</sup> See FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS’ WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA 1754–1766, at 94–107 (1998).

captures had not changed lawful title but rather were acts of piracy.<sup>155</sup> Although the dispute was not judicially resolved, it would not even have been intelligible unless the French position had seemed plausible.

Contemporaneous case law provides further support for the formalist understanding: three early nineteenth-century English cases also attest to the prevalent belief that a declaration of war would have different and more extensive legal consequences than the mere occurrence of hostilities. The 1799 English case of *The Herstelder*<sup>156</sup> posed the question whether the English capture of a Dutch vessel on August 27, 1795, had been valid given that war had not been declared until September 15, 1795.<sup>157</sup> The court found that although the capture had preceded the declaration, nonetheless "the character of Holland during the whole of that doubtful state [immediately preceding the declaration] is to be considered as hostile."<sup>158</sup> Consequently, the declaration could be given retroactive effect and the capture be validated on that basis.<sup>159</sup>

English courts applied the same doctrine in an 1804 case, *The Boedes Lust*.<sup>160</sup> There, the British had seized a Dutch vessel a month before the issuance of a declaration. The court again attributed to the declaration

a retroactive effect, applying to all property previously detained, and rendering it liable to be considered as the property of enemies taken in time of war. This property was seized provisionally, an act itself hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of Holland.<sup>161</sup>

Thus, the seizure itself, although "hostile enough in the mere execution," had an uncertain legal character until the declaration of war not long afterwards established beyond doubt that the Dutch ship was "liable to be considered as the property of enemies taken in time of war."<sup>162</sup> In both *The Herstelder* and *The Boedes Lust*, the bare outbreak of hostilities did not carry the same legal consequences as a declaration of war, although the legal effects of the latter could be projected

<sup>155</sup> See NEFF, *supra* note 82, at 179; 6 P. PRADIER-FODÉRE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC: EUROPÉEN ET AMÉRICAIN SUIVANT LES PROGRÈS DE LA SCIENCE ET DE LA PRATIQUE CONTEMPORAINES 620-21 (A. Durand & Pedone-Lauriel eds., Paris 1894).

<sup>156</sup> 1 C. Rob. 113, 165 Eng. Rep. 116 (1799).

<sup>157</sup> See *id.* at 114-15.

<sup>158</sup> *Id.* at 116.

<sup>159</sup> See William J. Ronan, *English and American Courts and the Definition of War*, 31 AM. J. INT'L L. 642, 644 (1937).

<sup>160</sup> 5 C. Rob. 233, 165 Eng. Rep. 759 (1804).

<sup>161</sup> *Id.* at 243; see Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 31 (1938).

<sup>162</sup> *The Boedes Lust*, 5 C. Rob. at 245.

back into the ambiguous predeclaration period.<sup>163</sup> A third English case, *The Fortuna*, stated:

The court sometimes looks to the circumstances of an approaching war, where the expectation of such an event appears to have guided the conduct of the parties themselves when the contracts were entered into, and in such cases it feels itself justified in applying the principles that belong to a state of actual war.<sup>164</sup>

The formalist theory can thus give substance and meaning to the Declare War Clause, even if (as Chancellor Kent was to say) it views the power to declare war as “but a slender prerogative” compared to the far greater congressional power to control war funding.<sup>165</sup> Moreover, the formalist account makes sense of the fact that nations thought it necessary, or at least advisable, to issue “declarations” of war even after hostilities had begun—indeed, in some cases, even *years* after hostilities had been underway. By contrast, Prakash’s “categorical theory,” which collapses “declaring” war into “making” war, cannot satisfactorily account for that phenomenon.

Second, the formalist theory can also explain—as an alternative to Prakash’s categorical account—why the Framers vested the power to “declare” war in *Congress*, rather than (as in the British system) leaving it with the Executive. The idea that the power to declare war had to belong to the authority with the power to unmake domestic law traces back to the Middle Ages: because a declaration of war set aside the civil law, it had to issue from an authority that was above that law.<sup>166</sup> This idea survived into early modern jurisprudence: as Christian Wolff observed, a declaration of war would have *domestic* as well as international legal consequences.<sup>167</sup> Thus, a declaration of war could affect the commercial and other relationships between American nationals and nationals of the opposing belligerent, for example, by terminating or suspending treaties, canceling contracts, prohibiting trade, subjecting enemy aliens or their property within the country to various restrictions or disabilities, and obliging American merchants conducting business in the territory of the opponent to depart from it.<sup>168</sup> The power to effectuate such domestic legal changes was, therefore, legislative in character—a fact that in itself gave the Framers sufficient reason to lodge the authority to declare war in Congress rather

<sup>163</sup> In *The Venus*, the U.S. Supreme Court approvingly discussed *The Boedes Lust*. See 12 U.S. (8 Cranch) 253, 285–86 (1814).

<sup>164</sup> 1 Edw. 56, 59, 165 Eng. Rep. 1031 (1809).

<sup>165</sup> KENT, *supra* note 152, at 49.

<sup>166</sup> See KEEN, *supra* note 83, at 69.

<sup>167</sup> See WOLFF, *supra* note 118, at 381.

<sup>168</sup> See, e.g., *Jones v. Walker*, 13 F. Cas. 1059, 1062 (district and date not reported) (No. 7507) (Jay, Circuit Justice) (stating that the power to determine whether a treaty remains in effect falls “to congress, [i]t being necessarily incident to the right of making war”).

than in the Executive. It is therefore not *necessary* to assume, as Prakash apparently does, that the Framers' decision to assign the power to Congress sought to serve as a crucial check against the danger of unilateral, executive war-making. Rather, the assignment makes perfect sense in light of common understandings in the Framing period of what a declaration of war might accomplish under domestic as well as international law.

Legal documents from the Framing period demonstrate that a declaration of war was often thought to have effects under domestic law as well as under international law.<sup>169</sup> Here we shall consider only the Supreme Court's 1814 decision in *Brown v. United States*. In *Brown*, the Court adjudicated the domestic legal effects of the United States' declaration of war in 1812.<sup>170</sup> Chief Justice John Marshall framed the leading question as: "May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?"<sup>171</sup> In other words, was a further legislative act authorizing such seizure and condemnation necessary? Marshall decided that a declaration of war did not, of its own operation, vest the enemy's property in the government but only created a "right" to confiscation whose assertion and exercise depended on the government's will, as legislatively expressed:

[T]he declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government . . . .<sup>172</sup>

Although Marshall ruled that the mere declaration itself had no confiscatory effects under domestic American law,<sup>173</sup> one could reasonably have considered the question an open one before. Significantly, Justice Story, who had ruled otherwise in the circuit court below, wrote a lengthy and powerful dissent at the Supreme Court level, in which he followed what he regarded as "the true doctrine of

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<sup>169</sup> For instance, in a 1798 opinion, *Treason*, 1 Op. Att'y Gen. 84 (1798), Attorney General Charles Lee determined that, in light of "the acts of the French republic relative to the United States, and the laws of Congress passed at the last session," there existed "not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations." Because the conflict had such a legal character, Lee deduced, citizens of the United States "or any other person within the United States not commissioned under France," had become subject to being "tried and punished according to our [domestic] laws" if they aided or abetted France in her maritime warfare. "[A] French subject . . . acting openly according to his commission" would have to be "treated according to the [international] laws of war."

<sup>170</sup> See 12 U.S. (8 Cranch) 110 (1814).

<sup>171</sup> *Id.* at 123.

<sup>172</sup> *Id.* at 125–26.

<sup>173</sup> See *id.* at 129.

the law of nations,” viz., that “the mere declaration of war is not supposed to clothe the citizens with authority to capture hostile property, *but that they may lawfully seize hostile property in their own defence, and are bound to secure, for the use of the sovereign, all hostile property which falls into their hands.*”<sup>174</sup>

For both Chief Justice Marshall and Justice Story (albeit in different ways), the issuance of the declaration of war in 1812 in itself changed the domestic legal environment. For Marshall, the declaration had created a right, presumably under international law, of Congress to authorize confiscation of enemy alien property within the United States. For Story, the declaration had created a limited right of private seizure or sequestration even in the absence of any further legislative authorization.<sup>175</sup> Further, Story maintained, a declaration could retroactively justify a private seizure of what after that declaration became unambiguously enemy property, thereby furnishing the private party making the seizure with a defense against a charge of piracy.<sup>176</sup> Finally, Story concluded that the declaration in itself had vested full authority to seize enemy property in the *President*:

[A]s the executive of the nation, he must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. And there being no limitation in the act [of declaring war], it seems to follow that the executive may authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized.<sup>177</sup>

We may summarize our conclusions in this section as follows. The early modern jurisprudential understanding of the meaning and functions of declarations of war evolved out of the medieval tradition of just war. While confused and contradictory at the time of the Framing, that body of jurisprudence clearly exhibited some prevailing tendencies. In particular, it generally attributed to a “declaration” of war a variety of effects under international law that did not arise, or at any rate were less certain to arise, from the mere outbreak of armed conflict between two nations. American and British treatise writing, case law, and state practice in the Framing period reflected widespread acceptance of that jurisprudential understanding, even if the term was also used more broadly and colloquially to refer to the bare outbreak of hostilities. Interpreting the Declare War Clause in light of this widely current understanding gives a full and coherent account of that Clause, which avoids collapsing “declaring war” into “waging war” as Prakash does. Furthermore, the formalist theory can successfully draw

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<sup>174</sup> *Id.* at 134–35 (emphasis added).

<sup>175</sup> *See id.* at 130–33.

<sup>176</sup> *See id.* at 133–34.

<sup>177</sup> *Id.* at 145.

on both early modern jurisprudence and early American legal writing to explain why the Framers should have vested the power to “declare war” in Congress rather than simply leaving it with the President: a declaration of war could have domestic legal effects and was thus properly conceptualized as a legislative power.

## V

## EARLY PRACTICE

Prakash places great store in the practice of the executive branch after the Framing. As a matter of originalist methodology, the weight this material deserves is unclear, as subsequent practice could not inform the understanding of those who had earlier ratified the Constitution. Nevertheless, Prakash believes that the post-ratification statements of Presidents reflect a consistent understanding of the power to declare war that extends back several decades. We believe that the examples drawn from America’s early wars are more complex and do not support Prakash’s claim that Congress had authorized every early conflict. While there is no doubt that Presidents sought congressional approval for military hostilities on some occasions during this period, such as the Quasi War with France and the War of 1812, it is not the case that the President had specific legislative authorization for other conflicts. We focus here on two examples, Washington’s war against the Indians of the Ohio Valley and Jefferson’s war against the Barbary states, where congressional authorization was limited to no more than creating and funding the military necessary for offensive action.

*Washington.* During Washington’s presidency, the United States waged war against only one enemy—the Indian tribes on the western frontier, primarily in present-day Ohio. The Washington administration developed a political and military strategy toward the Indians without consulting Congress. Instead, it sought Congress’s cooperation when it needed increases in the size of the Army, military spending, or approval of diplomatic missions and agreements—in other words, those areas where the Constitution specifically provided a legislative role.

Relations in the West had deteriorated due to isolated and sporadic but growing conflicts between Indians and American settlers and the refusal of some tribes to recognize the territorial terms of the peace with Great Britain.<sup>178</sup> The British were providing arms and political support to the Indians in the hopes of creating a buffer state that would limit American expansion in the Northwest.<sup>179</sup> Washing-

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<sup>178</sup> See RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 92–93 (1975).

<sup>179</sup> See ELKINS & MCKITRICK, *supra* note 37, at 391.

ton and Secretary Knox pursued a two-tracked strategy: they hoped that diplomacy might produce a peaceful settlement with the tribes, but they also prepared for war by building a small Army of regular troops that could take the offensive.<sup>180</sup>

It would have been impossible for the executive branch to conduct military operations against the Indians without Congress, but not because of the latter's "declare war" power. There simply was no military for the President to order against the Indians. In August 1789, President Washington reported to Congress that the existing Army numbered only 672 troops, scattered over western Pennsylvania and the frontier.<sup>181</sup> At this time, the Indian tribes threatening settlers in Georgia could field 5000 warriors.<sup>182</sup> Under the Articles of Confederation, Congress had established the force to protect the frontiers "from the depredations of the hostile Indians" and police the public lands.<sup>183</sup> In order to wage any kind of military operations against the Indians, Washington would need the cooperation of Congress.

Congress quickly answered Washington's call by continuing to fund the small permanent Army and giving him the authority to call out the state militia "as he may judge necessary" to protect settlers against "the hostile incursions of the Indians."<sup>184</sup> Congress enacted no statute declaring war or authorizing offensive hostilities against the tribes. It placed no conditions of any kind on the use of the nonmilitia, regular armed forces. The natural inference is that Congress recognized the President's powers as Commander in Chief to decide how to use the forces that the Legislature once created. It is possible that Congress believed it was simply reauthorizing the Army under the same conditions and purposes as that of the Confederation Congress. But it need not be left to inference. During the House debates, some in Congress objected to the bill's language because they believed it gave the President the unconstitutional power to start a war.<sup>185</sup> Others wanted to add language to the bill to force the administration to adopt a more aggressive strategy toward the Indians.<sup>186</sup> Madison argued that Congress should not specify where troops should be based and for what purposes they should be used. "By the constitution, the President has the power of employing these troops in the protection

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<sup>180</sup> See KOHN, *supra* note 178, at 91–127.

<sup>181</sup> See Communication from George Washington to the Senate (Aug. 10, 1789), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 5, 6 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832).

<sup>182</sup> See KOHN, *supra* note 178, at 96.

<sup>183</sup> 1 ANNALS OF CONG. 715 (1834).

<sup>184</sup> See Act of Sept. 29, 1789, ch. 10, 1 Stat. 96.

<sup>185</sup> See KOHN, *supra* note 178, at 97.

<sup>186</sup> See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 118 (1976).

of those parts [of the country] which he thinks requires them most."<sup>187</sup>

Despite his statement four years later, Washington clearly believed in 1789 that once Congress had created the military, the Constitution gave him the authority to decide to use it. Even before Congress had approved the continuation of the regular Army, the administration ordered General Josiah Harmar to move the troops to the area of modern Cincinnati to begin disrupting Indian activities.<sup>188</sup> In October, Washington ordered Arthur St. Clair, governor of the Northwest Territory, to mobilize 1500 militia to undertake offensive punitive operations against the Wabash and Illinois Indians should they reject diplomatic overtures.<sup>189</sup> These forces would not be enough. Federalists had long thought that state militia were unreliable, poorly trained, and had performed poorly in the Revolution.<sup>190</sup> More regular troops would be required. Secretary Knox believed that at least 2500 regulars would be needed to defeat the hostile Indian tribes in the Ohio region.<sup>191</sup> A few months later, Washington requested an increase in the permanent Army to 1200 and Congress obliged. Continuing its practice from 1789, Congress passed no specific authorization of hostilities against the Indians and placed no restrictions on the use of the troops it had raised.<sup>192</sup>

It appears that Washington settled on war with the Indians in the Ohio region that summer. On June 7, 1790, Washington ordered Generals Harmar and St. Clair to organize an offensive, punitive expedition into Indian territory.<sup>193</sup> He neither sought nor received authorization from Congress. After meeting with his generals, Washington next approved a more ambitious plan to field an Army of 2000 troops, roughly 1600 of them militia, to attack the major villages of the tribes in the Ohio area and to construct a permanent garrison to block their communications with the British.<sup>194</sup> As military historian Richard Kohn observed, "A 2,000-man, two-pronged expedition fully committed the military, political, and moral prestige of the United States government . . ."<sup>195</sup> Washington sought no authorization from Congress for these offensive operations, which were to extend more than 150 miles into enemy territory. On the other hand, Washington had informed Congress about the scope of the Indian

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187 1 ANNALS OF CONG. 724 (1834).

188 See KOHN, *supra* note 178, at 97.

189 See *id.* at 98.

190 See *id.* at 73–87.

191 See *id.* at 96.

192 See Act of Apr. 30, 1790, ch. 10, 1 Stat. 119–21 (repealed 1795).

193 See KOHN, *supra* note 178, at 102.

194 See *id.* at 103.

195 *Id.* at 104.

problems when he had sought increases in the size of the Army and the right to call out the militia, going so far as to send Congress St. Clair's reports.<sup>196</sup>

Washington's plans met with disaster. In October, General Har-mar's expedition lost about 200 men in a battle with the Indians and withdrew.<sup>197</sup> When news arrived in Philadelphia, disgust reigned in Congress and the public.<sup>198</sup> Washington decided another offensive against the Indians was necessary to reverse the setback, one that would field an Army of 3000 and would construct a series of forts throughout their territories after defeating the Indians.<sup>199</sup> He informed Congress of his new plans in a December 8, 1790 speech and requested an increase in the size and funding of the Army for the offensive.<sup>200</sup> Some members of Congress disliked the strategy and others disfavored the new expenses, but news of Indian massacres on the frontier overrode any opposition.<sup>201</sup> The second expedition was an even worse setback than the first and perhaps the most devastating American military defeat since the early days of the Revolution. On November 4, 1791, a surprise Indian attack completely destroyed St. Clair's force.<sup>202</sup> The regular American Army ceased to exist and no organized military stood in the western United States to protect the frontiers.<sup>203</sup>

When news arrived in the Capitol in December 1791, the city was stunned.<sup>204</sup> Washington came under withering attack. Critics accused the administration of mismanagement, poor strategy and policy, and a failure of leadership. Washington and Knox decided to escalate their strategy with a large, professional Army that could permanently defeat the Indian tribes.<sup>205</sup> Again, Washington did not seek authorization from Congress for further offensive operations or for his strategy, but he knew he would need legislative cooperation for the expansion of the military. Washington sent Congress a flood of information about the failed St. Clair expedition and conditions in the Northwest, and then requested a new 5000-man Army, which was more than five times the size of the 1789 Army, at a cost of roughly \$1 million a year, which

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<sup>196</sup> See, e.g., 1 ANNALS OF CONG. 927–28 (1834) (George Washington to House of Representatives, Sept. 16, 1789).

<sup>197</sup> See KOHN, *supra* note 178, at 106.

<sup>198</sup> See *id.* at 107.

<sup>199</sup> See *id.* at 109.

<sup>200</sup> See 2 ANNALS OF CONG. 1772 (1834).

<sup>201</sup> See KOHN, *supra* note 178, at 110.

<sup>202</sup> See *id.* at 115–16.

<sup>203</sup> See *id.* at 115–17.

<sup>204</sup> See *id.* at 116–17.

<sup>205</sup> See *id.* at 119.

was triple current expenditures.<sup>206</sup> Jeffersonians in Congress saw the request as a piece of the Hamiltonian program to duplicate the British political, economic, and now military system by creating a large, expensive standing Army, one of the great fears of the Anti-Federalists and their intellectual heirs.<sup>207</sup> Although opposition was fierce and public dissatisfaction with the administration's Indian policy was widespread, Congress gave Washington everything.<sup>208</sup> It placed no limits on the use of the troops or the strategy, but did include a new restriction—that the troops be demobilized “as soon as the United States shall be at peace with the Indian tribes.”<sup>209</sup>

Under the command of General Anthony Wayne, the 5000-man Army would defeat the Indians at the Battle of Fallen Timbers.<sup>210</sup> Historians have recognized that this victory ended the threat of Indian resistance to the opening up of the Northwest Territory and led to the successful resolution of the frontier issues with the British.<sup>211</sup> Throughout the six-year war, in which the United States saw its Army destroyed on the ground before it could achieve victory, Washington never sought or received explicit authorization for offensive operations from Congress. Rather, Washington explained his plans to Congress, which created the military to carry them out. Had Congress disagreed at any point, its check would not have derived from the power to declare war but from its simple ability to refuse to establish the military wanted by the President.

*Jefferson.* Although history remembers them as pirates, the Barbary pirates were in fact the autonomous regions of Algiers, Tripoli, and Tunis within the Ottoman empire and the independent nation of Morocco.<sup>212</sup> Their leaders waged war against the shipping of other nations, seized cargos and ships, and sold captives into slavery. Under the Continental Congress and the Washington and Adams administrations, the United States had essentially paid bribes in the form of tribute amounting to \$10 million to allow American shipping to proceed unhindered.<sup>213</sup> Jefferson's accession to the Presidency coincided with

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<sup>206</sup> See Statement of Henry Knox (Dec. 26, 1791), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 197, 197–99 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832).

<sup>207</sup> See KOHN, *supra* note 178, at 120–21.

<sup>208</sup> See *id.* at 121–23.

<sup>209</sup> Act of Mar. 5, 1792, ch. 9, 1 Stat. 241.

<sup>210</sup> See KOHN, *supra* note 178, at 156–57.

<sup>211</sup> See ELKINS & MCKITRICK, *supra* note 37, at 438–39.

<sup>212</sup> See SOFAER, *supra* note 186, at 208–09.

<sup>213</sup> The Barbary Pirates are usefully discussed in GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 45–67 (1997); ODED LÖWENHEIM, PREDATORS AND PARASITES: PERSISTENT AGENTS OF TRANSNATIONAL HARM AND GREAT POWER AUTHORITY 80–174 (2007); SOFAER, *supra* note 186, at 208–27; Montgomery Kosma, *Our First Real War*, 2 GREEN BAG 169, 169–78 (1999); and Gary J. Schmitt, *Thomas Jefferson and the Presidency*, in INVENTING THE AMERICAN PRESIDENCY 326, 336–37 (Thomas E. Cronin ed., 1989).

demands for higher payments and the impressment of an American Navy frigate, the U.S.S. *George Washington*, by the Dey of Algiers as a courier vessel.<sup>214</sup>

Jefferson decided to send the Navy to stop the insults to American shipping. In a meeting on May 15, 1801, the cabinet unanimously agreed that Jefferson should send a squadron to the Mediterranean as a show of force.<sup>215</sup> No one in the cabinet, including Madison or Gallatin, believed that the President had to seek congressional permission to order the mission.<sup>216</sup> The only legislation on the books was a statute enacted on the last day of the Adams administration. It required that at least six existing frigates be kept in “constant service,” an effort to prevent Jefferson from reducing the Navy to zero.<sup>217</sup> Jefferson and his cabinet thought that the statute could be read to allow the President to send a “training mission” to the Mediterranean. The cabinet also agreed that the President had constitutional authority to order offensive military operations should a state of war already be in existence because of the hostile acts of the Barbary powers. “The Executive can not put us in a state of war,” Gallatin said, 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 Executive.”<sup>218</sup> Jefferson and his advisors believed that the Constitution only required Congress to declare war to undertake purely offensive operations against a nation with which the United States was at peace.<sup>219</sup> As Abraham Sofaer has observed, Jefferson and his advisors assumed they had the authority for the expedition simply by virtue of Congress’s creation of the naval forces that made it possible—a position no different from the one President Washington had taken in the Indian wars.<sup>220</sup>

Jefferson was clear about this in his orders to the naval commanders, though less than forthcoming with Congress. The Secretary of the Navy ordered Commodore Richard Dale five days later to proceed to the Mediterranean and, if he found that any of the Barbary states had declared war on the United States, to “chastise their insolence” by “sinking, burning, or destroying their ships & Vessels wherever you shall find them.”<sup>221</sup> Dale could impose a blockade, which he

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<sup>214</sup> See Kosma, *supra* note 213, at 170.

<sup>215</sup> See SOFAER, *supra* note 186, at 209.

<sup>216</sup> See *id.*

<sup>217</sup> See Act of Mar. 3, 1801, ch. 20, 2 Stat. 110.

<sup>218</sup> THE COMPLETE ANAS OF THOMAS JEFFERSON 213 (Franklin B. Sawvel ed., 1903).

<sup>219</sup> SOFAER, *supra* note 186, at 209.

<sup>220</sup> See *id.* at 210.

<sup>221</sup> Letter from Samuel Smith to Captain Richard Dale (May 20, 1801), in 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 465, 467 (1939) [hereinafter NAVAL DOCUMENTS].

did with Tripoli, and take prisoners.<sup>222</sup> These orders obviously went well beyond simply protecting American shipping from attack. Upon arriving in Tripoli and discovering that the Bashaw of Tripoli had declared war, Dale issued orders to his squadron to attack any and all Tripolitan vessels.<sup>223</sup> In August 1801, Lieutenant Andrew Sterett, commanding the twelve-gun schooner *Enterprise* on a resupply mission to Malta, encountered a fourteen-gun Tripolitan corsair.<sup>224</sup> The *Enterprise* fought for three hours and killed half the enemy's crew. After capturing the ship, Sterett cut down its masts, threw its guns overboard, and set it adrift. He could not keep the corsair because he was on the outward leg of his resupply mission. Sterett's action received broad approval in the United States and a joint resolution applauding the crew.<sup>225</sup>

Jefferson chose to portray his orders differently in his first message to Congress during December 1801. He claimed that he had not authorized offensive operations, that Sterett had acted in self-defense, and that the *Enterprise* had released the corsair because Congress had not authorized offensive operations: "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel, being disabled from committing further hostilities, was liberated with its crew."<sup>226</sup> While some scholars have viewed Jefferson's words as presidential acceptance of Congress's control over war,<sup>227</sup> Jefferson did not accurately represent Sterett's offensive attack, Sterett's decision to release the captured warship, or the nature of the orders to Commodore Dale, nor did he reveal his thinking or that of his cabinet when those orders were cut. Jefferson followed by requesting that Congress authorize offensive operations.<sup>228</sup> During the subsequent congressional debates, no one questioned the constitutionality of Jefferson's orders to the Mediterranean squadron and several congressmen argued that the President had the power to do so because of the existing state of war.<sup>229</sup> Congress ultimately chose to delegate

<sup>222</sup> See *id.*

<sup>223</sup> See Letter from Captain Richard Dale to Captain Samuel Barron (July 4, 1801), in NAVAL DOCUMENTS, *supra* note 221, at 500, 500; Letter from Captain Richard Dale to Lieutenant Andrew Sterett (July 5, 1801), in NAVAL DOCUMENTS, *supra* note 221, at 503, 503; Letter from Captain Richard Dale to Captain Samuel Barron (July 9, 1801), in NAVAL DOCUMENTS, *supra* note 221, at 505, 505.

<sup>224</sup> See SOFAER, *supra* note 186, at 212.

<sup>225</sup> See Kosma, *supra* note 213, at 174.

<sup>226</sup> 7 ANNALS OF CONG. 12 (1851).

<sup>227</sup> See, e.g., LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 16 (2000).

<sup>228</sup> See 7 ANNALS OF CONG. 12–15 (1851).

<sup>229</sup> See SOFAER, *supra* note 186, at 214–16.

broad powers to Jefferson to take whatever military measures he thought necessary as long as war continued with Tripoli.<sup>230</sup>

Jefferson's message to Congress presents an example of a President's rhetoric not matching his actions. Jefferson claimed a limit on presidential power which neither he nor his cabinet had previously obeyed. On the other hand, Jefferson did not act as aggressively as Presidents do today. His orders to attack Tripoli responded to a declaration of war by the enemy. Nevertheless, Jefferson had sent American forces into a hostile area, ordered them to undertake offensive actions, and had no plausible congressional authorization at the time. He could justify his orders on the ground that Congress had created the forces needed for the military operation—the position taken by Hamilton in a published criticism of Jefferson. According to Hamilton, no congressional permission to use force was necessary once a state of war already existed due to the enemy's actions: “[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.”<sup>231</sup> What was lacking was any form of congressional authorization beyond the creation and funding of the Navy.

Our analysis helps expose a serious problem for Prakash's theory. Prakash argues that, under eighteenth-century usage, a nation could “declare war” in a wide variety of ways.<sup>232</sup> The key consideration in deciding whether such an act functions as a “declaration” is, it seems, the existence of an unfriendly intent (or what another nation might *perceive* as such), and even a defensive intent could easily be considered “unfriendly.” Further, Prakash argues that “declarations of war” can be conditional as well as unconditional. It follows that if a congressional appropriation is a line item specifically directed to military measures against a designated foreign or Indian nation, it should be seen as an unconditional declaration of war against that foe. Further, if the appropriation is a lump sum for general military purposes, it could be seen as a conditional declaration of war against all *potential* foes, thereby effectively giving the President the discretion to deploy the forces placed at his disposal as he judged best. *On Prakash's own premises*, then, an Act of Congress that placed funds in the President's hands for military purposes should often, and perhaps always, function as a “declaration of war,” whether conditional or unconditional, and should thus *in itself* authorize the President to use the forces in question either for the specific purpose Congress designated or at his

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<sup>230</sup> See Act of Feb. 6, 1802, ch. 4, 2 Stat. 129–30.

<sup>231</sup> Lucius Crassus, *The Examination No. 1*, N.Y. EVENING POST, Dec. 17, 1801, *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON, 444, 456 (Harold C. Syrett ed., 1977).

<sup>232</sup> Prakash, *supra* note 6, at 53–54.

discretion. In other words, simply funding a military will be a way—perhaps, in practice, the general way—in which Congress will authorize the President to wage war. While that is a conclusion *we* welcome, it makes an odd fit with Prakash's overall position.<sup>233</sup>

### CONCLUSION

Professor Prakash has done much to advance the debate among originalists about the meaning of the Declare War Clause. His deep research has added greatly to our understanding. Nonetheless, we think that his conclusion is mistaken. The mass of evidence that Prakash produces concerning the varied political, diplomatic, and legal usages of the term “declaring war” does not, and could not, establish that the Declare War Clause was a grant to Congress of the exclusive power to determine whether the United States would en-

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<sup>233</sup> The courts have long recognized that Congress may authorize the President to wage war by actions other than formal declarations of war, including legislation that appropriated funds for the military or that raised armies or navies. *See, e.g.*, *Montoya v. United States*, 180 U.S. 261, 267 (1901); *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973); *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971); *Hamilton v. McClaughry*, 136 F. 445, 449 (D. Kan. 1905); *see also* Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1392 (1994). Indeed, so common was this practice that Congress enacted section 8(a)(1) of the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1547(a)), precisely because it sought to block any inference that the authorization for the introduction of military forces into conflict could be drawn in the future from a military appropriation unless it referred back in terms to the War Powers Resolution.

The congressional practice of authorizing Presidential warmaking by the simple device of an appropriations measure dates back to the early Republic. For example, in his 1838 opinion *Existence of War with the Seminoles*, Attorney General Benjamin Franklin Butler held that a simple appropriations measure of \$120,000 “to defray the expenses attending the suppression of hostilities with the Seminole Indians,” Act of Jan. 14, 1836, ch. 1, 5 Stat. 1, served, even in the absence of a formal declaration of war, to make the hostilities with the Seminoles that had begun in January 1836 “a public war . . . within the meaning of the rules and articles of war and of the constitution of the United States.” 3 Op. Att’y Gen. 58, 307 (1838). No further legislative action beyond that simple appropriation was needed to authorize the President to wage war on the Seminole Tribe. In Butler’s view, as in ours, the Declare War Clause did not function as a separate and independent check on presidential authority.

Of course, Prakash might contend that the 1836 appropriation was specifically earmarked for hostilities against the Seminoles, but that an undifferentiated, lump sum appropriation for an Army or Navy would *not* be tantamount to a “declaration of war.” (On the category of lump sum appropriations, *see Lincoln v. Vigil*, 508 U.S. 182 (1993).) But there seems to be no reason, on Prakash’s premises, why even a lump sum appropriation should *not* be construed as authorizing the President to deploy the forces that Congress had raised. If anything, the broader lump sum grant could naturally be understood as a *more* comprehensive delegation of war-making power to the President than a narrow line item appropriation restricting the use of the forces in question to particular activities. If Congress wishes to restrict the President’s deployment power in specific ways, it has long known how to do so. *See* CASPER, *supra* note 213, at 61 n.136. Oddly, therefore, Prakash’s theory seems to support the view that by merely appropriating funds for a military force, Congress impliedly authorizes the President to use that force for war unless it expressly circumscribes the grant.

gage in any form of hostilities (other than self-defense in an extremely narrow sense). While it is true that the term “declare war” *could* have been understood in the sweeping and comprehensive sense that Prakash identifies—a sense in which even the severance of diplomatic relations or a calculated insult to another nation’s flag could be considered “declarations of war”—we believe that the question for the constitutional interpreter is to identify the *best and most plausible* sense of that term as used in the Declare War Clause. Unlike Prakash, we do not believe that the constitutional text is irredeemably ambiguous.

Rather, we think that careful scrutiny of the Constitution’s text, including the provisions adjacent to the Declare War Clause and other provisions relating to war, and of its structure establishes that the Declare War Clause must have had a narrower and more precise meaning. We believe that the most plausible interpretation of the Clause reads it as conferring on Congress the power to create a variety of legal regimes under international and domestic law suitable to the various kinds of conflicts subsumed under the name “public wars.” Rather than regulating the relations *between the President and Congress*, the Declare War Clause enables Congress to regulate the relations *between the United States and other states*. The Framers countered the risk of executive aggrandizement in war making in other ways—most notably by vesting in Congress the power to raise armies and navies and to control their funding. The long and successful history of Parliament’s struggle in England against the claim of the Crown to wage war as it pleased demonstrated to the Framers that the *funding* power was the most certain and effective check against executive abuses.

We support our reading of the Declare War Clause by looking to extrinsic evidence, just as Prakash does. Relying on the Constitution’s ratification history, the prevailing jurisprudence on the Law of War known to the Framers or reflected in the writings, the case law and state practice of their period, and the early, postconstitutional practice of the United States, we find that the Declare War Clause was *not* understood to vest Congress with the exclusive power to wage war or, even more broadly, to control any governmental activity that might even *signal* war. Again, we find that the Declare War Clause was not an essential ingredient in the Constitution’s scheme of checking and balancing competing branches of government. Rather, like the Treaty Clause or the Law of Nations Clause, it was a device that enabled Congress to perform a limited but useful function in structuring the United States’ foreign relations.

