

*Fall 1986*

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#### Recommended Citation

Charles A. Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 Val. U. L. Rev. 53 (2011).  
Available at: <https://scholar.valpo.edu/vulr/vol21/iss1/2>

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# COMMENTARY

## ON WAR-MAKING, ORIGINAL INTENT, AND ULTRA-WHIGGERY

CHARLES A. LOFGREN\*

### I

Professor Rostow has opened a number of intriguing issues, and not only the ones he explicitly addresses. One resulting temptation for a commentator is to discuss his position on the constitutionality of the War Powers Resolution, about which I believe he is mistaken (even though I largely agree with him on the measure's impolicy). Another is to explore his often implicit views about the role of original intent in constitutional interpretation. For now, however, I shall leave those questions of current constitutional law to the lawyers (excepting a brief concluding comment on the original-intent issue), and shall focus instead on his remarks partly occasioned by and on the subject of an article I did in 1972 entitled "War-Making Under the Constitution: The Original Understanding."<sup>1</sup>

Based on that article, Professor Rostow has a theory about me: that I am an "ultra-Whig," one of those folks who (*inter alia*) find it "reasonable to suppose that if the United States were weak, pacifist, and unarmed, the predators of the jungle would fully respect its rights under international law." I apparently fear "Hamiltonian government" and "read the Constitution with suspicious literalism."<sup>2</sup> Certain of my colleagues who recall my "hawkishness" during the Vietnam interlude and regard me as a "Reaganite" in the 1980s can now breathe easy.

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1. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L. J. 672 (1972) (hereinafter Lofgren, "War-Making"), reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 573-603 (R. Falk, ed. 1976), and recently reissued by Oxford University Press in C. LOFGREN, "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 3-38 (1986). Subsequent citations are to the original article.

2. Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U.L. REV. 18, (1986) (hereinafter Rostow, "Once More").

But if my colleagues' perceptions of me were and are correct—which I suspect is the case—then we confront discrepant facts. I might, that is, cut my response short by quoting Professor Rostow on “the laws of logic”: “one fact inconsistent with a theory disproves that theory.”<sup>3</sup> But one may reasonably doubt the adequacy of the “one-discrepant-fact test,” as I explain later. Then, too, despite a certain *ad hominem* quality to Professor Rostow's remarks, I take it that he is not really talking about me and my present day opinions, but about an interpretation of how Americans of 1787-88 understood the Constitution's allocation of authority to commit the nation to armed conflict.

## II

I argued in 1972 (and still maintain<sup>4</sup>) that by common understanding in 1787-88 the proposed new Congress would hold the lion's share of the war-making power. To lay one straw man quickly to rest, I did not argue (and in fact denied) that this view equates with the position that declarations of war provide the only method of congressional authorization. Nor did I suggest that the Framers and Ratifiers of 1787-88 conceived of—let alone addressed—the full range of issues which would loom large in the late twentieth century, and I think anyone who attempts related inferences is guilty of simplistic anachronism. As for what I did argue, my position rested on a wide range of evidence, which I can only sketch here. The reader should be able to judge, however, whether it adds up to “read[ing] text without context,”<sup>5</sup> or whether that charge better applies to Professor Rostow's argument.

A part of the evidence—but only a part—comes from the Philadelphia Convention. A body whose deliberations were largely unknown to the participants in the ratifying process, the Convention nonetheless offers insights into how the legally-more significant-Ratifiers probably understood the completed Constitution.<sup>6</sup> An example is James Wilson's remark (concurred in by James Madison) that “[h]e did not consider the Prerogatives of the British Monarch [which included the power of making war] as a proper

3. *Id.* at 22.

4. See Lofgren, *War Powers, Treaties, and the Constitution*, in *A HISTORY OF THE FRAMING AND RATIFICATION OF THE CONSTITUTION* (L. Levy and D. Mahoney, eds., forthcoming, Macmillan, 1987) (hereinafter Lofgren, “War Powers, Treaties, and the Constitution”).

5. Rostow, “Once More,” *supra* note 2, at 19.

6. See Lofgren, “War-Making,” 677-83; W. REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 74-99 (1981) (hereinafter REVELEY); A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 25-38 (1976) (hereinafter SOFAER). Here and in some subsequent footnotes, I have cited not only my own work but also other secondary sources that Professor Rostow finds more acceptable, however much their conclusions agree with mine.

guide in defining the Executive Powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.”<sup>7</sup> Coming from a supporter of a vigorous Executive, this comment is especially suggestive as to where Americans placed the war-making power along a legislative-executive spectrum, although it certainly does not conclude the issue. By contrast, the often-cited debate over changing Congress’ power “to make war” to a power “to declare war”<sup>8</sup> tells us very little. Close analysis of the meager record reveals a fair amount of confusion about what the delegates saw the change as accomplishing.<sup>9</sup> Madison and Elbridge Gerry thought it gave the Executive the authority to repel sudden attacks, a view perhaps more generally shared, although Oliver Ellsworth defended the change on the ground that it removed any hint that Congress would actually conduct war. Intriguingly, Roger Sherman saw it as narrowing executive authority. Other comments, on the occasion as well as uncertainty in the surviving records about votes, add further obscurities.<sup>10</sup>

In any event, as Madison explained in *Federalist* 40, the Philadelphia Convention’s “powers were merely advisory and recommendatory”; the Convention “planned and proposed a Constitution, which would be of no more consequence than the paper on which it was written, unless it was stamped with the approbation of those to whom it was addressed.”<sup>11</sup> This

7. See 1 THE RECORDS OF THE FEDERAL CONVENTION 65-66, 70 (M. Farrand, ed., rev. ed. 1937) (hereinafter FARRAND, RECORDS).

8. See 2 *id.* at 318-19.

9. See Lofgren, “War-Making,” *supra* note 1, at 673-77. *Accord*, REVELEY, *supra* note 6, at 82-85.

10. See 2 FARRAND, RECORDS, *supra* note 7, at 318-19; references in note 9, *supra*. Downplaying the ambiguity, Judge Sofaer comments about the episode: “They . . . appear to have intended the clause to authorize the President to defend the United States from attack without consulting the legislature, at least where the attack is so ‘sudden’ that consultation might jeopardize the nation. But nothing in the change signifies an intent to allow the President a general authority to ‘make’ war in the absence of a declaration; indeed, granting the exceptional power suggests that the general power over war was left in the legislative branch.” SOFAER, *supra* note 6, 31-32 (footnotes omitted; emphasis added). For the contrary view of “Rostow-Pacificus,” see Rostow, “Once More,” at 15, also quoted *infra* in note 42.

11. THE FEDERALIST, No. 40, at 263-64 (J. Cooke, ed. 1961). (All subsequent citations to *The Federalist* are to the definitive Cooke edition.) *Accord*, James Wilson in Pennsylvania:

[T]he late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint; it is laid before them to be judged by the natural, civil, and political rights of men. By their FIAT, it will become of value and authority; without it, it will never receive the character of authenticity and power.

2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION [RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA] 483-84 (M. Jensen, ed. 1976) (Wilson’s speech in the Pennsylvania Ratifying Convention, Dec. 4, 1787). *Cf.* SOFAER, 39 n.\* (quoting subsequent statements by Madison and Albert Gallatin on the legal priority of the

consideration gives special significance to the ratification debates and related newspaper and pamphlet literature and to commonly held views of the period that shaped the way the Ratifiers probably viewed the document they had before them.<sup>12</sup>

Professor Rostow is absolutely correct in holding that war without declaration was no novelty to eighteenth-century Americans. They read about it in the histories and the treatises on international law which they consulted, and they had intimately experienced it.<sup>13</sup> Jean Jacques Burlamaqui, one of the period's widely consulted writers on the law of nations (albeit one generally forgotten today), had explained:

A perfect war is that which intirely [sic] interrupts the tranquillity of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that which does not intirely interrupt the peace, but only in certain particulars, the public tranquillity being in other respects undisturbed. . . . This last species of war is generally called reprisals, of the nature which we shall here give some account. By reprisals then we mean that imperfect kind of war, or those acts of hostility which sovereigns exercise against each other, or, with their consent, their subjects, by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice<sup>14</sup>. . . .

If any doubt remains about American understanding in the 1780s, it bears mention that almost identical language appeared in an opinion in 1781 from the Court of Appeals in Cases of Capture, the sole central court under the Confederation.<sup>15</sup>

Professor Rostow concludes or at least implies that awareness of international-law categories, and of the prevalence of imperfect or undeclared war, led Americans in 1787-88 to interpret narrowly the meaning of Congress' authority to *declare* war and to authorize other specified actions. The

Ratifiers).

12. Because of the range of materials generated during the ratification process, I am more than a little uncomfortable at repeatedly referring in these pages to *The Federalist Papers* and thus reinforcing the all-too-common fixation on them as *the* source for the period. But they are the source with which non-specialists are most likely to be familiar, and so with this footnote I shed my discomfort.

13. See Lofgren, "War-Making," *supra* note 1, at 689-93. Indeed, formal declarations of war as then defined in the law of nations—announcements to the enemy, with proper ceremony, usually in his capital—had fallen completely into disuse.

14. 2 J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 258 (T. Nugent, trans. 1752; 3rd ed. 1784).

15. See *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 21 (Ct. App. in Cases of Capture, 1781).

result, he concludes or at least implies, was a realization that the President held a substantial residue of authority to initiate hostilities.<sup>16</sup>

Such inferences seem faulty to me. The evidence indicates that contemporaries did not understand “to declare war” in a technical international-law sense, as Professor Rostow would have us believe,<sup>17</sup> but instead largely equated it with deciding on or commencing war or, as Article Nine of the Articles of Confederation put it, “determining on . . . war.” Relatedly, as the excerpt from Burlamaqui indicates, even the treatises on the law of nations did not use the term “war” to denote only declared war. Then, too, the Constitution gave Congress authority to issue letters of marque and reprisal, which contemporaries who knew of the theory *and* practice of imperfect war most likely saw as further and broadly confirming congressional authority over resort by the nation to force.<sup>18</sup> As for response to sudden attack, the document’s only reference to this problem called attention to the states as the first line of defense.<sup>19</sup> (This last provision does not preclude the likelihood that the Ratifiers assumed a presidential role in countering immediate threats, but it does suggest something of the mental horizons within which they worked.)

In sum, the Ratifiers probably saw Congress as possessing nearly exclusive authority over committing the nation to either perfect or imperfect war. This view was consistent, moreover, with their narrow conception of the President’s position as commander-in-chief, a role Alexander Hamilton described as “amount[ing] to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy,”<sup>20</sup> but which he then expanded slightly to include “the

16. See Lofgren, “War-Making,” *supra* note 1, at 684-86; REVELEY, *supra* note 6, at 63, 102-03; SOFAER, 56.

17. See Rostow, “Once More,” *supra* note 2, at 5-6, 14, 15, 21; Rostow, *War, Foreign Affairs, and the Constitution*, 4 ENCYCL. OF THE AMER. CONST. 2007, 2010-11 (L. Levy, K. Karst, and D. Mahoney, eds. 1986); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850 (1972). I may misinterpret Professor Rostow, but my reading of him seems to flow from these sources. In 1972, he added the qualification: “It is tempting, but would be incorrect, to suggest, as Hamilton did, that the constitutional allocation of power between President and Congress . . . corresponds to the categories of international law. . . . The constitutional pattern is, and should be, more complex than any such formula.” *Id.* at 851. But he now praises “Pacifcus,” who construed “declare” and the other grants narrowly; and his 1972 qualification seems directed to modern arrangements rather than to the original understanding.

18. See Lofgren, “War-Making,” *supra* note 1, at 694-97, REVELEY, *supra* note 6, at 63-64. Cf. SOFAER, 32; 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 63-64 (1833) (on the *Framers’* inclusion of letters of marque and reprisal as a means of broadly vesting Congress with authority over various forms of undeclared war).

19. U.S. CONST., Art. I, sec. 10. See Lofgren, “War-Making,” *supra* note 1, at 682. Cf. REVELEY, *supra* note 6, at 64 (on the *Framers’* treatment of the clause).

20. THE FEDERALIST, *supra* note 11, No. 69, at 465.

protection of the community against foreign attacks.”<sup>21</sup>

Such is a sketch of what Professor Rostow labels the “ultra-Whig” position that I admit to endorsing. I find it noteworthy that W. Taylor Reveley in his book on the *War Powers of the President and Congress*, which Professor Rostow includes among the “serious and well considered scholarly studies of the constitutional issues [of war-making],”<sup>22</sup> departs in no significant respect from the position I have outlined concerning the understanding of 1787-88.<sup>23</sup> On the change from “make” to “declare,” for example, Reveley notes the obscurities of the debate and concludes that “it is not likely that the substitution signaled much gain in executive prerogative in the minds of the Constitutional Fathers.”<sup>24</sup> On the President as Commander-in-Chief he writes:

It [the Commander-in-Chief clause] was viewed as a modest grant of authority. Hamilton’s limited “first general and admiral” interpretation reflected the consensus. During hostilities the President would set strategy and tactics, and his authority would inevitably grow during crisis. But he would not commit America to hostilities except by signing authorizing legislation  
 . . . .<sup>25</sup>

As for the ratification debates, Reveley agrees with me that “to declare war” was given broad meaning,<sup>26</sup> and concludes (as I have<sup>27</sup>) that the Ratifiers’ inattention to the declare-war clause, despite contemporary fears of executive usurpation, “must have stemmed from the unanimous expectation

21. *Id.*, at No. 70, at 471. Here Hamilton was intent on defending the Executive not against Congress but against Antifederalist arguments that the nation would be safer with a plural executive. *See id.*, No. 70, *passim*. Cf. Lofgren, “War-Making,” 687-88.

22. Rostow, “Once More,” *supra* note 2, at 20.

23. *See* REVELEY, *supra* note 6, at 50-115. Cf. *id.* at 29-50 (suggesting and evaluating alternative readings of the constitutional text itself). Reveley has recently summarized his views in Reveley, *War Powers of the President and Congress: Who Decides Whether America Fights?* THIS CONSTITUTION, No. 8, Fall 1985, at 19-24, in which he underscores his conclusion about the congressional-ascendancy views of the Framers and Ratifiers by pointing out how practice soon diverged from those views. I do not see Reveley’s conclusions on this score as contrary to my comment (Lofgren, “War-Making,” *supra* note 1, at 701) that the years immediately following ratification provide evidence that corroborates my conclusions about the 1787-88 debate, since I also noted that the earlier consensus in fact broke down. *See* Lofgren, “War-Making,” *supra* note 1, at 700-01. But Professor Rostow may regard this as weaseling, and I may have provided insufficient explanation.

24. REVELEY, *supra* note 6, at 64.

25. *Id.*

26. *See id.* at 101-02.

27. *See* Lofgren, “War-Making,” *supra* note 1, at 688; Lofgren, “War Powers, Treaties, and the Constitution,” *supra* note 3. Cf. Lofgren, “War-Making,” *supra* note 1, at 686; REVELEY, *supra* note 6, at 64-65 (noting that Antifederalist attacks on the military role of the new President instead focused on the potential for domestic tyranny).

that it left the President no independent war-making authority.”<sup>28</sup>

Or consider Abraham D. Sofaer’s “meticulously careful” study, as Professor Rostow characterizes it.<sup>29</sup> Judge Sofaer writes:

The ratification debates confirm what the Constitution suggests—that Congress was to have the final say in foreign and military affairs. . . . The power to “declare” war could not tenably be read, after examining both the Convention and ratification processes, as limiting Congress’s control to formal war-making. Congress was seen by all who commented on the issue as possessing exclusive control of the means of war. No ratifier suggested that the president would be able unilaterally to utilize forces provided for one purpose in some [other and] unauthorized military venture. Undeclared wars were far too important a part of the international scene for one safely to assume that the Framers and ratifiers meant to leave that area of power to the President.<sup>30</sup>

To be sure, Sofaer goes on to explain from a modern perspective that the Constitution left many issues unresolved, with the result that the document provided an invitation to interbranch tension. Drawing in particular on *The Federalist*, he then finds evidence that Hamilton and Madison perhaps contemplated that necessity would lead the President to exercise prerogative powers above and beyond those constitutionally authorized.<sup>31</sup> I find his arguments here less well supported in that they depend on a particular pattern of inferences from the sources, and I think the resulting emphasis is less persuasive than Reveley’s concerning the way the *bulk* of the Ratifiers saw the matter. But even if one dismisses such historian-like quibbles, Judge Sofaer’s bow toward reading prerogative powers into the original understanding is most carefully circumscribed.

### III

In Professor Rostow’s view, focusing on the sort of evidence and dwelling on the interpretation that I have reviewed in the preceding pages may have some value, but more fundamentally is like doing *Hamlet* without the Prince of Denmark. “[O]ne fact looms up . . . which,” he claims, “conclusively disproves all . . . [such] hypotheses at once: the treaty power, and

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28. REVELEY, *supra* note 6, at 102; *see id.* at 101-06.

29. Rostow, “Once More,” *supra* note 2, at 20.

30. SOFAER, *supra* note 6, at 56 (footnotes omitted). The material I have excised from the quotation, as indicated by the ellipsis, pertains mainly to foreign affairs and is quoted *infra* in the text associated with note 46.

31. *See* SOFAER, *supra* note 6, at esp. 56-59.



the Founding Fathers' immediate experience with Benjamin Franklin's Treaties with France of 1778."<sup>32</sup> It is in this connection that Rostow observes: "According to the laws of logic, one fact inconsistent with a theory disproves that theory. The hypothesis must be discarded, and reformulated in terms which are consistent with the demonstrable evidence."<sup>33</sup> One can seriously doubt whether even those areas of intellectual endeavor which heavily involve formal theory operate in such a simplistic fashion.<sup>34</sup> And historical interpretation, which for the moment I shall take as constituting the issue between Professor Rostow and me, hardly proceeds according to the one-discrepant-fact test. If it did, most practitioners in my profession could clear out their libraries! But here I shall play by Professor Rostow's rule. (And I do so with a certain sense of irony: the result, to my mind, rather vitiates whatever value he sees in the "ultra-Whig" approach.<sup>35</sup>)

Where does Professor Rostow's test take us regarding the understandings of 1787-88? The Philadelphia Convention originally assigned treaty-making to the Senate. Late in the game, after the details of selecting the President were worked out, the arrangement actually specified in the Constitution was adopted.<sup>36</sup> But in the views of the delegates, did the change

32. Rostow, "Once More," *supra* note 6, at 23. Professor Rostow levels the charge against me and Messrs. Berger, Van Alstyne and Wormuth, but I suspect most readers of Reveley and Sofaer would agree that, if accurate, the charge would lie also against Reveley for his views on 1787-88 and probably against Sofaer.

33. *Id.* Cf. the test Professor Rostow applies specifically to Professor Van Alstyne: "Van Alstyne's argument is perfectly logical. But like many logical arguments, it is destroyed by a page of history." *Id.* at 23. Had I the standing, I might want to explore that point.

34. See e.g., T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2nd ed., 1970); S. TOULMIN, *HUMAN UNDERSTANDING: THE COLLECTIVE USE AND EVOLUTION OF CONCEPTS*, esp. 41-130 (1972). Toulmin sharply challenges Kuhn's "revolutionary" perspective, but nonetheless (to simplify greatly) finds scientific concepts are tested not by the canons of logic but through something of a common-law method of adjudication.

35. Professor Rostow concedes:

Much can be said for the related theories of Messrs. Berger, Lofgren, Van Alstyne, and Wormuth as versions of the original intent of the Founding Fathers—their *relationship, for example, to the President's autonomous constitutional authority over the conduct of foreign relations, which in troubled times has often involved the use of force or the threat to use it.*

Rostow, "Once More," *supra* note 2, at 22 (emphasis added). I admit to not giving much attention in 1972 to the cognate issue of foreign policymaking (although I have since done so elsewhere—see the other essays in LOFGREN, *supra* note 1); but the following pages suggest, I think, that closer attention (e.g., by Reveley and Sofaer) reveals scant warrant for speaking about "the President's autonomous constitutional authority over the conduct of foreign relations."

36. See Lofgren, "War Powers, Treaties, and the Constitution" *supra* note 3, (from which I have drawn sentences here and in the following paragraphs). A fuller account is in Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 *PERSPECTIVES IN AMERICAN HISTORY* 233, 233-50 (New Series, 1984) (hereinafter Rakove, "Treaty-making Clause").

give much authority to the President? After the Committee on Postponed Parts reported the treaty provision, delegates still spoke of the President as a "check" *on the Senate* and of treaties as requiring the "concurrence" *of the President*.<sup>37</sup> In short, the final wording conveyed for the Framers a presidential role in negotiation, which seemed necessary owing to the cumbersome nature of senatorial negotiation and the impossibility of secrecy if the larger House of Representatives were involved but for the Convention's participants the arrangement also preserved a leading senatorial role. As Professor Jack N. Rakove, a distinguished historian of the 1780s, has explained: "On balance, the Convention appears to have been more aware of the defects of the Senate and the limitations of the House than any of the inherent virtues of a vigorous presidency. . . . Nothing in the recorded comments of the delegates suggests that they had consciously fashioned a special role for the President to play; he had simply been given a share in the treaty-making process."<sup>38</sup> In the same vein, W. Taylor Reveley remarks, "The Framers' prior debate leaves little doubt that they thought the Senate institutionally capable of handling the country's diplomatic business. And against the background of British and colonial use of 'advice and consent,' those words were surely intended to grant the Senate at least as plenary a

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37. See 2 FARRAND, RECORDS, *supra* note 7, at 540-41. Delegates applied the term "concurrence" to both senatorial and presidential roles. For a fuller analysis, see Rakove, "Treatymaking Clause," *supra* note 36, at 247-49.

38. See *id.* at 249. Rakove speculates on the "circumstantial case," as he puts it, that the Confederation experience *may* have led several convention members to perceive problems with exclusive senatorial control over treatymaking. He further suggests that some delegates may have had some inkling and even expected that the Constitution's final treaty-making arrangement would allow a broadened presidential role in the future (*see id.* at 276-80), but he remarks,

Recent critics of the most expansive interpretations of executive power are still correct to argue that the framers of the Constitution would not have construed 'advice and consent' in the narrow terms of ratification. The belief that the Senate could of right express its views at *every stage* of the treatymaking process is well grounded in the surviving records of the deliberations in Philadelphia and the debates and commentaries of the ratification campaign, and it gains added credibility when one reconstructs the larger political context within which the framers acted.

*Id.* at 280 (emphasis added). By way of evaluation, the one flaw I see in Rakove's article is his too-quick dismissal of the ratification process as worthy of attention in its own right. (*See id.* at 250-51.) He reviews it instead for the retrospective enlightenment it provides with respect to the Framers' intentions. Nonetheless, he provides overall an exemplary treatment that intertwines solid evidence and carefully controlled inference. For another distinguished constitutional historian's narrow reading of the Framers' view of the President's role in treaties and foreign affairs, see Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Considered*, 5 SETON HALL L. REV. 527 (1974); Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979). Professor Bestor finds my view overly latitudinarian, while Rakove argues that Bestor overlooks the hints about a broader presidential role.

role in treaty making as the President.”<sup>39</sup>

Here, too, the more interesting question is how the Ratifiers understood the words of the completed Constitution. Antifederalists variously charged that the Senate would dominate the process of treaty-making, and that the Senate and President would together secretly subvert the national interest. Significantly, despite their inordinate suspicion of concentrated power, they did not detect a scheme for executive supremacy in the area of foreign policy.<sup>40</sup> Transforming alleged vice into virtue, the Federalists—the winners in the contest—agreed as to *what* the Constitution mandated. The few Federalist comments hinting at the possibility of a broad and independent presidential role were only that—hints.<sup>41</sup> Two numbers of *The Federalist* are more representative. John Jay in Number 64 and Alexander Hamilton in Number 75 defended the propriety of joining the Senate and the President, although, as Hamilton remarked, treaty-making, while not neatly classifiable, had more the character of legislative activity. (*Pace* Hamilton as “*Pacificus*.”)<sup>42</sup> Including the President in the treaty process, Jay explained, was desirable because he could act with “that perfect *secrecy* and *dispatch* [which] are sometimes requisite [to negotiation]”;<sup>43</sup> Jay then went on to show how presidential activity would take place within the context of ongoing senatorial guidance.<sup>44</sup>

39. REVELEY, *supra* note 6, at 92.

40. For a review of the evidence, see Rakove, “Treatymaking Clause,” *supra* note 36, at 251-53.

41. *See id.* at 255-57. As an example, James Wilson commented in Pennsylvania that “[w]ith regard to their power in forming treaties, [the Senate] can make none; they are only auxiliaries to the President.” His larger point, however, was that the Senate was adequately *checked* in its various powers, which he later restated with this emphasis: “[The Senate] can make no treaty without [the President’s] concurrence.” 2 DOCUMENTARY HISTORY, *supra* note 11, at 491, 560-61. *See also* Rakove, “Treatymaking Clause,” *supra* note 36, at 257-67 (finding it doubtful that based on their knowledge of English and continental political and legal theorists, the Framers would have seen in them a base for enhanced executive authority; “their real legacy was not enlightenment but confusion”).

42. *Compare* Hamilton in 1788 as “*Publius*” with Hamilton in 1793 as “*Pacificus*.” Thus: “[I]f we attend carefully to [the treaty power’s] operation, it will be found to partake more of the legislative than of the executive character, though it does not strictly seem to fall within the definition of either of them.” THE FEDERALIST, *supra* note 11, No. 75, at 504. “It deserves to be remarked, that as the participation of the senate in the making of Treaties and the Power of the Legislature to declare war are exceptions out of the general ‘Executive Power’ vested in the President, they are to be construed strictly . . . .” “*Pacificus* No. 1,” June 30, 1793, in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 42 (H. Syrett, *et al.*, eds. 1969). Also, *compare* Hamilton as “*Pacificus*” with Judge Sofaer’s inference, quoted *supra*, note 10.

43. THE FEDERALIST, *supra* note 11, No. 64, at 434.

44. *Id.*, No. 64, at 435-36.

The convention have done well therefore in so disposing of the power of making treaties, that although the president must in *forming* them act by the advice and consent of the senate, yet he will be able to manage the business of *intelligence* in such manner as prudence may suggest.

W. Taylor Reveley has summarized the ratification debates in this fashion: "While there was isolated contrary comment, it was generally intended that the Senators participate with the President in *all* aspects of treaty making; further, that they jointly oversee American foreign affairs as a whole, with some expectation that the Senate was to be the dominant partner."<sup>45</sup> Abraham Sofaer puts it somewhat more tentatively, but largely concurs, writing: "The President was to manage diplomatic intercourse and negotiations, and to conduct all authorized military operations. But Congress, and especially the Senate, would be able to approve or reject foreign policy in exercising their powers over treaties, appointments, and appropriations. Even Hamilton recognized that the legislature must have ultimate authority."<sup>46</sup>

There remains the Supremacy Clause, which includes treaties. Professor Rostow seems to think that it would have led the Framers and Ratifiers to assume a role for the President pursuant to the obligation of the French Treaties of 1778—a role that might extend as far as independently ordering military action. Such a conclusion is highly implausible. Had anyone glimpsed this prospect in 1787-88, it seems likely that charges would have flown. But charges did not fly, and for good reason. For contemporaries to come to have Professor Rostow's conclusion would have been quite out of line with the otherwise dominant assumptions about congressional control

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. . . Those matters which in negotiations [*sic*] usually require the most secrecy and the most dispatch, are those *preparatory and auxiliary* measures which are no[t] otherwise important in a national view, than as they tend to facilitate the attainment of the objects of negotiation. For these the president will find no difficulty to provide, and should any circumstance occur which requires the advice and consent of the senate, he may at any time convene them. Thus we see that the constitution provides that our negotiations for treaties shall have any advantage which can be derived from talents, information, integrity, and deliberate investigation on the one hand [that is, on the part on the Senate], and from secrecy and dispatch on the other [that is, by the President].  
*Id.*, No. 64, at 435-36 (emphasis added).

45. REVELEY, *supra* note 6, at 107 (Reveley's emphasis).

46. SOFAER, *supra* note 6, at 56. Judge Sofaer goes on to observe that no arguments were made against congressional delegations of authority to the President to conduct foreign and military affairs. *Id.* While he is correct about the lack of comment, arguments were *not* made against an almost limitless variety of possibilities, so I am not certain what silence *per se* establishes. Did it indicate assent or inattention or ignorance? Much depends on whether—on the basis of other evidence—one might expect the subject to have been on the minds of contemporaries. In this instance, perhaps the silence does indicate some degree of assent to delegation, which was consistent with inferences from some of the then-read treatises on the law of nations (see Lofgren, "War-Making," *supra* note 1, at 690, 691-92). This, incidentally, is one reason I suspect that an "originalist" should have no particular difficulty with either the Tonkin Gulf Resolution or the War Powers Resolution—or perhaps with the North Atlantic Treaty (despite Professor Rostow's fear that an ultra-Whig interpretation rules out the NATO commitment). But this goes to the constitutional significance of the history of 1787-88, which is a separate issue from the problem of determining the views that people held in 1787-88. See also note 61 *infra*.

over the commencement of hostilities and senatorial participation in and perhaps dominance of foreign affairs.

Not least in this regard, it fairly boggles the mind to read, as Professor Rostow asserts, that “the Founding Fathers regarded the French alliance with gratitude and reverence as a pillar of the Nation’s existence.”<sup>47</sup> (Do I detect an uncharacteristically idealistic streak in realist Rostow’s reading of history?) I seriously doubt, for example, that Anglophilic Alexander Hamilton spent much time in 1787-88 analyzing the new government’s powers in light of possible contingencies of the sort Professor Rostow portrays.<sup>48</sup> Speculation aside, the alliance “was a marriage of convenience for France and of necessity for America, hence neither party looked upon the union as one of trust and love, as Merrill Jensen accurately described the episode.”<sup>49</sup> In the end, the American negotiators—Benjamin Franklin, John Adams, and John Jay—went behind the back of France, America’s supposed ally, to negotiate a preliminary peace in 1782 directly with Great Britain.<sup>50</sup> In the ensuing years of the 1780s, relations further worsened, as Americans suspected the French of conniving with Spain to close the Mississippi River to American navigation, of otherwise restricting American commerce, of encouraging the Barbary pirates, and of outright subversion.<sup>51</sup> When one recalls that the French Revolution, with its consequent factionalizing of America politics, had not yet occurred, it seems likely that the formal obligation of the French alliance figured hardly at all into American understandings of the Constitution in 1787-88.<sup>52</sup>

Using his one-discrepant-fact test, Professor Rostow might also rely on Federalist arguments, typified by Hamilton’s in *Federalist* 23, that because the contingencies facing the nation were indefinite and unpredictable, no limitations could safely be put on the central government’s authority to meet them. Thus Hamilton wrote:

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47. Rostow, “Once More,” *supra* note 2, at 24. See also: “[The French] treaties were universally and (and rightly) regarded in the United States as the rock on which the independence of the nation was founded.” *Id.* at 11.

48. See *id.* at 24.

49. M. JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789*, at 6 (1962).

50. See *id.* at 6-18; R. MORRIS, *THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE, passim* (1965). Among other things, the Americans had concluded that France wanted a treaty that assigned truncated boundaries to an independent United States.

51. See F. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 106-11 (1973).

52. Professor Rakove makes a rather different and more plausible point than Rostow’s regarding the wartime treaties and the Treaty of Peace with Britain. He argues that recollections of the wartime maneuvering in Congress on diplomatic issues *may* have convinced some of the Framers that the Senate needed checking in its diplomatic role. See Rakove, “Treatymaking Clause,” *supra* note 36, at 269-72, 275-76.

The authorities essential to the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.<sup>53</sup>

The problem with reading such statements as a charter for executive prerogative is threefold. First, they were directed to the separate issue of the wisdom of reserving various powers to the states. Most obviously the Federalists saw the requisition arrangements under the Articles of Confederation as patently inadequate. Second, both in context and by their terms, the indefinite contingency arguments, although themselves not entirely free from ambiguity, concerned mainly the legislative powers of the new government. (Note the list at the beginning of the passage just quoted. Only the direction of forces fell under the Executive, and Hamilton soon explained what *that* meant when he glossed the Commander-in-Chief role in *Federalist* 69.) Third, evidence from the ratification debates in general makes it highly unlikely that contemporaries understood the indefinite contingency arguments as claims for extensive executive power. When the Federalists paraded the President's ability to act with efficiency, energy, secrecy, and dispatch, they did so along the narrowly defined lines suggested by Jay in *Federalist* 64, as described above.<sup>54</sup> And again the Antifederalists' silence offers corroboration. Despite their acute nose for the possibility of concentrated power—and their eagerness to dredge up any plausible argument against the Constitution—they failed to scent executive prerogative.

#### IV

As I noted in 1972, straying from my primary topic, the consensus of 1787-88 did not last.<sup>55</sup> Hamilton's "Pacificus" letters are incontrovertible evidence. It nonetheless bears reiteration that not only did Hamilton's outlook in 1793 vary from his public position during the ratification contro-

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53. THE FEDERALIST, *supra* note 11, No. 23, at 147. See also *id.*, No. 34, at 210-11.

54. See e.g., *id.*, No. 70, discussed *supra*, note 21 and accompanying text.

55. See Lofgren, "War-Making," *supra* note 1, at 700. For a more extensive review of some early episodes that often enter into discussions of presidential authority in foreign affairs, see Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L. J. 1, 12-27 (1973), reprinted in LOFGREN, *supra* note 1, at 181-99.

versy; it also failed to obliterate the earlier view. James Kent, for example, soon contended that “war only can be commenced by an act or resolution of Congress”;<sup>56</sup> and, as if to confound further the search for the “real” Hamilton, in the difficulties with France at the end of the decade Hamilton himself held that while President Adams could authorize the repelling of actual attacks on American shipping, under the Constitution he could not make reprisals without first obtaining congressional approval.<sup>57</sup> Finally, “[t]he Supreme Court made clear that it regarded Congress as the ultimate source of authority on whether and how the nation would make war. . . . Both branches could act, . . . but Congress had the final say.” Such at least is Judge Sofaer’s gloss on the cases.<sup>58</sup>

Clearly, however, institutional roles were evolving, and why not? I see no resulting need to read those post-1789 roles into the understandings of 1787-88. By contrast, Professor Rostow leaves the impression of doing so, and for a particular reason. He sees an “ultra-Whig” position on the events of 1787-88 as entailing a view of the presidency in its modern role.

To use the somewhat arcane terms of the current debate over proper approaches to constitutional interpretation, I offer the theory that Professor Rostow is both an “interpretivist” and an “originalist.” That he is an interpretivist goes almost without saying: he ties his position in significant ways to the actual document. That he is also an originalist may seem less obvious, for he writes: “‘original intent’ can never be more than one guiding factor among many in the growth of the law . . . .”<sup>59</sup> But he also sees the ultra-Whig view of original intent, if accurate, as absolutely damning to

56. J. KENT, DISSERTATIONS, BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 83 (1795).

57. If [existing statutory law does not provide authority, and President Adams] is left at the foot of the Constitution, as I understand to be the case, I am not ready to say that he has any other power than merely to employ the ships as convoys, with authority to *repel* force by *force* (but not to capture) and to repress hostilities within our waters, including a marine league from our coasts.

Any thing beyond this must fall under the idea of *reprisals*, and requires the sanction of that department which is to declare or make war.

Letter from Hamilton to Sec’y of War J. McHenry, May 17, 1798, reprinted in 21 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 42; 10 THE WORKS OF ALEXANDER HAMILTON 281-82 (H. Lodge, ed., 1904). (Note, too, Hamilton’s apparent equating of “declare” and “make.”) For further confoundment, see Hamilton as “Lucius Crassus” in “The Examination, No. 1,” [December 17, 1801], commenting on President Jefferson’s moves against the Barbary Pirates, in which he argued the obverse of his position in 1798. See 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 42, at 453-57. As regards the public debate of 1787-88, of course, the problem is not what the “real” Hamilton thought privately, but what Hamilton said as “Publius.”

58. SOFAER, *supra* note 6, at 166. Accord, Lofgren, “War-Making,” *supra* note 1, at 701.

59. Rostow, “Once More,” *supra* note 2, at 23.

particular constitutional interpretations he holds dear.<sup>60</sup> That, to me, constitutes a variety of originalism.

I am not so certain about the present-day constitutional bearing of the ultra-Whig interpretation of 1787-88. One may plausibly and consistently argue that originalism allows one to *deny* the binding force today of many of the understandings of 1787-88.<sup>61</sup> Aside from a few by-the-way comments, anyway, I have not yet committed myself in print on the questions of originalism-versus-nonoriginalism and the implications of originalism; and for now I only observe that Professor Rostow's article underscores the importance of the issue of the proper role for original intent, even though he does not address it.

By way of conclusion, let me instead push the question of originalism in a different direction, with a personal recollection. The catalyst for my own investigations of the views held by Americans in 1787-88 was the controversy of the Vietnam era. As far as I can reconstruct my probings, I expected I would come to conclusions about 1787-88 that were close to those Professor Rostow evidently still holds; and in a way, being a politically committed animal, I hoped I would. But as I interpreted the evidence as best I could, I did not reach such conclusions. Nor, I venture to say, have most historians of the periods, including Mr. Reveley and Judge Sofaer.

My personal experience in this regard, I readily admit, has little significance, except in this respect: if the law, like art, is a jealous mistress, so is history. Lawyers as advocates may have to resort to "law-office history," as even the Supreme Court does on occasion,<sup>62</sup> or they may affect a stance of historical nihilism, as Professor Rostow himself came close to doing in 1972.<sup>63</sup> But what good ultimately is accomplished by distortion of the his-

60. *E.g.*, "Either the North Atlantic Treaty is unconstitutional, or their [the ultra-Whigs'] version of the original intent is inadequate and erroneous." *Id.* at 25.

61. Professor H. Jefferson Powell argues that the Framers and Ratifiers expected the Constitution would be interpreted not according to how *they* specifically understood it, but according to then-existing canons of common-law and statutory interpretation, which by and large eschewed resort to legislative history and subjective intent. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). In my view, Professor Powell misstates some of the evidence that he surveys (see my passing remarks in Lofgren, *Book Review of D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT . . . 1789-1888*, in CONSTITUTIONAL COMMENTARY (forthcoming, Winter 1987)), but that, too, is another issue.

62. *See e.g.*, Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969).

63. It is psychologically impossible for a man of the twentieth century, however learned and sensitive, to perceive the world as the men of 1787 did. There is no way for him to reproduce the structure and climate of their universe—to understand as they did the relation of the several parts to each other and the weight which various fears, concerns and ambition had in their minds.

Rostow, *Great Cases*, *supra* note 16, at 844. My response: we probably cannot understand those people and their universe in *every* detail, but that is true of all history; and there are



torical record, or by resort to labels in place of doing careful history? Would it help to label Professor Rostow a “quasi-monarchist”? Edward S. Corwin, who is *his* authority on the application of “ultra-Whig,” arguably provides us with sufficient warrant.<sup>64</sup> Yet, having recently reread Professor Rostow’s seminal article on the Japanese-American cases,<sup>65</sup> I would hesitate to so identify him, even though the domestic and external war powers are probably distinguishable.<sup>66</sup> I simply wish that when lawyers use history, they would do so well, whatever premium the profession puts on building a winning case.

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some fine and sensitively nuanced studies of the 1780s. (See e.g., Rakove, “Treatymaking Clause,” *supra* note 36; R. KOHN, *EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA* (1975); F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985)). Indeed, I rather doubt that Professor Rostow himself believed the remark, however much it echoes Justice Jackson’s quotable comment in *Youngstown* on Pharaoh’s dreams, because he quickly ignored it, explaining with seeming confidence that “[t]he astute men who drafted the Constitution and started it on its way had a much deeper and more realistic sense of the relationship between law and life than [a simplistic constitutional model suggests. . . .].” *Great Cases*, *supra* note 16, at 844.

64. In the same sentence in which he gave the label “ultra-Whig” to Madison’s “Helvidius” letters, Professor Corwin applied “quasi-monarchical” to Hamilton’s performance as “Pacifcus,” which Professor Rostow so admires. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 17 (4th rev. ed. 1957). It deserves noting that Professor Corwin, the master-constitutionalist of the first half of the twentieth century, found the positions of both “Pacifcus” and “Helvidius” reflected in early practice. See *id.* at 177-83.

65. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L. J.* 489 (1945).

66. Cf. Lofgren, *War Powers*, in 4 *ENCYCL. OF THE AMER. CONST.*, *supra* note 17, at 2013.