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Ely, Black, Grotius & Vattel

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The force (and importance) of *War and Responsibility*¹ is mainly the product of Chapters Two and Three, dealing with the sorry role that Congress played in authorizing the Vietnam War and the conclusions that seem to follow given recognition of that role. My focus here, however, is Chapter One. A very different conception of the Constitution's approach to war ultimately emerges, I believe, if we read closely John Ely's introductory remarks.

The implications of this alternative conception are strong: First, presidential use of military force requires a prior congressional declaration of war only if, along with the use of force, the President means to alter the ordinary legal rights of American citizens or other persons who come within the protection of the United States Constitution. Thus, for example, a presidential military effort accompanied by relocation of United States residents to internment camps, or by a regime of press censorship, would presuppose a declaration of war—or rather, in the absence of such a declaration, these accompaniments might well be unconstitutional. Second, arguments invoking wartime necessities are not properly part of constitutional law absent congressional declaration. On this view, well-known Cold War and Vietnam War free speech cases are especially vulnerable to criticism.

These conclusions, however, are not the main topic of this Essay. Instead, I undertake a series of excursions. Ely's discussion—or rather its limits—leads me to retrieve (in turn) Justice Black's opinion in *The Steel Seizure Case*; the language of the declaration of war of the War of 1812, along with some related statutes; and the analyses of declarations of war in the works of Grotius and Vattel. In the end, however, the Grotian argument becomes central: the chief inspiration for the rereading of United States constitutional law that I propose.

* Professor of Law, University of Miami School of Law. Bernard Oxman, Michael Froomkin, and Laurence Tribe helpfully criticized earlier drafts of this essay. Anne Klinefelter and Beth Gwynn—with characteristic excellence—marshalled library resources. Nicolo Trocker offered knowledge and encouragement. Gaps and lapses are my doing. I take up in more detail some of the methodological and substantive issues raised by Part V of this essay in a larger work in progress, tentatively titled "Constitutional Law and Formal Revolution."

1. JOHN H. ELY, *WAR AND RESPONSIBILITY, CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

I.

Article I, Section 8 of the Constitution states that "Congress shall have Power . . . To declare War . . ."² Ely understands this language to mean "Acts of war must be authorized by Congress."³ Chapter One of *War and Responsibility* can be read (without denying its other aims) as a defense of this translation. The gist of its argument appears at the outset:

The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, "declared" in so many words or not—most weren't, even then—had to be legislatively authorized.⁴

"Declare" is obviously the key term. Ely at one point notes authority for the proposition that "declare war" and "commence war" were "synonymous" well before the end of the eighteenth century.⁵ At another point, however, he observes that "declare war" was a formula added relatively late in the constitutional drafting process, substituting for the earlier phrase "make war."⁶ The initial wording, Ely concludes, seemed to the framers to suggest an improper overlap of the congressional role and the executive responsibility as commander in chief. In particular, "make war" raised a question about advance congressional authorization of executive use of military forces to repel sudden attacks.⁷ Plainly, therefore, the framers appreciated the difference between "'declared' in so many words" and "commence."⁸ But did they also assume that there was a difference between "'declared' in so many words" and "or not," between "declared" and "authorized"?⁹ Ely cites Alexander Hamilton's observation that "the ceremony of a formal

2. U.S. CONST. art. I, § 8, cl. 11. For criticism of Ely's reading of "declare war" making use of resources more familiar than I will use, see Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364 (1994). For a useful guide to the "declare war" secondary literature generally, see Peter D. Coffman, *Power and Duty: The Language of the War Power*, 80 CORNELL L. REV. 1236, 1240-41 n.30 (1995) (book review).

3. ELY, *supra* note 1, at 10.

4. *Id.* at 3.

5. *Id.* at 142 n.21 (citing David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 POL. SCI. Q. 1, 6 (1988)).

6. ELY, *supra* note 1, at 5.

7. *Id.*

8. See also U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

9. "Authorized" is itself a complex term. Must authorization be express or is tacit approval also authorization? If authorization must be explicit, questions would then arise as to whether "declarations of war" are authorizations possessing a particular form, and whether (and why) this particular form is necessary. Later in this essay, I will suggest that declarations of war serve a distinct purpose, distinguishing such declarations from other forms of explicit authorization

denunciation of war has of late fallen into disuse.”¹⁰ Hamilton’s point (he was arguing against a constitutional ban on raising armies in peacetime) was the observed practice of foreign governments.¹¹ It is not easy, therefore, to draw any definite conclusion from this remark *per se* about practice under the proposed United States Constitution.¹²

There are intimations in the Philadelphia debates and the framers’ subsequent statements that “declaring” war was a practice crucially involving the use of language, indeed language of relatively definite form. According to James Madison’s notes, Oliver Ellsworth spoke in favor of the Madison/Gerry motion to replace “make war” with “declare war,” *inter alia* observing, “War also is a simple and overt declaration.”¹³ Madison himself, writing in *The Federalist* about Article I, Section 10, appears to make an analogous assumption about definite form:

The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States.¹⁴

Is “a declaration of war” like “letters of marque” in the sense that they are both documents of definite form? The powers to declare war and issue letters of marque and reprisal, after all, are listed together in Article I, Section 8. Madison’s passage, although it does plainly distinguish between “war” and “its declaration,” is ultimately opaque. But both Ellsworth and Madison do seem to suppose that to “declare war” is to engage in what we would call today a “performative utterance,” and thus at least to raise (for us) the question of whether this is a speech act possessing some sort of necessary distinctive mark.¹⁵ These fragments, however, like Hamilton’s remark, do not clearly resolve the underlying duality that the framers plainly perceived—the overlap of war as a state of affairs and as an act (performance) of state.¹⁶

(although, in the process, limiting the circumstances in which such declarations might be necessary). See discussion *infra* part V.

10. See Ely, *supra* note 1, at 140 n.5.

11. See THE FEDERALIST NO. 25, at 149-50 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

12. I will argue later in this essay that, read against the backdrop of Grotius and Vattel, Hamilton’s reference to “denunciation” may, in fact, be significant. See discussion *infra* part V.

13. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 476 (Adrienne Koch ed., 1966).

14. THE FEDERALIST NO. 44, at 277 (James Madison) (Henry Cabot Lodge ed., 1888).

15. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 117 (2d ed. 1975).

16. On war as a state of affairs, see THE FEDERALIST NO. 30, at 178 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) (“a war breaks out”). See also JAY FLIEGELMAN, DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, & THE CULTURE OF PERFORMANCE 151 (1993)

II.

There are some terms in the language in which the framers wrote the Constitution whose meanings are lost to us.¹⁷ In this case, though, there are approaches still to be tried. I take as specific inspiration Justice Black's majority opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁸

Black (we remember) repeatedly rejected claims of constitutional authority for President Truman's seizure of the steel industry by insistently asserting the existence of a clear-cut distinction between legislative and executive power. Thus, the Commander in Chief clause was inapposite because it does not grant power "to take possession of private property in order to keep labor disputes from stopping production" since "[t]his is a job for the Nation's lawmakers, not for its military authorities."¹⁹ Also: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."²⁰ Black stressed that Article I, Section 1 grants "[a]ll legislative Powers" to Congress.²¹ The Necessary and Proper Clause, he noted, authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²²

This is all question-begging, of course. Why was the steel industry seizure "lawmaking"? Black's answer is notable:

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution.²³

The executive order looked like a statute.

How do we know what a statute looks like? At one level, we might

(noting "the tension in the Declaration [of Independence] between the description of independence as the necessary consequence of George's actions, and the document's own status as a performative utterance").

17. See, e.g., *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460-63 (1978).

18. 343 U.S. 579 (1952).

19. *Id.* at 587.

20. *Id.*

21. See *id.* at 587-88.

22. See *id.* at 588.

23. *Id.*

think that Justice Black was making a claim of personal authority. Senator/Justice Black certainly knew a statute when he saw one. But we can also see that Black's formulation evoked a very specific picture of a statute—a statute contains a statement of purpose, rules expressing that purpose, and authorization to administrators to adopt further rules to elaborate the statutory rules. The model that Black brought to bear, we know immediately, is the shorthand form of every New Deal enactment.²⁴ As constitutional law, therefore, Black's argument is methodologically provocative. It resolves the question of constitutional construction, not by reading the Constitution directly, but by reading another document—the executive order—and comparing it with yet another document—the statutory form.²⁵

The question I have been raising thus becomes whether (like the power to “make all Laws”) the constitutional grant of power to Congress to “declare War” can be associated with a model with which arguably improper executive action might be compared and therefore judged. We might—were we to follow Black precisely—take the World War II declaration of war against Japan as this model. In applying his approach, however, there is no reason to suppose that we are limited to using Black's New Deal model. Given Ely's initial preoccupation with the views of the framers, a more apt point of departure for present purposes is the declaration of war closest to the period of constitutional drafting: the declaration of war for the War of 1812. (James Madison's presidency also singles out this declaration as particularly interesting.)

This is the text:

An Act declaring War between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to

24. See Patrick Gudridge, *Ripeness Within the Legislative Interpretation of Case or Controversy* (December 1995) (unpublished manuscript on file with author) (discussing New Deal statutory form from a more technical perspective); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

25. Black's argument assumes that it is possible, in principle, for an executive order to take a form plainly different from the form of a statute. The crucial difference, it appears, lies in the claim (or denial) of originality. For Black, an executive order should purport to interpret a statute, to derive policies or organizing principles from statutes. Statutes themselves, on this view, claim an initial status, purporting to be *first* articulations of governmental agendas.

issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof.²⁶

The declaration is brief (plainly not a New Deal statute), but nonetheless suggests much.

First, like Black's model statute, the declaration is importantly a delegation, authorizing the President to use "the whole" armed forces and to issue commissions or letters of marque and reprisal to "private armed vessels." Why was it necessary for the declaration to do anything more than declare war? Why couldn't the President "use the whole land and naval force of the United States" against Great Britain (given the declaration of war) without specific authorization in the declaration itself? The Constitution already named the President as Commander in Chief. Why couldn't "private armed vessels" proceed "against the vessels, goods, and effects" and "subjects" of Great Britain given a declaration of war even in the absence of the specifically described process? The Constitution separates, even as it juxtaposes, the powers to "declare War" and to "grant Letters of Marque and Reprisal." Perhaps this enumeration explains the need the drafters felt to include the latter authorization. Interestingly, the declaration both subordinates the ship owners to the President (who issues and drafts their authorizing documents) and equates the President and the owners (both are treated as requiring congressional authorization). In a sense, it is as though the President and private ship owners are alike "owners" (as though that is what "commander in chief" means), and that ownership is the status acted upon.

Second, Congress returned to the question of letters of marque and reprisal some eight days later.²⁷ This lengthy, seventeen-part statute defined the process for applying for letters of marque and reprisal, specified rules governing bounties, prizes and salvage, provided for treatment of prisoners of war, imposed record-keeping requirements, and made applicable the law of courts-martial. For present purposes, what is most interesting about this statute is the assumption that its drafters made about the status of the prior declaration of war, referred to in the marque and reprisal statute as "an act entitled [sic] 'An act declaring war between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territo-

26. Law of June 18, 1812, ch. CII, 2 Stat. 755 (1812).

27. Law of June 26, 1812, ch. CVII, 2 Stat. 759-64 (1812).

ries.’ ”²⁸ The declaration was (or was the same thing as) a statute—an “act.”

Third, “act” is, in fact, exactly right. The declaration, by its terms, means to be itself decisive, itself a change in circumstances: “That war *be* and the same is *hereby* declared to exist” War *now* exists—is *now* in being—because it is *hereby* declared.²⁹ This is precisely the grammar of statutes per se, as even a quick glance at acts passed around the time of the declaration shows:

“*Be it enacted* . . . That the President . . . shall have the power to grant remissions”³⁰

“*Be it enacted* . . . That all promissory notes . . . hereafter drawn . . . within the county of Alexandria . . . shall be governed by, and subject to, the same laws as are now in force . . . within the county of Washington”³¹

“*Be it enacted* . . . That the infantry of the army of the United States shall consist of twenty-five regiments”³²

It is perhaps not surprising, therefore, that the compiler included the 1812 declaration of war as simply one of a list of acts arranged in chronological order in the Statutes at Large.³³

We are back to Justice Black. A declaration of war is a law. Since the Constitution grants Congress legislative exclusivity (“all Laws” in the words of the Necessary and Proper Clause—the residual completion of the Article I, Section 8 list), presidential action that is in form a declaration of war is unconstitutional. If this proposition is to do real work, it necessarily supposes an account of which formal features of a declaration of war matter. This account, we may think, in turn supposes some sense of the assumptions underlying the conclusion that a declaration of war is a law, of what circumstances justify this equation.

In this regard, the terms of a second statute following upon the 1812 declaration (this one some ten months later) are instructive:

An Act vesting in the President of the United States the power of retaliation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all and every case, wherein, during the present war between the United States of America and the United Kingdom of Great Britain and Ireland, any violations of the laws and usages of war, among civilized

28. *Id.* at 759.

29. See AUSTIN, *supra* note 15, at 57.

30. Law of June 17, 1812, ch. C, 2 Stat. 752 (1812).

31. Law of June 24, 1812, ch. CVI, 2 Stat. 755 (1812).

32. Law of June 26, 1812, ch. CVIII, 2 Stat. 764 (1812).

33. *Cf. id.* at 786 (resolutions grouped separately).

nations, shall be or have been done and perpetrated by those acting under authority of the British government, on any of the citizens of the United States or persons in the land or naval service of the United States, the President of the United States is hereby authorized to cause full and ample retaliation to be made, according to the laws and usages of war among civilized nations, for all and every such violation as aforesaid.

Sec. 2. *And be it further enacted*, That in all cases where any outrage or act of cruelty or barbarity shall be or has been practiced by any Indian or Indians, in alliance with the British government, or in connexion with those acting under the authority of said government, on citizens of the United States or those under its protection, the President of the United States is hereby authorized to cause full and ample retaliation to be done and executed on such British subjects, soldiers, seamen or marines, or Indians, in alliance or connexion with Great Britain, being prisoners of war, as if the same outrage or act of cruelty or barbarity had been done under the authority of the British government.³⁴

Congress authorized James Madison to order torture or execution of British prisoners of war?³⁵ Tabloid jurisprudence is not the point. For present purposes, what is interesting is technique, the devices its drafters used to define the terms of the Retaliation Act's project. The first sentence is written as though it were a grant of subject-matter jurisdiction. Certain "violations of the laws and usages of war" are put within the competence of the President, along with corresponding remedies, also "according to the laws and usages of war." The statutory provision itself purports to function as an intermediary. It does not define "violations" or "full and ample retaliation," but supposes that those terms are defined elsewhere, within the body of international law that the statute fixes as relevant for the President to take into account. The second sentence repeats the term "full and ample retaliation," again leaving it undefined. Instead, its principal task is an equation linking "Indians" ("in alliance with . . . or in connexion with") and the British government ("as if the same . . . act . . . had been done under the authority of the British government") in order to establish a second equation of "outrage" and "full and ample retaliation," notwithstanding the seeming difference in the identities of the perpetrators and the punished. The ultimate aim of both of these equations, evidently, was to establish a legal

34. Law of March 3, 1813, ch. LXI, 2 Stat. 829-30 (1813).

35. It appears that practices undertaken pursuant to the Retaliation Act were limited to hostage taking, solitary confinement of hostages, and threatened executions. See Ralph Robinson, *Retaliation for the Treatment of Prisoners in the War of 1812*, 49 AM. HIST. REV. 65 (1943); see also JOHN K. MAHON, *THE WAR OF 1812*, at 224-25, 383 (1972) (discussing charges of atrocity and mistreatment of prisoners of war).

identity between the presidential conduct authorized in the first sentence and that authorized in the second.³⁶ Plainly, the Retaliation Act claims for itself only a secondary status. It is not a primary rule.³⁷ Instead, it undertakes two quasi-logical operations (relevance-setting and substitution), rendering or attempting to render a larger body of law ("the laws and usages of war") available for presidential use. Because the statute plays this intermediary role, it can leave its key terms (such as "full and ample retaliation") tactfully unspecified. Further detail, presumably, is the province of the primary regime.

Derivative work of this sort was a principal business of statutes in the first part of the nineteenth century.³⁸ If a declaration of war, at the time, was understood to be a "Law" akin to a statute, was a declaration also similarly secondary, chiefly a trigger of some set of primary norms? If so, it is likely (especially given the example of the Retaliation Act) that "the laws and usages of war" would have been the regime brought to bear. To identify the point of a declaration from the early nineteenth century perspective, and, therefore, whether or not particular executive action presupposes (would have presupposed) a declaration's congressional enactment, a second look is in order—the view from (then) contemporary international law.

III.

"The international jurist most widely cited in the first fifty years after the Revolution was . . . Vattel."³⁹ Vattel, however, took as his

36. At the time, apparently, international law acknowledged the propriety of executing prisoners of war in retaliation for enemy killing of prisoners "without any just reason." M. D. Vattel, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 414 (trans. ed. 1820). Vattel, however, recommended the threat of reprisal, rather than the act itself, as the better course:

Alexander the Great, having cause of complaint against Darius, for some malpractices, sent him word, that if he continued to make war in such a manner, he would pursue him to the utmost, and give no quarter. It is thus an enemy violating the laws of war is to be checked, and not by causing the penalty due to his crime to fall on innocent victims.

Id. at 415.

37. The primary/secondary distinction, of course, is H.L.A. Hart's. See H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961).

38. On the ready overlap of statutory and common law usages in this period, see William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 805-06 (1985). I describe my own reactions to reading early nineteenth century statutes (in particular congressional enactments in 1825) elsewhere. See Patrick O. Gudridge, *Legislation in Legal Imagination: Historical Exercises—1825, 1875, 1925* (1984) (unpublished manuscript on file with author).

39. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978) (citation omitted).

point of departure "[t]he celebrated Grotius."⁴⁰ It is, therefore, *De Jure Belli ac Pacis* to which I first turn.⁴¹ My purpose, though, is not simply introductory. As we will see, a declaration of war within the Grotian account is emphatically "legal" in character. The "legality," we will also see, is both complex (reflecting and reproducing a particular politics) and surprising (the only individual right directly recognized concerns the individual's relationship to her or his own state). Ultimately, after I take up Vattel, it will become apparent that the Grotian account supplies the most apt background against which to read the language of Article I, Section 8 of the United States Constitution.

De Jure Belli ac Pacis, Book III, Chapter III ("Of a just or solemn War, according to the Right of Nations, and of its Denunciation"⁴²), begins with the proposition that a war is just "not from the Cause whence it arises, nor, as elsewhere, from the great Actions done in it, but from some peculiar Effects of Right."⁴³ Such "effects of right" are a function of the identity of the parties to the war. The right to "make a just War" vests only in "they that have Sovereign Power," and not "Captains of Thieves."⁴⁴ Thus, lawful war is fought with states, including states that "commit some acts of Injustice, even by publick Deliberation," and not with "Compan[ies] of Pirates and Robbers," even though "they may observe some kind of Equity among themselves, without which no Body can long subsist."⁴⁵ "But that War may be called just in the Sense under Consideration, it is not enough that it is made between Sovereigns, but . . . it must be undertaken by publick Deliberation, and so that one of the Parties declare it to the other."⁴⁶ This requirement is not a matter of the law of nature which, for example, demands "no

40. VATTTEL, *supra* note 36, at 4. "It appears from many passages in his excellent work, that this great man had a glimpse of the truth: but as he broke up the land, if I may be allowed the expression, and investigated an important subject, much neglected before his time, it is not surprising that his mind, overcharged by an immense variety of objects and citations which entered into his plan, he could not always acquire those distinct ideas so necessary in the sciences." *Id.* at 5. For Vattel's references to Grotius (who was the only modern author cited) in connection with the particular topic of declarations of war, see *id.* at 386.

41. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Jean Barbeyrac ed., 1738). The English translation of the Barbeyrac edition was published, obviously, relatively close to the period of constitution-writing in the United States; Barbeyrac's elaborate notes are an important additional resource. See also RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 73 n.31 (1979) (stressing the importance of Barbeyrac's edition "in the intellectual history of eighteenth-century England). But see A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS vi (Onuma Yasnaki ed., 1973) ("Barbeyrac's translation is strongly coloured by his own bold interpretations.").

42. GROTIUS, *supra* note 41, at 549.

43. *Id.* at 549-50.

44. *Id.* at 552.

45. *Id.* at 550.

46. *Id.* at 552-53.

denouncing of War" if "Force is repelled by Force, or Punishment demanded of him who is the Offender."⁴⁷ Grotius is emphatic: "But by the Law of Nations, a publick Denunciation is required in all Cases, as to those peculiar Effects of a just War, if not on both Sides, yet on one."⁴⁸

Declarations may be conditional or absolute.⁴⁹ Distinctive practices associated with declaring war, such as "throwing . . . a Spear into the Enemy's Ground,"⁵⁰ are simply "peculiar Customs" and not "Rules which properly belong to the Law of Nations."⁵¹ A declaration of war against a sovereign "is presumed at the same Time to be denounced, not only against all his Subjects, but also others who shall join him, and who ought to be considered, in Regard to him, only as an Accessory" (although war fought against such associates after the conclusion of hostilities vis-a-vis the principal requires a new declaration).⁵² The purpose of a declaration of war is not "to shew that [the declarants] would do nothing in Secret, or by Deceit."⁵³

But that is might manifestly appear, that the War is not made by a private Authority, but by the Consent of both Nations, or of their Sovereigns. For hence arise certain peculiar Effects, which in a War against Robbers, or a War made by a Prince against his own Subjects, will not be allowed.⁵⁴

It is for this reason that a defensive war requires declaration ("to obtain the Effects proper to a just War"); that wars occasioned by violations of the rights of ambassadors require declaration; and that, notwithstanding

47. *Id.* at 553.

48. *Id.* at 555. In its original Latin, the emphatic legality of the Grotian account of declarations of war would seem to be especially clear. The title of Book III, Chapter III, reads: "*De bello justo sive solenni jure gentium, ubi de indictione.*" HUGO GROTIUS, *DE JURE BELLI AC PACIS* 670 (Amsterdam ed. 1712). Grotius subsequently associates "indictio" with "denuntiatio," see *id.* at 677, a term used throughout the chapter (and the origin, obviously, for the repeated use of "denunciation" in the English translation of the Barbeyrac edition). "Denuntiatio" was a term of art in Roman procedure, referring to types of summonses. See LEOPOLD WENGER, *INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE* 85-86, 272-75 (Otis Harrison Fisk trans., 1940). Concerning the reliance of Grotius upon Roman law forms, see DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 213-19 (1990); see also ALAN WATSON, *INTERNATIONAL LAW IN ARCHAIC ROME* 20 (1993) (in early Roman practice, "declarations of war have the form of a *legis actio* of private law," although he notes "that does not mean they have the form of any one particular *legis actio*").

49. See GROTIUS, *supra* note 41, at 555.

50. *Id.* at 553 (second occurrence). [An eight-page section in Book III, Ch. III of the Barbeyrac edition is misnumbered; therefore, some page numbers appear on duplicate pages. When citing to such a page, we indicate to which occurrence of the page number the author is referring. *Eds.*]

51. *Id.* at 554 (second occurrence).

52. *Id.* at 555 (second occurrence).

53. *Id.* at 556 (second occurrence).

54. *Id.* at 556-57 (second occurrence).

"natural Right," a "Denunciation requires no Time to be allowed after it."⁵⁵

Manifestly technically adept; elegantly accommodating, distinguishing or disagreeing with prior writers (detail missing in the preceding summary), Grotius seemingly reaches a technician's conclusion: Declarations of war have no intrinsic meaning, but simply exist, according to the law of nations, to make applicable the pertinent part of the law of nations.⁵⁶ His presuppositions, however, are remarkable. It is not as though states are taken as given. "Nations, or . . . their Sovereigns" compete with "private Authority,"⁵⁷ pirates and robbers "confederated only to do Mischief."⁵⁸ Declarations are made to make clear the distinction; an important part of the elaborated law of declarations concerns who precisely is included (along with the named state) as the subject of a declaration—again, the relevant actors are not simply supposed. But from what perspective is it difficult to distinguish between states and pirates and robbers? Attributes of individuals organize the famously secular account of the law of nature, the attendant theory of natural rights, and the description of just grounds for war that follows.⁵⁹ Indeed, in the last of these accounts, Grotius takes *private* law as his point of departure. "Now, as many *Sources* as there are of *judicial* Actions, so many *Causes* may there be or War."⁶⁰ Attention to the capacities of individuals to interact, agreeing and disagreeing, and to their capacity as well to act in their own interests, also shapes the notably skeptical political theory.⁶¹ The well-known passage rejecting popular sovereignty as necessarily relevant precisely illustrates this individualism (albeit paradoxically):

And here we must first reject their Opinion, who will have the Supreme Power to be always, and without Exception, in the People; so that they may restrain or punish their Kings, as often as they abuse their Power. . . . It is lawful for any Man to engage himself as a Slave to whom he pleases; as appears both by the *Hebrew* and *Roman* Laws. Why should it not therefore be as lawful for a People that are

55. *Id.* at 557 (second occurrence).

56. He makes the point more generally earlier: "*Hermogenianus* declares, that Wars were introduced by the Law of Nations, which I think ought to be interpreted somewhat different from what it generally is, viz. That the Law of Nations has established a certain Manner of making War; so that those Wars which are comfortable to it, have, by the Rules of that Law, certain peculiar Effects. *Id.* at 28.

57. *Id.* at 556 (second occurrence).

58. *Id.* at 552.

59. See *id.* at 1-23, 127-515.

60. *Id.* at 129.

61. On Grotius and skepticism, and the larger theme of the link between reason of state and "modern" natural rights political theory, see RICHARD TUCK, *PHILOSOPHY AND GOVERNMENT, 1572-1651*, at 154-201 (1993).

at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without reserving any Share or that Right to themselves? . . . But as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may chuse what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him.⁶²

In the government of a state, authority may not rest with the people, because the people—perhaps making the best of a bad situation⁶³—may have so chosen. The Grotian point of view is ultimately individual. The state, however authoritarian, is a product of individual choices.⁶⁴

It is, therefore, the viewpoint of individuals that encompasses the panorama of contention and violence that Grotius subsumes under his definition of war and that motivates his discussion of laws of war as a means to peace. The state, within the Grotian account, appears as a means of protection for individuals. It affords an alternative (sometimes) to self-help. Its own modes of operation (tend to) instantiate legality. This is itself protection. "Dion Chrysostom is more in the right, who says that the Law (especially that of Nations) is in a State, as the Soul in a human Body, for that being taken away it ceases to be a state."⁶⁵ This passage is characteristic. The classical metaphor, restated, equates legality and reason of state, trustworthiness from the individual perspective and state self-interest. In these terms it is not surprising that it is the "law of nations" that is especially illustrative—states (themselves often provisional and artificial), interact, and therefore become subject to constraint, in much the same way as individuals.

To what extent, however, did the law of nations as Grotius depicted it actually protect individuals? Not much, it appears at first glance. Chapters IV through VIII of Book III describe how, under the law of

62. GROTIUS, *supra* note 41, at 64.

63. "There may be many Causes why a People should renounce all Sovereignty in themselves, and yield it to another: As when they are upon the Brink of Ruin, and they can find no other Means to save themselves; or being in great Want, they cannot otherwise be supported. *Id.* at 65.

64. "A Debt contracted by a free People, ceases not to be a Debt, because they are at present under a King; for the People are the same, and they still retain a Property in those Things that belonged to them as a People, and hold the Sovereignty too, tho' it be not exercised now by the Body, but the Head." *Id.* at 266-67. The tension obviously present in the idea of individuals bargaining away sovereignty and yet retaining priority is especially evident in this passage, resolved only partly by the body-head metaphor. See also TUCK, *supra* note 61, at 199-200 (discussing this difficulty and its significance more generally).

65. GROTIUS, *supra* note 41, at 551. For a notable recent elaboration of this theme, see BLANDINE KRIEGLER, *THE STATE AND THE RULE OF LAW* (M.A. LaPain & J.C. Cohen trans., 1995).

nations, states at war may kill with impunity (or enslave) "not only those who are actually in Arms, and the Subjects of the Prince engaged in War, but also all those who reside within his Territories,"⁶⁶ as well as prisoners of war (even after unconditional surrender);⁶⁷ how states, allowed by the law of nations, may plunder or lay waste to an enemy's country (including sacred places and tombs);⁶⁸ how states and individuals may acquire absolute title to captured property;⁶⁹ and how states, by conquest, may acquire all rights of sovereignty of conquered states.⁷⁰ These are, it appears, rights of aggression rather than protection. The only defensive right that Grotius discusses at length (also the only right mentioned in his account of declarations of war), is the right of postliminium. Individuals or people, who in war are subjugated by an enemy, but who, also in the course of war, become free from this subjugation reacquire prior rights, "as if . . . never . . . in the Enemy's power."⁷¹

The prominence of postliminium in *De Juri Belli ac Pacis* is revealing. Grotius might have treated the question of the rights of returned prisoners of war as exclusively a matter of the law of particular states. Alan Watson, for example, holds to this view: "Postliminium is simply part of internal Roman private law."⁷² But Grotius, aware of this option, explicitly included postliminium within the law of nations, although he also allowed for the possibility that domestic regimes might alter the precise content of the right.⁷³ Grotius additionally recognized that postliminium was not a matter of natural law. Concluding his extended discussion of the details of the right, he observed: "But in our Days, not only among Christians, but even most of the Mahometans, as this Right of Captivity out of Time of War, so also that of Postliminity is abolished, the Necessity of both ceasing because the Rights of that natural Relation, which is between all Mankind, have been re-established."⁷⁴ For the present purposes, it is the jurisprudence of this passage (and not its ostensible optimism⁷⁵) that is important. The Grotian system, it is easy to see, requires recognition of the right of postliminium given the origin of the system in the posited tension between states and individuals. The status of individuals cannot be entirely contingent, a function

66. GROTIUS, *supra* note 41, at 562.

67. *See id.* at 565-66.

68. *See id.* at 573-78.

69. *See id.* at 579-601. Concerning captured persons as property, *see id.* at 602-08.

70. *See id.* at 608-11.

71. *Id.* at 616.

72. WATSON, *supra* note 48, at xii.

73. *See* GROTIUS, *supra* note 41, at 612, 618.

74. *Id.* at 625-26.

75. Grotius immediately proceeds to discuss a current French case decided through reference to principles of postliminium. *See id.* at 626.

solely of the fortunes of war. At the time, political arrangements are understood to be artificial and therefore changeable.⁷⁶ Status within states is not simply "there," not something that of necessity (absent express legal provision) survives interruption.⁷⁷ Postliminium, thus, must be defined "outside" states, a matter therefore for the law of nations, even though for individuals it is chiefly a right vis-a-vis their "own" states.⁷⁸

This contingency of states, it turns out, is also a source of otherwise missing wartime protection for individuals vis-a-vis an enemy. The concluding chapters of Book III address "Moderation" as a limit, for example, on killing enemies,⁷⁹ despoiling the enemy's country,⁸⁰ making captures,⁸¹ and acquiring dominion;⁸² and also "Faith" between enemy states and individuals acting for states, in wartime itself, in concluding wars, and in observing truces.⁸³ Punctuated throughout the pertinent chapters by appeals to virtue of various sorts, Grotius' overarching argument appears most clearly in chapter XII ("*Concerning Moderation in regard to the Spoiling the Country of our Enemies, and such other Things.*"⁸⁴) "But unless it be for some Advantage, it would be very foolish to do another Damage, without any Profit to ones self."⁸⁵ Even right motives, however, should be judged skeptically: "But if we rightly weigh the Matter, such Things are for the most Part managed rather out of Spite than wise Counsel: For very often either those inducing Reasons cease, or there are others more powerful, that advise to the contrary."⁸⁶ "Reasons . . . more powerful" are for Grotius difficult to disentangle from self-interest (even in the case of religious

76. As if to emphasize the artifice of states and the priority of individuals, Grotius begins his discussion of postliminium by parsing the term, depicting it as meaning simply "a return to the Frontiers," *id.* at 612; the alternative view (as Barbeyrac explains it in his commentary) seems to have joined "return" and a term connoting slavery, *see id.* at n.I(1).

77. For especially clear recognition of the problem, see W.W. BUCKLAND, *THE ROMAN LAW OF SLAVERY* 307 (1908). *See also* ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 41-45 (1982) (view of slavery as "extrusive" or fallen state encompassing individuals, including prisoners of war, whose conduct justifies their descent).

78. Not surprisingly, given the priority of individuals within his account, Grotius made use of notions of waiver to fix the boundaries of postliminium. *See* GROTIUS, *supra* note 41, at 615, 616; *cf.* ALAN WATSON, *THE LAW OF PERSONS IN THE LATER ROMAN REPUBLIC* 242-44 (1967) (showing presence of both intentional and nonintentional conceptions of postliminium in Roman law).

79. GROTIUS, *supra* note 41, at 630-49.

80. *See id.* at 649-58.

81. *See id.* at 658-59.

82. *See id.* at 669-76.

83. *See id.* at 686-735.

84. *See id.* at 649.

85. *Id.* at 650; *see* Onuma Yasuaki, *Conclusion: Law Dancing to the Accompaniment of Love and Calculation, in A NORMATIVE APPROACH TO WAR*, *supra* note 41, at 347.

86. GROTIUS, *supra* note 41, at 650.

obligations⁸⁷).

Vertue itself, little esteemed in this Age, ought to forgive me, if, whilst she is by herself, neglected, I endeavour to render her valuable on the account of her Advantages. First then Moderation observed in preserving those Things which do not lengthen out the War, takes from the Enemy a powerfule Weapon, Desperation.⁸⁸

Grotius constructs long lists of people whom there may be no reason to kill (including prisoners of war), property there may be no reason to destroy, and rights of dominion there may be no reason to exercise.

The sense of contingency, the skepticism it encourages, and the moderation that follows are not exclusively by-products of matters over which states or individuals have no control. Grotius sanctions strategic behavior. Thus, he devotes much of his initial discussion of good faith to defending the obligation owed to a state who "through Fear has forced a Promise from one."⁸⁹

But a solemn War, that is, publick, and denounced on both Sides, among other particular Effects of external Right, has also this, that whatever Promises are made in that War, or for bringing it to a Conclusion, are so valid, that tho' they were occasioned by a Fear unjustly caused, yet they cannot be made void without the Consent of him to whom the Promise was made. Because as many other Things, tho' in themselves not wholly innocent, are yet by the Law of Nations reputed just, so is Fear, which in such a War is occasioned on either Side; for if it were not allowed, such Wars, that are but too frequent, could be neither moderated, nor concluded, which yet are very necessary to be done for the good of Mankind.⁹⁰

Promising is independent of truth-telling. "[A] promise of itself confers a new Right."⁹¹ It is a performative utterance; more precisely, it initiates a constitutive interaction. "From this Society founded on Reason and Speech, arises that Obligation from a Promise."⁹² The act of promising itself suggests sequences of actions and responses, possibilities that influence judgment and therefore restrain conduct.⁹³

Throughout the Grotian argument, we can see, "the *negotiatory*

87. "Therefore all Magistrates ought strictly to forbid these Things, for which they must render an account for the unnecessary shedding of Blood to him, whose Viceregents they are" *Id.* at 649.

88. *Id.* at 657.

89. *Id.* at 689; *see id.* at 688-91.

90. *Id.* at 691-92.

91. *Id.* at 687.

92. *Id.*

93. It is for this reason, Grotius argues, that promises made to pirates are binding, even if "such Sort of People have not with others that particular Community, which the Law of Nations hath introduced"—"if we treat [them] as such, it is to be understood, as if in that Respect, remitted the Punishment." *Id.* at 688.

character" of rights (of both individuals and states) is the key.⁹⁴ Contingency, self-interest, and strategy—the raw materials of both reason of state and individual reason—are in war simultaneously the origins of the formality of war and the rights of individuals.

IV.

Vattel approaches declarations of war differently.

[I]t is possible that the present fear of our arms may make an impression on the mind of an adversary, and induce him to do us justice. We owe this farther regard to humanity, and especially to the lives and tranquility of the subject, 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. This is called *declaring war*.⁹⁵

The point of view now is plainly that of the state. "[T]he sovereign power has alone authority to make war."⁹⁶ The law of nations becomes a proper subset of natural law generally, "the science of the law subsisting between nations and states, and of the obligations that flow from it."⁹⁷ "[T]o form an exact knowledge of this law, it is not sufficient to know what the law of nature prescribes to the individuals of the human race."⁹⁸

"The right of making war belongs to nations only as a remedy against injustice"⁹⁹ Injustice is injury; because the state is the relevant unit, it must be "the nation to which an injury has been done, or is preparing to be done."¹⁰⁰ The definition of such injury summarizes Vattel's fundamental principle: "The whole right of the nation, and consequently of the sovereign, proceeds from the good of the state, and by this rule it is to be measured."¹⁰¹ Much of the bulk of *The Law of Nations*, preceding the relatively late discussion of war, supplies content for this proposition. Vattel elaborately describes the proper agendas of states considered individually and relative to each other,¹⁰² thereby specifying a detailed conception of "the good of the state," which substitutes

94. Richard Tuck, *Rights and Pluralism*, in *PHILOSOPHY IN AN AGE OF PLURALISM: THE PHILOSOPHY OF CHARLES TAYLOR IN QUESTION* 168 (J. Tully ed., 1994).

95. Vattel, *supra* note 36, at 381.

96. *Id.* at 357. "Public war is that betwixt nations or sovereigns, and carried on in the name of the public power, and by its order. This is the war we are here to consider" *Id.* at 356.

97. *Id.* at 47 (emphasis omitted).

98. *Id.* at 3.

99. *Id.* at 381.

100. *Id.* at 368.

101. *Id.* at 369.

102. *See id.* at 57-340.

precisely for the individual rights-based enumeration serving a similar purpose in *De Jure Belli ac Pacis*.

It is as itself "a remedy against injustice" that the declaration of war figures most prominently in Vattel's scheme: "[A] farther trial for terminating the difference without the effusion of blood by making use of the principle fear, for bringing an enemy to more equitable sentiments" ¹⁰³ A declaration will ordinarily "set forth the cause." ¹⁰⁴ It "must be made known to the state against whom it is made." ¹⁰⁵ "[A]ll opprobrious words are to be avoided, together with every expression indicating hatred, animosity and rage; as these can only excite the like sentiments in the enemy." ¹⁰⁶ "If the enemy . . . offers equitable conditions of peace, the war is to be suspended" ¹⁰⁷ Vattel does not ignore, however, the very different account that Grotius had offered in *De Jure Belli ac Pacis*:

Besides the foregoing reasons, it is necessary for a nation to publish the declaration of war for the instruction and direction of its own subjects, in order to fix the date of the rights belonging to them from the moment of this declaration, and relatively to certain effects which the voluntary law of nations attributes to a war in form. ¹⁰⁸

A more precise terminology, therefore, is useful. "This *publication* of the war may be called *declaration*, and that which is notified directly to the enemy, *denunciation*" ¹⁰⁹

As this distinction itself perhaps illustrates, Vattel by and large marginalizes Grotian preoccupations. The "voluntary law of nations," whose effects vis-a-vis individuals a declaration fixes, is simply a set of conventions emerging because, at the limit, the law of nature and thus the law of nations is a matter of "the conscience of sovereigns." Working rules must, therefore, come into existence that do not presuppose actual knowledge of conscience. ¹¹⁰ These working rules are variations on a single proposition: "*a war in form, as to its effects, is to be accounted just on both sides.*" ¹¹¹ For example, "every acquisition obtained by war in form, is valid, independently of the justice of the cause" ¹¹² Postliminium rights of individuals are both a matter of convention and the national character of war. "If the war be just, they

103. *Id.* at 382.

104. *Id.*

105. *Id.*

106. *Id.* at 385.

107. *Id.* at 382.

108. *Id.*

109. *Id.* at 385.

110. *Id.* at 446.

111. *Id.*

112. *Id.* at 449.

were unjustly taken, and thus nothing is more natural than to restore them as soon as it becomes possible. If the war be unjust, they are not bound to bear the calamities of it more than any other part of the nation."¹¹³ Limits on killing prisoners of war derive not so much from a contingency-driven general rule of moderation, but from the remedial role of war itself. "On an enemy's submitting and delivering up his arms, we cannot with justice take away his life."¹¹⁴ The affirmative case for stratagems, similarly, does not emerge as a concomitant of circumstances generally, but again as a case of "the mildest means."¹¹⁵

V.

Grotius and Vattel supply a provocative context within which we might reconsider the language of the Framers and the Constitution. Hamilton's reference to "the ceremony of a formal denunciation of war" seems to follow Vattel precisely. We may wonder whether the constitutional "declare" also ought to be read in light of *The Law of Nations*. But as a result, given Vattel's distinction between denunciations and declaration, the relevant definition would therefore be Grotian, identifying a declaration of war as a legislative act marking a shift in governing law, especially relevant for persons citizens of, or otherwise under the protection of the United States.

It is certainly possible, in the light of this reading of Article I, Section 8, to identify other constitutional provisions exhibiting Grotian tendencies. The Article III, Section 3 definition of treason as "levying War" obviously supposes that war (in some sense) might be privately as well as governmentally instigated.¹¹⁶ The Third Amendment expressly differentiates that legal concomitants of peace and war, excluding from its ban on quartering soldiers "in any house" quartering "in time of war . . . in a manner . . . prescribed by law."¹¹⁷ The 1812 declaration of war is also consistent. We can readily note the absence of justification: there is nothing suggestive of Vattel's last plea. The letters of marque provision, authorizing prize-taking by privately-owned ships, overlaps public aims and endorsement of a particular mode of private property acquisition. The declaration's statutory form, coupled with the particular posture of legal intermediation that form suggests, readily brings to mind the choice of law possibility.

We will soon see, however, that at least some pertinent constitu-

113. *Id.* at 457.

114. *Id.* at 414.

115. *Id.* at 438.

116. U.S. CONST. art. III, § 3, cl. 1.

117. U.S. CONST. amend III.

tional texts may be open to Grotian readings, but certainly do not require (and may also be read to resist) such glosses. I do not claim, moreover, that Hamilton or other framers consciously drew Vattel's distinction. The understanding of "declare War" that I have put forward, therefore, supposes a constitutional jurisprudence not limited to the simplest "originalism." I do not propose to elaborate that jurisprudence here. It is enough for present purposes to note consequences—to trade on what (I think) are appealing (or at least intriguing) results of inserting a late eighteenth century acknowledgement of an early seventeenth century perspective within late twentieth century constitutional law. I conclude this essay with three observations, initial sketches of some of the consequences of the Grotian view for current constitutional law.

First, within this view the introduction of United States military personnel into combat or near-combat does not by itself trigger a constitutional requirement of a declaration of war. The main point of a declaration becomes the change it makes in the legal regime within which United States noncombatants find themselves. Particular exercises in combat or near-combat would presuppose a declaration only if such exercises (or linked activities) would somehow alter the circumstances of United States noncombatants in ways that the change in legal regime addresses. As a result, the declaration of war clause of Article I, Section 8 is not a constitutional restatement of John Ely's contention that non-trivial United States combat commitments generally require congressional authorization. Sometimes declarations of war will be necessary, sometimes not. It does not follow, of course, that Ely's conclusion is wrong. The interplay of other constitutional provisions may carry strong implications—perhaps, for example, the combination of the Article II juxtaposition of "executive" and "commander in chief" and the Article I linkage of expenditures, "appropriations," and "law."¹¹⁸

Second, the central question becomes the content of the legal norms that a declaration activates. We no longer ordinarily conceive of law in terms which assign to judicial opinions or statutes the role of initiating, or otherwise bringing to bear, entire preexisting systems of jurisprudence. To be sure, we still conceive of such systems. However, we think of them as built up or constituted by opinions or statutes—a kind of reversed polarity. As a result, our conceptions of movements across regimes are typically formulated in terms of movements from one legal instrument or set of legal instruments to another. One collection of cases gives way to another; or a statute substitutes for cases; or constitutional provisions and associated judicial opinions substitute for statutes

118. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-46 (1952) (Jackson, J., concurring); ELY, *supra* note 1, at 142-43 n.22.

or administrative orders. If a declaration of war is a legal switch, it must (now) effect this sort of movement. War in law (now) is in form an accumulation of executive orders and statutes. If this accumulation replaces or reverses priority vis-a-vis other legal instruments, the obvious "other" is the Constitution, or at least one or more of its parts. And if the particular importance of a declaration of war lies in its impact on the legal environment that individuals confront, its chief rearranging of priorities should concern the Bill of Rights. A declaration of war, on this view, is akin to a declaration of a state of siege or other emergency authority provided for, for example, in many Latin American constitutions.¹¹⁹ It is also similar, within the United States Constitution, to the suspension proviso of Article I, Section 9, Clause 2, allowing Congress to limit the availability of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."¹²⁰

Caveat: The provisions of the Bill of Rights do not on their face distinguish war and peace in addressing the circumstances of persons who are not members of the military (the Fifth Amendment does not require grand jury indictment in "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger")—*except* (as we have seen) for the Third Amendment. *Expressio unius est exclusio alterius*? Important parts of the Bill of Rights, however, marked departures from British practice (were in this sense new), or stated propositions that, whatever their implications in detail, were of importance initially because they expressed presuppositions of American government: starting points, not conclusions. (Madison, we know, initially thought that inclusion of the Bill of Rights in the Constitution either unnecessary or inevitably restrictive of what were supposed to be general propositions.) Reading the Bill of Rights standing alone to be what the courts have subsequently made it—phrasings evoking or encoding often complex legal structures, phrasings on this view amenable to traditionally "legal" interpretation—is therefore arguably anachronistic (to be sure, not necessarily wrong, but not self-evidently right either).

More recently, in any case, the idea that in time of war government may disregard otherwise relevant individual rights is, if not universally acknowledged, more or less commonplace. Limitations on ordinary just compensation rights and acknowledgements of the propriety of war cen-

119. For discussion of one recent constitution's approach to such provisions, see Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 790-91 (1990).

120. U.S. CONST. art. I, § 9, cl. 2; *see also* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1390-91 (1989) (discussing briefly the framers' conception of war power as emergency power).

sorship are perhaps the most obvious examples.¹²¹ Declarations of emergency are not novel either. At least in the past half-century, however, such declarations have been mostly executive work or general congressional authorizations.¹²² These declarations have not, it appears, themselves functioned as constitutional switches. Instead, constitutional law, at least as judicially characterized, frequently represents questions of emergency as already prefigured in constitutional grants of authority or, more importantly for present purposes, as already acknowledged in definitions of individual rights. For most judges, almost all such rights are, in the end, rights to demand justifications for government action. To be sure, much work must be done along the way to determine what sort of justification is necessary, and it is in this process (perhaps) that theories of rights per se matter. But the result remains, in important part, apologetics. For example, judgments that First Amendment protections are inapplicable take the form of judicial descriptions of the sorts of government objectives that justify limitations of free speech or free association. Within constitutional law of this sort there is no need for a war switch as such.

If a war switch were to be meaningful, constitutional protections of individual rights (absent a declaration of war) would have to be framed in terms which would either not credit war aims as justifications for limiting rights or prohibit war measures outright (assuming that such measures could be defined). Within this regime, for example, the opinion of Justice Douglas in *New York Times Co. v. United States*¹²³ captures the gist of that case exactly. Assertion of "the power to wage war successfully" as justification for prior restraint was out of order because "the war power stems from a declaration of war."¹²⁴

Third, if this way of regarding declarations of war were to take hold, it might reduce a felt need to frame constitutional rights jurisprudence with an eye to the appropriateness of usual formulations in the

121. Concerning just compensation rights in wartime, see, e.g., *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *United States v. Caltex, Inc.* 344 U.S. 149, 153-56 (1952). With respect to censorship, see, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931); *Schenck v. United States*, 249 U.S. 47, 52 (1919). I discuss the limits of these limits *infra*.

122. See Lobel, *supra* note 118, at 1407-09, 1412-16.

123. 403 U.S. 713, 718 (1971) (per curiam).

124. *Id.* at 722 (Douglas, J., concurring). *Laird v. Tatum*, 408 U.S. 1 (1972), might present an illustration of a government practice—United States military surveillance of United States citizens—which would be per se unconstitutional absent a declaration of war. Arguably, absent war authority or perhaps congressional suspension of habeas corpus, the Constitution provides no ground for this form of executive action. If the constitutional violation is the constitutionally unauthorized surveillance itself, and not any consequent inhibition of free speech, plaintiffs would presumably possess a justiciable claim. *Cf. N.E. Fla. Chapter, Associated Gen. Contractors v. City of Jacksonville*, 113 S. Ct. 2297 (1993) (challenge to discriminatory rule itself rather than its consequences is justiciable).

extreme conditions of wartime, and consequently, perhaps, with an eye also to limiting the scope of ordinary jurisprudence to clear cases and formulas.¹²⁵ Given a declaration of war, usual constitutional rights jurisprudence would be inapplicable. This may seem to be too much putting a good face on a bad situation. The proposition that the Bill of Rights does not apply in wartime might be reason enough to reject the idea of declarations of war as constitutional switches. Of course, it is not clear how much effect constitutional protections of individual rights had in either World War I or World War II.¹²⁶ In any case, recognition of individual rights is not the only form constitutional limits take. Federal legislation or executive action affecting individuals would still require constitutional authorization; still need to display some measure of relationship to "War," or war aims. At minimum, a regime-shifting interpretation of the constitutional function of declarations of war would seem to carry with it the corollary that legislation or executive orders implementing a declaration clearly exhibit, in some way or another, the distinctly war-related reasons underlying whatever actions they might order or authorize. *Woods v. Cloyd W. Miller Co.*¹²⁷ need not be read as utterly open-ended, notwithstanding its conclusion that "post-war" is still "wartime" for at least some regulatory purposes. *Duncan v. Kahanamoku*,¹²⁸ limiting the reach of martial law in Hawaii, illustrates a more restrictive approach. World War II-era just compensation law supplies another example, seeming to distinguish between noncompensable wartime regulation or destruction of private property, thus government action on its face peculiar to war, and compensation-owing military procurement, in principle no different in peace or war.¹²⁹ Judgments about sources of power at the height of war may be just as vulnerable to the urgencies of the moment as judgments about the degree of constraint

125. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

126. But see *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). We remember the famous phrase—"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . ." *Id.* at 642. But in the *Barnette* case itself, the officials requiring the flag salute were state, not federal, and the Supreme Court's decision—as Justice Jackson carefully noted, see *id.* 638 & nn.17 & 18—was entirely consistent with relevant congressional actions. Arguably, the Court might have disposed of the case on the basis of constitutional preemption. See *Zschernig v. Miller*, 389 U.S. 429 (1968). My analysis does not require the erasure (in effect) of Justice Jackson's opinion, but it does call attention to the relatively "safe" context the case supplied Jackson for purposes of evoking the "many freedoms that we hold inviolable as to those in civilian life," *Barnette*, *supra*, 319 U.S. at 642 n.19.

127. 333 U.S. 138 (1948).

128. 327 U.S. 304 (1946).

129. Compare *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) and *United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (no compensation required) with *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) and *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

imposed by constitutional rights. This last conclusion suggests, if it suggests anything, the possible value of formally segregating war for purposes of constitutional law.¹³⁰ Nonmartial constitutional law, at least, has a chance to develop unimpeded by the implications of the extreme case.

The Cold War and the Vietnam War are the crucial contexts, however. It is enough to compare Justice Black's majority opinion in *Kahanamoku*, almost casually depicting centuries of commitment to marginalizing martial law,¹³¹ with the anti-Communist subversive organization cases decided only a few years later. Chief Justice Vinson's majority opinion in *American Communications Ass'n v. Douds* displays an obvious anxiety—"freedoms themselves are dependent upon the power of constitutional government to survive;"¹³² his plurality opinion in *Dennis v. United States* is similarly alarmed—"[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech."¹³³ Civil courts remain open (the issue in *Kahanamoku*), but First Amendment law is now being framed within the perceived necessities of a constructive state of siege.¹³⁴

It is enough as well to compare *United States v. O'Brien*¹³⁵ with *Texas v. Johnson*¹³⁶—the draft card burning and flag burning cases. *O'Brien* (or at least John Ely's reading of the case¹³⁷) supplies the organizing framework for Justice Brennan's opinion in *Johnson*.¹³⁸ Brennan, however, celebrates "the joust of principles" confident of the outcome—"nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag."¹³⁹ In *O'Brien* itself, Chief Justice Warren barely notes the Vietnam War, making one oblique reference to "the war,"¹⁴⁰ and the political protest out of which

130. Within Lobel's terms, therefore, my proposal is (in result at least) traditionally liberal. See Lobel, *supra* note 120.

131. See 327 U.S. at 319-24.

132. 339 U.S. 382, 394 (1950).

133. 341 U.S. 494, 509 (1951).

134. *Douds* and *Dennis* thus reversed the approach that Max Radin borrowed from Second and Third Republic France and recommended for United States use during World War II: "It expedites and simplifies procedure but it assumes the obligation to maintain law and the constitutional guaranties substantially intact." Max Radin, *Martial Law and the State of Siege*, 30 CAL. L. REV. 634, 640 (1942).

135. 391 U.S. 367 (1968).

136. 491 U.S. 397 (1989).

137. John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

138. See 491 U.S. at 403.

139. *Id.* at 418, 418-19.

140. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (quoting O'Brien's

the case arose.¹⁴¹ Much of the bulk of the opinion is a meditation on the vulnerabilities and needs of large record-keeping systems.¹⁴² Conscription, of course, is not a uniquely wartime exercise. Its requirements, however, are made to seem like substitutes for the questions that we might think that free speech jurisprudence would ask, questions aimed precisely at determining whether ordinary administrative rationality rather than specifically wartime management of dissent is the government's preoccupation-in-chief. It is as though, in order to demonstrate that the government's prohibition is not a response to political expression, the Supreme Court must censor itself. Or rather, we may suspect, juxtaposition of the war, political protest, criminal prosecution, and the government's clerical concerns might call attention to the difficulty of the Court's argument, its refusal to assign priorities to constitutional and bureaucratic values (or perhaps the priorities it actually does assign).

Douids, *Dennis*, and *O'Brien* are surely war cases. *Kahanamoku* and *Johnson* are not—certainly chronologically, decided respectively in 1946 and 1989, definitive *after* years. But even *Johnson* and *Kahanamoku* are not fully postliminial cases. Brennan knows who will win “the joust.” Black celebrates individual rights, but rights necessarily within (or the results of) government institutions. The Grotian picture is missing: *both* governments and individuals, *neither* achieving definite priority, *both* therefore complexly dealing with the other. If declarations of war mark a divide, in at least cases like *Douids*, *Dennis*, and *O'Brien* opinions would need to be written, and sometimes conclude, differently. This would not necessarily mean denying the reality of the risks to which the actual opinions pointed. But it might mean, as I suggested in the course of discussing *O'Brien*, demanding more of the government by way of proof of likelihoods, of assignments of probability as between minor and major manifestations of the risk, as well as some taking into account of the probability that government efforts would ultimately achieve their objectives. Alternatively, the impact on individuals ought to be equivalently writ large, the effects of suppression of dissent displayed at the same high level of magnification as the effects of subversion.

The Grotian account, outside war, supposes hard choices and sovereignty bargained away. It supposes, we would guess, that the aggregate results of such choices, judged *ex post*, would show no clear pattern of winners and losers as between governments and individuals. If this per-

characterization of his draft card burning as “in ‘demonstration against the war and against the draft’ ”).

141. *Id.* at 369.

142. *See id.* at 372-75, 378-82.

spective were part of our constitutional law (it would have to be if declarations of war were to be meaningful regime-switches), constitutional adjudication, in the pertinent cases, should end up similarly patternless.