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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

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Papers may engage with case studies, philosophical arguments or any other method that answers philosophical question applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

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All authors who submit to this edition will be provided with a complementary copy of the journal.

Length: Any length is acceptable, although readability to non-specialist is key.

Presentation Style: Papers must comply with the Australian Guide to Legal Citations, Second Edition published by the Melbourne University Law Review. An electronic edition is available at, http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf

Submission: You must submit electronically in Microsoft Word format to editor@jurisprudence.com.au. Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.

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Alternatively, the Journal is available online at www.jurisprudence.com.au and can be read there free of charge.

EDITORIAL

Since our last issue, I moved into new chambers in Melbourne. It has been a labour of love: We purchased Stawell Chambers in June and have undertaken a meticulous renovation of this landmark building since then. The building was built as the first home of the Victorian Bar Association and has been barristers chambers since its construction in 1890. Other than a brief period in the 1950s, Stawell has always been the home to members of the legal fraternity.

For me, it is interesting having 22 barristers as neighbours. Until now, my legal career has always been in the hall of academia. With this transplantation to the world of practice, I have the wonderful opportunity of new insights into how the professional world really works.

I observe that barristers are creatures of habit. It surprised me that few of them have computers and virtually none use digital research tools, like WestLaw or Lexis. Instead, couriers come everyday with stacks of briefs and printed case reports. This surprises me in so many ways, particularly because *The Journal Jurisprudence* is distributed both electronically and in print. The bulk of our readership is electronic, but we still receive old-fashioned cheques and distribute seemingly antiquated printed copies to all corners of the globe.

Four years ago, I created this journal to bridge the growing gap between theory and practice. In some small way, co-locating our offices with practitioners allows me to bring a bit of the academy to the real world.

There have been many small milestones in this journey, one of which is this new home. Another is the growing number of citations our journal has received in judicial opinions and academic writing. I notice that more universities have articles from our journal as required reading, which truly gives credence to the task we have undertaken.

Dr Aron Ping D'Souza

Melbourne, Australia

23 February 2011

**AMERICANS' UNWILLINGNESS TO PAY TAXES BEFORE THE AMERICAN
REVOLUTION: AN UNCOMFORTABLE LEGACY**

Richard A. Westin
Professor, University of Kentucky Law School

"Like mothers, taxes are often misunderstood, but seldom forgotten." — Lord Bramwell, 19th Century English jurist

Introduction¹

When one reflects on the sorry condition of America's finances one has to wonder why there is such resistance to fiscal discipline. Is it merely because there is an obstreperous group in the US Congress who cannot abide any tax? Has the public been subtly lobbied into believing that American taxes are high, pointless and intolerable or is there some gene in the America's body politic that has always been there that expresses itself from time to time in a pernicious cheapness? Perhaps all those things are true, or perhaps none. Nevertheless, a glance backward at Colonial days can stimulate a sense of déjà-vu.

In writing this article I relied primarily on the writings of the American historian Lawrence Gipson, who wrote extensively on the New World in the Eighteenth Century. He undoubtedly has his own prejudices, but his pedigree seems impeccable.² The other main reliance was on Arthur Schlesinger, who closely studied the role of the colonial merchants in American Revolution.³

THE BACKGROUND: WAR AND THE EXHAUSTION OF REVENUES

When the "Great War for the Empire" (often incorrectly referred to as the "Seven Years War")⁴ ended in 1763, Great Britain was deeply in debt, but was ceded some first rate real estate, namely Canada. The war itself had been conducted on a global scale, including the French and Indian Wars in North America, and it took two

¹ My thanks to Professor Stephen Vasek for his guidance in researching and writing this article.

² Dr. Lawrence Henry Gipson was a member of the "Imperial School" of historians. He was born in Greely, Colorado, and was one of the first Rhodes Scholars. He earned degrees at the University of Idaho and Oxford and is famous for his 15-volumb study entitled "The British Empire" which includes detailed coverage of the colonies in North America and The Caribbean. He won the Pulitzer Prize in 1962 for the volume entitled "The Triumphant Empire." He died in 1971.

³ History is subject to interpretation, and is generally written by the winners. For a list and brief description other historical theories concerning the American Revolution see Gipson v. 13.

⁴ Vol. 13, p. 187. That war was a German operation.

separate treaties to terminate hostilities (the treaty of Paris and the treaty of Hubertusburg. Every major power in Europe participated in the war, and on a vast geographical scale that included hostilities along the African Coast, in Central and North America, India and the Philippines, all at great expense to the participants. The explanation of the origins of the of the War are exceptionally intricate and unmemorable.

The Great War included our French and Indian War, which pitted Britain against France in the New World. The colonists, especially from Massachusetts and Connecticut, contributed money and troops to the effort and after the war Britain reimbursed the colonies £ 1,072, 783, a third of which went to Massachusetts in light of its proportionately greater contribution. This roughly halved the war debts of the Colonies. Gipson described this British largesse as “unprecedented” in the sense that it was apparently the first time in modern history that a parent state reimbursed its colonies for such expenditures. On the other hand, Britain evidently imposed a one shilling per pound tax on tea imported into the American colonies⁵.

When the smoke of war cleared, Britain’s public debt was a then staggering sum of £146,000,000, and called for annual interest payments of £4,700,000 which left the British citizenry “with little prospect of reducing the heavy load of taxation.”⁶ On the other hand, the War had brought

“unprecedented prosperity” to the colonies, even great fortunes, because of the “shipment of vast sums of . . .specie from England to America, not only as pay for the soldiers, teamsters, army pioneers, bateau-men, and others, but also for the purchase at good prices of enormous quantities of food, supplies and other things needed for carrying on the war”⁷

There were other effects as well, all of which presented some peril for Britain; the American colonies soon emerged as an economic powerhouse, soon out-producing Britain in, ships and steel because of its natural advantages. There was a

⁵ Lawrence Henry Gipson, *The British Empire Before the American Revolution: The Triumphant Empire: Thunder-Clouds Gather in the West 1763-1766* Vol. X, p. 54 n. 1 (1965) (1 shilling per pound in the Massachusetts Bay Colony). In Great Britain, in the 1760's there was almost a 100% face value tax on imported tea. This was comprised of a 25% import tax on face value plus an additional excise of 25% plus 1 shilling per pound for tea sold for domestic consumption. Benjamin Woods Labaree, *The Boston Tea Party* 6 (Oxford University Press, 2d printing, 1968).

⁶ Gipson, Vol 13, p. 188.

⁷.” L. Gipson, *A VIEW OF THE THIRTEEN COLONIES AT THE CLOSE OF THE GREAT WAR FOR EMPIRE*, p.4 (monograph, reprinted from *New York History* , October 1959 (presentation of Canadian Historical association).

corps of hardened military veterans who could fight another war, and the colonists developed a stronger sense of solidarity, referring to themselves as “Americans” for the first time.⁸ Gipson describes the Americans as people “who had become the freest, most enlightened, most prosperous, and most politically experienced of all the colonials in the world” and he considered the very fact that blatantly subversive writing such as Jefferson’s *Summary Views of the rights of British America*, which preached that all efforts of Parliament to regulate the colonies were acts “of arbitrary power. . . over those States” could freely circulate showed that Britain ruled with a very light hand indeed.⁹

Finally, many newspapers had spring up, including the highly inflammatory *Boston Gazette and Country Journal* which presumably did well financially selling newsprint that fanned the flames of anti-British indignation in New England.

THE STAMP ACT

After subduing the French, the British felt obliged to maintain seven thousand troops along the frontier to protect American (and indirectly British) interests from fresh trouble. In 1765 the British projected the costs at £300,000 of which it expected America and the West Indies to contribute £100,000 by means of stamps and other duties; it appears that the £100,000 could well result in no drainage of currency in the sense that the money would be disbursed in America.¹⁰ By this accounting, Britain was a generous master and the Americans were mean-spirited ingrates in resisting their contribution. As one American historian put it, “the colonial militia did not find border garrison duty to its liking,”¹¹ so they left the dirty work to the British.

This revenue need led to the short-lived Stamp Act of 1765¹² which declared that various printed materials distributed in North America be produced on stamped paper made in London and bearing an embossed revenue stamp. The tax reached magazines, newspapers, legal documents and a variety of paper used throughout the colonies and was payable solely in British currency. This was not a novel form of taxation. The first stamp act was passed in 1670 “laying Impositions on

⁸ .Id., p.5-7 (monograph, reprinted from *New York History* , October 1959 (presentation to Canadian Historical association).

⁹ Gipson, Vol 13, p. 203-5 (“British indulgence and the flowering within the Empire of ideas of English liberty.”)

¹⁰ L. Gipson, *AMERICAN LOYALIST: JARRED INGERSOLL*, p. 161 (Yale 1971). (The book Chronicles the life and times of a Connecticut resident with moderate Loyalist leanings who was in the thick of the uproar that led to the American Revolution.)

¹¹ Benjamin Labaree, *THE BOSTON TEA PARTY*, p.16 (Oxford. Univ. Press 1964) (“Labaree”).

¹² Duties in American Colonies Act 1765, 5 George III, c. 12

Proceedings at Law”¹³ and was extended in 1694 via Parliament’s “Act for granting to Their Majesties several Duties upon Vellum, Parchment and Paper.”¹⁴ These taxes were limited to taxpayers in England, Wales and (believe it or not) the Town of Berwick Upon Tweed. In light of the long-standing domestic stamp taxes in Britain, Americans claiming the rights of Englishmen could hardly claim to be stunned by the extension of the century old tax to them.

The new Stamp Tax was slow to be enacted. George Grenville, who bore the imposing title “First Lord Commissioner of the Treasury and Chancellor the Exchequer,” presented the bill to Parliament in early 1764, but the House of Commons had serious reservations about it. Although Parliament had previously satisfied itself that it was lawful to impose a tax on unrepresented colonists, there were “many members warmly opposing it” and it was deferred until the next session of Parliament. The problem Parliament balked at was that the tax was “internal” to the colonies as opposed to an “external” tax in the form of import duties.¹⁵ Interestingly, Ben Franklin – later a firm supporter of the Revolution -- considered that if the colonies had to raise revenues, they would likely enact a “stamp Act, an Excise on Rum, etc.- or both...”¹⁶ Grenville himself was no drunken lord. According to writing of the day:

“Grenville, according to Maudit, sought to introduce a new constitutional principle in parliamentary legislation: namely, that the [colonial government] assemblies should signify their assent to a plan for raising a revenue in America and “should have the privilege of requesting any particular modification of it as they should think fit.”

Of course, the “privilege” of requesting changes is a long step from conditioning legislation on consent of the colonial assemblies.

Grenville also saw the tax as “an Equitable and fair contribution to the whole” and considered that it “will lay the burden principally upon Luxury, Law-Suits, etc. where it ought to fall.” Even with the projected revenues from the tax, the British would still pay the bulk of the cost of defending the Colonies and the money raised would in be recycled within the Colonies as a result of the payments to support the troops, and the Stamp Tax rates were much lower than those in Britain and documents that would otherwise have to be stamped in Britain were exempt.¹⁷

¹³ 22 and 23 Charles II, c.9.

¹⁴ 5 William and Mary, c.21.

¹⁵ L. Gipson, Vol. X, p.258.

¹⁶ Id. P.. 261.

¹⁷ Id., p.276.

The American reaction to the Stamp Tax was overwhelmingly negative for a number of reasons that Gipson traced, while declaring that understanding the entire issue is “one of the most difficult tasks that faces the student of American colonial history.”¹⁸

He identified three basic reasons. First, there were shifting constitutional claims. Initially, colonial thinking accepted Britain’s import duties and a tax on sailors to support Greenwich hospital on the theory that those were “external taxes” and that internal taxes were unacceptable, but later this shifted to the impermissibility of any taxes emanating from London. A second reason was the colonists’ growing sense of separate identity as a social group which manifested itself in resistance to being governed from abroad. The third reason, resistance to any tax, was set in a context of a weak economy, with people being cast into debtors’ prisons and political radicals pushing aside “slow-moving moderates.”¹⁹ This was exacerbated by the ugly fact that some people would profit from being granted the right to make money distributing the stamps.

Others likened the Stamp Tax to bondage and to the colonists as Israelites under the thumb of Egypt. By way of example, the *New Haven Gazette* printed this rant against the Act and its beneficiaries:²⁰

“I must take leave positively to declare that all measures prejudicial to the interests of America, ever taken, have not only been proposed but even warmly received by mean, mercenary Hirelings, Parricides among yourselves who for a little filthy Lucre would at any time betray every Right, Liberty and Privilege of their fellow subjects”

This was surely not the reaction the avuncular Grenville would have expected. Unfortunately for Britain, the timing of the tax was exceptionally poor in that the colonies were going through a temporary economic crisis and were unable to collect their own taxes,²¹ largely because the artificial economic prosperity created by the war ceased when the war ended and lavish military spending dried up.²² Buoyant prosperity returned in 1770.²³

¹⁸ L. Gipson, *AMERICAN LOYALIST: JARRED INGERSOLL*, p. 149 (Yale 1971).

¹⁹ *Id.* p. 153.

²⁰ *Connecticut Gazette*, August 9, 1765, supplement, reported in L. Gipson, *AMERICAN LOYALIST: JARRED INGERSOLL*, p. 155 (Yale 1971).

²¹ L. Gipson, *AMERICAN LOYALIST: JARRED INGERSOLL*, p. 154-155 (Yale 1971) discussing Connecticut.

²² See Arthur M Schlesinger, *COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION: 1763-1776*. 56-67 (Frederick Ungar Pub. Co. 1964) (“Schlesinger”). There were
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Britain's finances were initially in the same sorry condition because of the recent world war. In any case, the Stamp Tax was repealed on March 18, 1766 largely because it was a failure at raising revenue thanks to populist intimidation of the collectors of the tax.²⁴ Parliament bungled the repeal in that the public relations benefits that accompanied the repeal of the tax were cancelled when Parliament simultaneously reaffirmed its legislative powers over the colonies in the Declaratory Resolution, which led to further apprehension in America because an earlier law called the Declaratory Act enabled Britain's control of Ireland.²⁵

To sum it up, radicals in the colonies succeeded in killing off a modest tax that was thoughtfully devised for a cause that overwhelmingly benefitted the colonists. In modern parlance, they ate the Crown's lunch. The fiscal problem remained, however, because the seven thousand troops still had to be paid to protect increasingly ill-tempered colonists. Administration of the American colonies was not cheap either.

THE EMPIRE STRIKES BACK: THE TOWNSHEND ACTS

Britain's next step, under the guidance of Chancellor of the Exchequer Charles Townshend²⁶, was to enact five laws²⁷ collectively known as the Townshend Acts. Their natures were mixed, but their vital purposes were to raise revenue in the colonies to pay the salaries of governors and judges so that they would be independent of financial reliance on local legislatures,²⁸ and to increase the efficiency of trade regulations, including combating smuggling.²⁹

other reasons for the economic decline, including restrictive legislation in 1764. One needs to keep in mind that in those days, defaulting debtors faced prison for nonpayment, so the pain from economic depression could be intense and therefore greatly feared. Laying a tax at such a moment was bad timing in terms of potential animosity of the Colonists.

²³ Id.. 250-242.

²⁴ Id. pp. 56-57, He considered the chief cause of the economic decline was restrictive trade legislation of 1774. Id. P. 56.

²⁵ http://en.wikipedia.org/wiki/Declaratory_Act (retrieved August 13, 2011).

²⁶ Townshend died in September of 1767 at the age of 42, which freed him from witnessing the dramatic failure of the Acts.

²⁷ The Revenue Act of 1767, the Commissioners of Customs Act, the Vice Admiralty Court Act, the Indemnity Act, and the New York Restraining Act to punish [New York](#) for failing to comply with the 1765 [Quartering Act](#) was designed to meet a temporary emergency. Schlesinger, p.93.

²⁸ Revenue Act of 1767, 7 Geo. III ch. 46.

²⁹ The Commissioners of Customs Act of 1767 set up the American Board of Customs Commissioners, an enforcement body, which was similar to the [British Board of Customs](#). It attracted much hostility.

On February 18, 1767 the House of Parliament approved a bill for £315,917.16.5 “toward defraying the extraordinary expenses of His Majesty’s land forces [in America] and other services up to February 3.”³⁰ America was annoyingly expensive to protect. According to a contemporaneous letter of Grenville’s:

“Nothing has yet been done or is likely to be done . . . except voting vast Sums of money to be raised upon Great Britain in order to ease America from the Burthen of Contributing any thing to her own Support, but however we may look upon the Question within Doors [of Parliament] the Tide out of Doors, seems very strong & universally turning the other way.”³¹

The Revenue Act component bowed to colonial constitutional claims that only external taxes were permissible by imposing import duties on various items, such as glass, certain paints, papers and tea and staying away from taxation beyond the point of importation, with the intention of raising a modest £ 40,000 pounds to pay for American administration and defense, and to be spent in America.. Britain repealed its heavy tax on imported tea³² and replaced some of the lost revenue with a three penny per pound tax imposed as an import duty on the colonies. The new model was supposed to allow British tea to undercut the price of smuggled tea, and was buttressed with stronger powers to combat smuggling, including hiring more customs officers, granting customs officials broad authority to search houses, break open doors and chests and seize smuggled goods.³³

Canada responded to the Acts with a yawn. Nova Scotia³⁴ was thriving economically and Quebec seemed not to care.³⁵ In fact, when the First Continental Congress invited Nova Scotia to participate in separation talks it did not even bother to send a delegate.³⁶

³⁰ Gipson, Vol. 11, p. 101.

³¹ Letter to Simon Fraser, Grenville Letter Book, Vol. 2, Huntington Library.

³² Indemnity Act of 1767, 7 Geo. III ch. 56. The tax was one shilling per pound. Gipson, Vol. XI, p.111. Among other things, it was hoped that this act would help support the finances of the East India Company, and entity that might nowadays be described as a government-private partnership with geopolitical overtones.

³³ Schlesinger p. 84.

³⁴ The jurisdiction was much larger then because it included New Brunswick and Prince Edward Island. Gipson, Vol. 13, p.133.

³⁵ Gipson vol. 13, p. 207. Gipson reports that the people of Quebec were dispirited by the King of France’s turning his back on them. Evidently this made them less quarrelsome.

³⁶ Gipson v. 13, p. 135. The invitation was to a second meeting of the Continental Congress in Philadelphia in 1775, Nova Scotia sought neutrality for various reasons, including economics and lack of identification with evolutionary ideas. Id.135-138.

Americans at least partly countered the taxes on items other than tea by making them in America.³⁷ Tea was another matter. Before the Townshend Acts changed things, Americans paid much lower taxes than Britons for their tea. Britain formerly levied inland duties plus a one shilling (12 pence) tax per pound of “black and Singlo tea,” but the one shilling tax was rebated (eliminated) on export and replaced with an export tax, making it much cheaper than tea sipped in Britain, although not untaxed.³⁸

The Townshend Act’s low tax rates were a boon to consumers and the bane of Northern merchants. From their point of view they were already burdened by restrictive British trade policies,³⁹ but made a good living selling tea smuggled from Holland and elsewhere.⁴⁰ “Elsewhere” included distant ports such as Madeira, a source of wines to traffic in.

John Hancock’s ship, *Liberty*, was in that smuggling trade at least once. (Hancock was the merchant prince of Boston.) In May, 1768 customs officials in Boston sequestered the ship and towed it out into the harbor under the guns of the *HMS Romney*, a ship known for forcibly impressing seamen, which led to a local riot, which included assaults on customs officers and a completely ineffectual effort at prosecution.⁴¹ The frustrated governor later made what Schlesinger calls a “bad tactical error” when he sent troops to Boston in reaction to the event.⁴²

Smuggling tea began to thrive again a few years later when the East India Company raised the price of tea, making smuggled tea competitive.⁴³ There was popular sympathy for the smugglers, and people who informed on them ran the

³⁷ Schlesinger p. 97. Smuggling of molasses, once very active declined, when Britain dropped the tax on molasses as part of the Townshend Acts. Id.

³⁸ Gipson. Vol. XI, p. 111. Historians seem to differ on the base and rate of the tax. It appears that tea imported from England bore a one shilling per pound tax burden. It may have taken the form of an export tax.

³⁹ Also known as the Staple(s) Act. For example, the Navigation Act of 1663 forced all European goods for the colonies to be initially shipped to Britain.. There numerous cumulative acts that amounted to the Navigation Acts.

⁴⁰ Schlesinger p. 103.

⁴¹ Schlesinger p. 103.

⁴² Schlesinger 104. The worst incident by far was the Boston Massacre in March of 1771, a skirmish in which Captain Preston’s over-anxious troops who were taunted by a crowd throwing ice balls at them caused the deaths of five and injuries to six others, opportune grist for the ideological mills of San Adams, Paul Revere and others. Two of the troops involved were found guilty by a local jury and the rest were acquitted thanks to the advocacy of John Adams. General Gage removed the troops.

⁴³ Schlesinger p. 98. Hancock was an exceptionally wealthy Boston merchant.

risk of being tarred and feathered.⁴⁴ In July of 1769 the British revenue cutter *Liberty* was burned, and in 1772 the unpopular revenue cutter *Gaspee*, which ran aground near Providence, was attacked by a rich merchant, a sea captain and an undefined mob, and set fire to. The chief justice of Rhode Island, John Brown, an ex-smuggler himself, headed a commission of inquiry, but it got nowhere because no one would inform on the participants in the affair.⁴⁵ The British later cut back on the use of revenue cutters and their seizures dropped by almost 60%.⁴⁶

According to Schlesinger's analysis, the colonial merchants – who had faced financial ruin from the 1764-1765 Parliamentary legislation -- became “the instigators of the first discontents.” Later, they found themselves shocked by the excesses of the mobs which their own agitation had spawned and retreated from stirring up blue-collar revolutionaries.⁴⁷ The later Tea Act threatened them with a monopoly and the majority of them responded by joining with the radicals, although most Boston merchants remained on the side of the Crown.

In April, 1770 Britain gave up and repealed the revenue provisions of the Townsend Acts, except for the small duty on tea. A great deal of the reason for repeal was that the merchants' collaborative and self-serving non-importation agreements that resulted in slashing British imports by 1769.

According to Schlesinger, the merchants returned to their satisfying work, leaving the radicals without a compelling issue or an organization divorced from the control of the merchant class. However, he reported that, “the home government supplied promising material [for the compelling issue] for the first time when the report reached Boston in . . . 1772 “ with the announcement that judges salaries would be paid from out of customs revenue. “No propagandist ever utilized and opportunity more dexterously than Samuel Adams on this occasion.”⁴⁸ Adams exhortations included the following diatribe against Americans paying judges' salaries. It starts with an objection to the merchants who allegedly:

⁴⁴ Schlesinger 100-101. He cites four instances as illustrations, including one case involving a tide watcher (port customs officer) in Providence.

⁴⁵ Schlesinger 252-3. There were reportedly over 1,000 witnesses.

⁴⁶ Schlesinger p.253

⁴⁷ Adams described meeting with a knot of ‘Sons of Liberty’ in a the counting room of a distillery, he found there two distillers, a ship's captain, the “printer of the popular organ,” and four mechanics. Schlesinger p. 72. The Sons of Liberty were especially voluble in their indignation at Britain.

⁴⁸ Schlesinger pp. 254-5. For example, Hancock, a patron of Sam Adams stopped promoting the antiparliamentary movement, to preserve his business interests, and on occasion threw his influence against Sam Adams

“have passively submitted to the Indignity of a Tribute; and the Landholders, tho’ sharers in the Indignity, have been perhaps too unconcern’d Spectators of the humiliating Scene . . . Had the body of the People shown a proper Resentment, at the time when the proud Taskmasters first made their appearance, we should never have seen Pensioners multiplying like the locusts of Egypt . . . Is it not High Time for the People of this Country explicitly to declare, whether they will be Freemen or Slaves? . . . Let it be the topic of conversation in every social Club . . . Let every Town assemble. Let Associations & Combinations be everywhere set up to consult and recover our just Rights.”⁴⁹

Governor Hutchinson, an American,⁵⁰ did not think much of the opposition’s character. They are, he wrote privately:

“Constituted of the lowest class of the people under the influence of a few of a higher class, but of intemperate and furious dispositions and of desperate fortunes. Men of property and of the best character have deserted their meetings, where they are sure of being affronted.”⁵¹

One curiosity of the writings of the era is the apparent absence of a vocal centrist group in America that spoke up for the honest point that the colonies’ defense and British administration were costly and had economic value and that it was reasonable for the British to ask for a modest contribution. Instead, the unstated American position seems to have been that its residents were entitled to all the rights of Britons, but should be exempt from taxes and should have the right to smuggle whatever was exposed to being taxed, especially cheap tea from Holland, their favorite stimulant.

⁴⁹ Schlesinger quotation at p. 256, from *Sam Adams Writing (Cushing)*, vol. ii, pp.332-337.

⁵⁰ Thomas Hutchinson, born in Boston to a family of 12 children, of a well-off merchant family, started off as a businessman. He had an affection for his collection of colonial historical documents, many of which were destroyed in a mob attack on his house that did great damage and included thefts, including of the cupola. The mob attack was based on charges of nepotism arising from his brother having been appointed a stamp collector. Thomas Hutchinson graduated from Harvard (Class of ‘27) at 16. As Governor, he advised Lord North to adopt moderate policy towards the colonies.

⁵¹ Schlesinger 256, citing Hutchinson’s letters.

THE BOSTON TEA PARTY

Parliament passed the Tea Act on May 10, 1773⁵² in order to help salvage the East India Company from bankruptcy and to allow it to dispose of a huge inventory of unsold tea sitting in London. It had nothing to do with taxes.⁵³ The three penny per pound tax remained in place and there was a full rebate of British taxes.⁵⁴

The legislative plan was to ship the tea to the colonies, and sell it at a low price. This posed a serious risk to the colonial merchant class because the new law allowed the Company to cut out both British exporters, who formerly bought tea at wholesale auctions, and American importers who bought from the British wholesalers. In effect, the Company stood to sell direct to American retailers via its consignees, allowing the American consumer to cut out the profits of two sets of former middlemen. The merchants recognized the risks to themselves immediately; this tea would undercut contraband Dutch tea while cutting them out of the Indian tea trade. According to Schlesinger, provocative behavior of propagandists in the chief smuggling ports – Boston, New York, and Philadelphia – broadened the basis of popular protest by invoking old arguments against the taxing authority of Parliament and invented “new and bizarre arguments.”⁵⁵

In the initial phase the newspapers generally decried the merchant’s losses, including to the lucrative smuggling trade and portrayed the East India Company as a monstrous conspiracy. The loyalists writers saw the real cabal as the collusive merchants “stirring up an odium against the [East India Company being] the main point at which they have labored.” The merchants most persuasive argument was that the tea monopoly was just the opening wedge of a strategy that would wipe out the entire domestic merchant class, which would be followed – once the Company had the monopoly it sought – by other imposts and crippling price increases.⁵⁶ This effort to induce paranoia included allegations that the Tea Act eliminated the 3 pence/pound tea duty in order to further undercut local

⁵² 13 George III, c.44.

⁵³ The existing Tea Tax yielded pitiful revenues. Ben Franklin calculated a net revenue after expenses of enforcement of £85 in 1772. Schlesinger at p.26, citing Franklin, *Writings* (A. H. Smyth, vol.v., p. 460, vol. vi, pp.2-3.

⁵⁴ Schlesinger p.263. The difference from prior law was that the East India Company would not be liable for shortfalls in revenue. Id.

⁵⁵ Schlesinger p.265.

⁵⁶ For example, according to the N.Y. Journal of Nov. 4, 1773 (from Schlesinger p. 271-272). Regardless of whether there was an import duty, “The scheme appears too big with mischievous consequences and dangers to Americans . . . as it may create a monopoly; or, as it may introduce a monster, too powerful for us to control, or contend with, and too rapacious, and destructive, to be trusted, or even seen without horror, that may be able to devour every branch of our commerce, drain us of all our property and substance, and wantonly leave us to perish by thousands...”

competition. On learning that the duty was still in place, the anger at not being taxed was followed by radical fury at being taxed without consent. Schlesinger considered the latter objection was “for rhetorical effect,” partly because tea revenues were only about 25% of total revenues, with the other 75% coming from sugar, molasses and wine, about which there was no complaint. At the absurd end of the rhetoric were claims that the Company had impoverished and killed seemingly endless Asians, that tea was a health hazard (inducing dropsy, etc.) and caused in the entire populace a general malaise. Not everyone agreed. The small town of Hinsdale, New Hampshire saw through the folly and declared it would banish tea as soon as” the towns and persons who declaimed it so loudly against the tea should abstain from the use of rum,” which they considered much more pernicious. This state of affairs is the stage on which the theater of Boston Tea Party was performed.⁵⁷

The “Tea Party”⁵⁸ was not America’s finest hour, although it has reached mythical proportions as an anti-tax rallying point. The essential facts were that on December 16, 1773 a mob of men forcibly boarded three ships in Boston Harbor carrying tea destined for Boston, and which Governor Hutchinson refused to be coerced into returning to Britain.

The circumstances preceding the destruction of the tea were that the owner of the tea-laden *Dartmouth*, Francis Rotch, had been forced into an impossible predicament. On the 14th of December he capitulated to colonial coercion a meeting of assemblies of several towns in Boston that he return to Britain with his ship and cargo. On the 16th the assemblies, suspicious of his delay⁵⁹, summoned him to appear and justify the continuing presence of the *Dartmouth*⁶⁰ in Boston. His explanation was that despite his efforts, the colonial authorities would not release the ship and Rotch necessarily refused to sail the ship back to Britain. Next, according to the *Boston Evening-Post*, the assembled persons at the meeting house, “[h]aving manifested a exemplary patience and caution in the method it had pursued to preserve the Tea, the property of the East India Company, without its being made saleable among us, which must have been fatal to the Common-

⁵⁷ Schlesinger pp.262-278 (content of the paragraph in general).

⁵⁸ Initially known as the “destruction of the tea” and apparently not called the “Tea Party” until some point in the 19th Century.

⁵⁹ The delay was bureaucratic. He needed a departure clearance which he tried for but was met with dithering. Interestingly, the British concocted a face-saving plan whereby Rotch would sail out and suffer a shot across the *Dartmouth*’s bow, after which the British impound it. Rotch balked because, he said, he could not find a crew for the task. Benjamin Labaree, *THE BOSTON TEA PARTY*, 140 (Oxford 1964).

⁶⁰ Also the name of a college in New Hampshire originally founded to educate native Americans.

Wealth”⁶¹ dissolved the meeting, which was apparently held in Old South Church.⁶²

Shortly thereafter a band of men thinly disguised as Mohawk Indians wearing blankets and brandishing hatchets, emerged from the building occupied by the radical *Boston Gazette*, shouting war whoops and, as we all know, forced they way aboard the offending vessels and dumped the ships’ tea worth £15,000 into the harbor. According to Gipson, “[it] was clear that all preparations for the boarding were carefully planned.”⁶³ The “Mohawks” then, still disciplined, marched through Boston with fifes and drums before dispersing.

So who was in the mob that swarmed the boats? We know that merchants selling smuggled tea had a stake in game as did legitimate importers who faced financial loss, if not ruin, from being cut out of the opportunity to take wholesale tea from Britain. Consumers benefitted from the Tea Act, so their stake was ideological and individualistic. By one slippery account fed to the government, they were people “from the country.”⁶⁴ Governor Hutchinson wrote that he was unable to get any account from the members of the assembly, although we do know that “many people of property” were at the assembly meetings, so the identity of the men who poured onto the dock “from the country” in addition to local hotheads⁶⁵ drunk on constitutional theories, could reasonably have included some offended merchants. A Web site founded by the present-day Tea Party confidently claims, with no stated authority, that two-thirds of those whose ages were known were under 20, including 16 teenagers and was a thoroughly mixed group, of whom only two were over 40.⁶⁶ Historian Arthur Schlesinger was much more cautious as to the numbers, and more concrete as to the role of colonial merchants. He found 15 of them “of the more radical stamp” among the mob, toiling “side by side with

⁶¹ Boston Evening-Post, December 20, 1773.

⁶² Benjamin Labaree, *THE BOSTON TEA PARTY*, p.136 (Oxford. Univ. Press 1964). By then he had the advice of his lawyers, who included John Adams.

⁶³ Gipson, Vol XII, p.82.

⁶⁴ Gipson,, p.83 (Knopf, 1961) (account of selectman John Scollay). A fourth ship destined for Boston and the same ignominious fate was grounded in a storm off the coast.

5. Id. p.85.

⁶⁵ A specific example from an unreliable source is that it includes Thomas Crafts, a decorative housepainter, vegetarian, member of the Sons of Liberty and a Mason, like many other Sons of Liberty. Boston Tea Party Historical Society, <http://www.boston-tea-party.org/>, (retrieved September 15, 2011), evidently a lifeless front for the present day Tea Party.

⁶⁶ Boston Tea Party Historical Society, <http://www.boston-tea-party.org/>, (retrieved September 15, 2011). The site puts the total number in the mob at over 150.

carpenters, masons, farmers, blacksmiths and barbers,”⁶⁷ not to mention the alleged swarming teenagers described at the Tea Party site. Paul Revere was among them.⁶⁸ If one accepts the Tea Party Website’s claim of 173 Mohawks⁶⁹, and eliminates the teenagers on the grounds of being younger than the age of reason, the result is 15 merchants and 43 others.

What we do know is that it was colonial merchants and not consumers who had the most to gain in the material world by the incendiary act of destroying the tea. A illustrative letter from a member of the Council,⁷⁰ Isaac Royall, to the Earl of Dartmouth pins the blame for civil disorder on the merchants. Royall asserted the local population was thoroughly loyal, and that the problem lay with depraved merchants (and presumably their British protectors) in the colonies. The colonists, he wrote, were:

“Zealously tenacious of their inestimable Charter Rights and Privileges which they apprehend , , , have been greatly infring’d and broken in upon through the Machinations and Misrepresentations . . . from persons on this side of the Atlantic, who, from an Insatiable Thirst after Power and Gain, are far from seeking the welfare of Great Britain and her Colonies.”⁷¹

A few immediate impacts of this destruction of the tea, which was only one of a number of provocations by colonial radicals, including a sharp increase in the price of smuggled tea that nearly led to riots in Philadelphia that were averted by a committee of investigation that forced tea merchants to reduce their prices.⁷²

AFTERMATH⁷³

Britain’s administration, headed by Lord North responded punitively by securing Parliamentary legislation that closed the Port of Boston until the East India Company received reparations, assurances were obtained that trade would be carried lawfully and that custom duties would be collected. Edmund Burke, the

⁶⁷ See Arthur M Schlesinger, *COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION: 1763-1776*. 56-67 (Frederick Ungar Pub. Co. 1964).

⁶⁸ Labaree, , p. 72 (Oxford 1964). Labaree places John Hancock ashore, along with Sam Adams, ⁶⁹ I might have miscounted. The list is slightly sloppy.

⁷⁰ The Council was a long-standing eight-member institution that was in effect selected by the Crown but represented the interests of the colonists. It acted as advisor t the governor and had some limited powers.

⁷¹ Gipson, Vol XII, p. 85. Royall then went on the contrast the current administration with the previous ”more mild and prudent” one.

⁷² Schlesinger p. 290.

⁷³ What follows is largely cribbed from Carl T, Bogus, *Rescuing Burke*, 72 *Mo. L. Rev.* 387 (2007) (makes case that Edmund Burke was not a conservative in the modern sense).

political philosopher and member of Parliament, prudently counseled against the instinct to retaliate and pointed out the great risks to trade if harsher policies were to backfire,⁷⁴ including the risk of animosity, warning that, “[i]f punishment is not just but rigorous it is a double Cause of Complaint,” and went on to declare that “[e]very punishment is unjust that is inflicted on a party unheard.”⁷⁵ Hotter heads prevailed. The port was shut and Parliament enacted the Coercive Acts that included repeal of the Massachusetts Bay Colony’s right to select governmental members and to convene town meetings. More ominously, the new law granted the Crown the right try alleged criminals in England, and made the highly offensive practice of billeting British soldiers in colonial homes possible.⁷⁶

In due course war followed, and as Arthur Schlesinger put it, the northern merchant class became passive spectators or secret abettors of the British and “had the mournful satisfaction, when the war was closed, of finding their worst fears confirmed in the inefficient government which the radicals established and in the enfeebled state of American commerce and business at home and abroad.”⁷⁷ Ultimately, he reports in a twist one would not expect, they “drew together” in an effort to found a new government that would protect their interests, and thus:

“[O]nce more united, the mercantile interests became a potent factor in the conservative counter-revolution that led to the establishment of the United States Constitution.”

So, once the hysteria was over, there was a new country, which – having turned its back on any duty to pay for its own defense or administration -- now had to pay its own bills, and is once again inflamed by radicals to refuse to pay its bills.

Reflecting on the events, one is led to wonder, are there countries which we provide with expensive defense forces that decline to pay us? Are “merchants” whipping up our congenital hot heads? Is smuggling part of our heritage? Is our willingness to overlook important debts, such as future federal pension liabilities, tied to a collective private unwillingness to pay taxes? Is the private unwillingness based in part on revisionist history of pre-Revolutionary popular resistance to taxes? If the American Colonies had been granted a few seats in Parliament, would there be no United States, or would radicals have found more reasons for national indignation, or do empires crumble naturally anyway, inexorably releasing their colonies?

⁷⁴ Barbara W. Tuchman, *THE MARCH OF FOLLY* 196 (1984).

⁷⁵ Conor Cruise O'Brien, *THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE* 3 at 137. (1992) (excerpted from speech in House of Commons).

⁷⁶ Bogus, at 429.

⁷⁷ Schlesinger, pp56-67.

**RAWLS'S PRINCIPLES OF JUSTICE AND NONIDEAL
CASES OF RELIGIOUS PRACTICE AND CORPORATE PARTICIPATION**

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I. INTRODUCTION

In the first chapter of *A Theory of Justice*, Rawls explains his aim of presenting a conception of justice that “generalizes and carries to a higher level of abstraction the familiar theory of the social contract:”¹

In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement.²

Somewhat later, Rawls describes the crucial backdrop for the original contract:

I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate the principles solely on the basis of general considerations.³

In this paper I examine Rawls’s conception of justice in a different light: I apply his principles of justice in the context of an actual society with actual problems. Like many systematic philosophical theories, Rawls’s conception of justice presents a purely hypothetical starting point that begins a sort of domino effect, culminating in an abstract—or ideal—conception of justice.⁴ The principles agreed upon in the original position control everything that follows the original contract, seemingly making criticism possible only after those principles have been implemented in the context of the original position. From this perspective, it may not be sensible in every case to pick and choose from Rawls’s individual concepts (*e.g.*, first principle, difference principle) and apply them to actual problems in an actual, nonideal society that has not agreed to Rawls’s propositions. However, the hypothetical nature of the original position does permit one to return behind the

¹ JOHN RAWLS, *A THEORY OF JUSTICE* 10 (Harvard University Press 2003) (1971).

² *Id.*

³ *Id.* at 118.

⁴ *See id.* at 215 (“Arranged in...[lexical] order, the principles define then a perfectly just scheme; they belong to ideal theory and set up an aim to guide the course of social reform.”).

veil, so to speak, in an attempt to apply and clarify Rawls's ideal conception of justice in the context of a particular society.

I will examine two specific societal issues under Rawls's principles of justice: freedom of religious practice and corporate political participation and distribution. In the first case I argue that Rawls's first principle of justice opposes a government's restriction of a person wearing conspicuous religious symbols in public places, and in the second case I argue that Rawls's difference principle is in accord with a government's right to restrict corporate expansion. The backdrop for this examination—which may be called a limited examination—is that applying Rawls's principles to these specific societal issues in a non-Rawlsian society is not without problems. Examining Rawls's theory in the limited sense is much different from examining it as a complete, ideal conception, such as inquiring whether the theory as a whole is sounder than utilitarianism. One of the more obvious problems with examining Rawls's principles in the limited sense is that it potentially blurs two ways of conceiving justice: as a theoretically pure ideal and as a system actually embodied in positive law. It is not difficult to imagine a society that considers justice to be stoning a woman (women only, not men) to death for committing adultery, for example. In such a society, describing an instance in which a woman is stoned to death for committing adultery is a perfectly accurate description of justice in the positive law sense. However, such a society can clearly be thought of as unjust when juxtaposed with an ideal institution of justice, and so one must be cognizant that there are at least two ways to conceive of justice and clarify to which conception one is referring.⁵ A related problem in examining Rawls's principles in the limited sense is that it potentially blurs the lines between the normative realm of justice applicable to institutions and the ethical or moral realm applicable to individuals in specific circumstances. These two realms are clearly distinct in Rawls's conception of justice.⁶ Therefore, examining Rawls's principles in the limited sense may risk mistaking his normative guidelines for institutions as applicable to an individual's moral conduct in a particular situation.⁷

⁵ See *id.* at 50, for a discussion of how seemingly unjust institutions assume the role of justice in that they adhere to established principles.

⁶ See *id.* at 47 (“The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately.”).

⁷ *But see* BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 102-03, (Harvard University Press 1985) (suggesting that contractual theories may structurally fail if individual morality is not the first inquiry when addressing what a person is required to do); Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *PHILOSOPHY AND PUBLIC AFFAIRS* 250, 283 (1998) (“Where people live within the domain of justice they must concern themselves with the substantive political/moral aim expressed in the principles of justice....It is not credible that what fundamentally matters is that the relevant institutions promote equality or well-being, rather than that equality or well-being be promoted.”).

For these reasons, one of the goals of this paper is clarification and description of such ambiguities, not explanation of which conception is right or wrong.

While there are problems involved in applying Rawls's principles in the limited sense, examining his theory (or any systematic philosophical theory) solely as an ideal conception is not without its own problems. As a general matter, examining a theory of justice solely as an ideal conception may impede its applicability because it is given on the front end that the hypothetical institution cannot be implemented as examined. This is the case, of course, because an actual society cannot literally return behind Rawls's veil of ignorance, and, even if it could, it would be irrational for the more advantaged society members to do so. To be sure, the goal of the original position is to examine—hypothetically—what one would do if one were behind the veil. That being said, an ideal institution's failure to apply to the actual reality of any particular society is worth noting inasmuch as general propositions of justice must ultimately succeed or fail based on their actual consequences.⁸ Moreover, it may be questioned whether the original position's abstract state of nature is a viable hypothetical without the context of an actual society as a reference point. Examining Rawls's principles solely as an abstract conception may force one to manipulate the concept of "society" to such an extent that one is no longer examining anything that resembles a society, for instance. As Robert Paul Wolff has noted, there may be "grounds for supposing that human beings *could not* have the sorts of general knowledge Rawls attributes to the parties in the original position, without their also having to be aware of the sorts of particular facts about themselves that are cloaked by the veil of ignorance."⁹ In other words, actual societies are complex human products that inherently involve a certain combination of knowledge among its members, and manipulating that inherent knowledge may create serious epistemological problems. To give just one example from Bruce Ackerman, knowledge of guaranteed well-being has to be arbitrarily granted to the parties in the original position in order for them to accept a law limiting population growth: a self-interested person in the original position would vote in favor of such a law if the person knew he or she would be one of the people who would be born, but "*if I thought I might be deprived of existence by the birth limit, I would have a very different attitude.*"¹⁰ The question follows: On what ground is

⁸ See, e.g., EDMOND N. CAHN, *THE SENSE OF INJUSTICE* 3-11 (New York University, 1949); Murphy, *supra* note 7, at 278 ("[A]n acceptable theory of justice must have acceptable implications for both ideal and nonideal theory.").

⁹ ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS* 21-27, 129-32 (Princeton University Press 1977).

¹⁰ BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 222-23 (Yale University Press 1980).

the veil of ignorance rigged to provide knowledge of guaranteed well-being in the case of birth control, but not in other cases?¹¹

It is for these reasons, then, that I examine Rawls's principles in the limited sense—in the context of actual societies struggling with actual issues, namely, questions of freedom of religious practice and corporate political participation and distribution. The modest goal of this paper is therefore to provide an illustrative assessment of Rawls's principles through their application, while remaining cognizant of the difficulties in taking such an approach. The chief benefit of this approach is that it permits an ideal, systematic conception of justice to be compared with empirical examples of justice embodied in positive law. The hope is that such a comparison will provide a more full description of various positive law examples of justice by illustrating the degree to which they differ from an ideal institution of justice.¹²

II. FREEDOM OF RELIGIOUS PRACTICE AND THE FIRST PRINCIPLE

In April 2011, a law in France went into effect that banned women from wearing the niqab (a full-face Muslim veil) in any public place, including while walking down a public street, riding a public bus or subway, watching a movie at the cinema, and visiting the Louvre.¹³ As the *Guardian* reported, the niqab ban “has reopened the long-running debate over how the country with Europe’s biggest Muslim community integrates Islam into its secular republic.”¹⁴ Indeed, France banned simple headscarves (the hijab) and other religious symbols from public schools after an impassioned national debate in 2004.¹⁵ The French government argued that that the 2004 law was necessary to maintain the secular nature of French schools, while critics—including the United States Commission on International Religious Freedom—condemned the law as a violation of the freedom to practice religion, as many Muslims believe wearing modest clothing

¹¹ See RAWLS, *supra* note 1, at 140-41, for a discussion of average utility and why the original contractors would not encourage the population to grow indefinitely because they would want to advance their own interests by keeping average welfare higher.

¹² See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* Lecture V (1832) (“To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law.”).

¹³ See Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES, April 12, 2011, at A4; Angelique Chrisafis, *Full-face veils outlawed as France spells out controversial niqab ban*, GUARDIAN, March 4, 2011, at 3.

¹⁴ Chrisafis, *supra* note 13, at 3.

¹⁵ See Annual Report of the United States Commission on International Religious Freedom, 53 (May 2004), available at <http://www.uscirf.gov>.

and covering the hair is an Islamic duty.¹⁶ The enactment of the 2004 law was a watershed moment for France, precipitating the current trend of more stringent laws banning the wearing of religious symbols in all public places.¹⁷ The 2004 law is therefore an important example of justice embodied in positive law, allowing for an apt comparison with Rawls's ideal conception of justice.¹⁸

I will begin by examining the 2004 law under Rawls's first principle of justice, which he believed would be accepted in the original position.¹⁹ Later I will examine why Rawls thought the first principle (and the second) would be accepted in the original position, and provide an analysis of that assumption. However, for now I will assume that the first principle has been accepted, which states "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."²⁰ This principle secures the following liberties:

- (1) Political liberty (the right to vote and hold public office) and freedom of speech and assembly;
- (2) Liberty of conscience and freedom of thought;
- (3) Freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person);
- (4) The right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the first principle.²¹

Rawls's two principles are lexically ordered, meaning that the second principle cannot be addressed until the first principle is maximized. Nor can the contracting parties take any action that would jeopardize the maximization of the first principle when addressing the second principle.²² The initial inquiry in this case,

¹⁶ See *id.* at 53-54 ("The French government and legislature should be urged to reassess this initiative in light of its international obligations to ensure that every person in France is guaranteed the freedom to manifest his or her religion or belief in public, or not to do so.").

¹⁷ See *id.*, where the United States Commission on International Religious Freedom commented that "there are plans for similar legislation to cover the wearing of religious garb and symbols in other public institutions."

¹⁸ The 2004 law bans dress or symbols that "conspicuously show religious affiliation," and is not limited to the hijab. *Id.* However, it has been widely argued that the 2004 and 2011 laws single out and stigmatize Islam. See Erlanger, *supra* note 13, at A4.

¹⁹ See RAWLS, *supra* note 1, at 52.

²⁰ *Id.* at 53.

²¹ *Id.*

²² *Id.* at 53-54 ("These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that infringement of the basic liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages").

then, rests squarely on the first principle and the basic liberties secured by the principle. Religious freedom—specifically, the right to wear a religious symbol such as a head scarf in a public school—is not explicitly protected by the basic liberties enumerated above, meaning that some sort of implicit protection has to be sought under the umbrella of another basic liberty. Although it may seem obvious that these liberties would extend to cover a student’s right to wear a head scarf, it is not given that parties in the original position would explicitly protect the freedom of religious practice when they reach the constitutive phase, and so the issue must initially be addressed under the first principle.²³

Several factors support the position that the freedom of religious practice is implicitly protected under the umbrella of other basic rights, and that banning the wearing of head scarves by Muslim students enrolled in French public schools is inconsistent with the first principle of justice. From the outset this position is based on the simple rationale that Rawls’s list of basic liberties is not intended to be exhaustive and does not include every possible worthwhile liberty.²⁴ Rather, the freedom of religious practice would naturally be protected by other enumerated rights such as the liberty of conscience or person, for instance, which exemplifies the Rawlsian scheme’s general commitment to political liberalism. James W. Nickel succinctly puts it this way: “Elements of political liberalism will make it difficult or impossible to pass laws forbidding the wearing of unusual clothing. (Here a legal liberty to do *A* will primarily be the absence of a legal duty to refrain from doing *A*.)”²⁵ While this argument seems, generally, to be correct, Nickel’s argument is based on an example of protecting one’s right to wear a Tarzan suit, which obviously does not directly address issues involving church, state, and secularism. For this reason it is necessary to look beyond structural arguments, focusing instead on what the original contractors would do in the original position behind the veil of ignorance.

The parties in the original position deciding on the first principle are behind the veil of ignorance in order to nullify the benefits of any special circumstances that would entice them to take advantage of such circumstances when deciding on the principles of justice.²⁶ Amartya K. Sen illustrates a similar scenario with a hypothetical situation involving bickering musicians deciding how to allocate

²³ See generally James W. Nickel, *Rethinking Rawls’s Theory of Liberty and Rights*, 69 CHI-KENT L. REV. 763, 766-72 (1994) (arguing that Rawls’s list of basic liberties should be reconstructed such that “liberties of the person” specifically protects freedom of religious practice.).

²⁴ See *id.* (arguing that attempting to list every possible worthwhile liberty would lessen the principle’s impact.)

²⁵ *Id.*

²⁶ See RAWLS, *supra* note 1, at 118.

practice time.²⁷ In Sen's example, a trumpet player is the better situated party in society than a piano player because the trumpet player is not disturbed by the piano player, while the piano player is disturbed by the trumpet player's practice; the trumpet player is thus given much more practice time because he is in a better bargaining position.²⁸ However, considering Sen's scenario from the perspective of those in the original position, trumpet players very likely would not receive such an unfair advantage because the original parties would not know whether they would be trumpet players or piano players, of course. Moreover, what happens when a tuba player is thrown into the mix? The point is that the parties in the original position behind the veil of ignorance would want to design practice-time allocation in a fairer, more just way. In the same way, one might relate this to religious practitioners, *i.e.*, under what circumstance would the original parties want to protect the liberty of religious practitioners who desire to outwardly display their faith in public institutions? At this early stage in the contracting process, then, it does not seem to be a stretch to argue that the contracting parties would at least grant a general freedom of religious practice under the first principle, considering that behind the veil of ignorance they would not know whether they would end up as religious practitioners. While granting a broad right to freedom of religious practice seems rational behind the veil of ignorance, the subsequent stages of the original parties' contracting process must be addressed in order to better examine the specific issue presented by France's 2004 law.

In Section 13.6 of *Justice as Fairness*, Rawls explains that his principles of justice are established and implemented in a four-stage sequence, with the original parties' limitations on knowledge being progressively relaxed in the stages after the veil of ignorance.²⁹ In other words, the original parties' veil of ignorance begins to be lifted as they move toward a constitutional convention and address the principles of their society in greater detail. It is in these middle stages that the original parties know more about the economic system, political culture, and other relevant general facts, *e.g.*, the diversity of society and the percentage of people who are Muslim and wear head scarves. However, the original parties do not know their place in society at this stage, and whether they would want to wear a religious symbol such as a head scarf, for instance. On the surface, then, Rawls believes it would be rational for the original parties to protect such religious freedom in the constitution.³⁰ However, consider that the parties learn (when the veil is partially

²⁷ AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 121-23 (Holden-Day 1970).

²⁸ *Id.*

²⁹ JOHN RAWLS, *JUSTICE AS FAIRNESS* 48 (Harvard University Press 2003) (2001); *see also* RAWLS, *supra* note 1, at 171-72.

³⁰ *See* RAWLS, *supra* note 1, at 186 ("From the perspective of the constitutional convention these arguments lead to the choice of a regime guaranteeing...religious practice, although these may be regulated as always by the state's interest in public order and security.").

lifted) that a certain small percentage of fanatical religious practitioners are intolerant of groups with differing beliefs and values—say, a certain small percentage of Muslims who believe it is their religious duty to bring about a global theocracy by committing, if necessary, terrorist acts. Such actions by this small group of religious practitioners would be in violation of the first principle, including each of the basic liberties enumerated under that principle. This knowledge might raise the following question for the original parties: To what extent should a society limit the freedom of religious practice of a vast group of law-abiding religious practitioners, when a tiny subset of that group threatens secularism and desires to take action in violation of the first principle?

In addressing this question, the original parties first acknowledge that the inquiry turns on the ordering of the two principles. They have accepted the first principle with its basic liberties and lexical order, prioritizing the maximization of the liberty of conscience and freedom of religious practice in the constitutional phase. In moving to the more narrow question of whether religious practice should be limited because it conflicts with state affairs, Rawls suggests that the original parties could do so only if there was a “reasonable expectation that not doing so will damage the public order which the government should maintain.”³¹ Absent clear evidence that limiting religious practice is necessary to maintain public order and security, the principles of justice simply do not permit the government to do what it—or a majority—wants to do with respect to questions of religious practice.³² Rather, the government is only concerned with maintaining its citizens’ freedom to pursue their religious interests in accordance with the principles of justice to which they agreed in the original position—not whether a religious association conflicts with a state interest.³³ The same is true with respect to intolerant religious sects: A just government does not have the right or duty to limit the freedom of intolerant religious sects without clear evidence that security and the foundational principles of justice are in danger, and the liberty of only the intolerant religious sect is to be limited when security is threatened by them; blanket restrictions over vast groups of religious practitioners who pose no threat to public order and security are precluded.³⁴ Moreover, any imposed restrictions are for the sake of the principles of justice—principles which the intolerant themselves would accept in the original position.³⁵ The resolution to the question at hand is therefore based on Rawls’s priority of liberty, in other words, the lexical

³¹ *Id.* at 186.

³² *Id.* at 186-87

³³ *Id.* at 186.

³⁴ *Id.* at 193.

³⁵ *Id.*

ordering of the two principles such that claims of liberty must be satisfied before moving to other considerations.³⁶

Based on this priority, the French government's ban on the wearing of head scarves by Muslim students is inconsistent with Rawls's first principle of justice, including because there is no reasonable expectation that such a ban is necessary to maintain security and public order. However, this conclusion may be criticized on a number of levels, which include certain fundamental assumptions about the nature of the original parties. As has been discussed, my analysis has been based on Rawls's basic assumption that the original parties would accept the principles of justice while behind the veil of ignorance. This assumption was justified for Rawls because the original parties are equally situated behind the veil of ignorance in the original position, and thus convinced by the same, rational arguments. With this given, Rawls is able to suggest that "if anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached."³⁷ However, this assumption still raises the question of whether a conception of justice based on the rational choices of self-interested, equally situated parties is "actually correct."³⁸ In other words, it may be possible that the original contractors make rational choices about the conception of justice they intend to embody in positive law, yet at the same time fail to make the "correct choice" in terms of moral or ethical considerations, whatever those considerations may be.³⁹ Such a scenario may be conceived when considering situations based on Rawls's maximin rule. For example, if there are two bags to draw from that have two possibilities in each, (1) emperor or slave, (2) white collar or blue collar worker, selecting from bag 2 is the only rational choice for Rawls's parties behind the veil of ignorance because it produces a better result for those who would be in the least advantaged position, *i.e.*, one would not want to make a choice behind the veil that could result in being a slave. However, consider that the odds of the choice were better and the original contractors (still behind the veil) determine that accepting Rawls's two principles are not the most rational choice (based on the odds), but rather that a society with a very small number of slaves is the most rational means of achieving justice. Similarly, instead of accepting the two

³⁶ *Id.* at 214; *see also* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 43-44 (Bobbs-Merrill 1965) ("Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.").

³⁷ RAWLS, *supra* note 1, at 120.

³⁸ WILLIAMS, *supra* note 7, at 102.

³⁹ *See* CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION 463-67 (MacMillan 1965) ("The critical appraisal implied by the attribution of rationality is to the effect that, judged in the light of the agent's beliefs, the action he decided upon constituted a *reasonable* or *appropriate* choice of means for achieving his end.").

principles, consider that the original contractors decide, based on the odds of the gamble, that a small amount of racial prejudice or infringement of religious freedom (say, the banning of head scarves) is acceptable. As Bernard Williams noted, “If self-interested rational choice is what is at issue, it is hard to see how the question of probabilities can altogether be avoided, or how, if the probability of ending up as a slave were small enough, it would not be rational for the parties to choose a system involving slavery.”⁴⁰ Therefore, while I argue that the intent of Rawls’s conception of justice is that the original parties would protect the wearing of head scarves in public schools, fundamental questions about probabilities and the nature and rationality of the original parties call into question whether they would necessarily do so.

III. CORPORATE PARTICIPATION AND THE DIFFERENCE PRINCIPLE

As discussed in my introduction, examining Rawls’s individual principles of justice as I have done thus far—in the context of an actual society—risks blurring the lines between an ideal institution of justice and justice embodied in positive law, as well as blurring the lines between the normative realm of justice applicable to institutions and the ethical or moral realm applicable to individuals in specific circumstances. However, examining Rawls’s principles through the lens of an actual society also clarifies these issues by highlighting how they are interconnected. Examining France’s 2004 law in this light illustrates the degree to which it differs from Rawls’s first principle of justice, while also stressing the difficulties of addressing positive law examples of justice under the framework of rational choice marshaled under abstract conditions of ignorance. Of course, the same sort of examination may be conducted of Rawls’s second principle, which accounts for social and economic inequalities (distribution) and includes the difference principle: “Social and economic inequalities are to be arranged so that they are...to the greatest expected benefit of the least advantaged.”⁴¹ I will therefore turn my attention to corporations and how their political participation can impact social and economic inequality.

In February 2011, the City Council of New York City held a hearing to analyze the possible impact Wal-Mart would have on local communities should it succeed in opening its first store in New York City.⁴² Representatives from Wal-Mart skipped

⁴⁰ WILLIAMS, *supra* note 7, at 79.

⁴¹ See RAWLS, *supra* note 1, at 72, for a discussion of the entire second principle, which states: “Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”

⁴² Elizabeth A. Harris, *Wal-Mart Skips Council Hearing as Impact of Stores is Assailed*, N.Y. TIMES, February 4, 2011, at A18.

the hearing, deciding instead to directly win over the residents in the locations where the stores would be located. The *New York Times* compared Wal-Mart's approach to a political campaign, citing the company's high-tech website promoting their position, purchase of airtime on several radio stations, purchase of advertising space in over thirty local papers, and fliers sent to residents in the relevant City Council districts.⁴³ While many City Council members opposed Wal-Mart's entrance into New York City on grounds that the company would hurt small businesses, Wal-Mart argued that it was being unfairly singled out because other "big-box" stores already existed in New York City.⁴⁴ Wal-Mart's difficulty with local governments has not been limited to New York City. Indeed, Wal-Mart attempted to bypass the Inglewood, California City Council's rejection of its bid for a proposed store in 2004. After Inglewood officials rejected Wal-Mart's proposal, the company spent over one million dollars in support of a ballot initiative that would have permitted construction of a "60-acre Wal-Mart shopping complex exempt from virtually all state and local regulation."⁴⁵ Inglewood residents defeated Wal-Mart's proposal at the polls, but, as the *New York Times* noted, the "vote was closely watched around the nation as a test of Wal-Mart's ability to sway public opinion and influence political bodies."⁴⁶ These events raise the following questions: First, does Rawls's conception of political participation support Wal-Mart's attempt to bypass the Inglewood City Council's rejection of its proposal to build a store? Second, is introducing a corporation like Wal-Mart into Inglewood's economy justified under Rawls's difference principle? I will argue that both questions should be answered in the negative based on (1) Rawls's preference of constitutional democracies emphasizing the fair value of political liberty, and (2) the difference principle's commitment to "chain connection" and "justice as fairness," as opposed to utilitarian principles.

Rawls's notion of political participation is based on the idea that each person in the original position of equality is fairly represented. From this starting point, the objective is to continue fair representation in the constitution and each subsequent stage of justice to the extent that it is practical.⁴⁷ In *Justice as Fairness*, Rawls distinguishes between constitutional and procedural democracies, noting that laws in the former must be consistent with basic rights such as those covered by the first principle, while in the latter regime there is no constitutional limit on the laws that the majority enacts.⁴⁸ Rawls's conception of justice is based on a constitutional democracy (*e.g.*, the constitutional convention is one of the four stages of adopting

⁴³ Elizabeth A. Harris, *Wal-Mart Will Skip Hearing by Council*, N.Y. TIMES, January 11, 2011, at A22.

⁴⁴ Harris, *supra* note 42, at A18.

⁴⁵ Jon M. Broder, *California Voters Reject Wal-Mart Initiative*, N.Y. TIMES, April 7, 2004.

⁴⁶ *Id.*

⁴⁷ See RAWLS, *supra* note 1, at 194-95.

⁴⁸ See RAWLS, *supra* note 29, at 145.

the principles of justice⁴⁹), and this preference does not bode well for Wal-Mart's actions when viewed through the lens of a Rawlsian regime. First, the company did not adhere to established requirements for a public hearing regarding building a new store, and, second, it disregarded the decision of the elected city council. In other words, when compared to a Rawlsian constitutional democracy based on the two principles of justice, Wal-Mart's actions in Inglewood can be seen as attempting to circumvent and nullify the decision of an elected city council by using a simple majority vote. As Rawls sees it, while political participation in a constitutional democracy guarantees certain first principle rights (*e.g.*, political rights), "sporadic and unpredictable tests of public sentiment by plebiscite or other means, or at such times as may suit the convenience...do not suffice for a representative regime."⁵⁰

In a related way, Wal-Mart's course of action can be seen as violating Rawls's precept of "one elector one vote."⁵¹ In other words, through its million dollar campaign, it can be argued that Wal-Mart took the value out of the liberties protected by the principle of participation such that everyone did not have the common status of an equal citizen.⁵² Similar concerns were raised in 2010 in *Citizens United v. Federal Election Commission*, the landmark case in which the U.S. Supreme Court overturned precedent by ruling that the First Amendment's free speech principle prevented the government from regulating the political speech of corporations.⁵³ In contrast to the holding in *Citizens United*, Rawls sought to rectify problems of equal liberties verses their actual worth by including the provision in the first principle that equal political liberties are to be guaranteed their fair *value*.⁵⁴ This means that when the principles of justice are adopted in the original position, it is understood that everyone will have a fair chance to impact elections, regardless of their position in society.⁵⁵ In order to realize this fair value in political institutions, Rawls suggested reforms involving public financing of elections, campaign contribution limits, equal access to public media, and freedom of speech and press regulations that do not involve content.⁵⁶ As was the case in *Citizens United*, such regulations are open to criticism that they infringe on the freedoms of speech and of the press. Rawls's response is that a fair value in political liberty is

⁴⁹ *See id.* at 48.

⁵⁰ *See* RAWLS, *supra* note 1, at 195.

⁵¹ *See id.* at 196.

⁵² *See id.* at 198-99 ("[W]hen parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom properly presented.... In due time they are likely to acquire a preponderant weight in settling social questions.").

⁵³ *See* *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

⁵⁴ *See* RAWLS, *supra* note 29, at 149.

⁵⁵ *Id.*

⁵⁶ *Id.*

no less important than other liberties, and adjusting free speech liberties is necessary to keep the political process “independent of large concentrations of private economic and social power.”⁵⁷ Indeed, a corporation is neither a voter nor a citizen, and, as Felix S. Cohen stated over seventy years ago, one should not “thingify” a corporation as a mortal man:⁵⁸ “[Asking where a corporation is] is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, ‘How many angels can stand on the point of a needle?’”⁵⁹ Cohen continues, “Nobody has ever seen a corporation. What right have we to believe in corporations if we don’t believe in angels?”⁶⁰ Cohen’s sentiment is similar to that of the dissent in *Citizens United*, namely, that it is an error to treat corporations and corporate speech as humans and human speech.⁶¹ If this is true, maintaining a fair value in political liberties may involve restricting the way in which an influential private entity may act as a sort of abstract super-citizen.

Turning to the question of whether introducing Wal-Mart into Inglewood’s economy is in accord with the difference principle, it helps to first highlight Rawls’s aim of establishing a conception of justice that is a general alternative to utilitarian theories.⁶² As a teleological theory, utilitarianism defines the good independently from the right: Right acts and institutions are the ones that produce the most good.⁶³ As Rawls sees it, the problem with such theories is that they can fail to account for the correct distribution of goods among people, focusing instead on any distribution that results in maximum fulfillment.⁶⁴ Rawls thus assumed that the parties in the original position would reject utilitarianism and instead adopt his principles of justice, which make up a deontological theory (*i.e.*, one that “does not interpret the right as maximizing the good”).⁶⁵ This perspective leads to the rationale behind the second principle, which is based on the proposition that society is not to institute beneficial circumstances for the better situated unless such a state of affairs would benefit the least advantaged, *i.e.*, the goal is to be able to honestly tell the lowest in society, *any other way we set up distribution would leave you worse off*.⁶⁶ Therefore, it is clear how this conception is an alternative to utilitarianism: The distribution of primary social goods is

⁵⁷ *Id.* at 149-50.

⁵⁸ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

⁵⁹ *Id.* at 810-811.

⁶⁰ *Id.* at 811.

⁶¹ See Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, January 22, 2010, at A1.

⁶² See RAWLS, *supra* note 1, at 20.

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 23.

⁶⁵ *Id.* at 26.

⁶⁶ *Id.* at 65.

restructured in terms of the least advantaged. The basis for this conception of distribution is desert, which, put simply, means that one neither deserves one's initial socio-economic starting position in society, nor does one deserve one's character attributes that allow one to succeed or fail in life—as such character attributes depend on “nature-nurture” factors for which one cannot claim credit.⁶⁷ Thus, desert is not a factor when considering the fairness of the difference principle, at least to the extent one acknowledges that no one deserves to be born a particular way or in a particular place.

Returning to the specific question presented—whether introducing a Supercenter into Inglewood's economy is consistent with the difference principle—Wal-Mart maintained that the Supercenter would bring jobs, additional taxes, and low grocery prices to Inglewood and its residents. On the other hand, Wal-Mart's opponents argued that Wal-Mart's aggressive business practices and strong opposition to union employment would ultimately lead to the loss of jobs and to lower wages for local workers. It is not difficult to see how an initial response to this problem could be that Wal-Mart's arguments are in accord with the difference principle based on a general economic theory of competition, which may allow Wal-Mart to inexpensively enter markets and help the less advantaged obtain consumer goods at lower costs. As proof of the general success of this position, the Wal-Mart advocate might argue that the United States has attained one of the highest standards of living because of the free flow of capital and labor, which helps even those at the bottom of the ladder to have a much better life than people in other countries in the same relative position. In countries in which this is not the case, it may be argued that there is a reduced overall standard of living because there is not a free flow of capital, labor, and competition (because the government has stepped in to try to determine the winners and losers or run things themselves). The Wal-Mart advocate might argue thusly:

The least advantaged in society do not have jobs at all. By building a Supercenter, many of these people would be provided with a low-paying job, but a job nonetheless—in addition to access to affordable groceries. As an added benefit, the most advantaged in society (Wal-Mart executives, Wal-Mart stockholders, the general wealth of Wal-Mart as a corporation, etc.) would greatly increase their wealth by having a bigger market. It is acceptable that some small businesses will be eliminated because they were more advantaged in the first place. Building a Supercenter is therefore in accordance with the difference principle because it would help the least advantaged.

⁶⁷ See RAWLS, *supra* note 1, at 89.

Although such a position may seem viable at first glance, it is fundamentally flawed because, as mentioned, the aim of the difference principle is not merely to help the least advantaged. As Amy Gutmann explains in *Liberal Equality*, the assumption is wrong “that any resulting benefits to the least advantaged can justify allowing the rich to have more. Rather, the difference principle as consistently stated can justify activities with marginal trickle-down effects only if they provide greater benefits to the least advantaged than *any possible* alternate arrangements.”⁶⁸

I will argue that introducing Wal-Mart into local markets does not necessarily meet this requirement. From the outset, I should note that it is far beyond the scope of this paper to conduct a thorough economic analysis of the entrance of a Wal-Mart Supercenter into a local market, and I will therefore take up the more modest goal of considering various hypothetical scenarios that would not be in line with the difference principle. For example, building the Supercenter is potentially contrary to Rawls’s “chain connection,” which is related to the difference principle in that it states that circumstances of the middle-advantaged members of society are to rise anywhere the circumstances of the least advantaged rise.⁶⁹ If it is true (as Wal-Mart’s opponents suggest) that Wal-Mart’s aggressive business practices would ultimately lead to the loss of jobs, then many of those losing jobs would be the middle-advantaged members of society (small, local businesses that would be Wal-Mart’s competition, for example).⁷⁰ Wal-Mart has been accused of developing Supercenters in locations in which it can potentially be the sole supplier of any number of items (including groceries) by lowering prices of those items during the initial years the Supercenter is open to such an extent that all surrounding competition is eliminated. This may be especially the case with companies like Wal-Mart, which offers many products and can continue to make money in certain parts of its store while running deep discounts in other parts. The loss of jobs for the middle-advantaged could have a ripple effect leading to the loss of higher paying jobs; for example, local Inglewood accounting offices and other professionals serving small businesses in the area may suffer as a result of the loss of small, locally-owned businesses. Such possibilities raise the question of whether building a Supercenter may actually increase the size of the least-advantaged class in the long run. In other words, the number of mid-level jobs lost could be more than the number of new low-level jobs offered by Wal-Mart, resulting in an overall

⁶⁸ AMY GUTMANN, *LIBERAL EQUALITY* 131-35 (Cambridge 1980).

⁶⁹ See RAWLS, *supra* note 1, at 70-71.

⁷⁰ See Barry C. Lynn, *Breaking the chain: The antitrust case against Wal-Mart*, HARPER’S, July 2006, for a discussion of how “the ultimate danger of monopsony is that, over time, it tends to destroy the machines and skills on which we rely,” and Barry C. Lynn, *American small businesses needn’t go extinct*, WASHINGTON POST, February 21, 2010, at B1, for a discussion of how “political moves and decision in Washington over the past several decades have made it much easier for the people who control large-scale corporations to displace small proprietors.”

loss of not only higher paying jobs, but of jobs in general. If such a scenario is a real possibility, then the issue becomes whether the Supercenter would fail to properly maximize the benefits to the least advantaged in such a way that other members of society will also benefit. The sentiment is simply that there were valid reasons why the monopolies of old were broken up, which is effectively what Wal-Mart has been accused of becoming in certain markets.⁷¹ In short, although building the Supercenter may result in certain positive gains for Inglewood, it may very well not be an appropriate solution in terms of yielding more comprehensive gains from the perspective of the chain connection and difference principle.

Based on the above scenarios, it may be asked whether Wal-Mart's entrance into Inglewood's economy would primarily benefit the least advantaged via low-paying jobs, or primarily increase corporate wealth with inexpensive labor—regardless of the broader implications to the local economy. If building the Supercenter results in the latter, upward movement by the least advantaged could be stifled. At the same time, however, the rationale of the Supercenter can be seen as utilitarian because overall wealth (including corporate wealth) may be maximized, which is illustrated in the graph in Chapter II, Section 13, Figure 8 of *A Theory of Justice*.⁷² This graph depicts the “contribution curve” (curve OP), which maps the relationship between the most (x-axis) and the least (y-axis) advantaged society members. Rawls labels the peak of the bell-shaped OP curve point “b,” which is the point at which his “justice as fairness” achieves efficient equality via the difference principle, and which therefore should not be passed. However, the best distribution from a utilitarian perspective is farther along the x-axis beyond point “b,” a point at which the bell curve has begun its descent on the y-axis, and thus a point at which the balance of benefits to the least advantaged declines (though the overall sum of benefits continues to increase along the x-axis in favor of the most advantaged).⁷³ Accomplishing a maximization of the OP curve for Rawls is dependent on background institutions securing fair and equal opportunities for citizens to nurture their abilities and obtain socially practical skills.⁷⁴ With such a scheme in place, Rawls argued that the OP curve would quickly reach the maximum such that the difference between the less advantaged and the more advantaged would not seem unjust.⁷⁵

⁷¹ See *Breaking the chain: The antitrust case against Wal-Mart*, *supra* note 70 (“When oligopolies rule unchecked by the state, what is perverted is the free market itself, and our freedom as individuals within the economy and ultimately within our political system as well.”).

⁷² RAWLS, *supra* note 1, at 67.

⁷³ *Id.*

⁷⁴ RAWLS, *supra* note 29, at 68.

⁷⁵ *Id.*

Of course, in our nonideal world, we are not dealing with societies made up of background institutions based on Rawls's principles of justice, which he believed would prevent the more advantaged members from uniting to "exploit their market power to force increases in their income."⁷⁶ Nevertheless, if building a Supercenter is not necessarily the best distributive option when examined under a Rawlsian lens, what sorts of alternatives would better provide citizens with "fair and equal opportunities to develop their native endowments and to acquire socially productive skills"?⁷⁷ Guttman offers one suggestion through her example of the unequal income distribution between doctors and nurses and lawyers and legal secretaries, which she argues would be addressed in a Rawlsian society through "fair equality of opportunity and governmental subsidies for vocational training [and the fact that] doctors would not be able to ensure their scarce supply, and access to medical schools would be less limited as long as medical care was a high social priority."⁷⁸ Although doctors might still earn larger incomes than nurses, the medical profession would be more graded and the priority would shift to giving citizens fair and equal opportunities to develop their native endowments and to acquire socially productive skills—thus better maximizing the OP curve and the position of the less advantaged members.⁷⁹ While the details of Guttman's example may not be specifically apt to the case involving Wal-Mart, the general idea is still relevant: A system of distribution that maximizes the market in favor of a small, advantaged group (whether in terms of corporate wealth or profession) is at odds with the Rawlsian goal of securing fair opportunities through a system that is efficiently centered on the least advantaged. For these reasons, the scenarios I have considered suggest that building a Supercenter may be aligned with utilitarian principles, but is not in line with the difference principle's commitment to chain connection and justice as fairness.

IV. CONCLUSION

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ GUTMANN, *supra* note 68, at 131-35.

⁷⁹ *Id.* Of course, taxation schemes would have to be altered in order to provide such governmental subsidies for vocational training, which Gutmann notes as follows:

Policies that would simultaneously remedy the inefficiencies of the real capital market and effect a more egalitarian distribution of wealth include raising inheritance taxation and closing existing loopholes, raising the tax rate on capital gains, and treating corporations for tax purposes simply as aggregates of individual stockholders. Profits to corporations could be treated as accretion to individual (rather than corporate) wealth, just as profits and savings accruing to salaried employees are now treated. No corporate body would be permitted to absorb and transfer profits into internal savings, and no individuals would be allowed to avoid taxes through the accumulation of unrealized capital gains. *Id.*

In this paper I have examined Rawls's principles of justice in the context of an actual society with actual problems, namely, freedom of religious practice and corporate political participation and distribution. In the first case, I argued that Rawls's first principle of justice opposes a government's restriction of a person wearing conspicuous religious symbols in public places, and in the second case I argued that Rawls's difference principle is in accord with a government's right to restrict corporate expansion. As has been discussed, Rawls's conception of justice presents a purely hypothetical starting point that culminates in an ideal conception of justice that permits some inequality, but not injustice:

[W]e may reject the contention that the ordering of institutions is always defective because the distribution of natural talents and the contingencies of social circumstances are unjust, and this injustice must inevitably carry over to human arrangements. Occasionally this reflection is offered as an excuse for ignoring injustice, as if the refusal to acquiesce in injustice is on a par with being unable to accept death.⁸⁰

To be sure, we do not live in a world without injustice. It is because of this fact that I have examined Rawls's principles of justice in a way that applies them to the nonideal reality of particular societies. I have suggested that such an approach has the benefit of making the original position's abstract state of nature a more viable hypothetical by providing the context of an actual society as a reference point. Remaining cognizant of the difficulties in taking such an approach, my goal has been to provide a more full description of various positive law examples of justice by illustrating the degree to which they differ from an ideal institution of justice.

I have specifically highlighted two difficulties with examining Rawls's theory in the limited sense, that is, applying Rawls's principles to specific societal issues. First, such an examination potentially blurs two ways of conceiving justice: as a theoretically pure abstraction and as positive law. Second, such an examination potentially blurs the lines between the normative realm of justice applicable to institutions and the ethical or moral realm applicable to individuals in specific circumstances. However, I have attempted to make apparent the interconnections among these issues and how theoretical and normative questions are closely related to pressing practical questions that actual societies face regarding justice. To put it another way, I have simply made the unremarkable claim that the role of political theory should involve a good deal of description and clarification of the reality of nonideal institutions, rather than focusing solely on the theoretical framework of ideal institutions. The utility of comparing justice embodied in positive law to ideal conceptions of justice is important inasmuch as providing insight into practical questions is a goal of political theory.

⁸⁰ See RAWLS, *supra* note 1, at 87.

Although I have limited my inquiry to questions regarding freedom of religious practice and corporate political participation and distribution, there is obviously a multitude of pressing practical questions that could be addressed. In February 2011, for example, President Obama and Attorney General Holder determined that the Defense of Marriage Act was unconstitutional and that the Justice Department would stop defending the law in court.⁸¹ Examples such as this highlight the fact that there remain many unanswered questions regarding a society's conception of the fundamental rights of its citizens—in that case, whether same-sex marriage may be discriminated against by the federal government. Similarly, questions that globalization poses for domestic political theories of justice are even less developed. Consider, for instance, Rawls's notion of the "just savings principle," which addresses how much capital each generation should put aside in order to preserve a just institution.⁸² In addressing issues such as the ability of future generations to treat and prevent disease, what principles does a society use in determining how to account for epidemics in other countries that could ultimately affect one's own country? If Rawls's theory is essentially a domestic theory, there may be ambiguities about how to address savings questions involving whether capital should be allotted for treatment on the one hand, or research and prevention on other.⁸³ Such issues could dramatically affect future domestic generations, but also depend largely on circumstances in other countries and societies that may not have the ability to prevent, treat, or contain devastating diseases. As I have suggested, it is these sorts of inquiries that highlight the expansive benefits of examining Rawls's principles of justice in the context of actual societies with actual problems. By treating political theory in this way, theoretical and normative questions may be examined anew and in light of the dynamic and ever-changing needs of nonideal societies.

⁸¹ See Letter From the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, (February 23, 2011), *available at* <http://www.justice.gov>.

⁸² See RAWLS, *supra* note 1, at 251-58.

⁸³ See *id.* at 7 ("The conditions for the law of nations may require different principles arrived at in a somewhat different way. I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies.").

HUMANITARIAN INTERVENTION AND THE WAR POWERS DEBATE

RICHARD HANANIA

War powers scholars debate whether Congress should have the exclusive ability to declare war. While this is the system that the Founders created, some hold that the modern world requires a stronger executive. All war powers scholars, however, make the same realist assumptions that were held by the founding generation. The author argues that war powers scholars neglect the existence of American idealism in international relations, and humanitarian intervention in particular. The author goes on to conduct a functional analysis of what placing the war powers back in congressional hands would mean for humanitarian intervention and finds that without an executive power to unilaterally use force abroad, there would be few or no humanitarian interventions undertaken.

INTRODUCTION

War powers scholars debate the proper balance of power between Congress and the president in setting foreign policy and going to war.¹ Whether originalists or not, they tend to rely on the words of the Founders and historical practice to make their case.² The writings of those who are against the expansive role that the president has assumed tend to begin by presenting evidence on the views of the Founding Fathers, showing that they worried about an executive unchecked abroad.³ They then purport to show that the Founders' fears have come true, and urge that we return to the proper balance between the two political branches.⁴

On the other side of the debate, those who are happy with the president's expansive foreign policy power argue that circumstances have changed since 1789.⁵ Giving Congress the authority it was meant to have at the founding would

¹ See *infra* Part II.

² See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 696 (2008) (expressing misgivings about the proposition that the original understanding should be all determinative, but explaining that the authors rely on it due to originalism's acceptance among scholars and the public); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 80–84 (1990); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1–5 (2d ed. 1989) (1973) (“If original intent cannot settle constitutional questions, it can throw essential light on them.”).

³ See *infra* Part II.A.

⁴ *Id.*

⁵ See *infra* Part II.B.

leave the United States unable to protect its interests.⁶ John Yoo, one of the defenders of the strong executive, agrees that a powerful president is needed to meet the challenges of the modern world, which is more dangerous than at the time of the ratification of the Constitution.⁷ However, he believes that the Founders consciously designed a system that allowed power over foreign affairs to fluctuate between Congress and the president, depending on the needs of the nation.⁸

The main argument put forth in this Article is that both defenders and critics of the powerful executive share some underlying assumptions that are dated. There was once a time when foreign policy was seen similarly to the way domestic policy was: thinkers and statesmen debated on the way to set up a system that would maximize the well-being of Americans. Today, the United States has assumed global responsibilities, including a responsibility to protect civilians in danger of being killed by their own governments.⁹ Thus, it is time to consider whether a system designed to produce the optimal amount of wars of self-defense might work differently from one that assumes the responsibility of advancing humanity as a whole.

The Article does not argue that the United States was ever a nation that acted completely in its national interests or behaved totally altruistically. Realism-idealism is a spectrum, not a strict dichotomy. At one end of the spectrum, there is the Chinese government in the 1970s, which had no problem with supporting the Khmer Rouge in Southeast Asia in order to prop up a regional rival to the Vietnamese.¹⁰ Even Henry Kissinger, the quintessential American realist, was forced to explain to Chinese leaders that the United States could not stand with the Cambodian regime, at least not publicly.¹¹ At the other end, there is the behavior of Sweden in being a major funder of the African National Congress in the 1980s,¹² despite not having any obvious interests in South Africa. What I will show, however, is that the United States since the founding has moved significantly towards the idealist end of the spectrum and at least occasionally fights wars for humanitarian ends, even if it does so selectively.¹³

⁶ *Id.*

⁷ See JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at viii–x (2005).

⁸ *Id.*

⁹ See *infra* Part III.B.

¹⁰ HENRY KISSINGER, *ON CHIA* 371–72 (2011).

¹¹ *Id.*

¹² Tom Lodge, *Thabo Mbeki and Cyril Ramaphosa: Crown Prince to Nelson Mandela's Throne*, 10 *WORLD POL'Y J.* 65, 67 (1993).

¹³ See *infra* Part III.B.

In Part I, I review the foreign policy of the Founding Fathers, and show that they were both descriptive and normative realists. I will then go on to show how these realist beliefs, along with the Founders' view of human nature, shaped the way that the Constitution was meant to balance authority over the power to make war between the executive and legislative branches. Part II proves that modern scholars accept both the Founders' views on why presidents are likely to go to war and the assumption that the best war powers system is the one that produces wars only fought in the best interests of the nation. This is true whether we examine the works of the defenders of executive power or its critics. Of course, war powers scholars vary in how much emphasis they put on original intent and how much they take functional considerations into account. To a pure originalist who believes that Congress was meant to decide when the nation went to war, this Article may not be of much value. But to those who rely on functional analyses to determine the optimal distribution of power between the political branches—including originalists who take Yoo's position that the Founders meant the president and Congress to struggle over control of foreign policy—having an accurate view of modern American foreign policy is vital.

Part III proves that these assumptions that war powers scholars hold are dated. With regards to the normative aspect of foreign policy, American leaders and opinion-makers have over time come to put relatively less emphasis on national interests and more on doing good globally, at the inevitable moments when the best interests of the United States and those of the world as a whole diverge. Of course, one will never catch a politician saying that he faced a tradeoff between the interests of his constituents and those of foreigners and decided to favor the latter. People generally have difficulty thinking in terms of tradeoffs, and politicians who talk in such terms are often disadvantaged.¹⁴ This should not, however, lead us to the naïve conclusion that leaders do not face such tradeoffs, at least subconsciously.¹⁵

Part III reviews the works of international relations scholars and shows that there is a consensus that there is an idealist strand in American foreign policy and that it has become more prominent, if not dominant, over time. War powers scholars,

¹⁴ Philip E. Tetlock, *Coping with Trade-Offs: Psychological Constraints and Political Implications*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 239, 239–42 (Arthur Lupia & Mathew Daniel McCubbins eds., 2000).

¹⁵ Neo-conservatives and liberal interventionists tend to believe that spreading democracy and human rights is in the best long-term interests of the United States. See Timothy J. Lynch, *Kristol Balls: Neoconservative Visions of Islam and the Middle East*, 45 INT'L POL. 182, 189–90 (2008). But as far as I am aware, every scholarly writer, even if not every politician or op-ed columnist, makes the self-evident assumption that there are times when the practices of a humanitarian foreign policy and national interests diverge.

usually by omission, deny this aspect of American foreign policy.¹⁶ This denial of the idealist-descriptive view can come in one of two forms. One can believe that the United States acts justly in its own interests, as a nation should,¹⁷ or that it acts unjustly in pursuit of its own interests, or those of a nefarious corporate elite.¹⁸ In either case, war powers scholars tend to ignore contemporary ideology and undertake functional analyses that are mistaken about modern American normative goals. Part III proves that these purely realist assumptions are not shared by experts in international relations. The realist view provides an accurate picture of American behavior at the founding, but ignores ideological changes since that time. While some argue that other parts of the Constitution should be reinterpreted in light of value changes,¹⁹ war powers scholars who argue that the world has changed in relevant ways simply point to material changes or new threats that have appeared since the founding.²⁰

This idealistic foreign policy is most clearly reflected in the practice of humanitarian intervention. I review three case studies of American intervention, showing that in each war the scholarly consensus is that American motivations were predominately, if not exclusively, humanitarian.²¹ Although some scholars fault the United States for its hypocrisy in holding different countries to different human rights standards,²² or see human rights rhetoric as a mask for serving imperial purposes and/or the needs of the military-industrial complex,²³ this

¹⁶ See *infra* Part II.

¹⁷ See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 124–29 (2010).

¹⁸ See PETER IRONS, *WAR POWERS* 264–68 (2005).

¹⁹ See Bruce Ackerman, *Lecture II: The Civil Rights Revolution*, in *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1762–63 (2006-2007) (arguing that the Warren Court's reinterpretation of the Fourteenth Amendment was an instance of constitutional change based on popular consent).

²⁰ See Eugene V. Rostow, "Once More Unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 2 (1986) ("changes in the magnetic field of world politics since 1789 have imposed novel and dangerous tasks on the people and the government of the United States"); YOO, *supra* note 7, at ix ("The world after September 11, 2001, however, is very different ... Rather than disappearing from the world, the threat of war may well be increasing."). The one writer to genuinely consider ideological changes since the founding in the context of a discussion on the war powers was Arthur Schlesinger, Jr. See *infra* notes 169–176 and accompanying text.

²¹ Humanitarian motivations can affect executive officials directly or indirectly. A president may be genuinely upset about human rights violations, or commit the country to a humanitarian war to improve his legacy or satisfy a constituency. Either way, this Article claims that at least the motivations of those who judge the legacy or pressure the executive are humanitarian, whatever the actual mental state of decision makers might be. There is evidence that humanitarian concerns affect American foreign policy both directly and indirectly. See *infra* Part IV.

²² See JULIE A. MERTUS, *BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY*, at xii (2008).

²³ See CHALMERS JOHNSON, *NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC* (2007).

Article does not argue that American leaders behave in a humanitarian manner without ever taking into account national interests or public choice concerns. The goal here is much less ambitious: to show that in the countless situations in which the United States could act to stop humanitarian atrocities, it occasionally does so.²⁴

Finally, Part IV spells out some of the implications of humanitarian intervention for the war powers debate. First, a public choice model of legislation indicates that to the extent to which one believes that the United States has moral or legal obligations to defend those being killed by their own governments, one can expect the legislature to be marked for its inaction in meeting these challenges. Any psychic benefit that the American population receives from such acts are widely distributed and events on the ground often proceed too quickly to expect Congress to act to stop humanitarian atrocities. On the other hand, although the executive is also constrained to some extent by public opinion, because of his quest for approbation we may expect him to be more likely to engage in humanitarian intervention. This model is based on the idea of the Founding Fathers that only Congress should have the power to declare war because executives seek glory via conquest.²⁵ While two hundred years ago the executive might gain prestige by becoming a great conqueror, today presidents seek fame by establishing a positive legacy and gaining the approval of their fellow elites. Part IV.B then tests this model against empirical reality, focusing on the interplay between Congress and the president at the key moments in the course of the decision making process in the three humanitarian interventions reviewed in Part III.

Our assumptions about the reasons for which the United States goes to war bear greatly on any debate about where the power to initiate hostilities should be placed. If one fears a president who is an imperialist, in the classic sense of the term, then showing that an executive is more likely to act in ways that advance what he sees as the good of humanity as a whole should allay these concerns. We may still believe that no one man should have the power to decide when war is in humanity's interests, that normatively the United States should only look out for its own interests, that Congress should decide how to balance national and internationalist goals, or that the original intent or plain text of the Constitution should control no matter what.²⁶ Similarly, if one wants the United States to engage in humanitarian intervention or protect democratic allies abroad, one must consider whether placing the war powers in the hands of the executive or

²⁴ See *infra* Part III.B.

²⁵ See *infra* Part IV.A.2.

²⁶ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 854–56 (1988-1989) (arguing that nonoriginalist methods of interpretation lack legitimacy).

legislative branch is more conducive to these goals. It may or may not lead one to a different conclusion than one a scholar might reach if he carries out his functional analysis assuming that the United States only uses force in self-defense, or that it should. This Article does not take a position on the complex normative questions presented in this paragraph, but simply seeks to point out that the assumptions that war powers scholars make about American foreign policy are dated and convince the reader that this fact is relevant to the debate.

I. FOREIGN POLICY AND THE FOUNDERS

In this Part, I begin by showing that in modern terms, the Founders were foreign policy realists, as opposed to idealists.²⁷ On the major descriptive issues on which realists and idealists disagree—whether representative and nonrepresentative governments can be expected to have similar foreign policies, whether nations and individuals act for the good of themselves or can be made to act for the good of the world, and to what extent relationships between countries will always be based on power relations—the Founders came down on the side of the realists. In Part I.B, I show that as a normative matter the Founders believed that when national and world interests diverge, leaders have an obligation to do what is right for their own people. Part I.C discusses how the Founders’ realist views and ideas about human nature, which reflected their era, determined how they structured and justified the constitutional distribution of power over foreign affairs.

A. The Founders as Practical and Descriptive Realists

1. The Acceptance of Power Politics and National Self-Interest

The Founding Fathers were greatly influenced by the writings of Locke, who shared in the common assumption of the time that foreign relations existed in the context of an anarchic international system.²⁸ States were assumed to behave as rational actors, seeking security and looking to expand their power.²⁹ These assumptions formed the basis of the 1648 Peace of Westphalia,³⁰ with European statesmen believing that they all had a stake in ensuring that no power would ever

²⁷ For a brief summary of the major disputes between the two camps, see John H. Herz, *Idealist Internationalism and the Security Dilemma*, 2 *WORLD POL.* 157, 158–59 (1950). See also Joshua Muravchik, *The Future Is Neocon*, 97 *NAT’L INT.* 20, 20 (2008) (noting that realism has a normative and a descriptive aspect).

²⁸ IRONS, *supra* note 18, at 17–18; SCHLESINGER, *supra* note 2, at 8 (“the Founding Fathers were more influenced by Locke than by any other political philosopher”).

²⁹ See NORMAN A. GRAEBNER, RICHARD DEAN BURNS & JOSEPH M. SIRACUSA, *FOREIGN AFFAIRS AND THE FOUNDING FATHERS: FROM CONFEDERATION TO CONSTITUTION, 1776–1787*, at xv (2011).

³⁰ *Id.* at xiii; NORMAN A. GRAEBNER, *FOUNDATIONS OF AMERICAN FOREIGN POLICY: A REALIST APPRAISAL FROM FRANKLIN TO MCKINLEY* xiv–xv (1985).

become strong enough to dominate its neighbors.³¹ This world was “a brutal, amoral cockpit” and one in which “power was king.”³²

There are some who have argued that there was an influential strain of idealistic internationalism in early American history.³³ Yet even if we accept this as true, this idealism was extremely passive by modern standards. To spread liberalism, the United States would engage in free trade and set a good example for the rest of the world.³⁴ In other words, this idealism was what we would today call isolationism. In fact, modern isolationists are often in favor of free trade and a great deal of nonviolent interaction between the United States and foreign countries.³⁵ Congressman Ron Paul echoes Thomas Paine when he calls on the United States to spread its values by example.³⁶ The idealists of the founding generation were closer to modern isolationism than they were to modern idealism in their practical recommendations.

A review of the foreign policy of the founding generation demonstrates that they acted in accordance with international realist norms.³⁷ Regardless of whether the Founders thought that power politics would eventually be eliminated, they accepted the legitimacy of the existing international system and were eager participants in it.³⁸ John Adams believed that European balance of power politics were natural and inevitable.³⁹ Serving as ambassador to France in the 1780s, Jefferson often reflected on the changing dynamics of European politics and what

³¹ GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at xiv.

³² See James H. Hutson, *Intellectual Foundations of Early American Diplomacy*, 1 *DIPL. HIST.* 1, 9 (1977).

³³ See David M. Fitzsimons, *Thomas Paine's New World Order: Idealistic Internationalism in the Ideology of American Foreign Relations*, 19 *DIPL. HIST.* 569, 574–75 (1995).

³⁴ See *id.* at 576; FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* 59–69 (1970).

³⁵ Adam Quinn, *The Great Illusion: Chimeras of Isolationism and Realism in Post-Iraq U.S. Foreign Policy*, 35 *POL. & POL'Y* 522, 527 (2007).

³⁶ RON PAUL, CONGRESSMAN, *WHY WE FIGHT*, SPEECH BEFORE THE HOUSE OF REPRESENTATIVES (Sept. 8, 2005), reprinted in RON PAUL, *A FOREIGN POLICY OF FREEDOM: 'PEACE, COMMERCE, AND HONEST FRIENDSHIP'* 327 (2007) (“Whenever the people turn against war as a tool to promote certain beliefs, the war ceases ... Then we can get down to the business of setting an example of how peace and freedom bring prosperity in an atmosphere that allows for excellence and virtue to thrive.”). Indicative of the size of the ideological shift since the founding is that the relatively isolationist Paul takes the subtitle of his book from Thomas Jefferson’s first inaugural address. Thomas Jefferson, *Inaugural Address* (Mar. 4, 1801).

³⁷ See Richard Russell, *American Diplomatic Realism: A Tradition Practised and Preached by George F. Kennan*, 11 *DIPL. & STATECRAFT* 159, 160 (2000) (noting “the drift in American diplomacy from its traditional assumptions held in the realist school towards the liberal or Wilsonian school of international relations”).

³⁸ See *id.* at 161; Hutson, *supra* note 32, at 12–15.

³⁹ GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at xxii (quoting John Adams). See also Hutson, *supra* note 32, at 18 (attributing the same belief to the Founders in general).

it meant for international stability.⁴⁰ Early Americans looked forward to the day when their numbers would allow their country to grow into the world's largest power.⁴¹

At the Continental Congress, foreign affairs were discussed exclusively in terms of power politics.⁴² American leaders understood the importance of having the support of France in any revolutionary effort.⁴³ One month before the signing of the Declaration of Independence, Richard Henry Lee argued that no nation would risk supporting the United States unless its leaders made a complete split with Great Britain.⁴⁴ The eventual decision to form an independent nation was based on just this consideration.⁴⁵ Yet the Founders were under no illusion that French support was based on anything but national interest. Any contrary view was grounded more on sentimentality than logic. Washington held that it was “a maxim founded on the universal experience of mankind, that no nation is to be trusted further than it is bound by its interest; and no prudent statesman or politician will venture to depart from it.”⁴⁶ He would return to this theme upon leaving office in his Farewell Address, lecturing that “[t]here can be no greater error than to expect or calculate upon real favors from nation to nation.”⁴⁷ Years after the Revolution, Hamilton reflected that, when the colonists discussed the possibility of receiving aid from France and Spain, their calculations were based on the interests of those two nations, rather than any expectation that they would care anything about American interests or the cause of liberty.⁴⁸ And when Adams heard that a British general had argued that France and America were too historically and culturally different to be allies, Adams responded that he knew of “no better rule than” that which said that whether nations were enemies or allies was determined by interests, and feelings of affection and animosity between them changed as circumstances did.⁴⁹

⁴⁰ GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at xxi–xxii.

⁴¹ See Hutson, *supra* note 32, at 9–11.

⁴² *Id.* at 13.

⁴³ *Id.* at 8–9.

⁴⁴ *Id.* at 9.

⁴⁵ WALTER A. MCDUGALL, *PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776*, at 5 (1997).

⁴⁶ *Quoted in* MAXIMS OF GEORGE WASHINGTON: POLITICAL, SOCIAL, MORAL, AND RELIGIOUS 218 (J.F. Schroder ed., 1855).

⁴⁷ GEORGE WASHINGTON, *FAREWELL ADDRESS* (Sept. 17, 1796), *reprinted in* 1 *THE GROWTH OF PRESIDENTIAL POWER: A DOCUMENTED HISTORY* 427 (William M. Goldsmith ed., 1974).

⁴⁸ ALEXANDER HAMILTON, ‘PACIFICUS’ NUMBER 5, *reprinted in* *LETTERS OF PACIFICUS AND HELVIDIUS, ON THE PROCLAMATION OF NEUTRALITY OF 1793*, at 33, 34 (J. and G.S. Gideon eds., 1845).

⁴⁹ *Quoted in* GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 12.

Even after France entered the war, but before independence had been won, the Founders were sure not to confuse American interests with those of France. In April 1782, John Jay met Franklin in Paris for negotiations with the French, Spaniards, and British.⁵⁰ In the negotiations of that summer, the French joined Spain in trying to keep the borders of the United States away from Louisiana.⁵¹ Realizing this, and despite having agreed not to negotiate apart from the French, Jay sought an independent solution with Britain that would give the United States a more westward boundary.⁵² “We can depend upon the French,” he wrote, “only to see that we are separated from England, but it is not in their interest that we should become a great and formidable people, and therefore they will not help us to become so.”⁵³ Adams later noted that the only reason the United States had stretched its borders to the Mississippi River was because of this maneuvering.⁵⁴ When French and American interests diverged, even while the nations were still wartime allies, there was no doubt about what was the proper course of action. No contemporary Congressman or later historian would frown on Franklin and Jay’s betrayal of French interests.⁵⁵

In the time between independence and the ratification of the Constitution, foreign affairs consisted of signing trade agreements based on reciprocity, trying to eject England from American territory, negotiating borders with Spain, and dealing with the Barbary pirates.⁵⁶ American foreign policy continued to be no different than the amoral *realpolitik* of the Old World.⁵⁷ When Adams’s attempts, as ambassador to London, to open up the British market to American trade failed, he advocated restrictions on British imports in kind.⁵⁸ The Founders continued to understand the importance of power relations and how America’s relative place in the world would determine how effectively the country’s leaders could protect her interests. Jefferson and Adams agreed that the only way that the British would ever deal with American demands was if America had the military strength to back up her diplomacy.⁵⁹ They were similarly frustrated with their inability to deal satisfactorily with the North African pirates. Adams wrote to Jay that while it would be “heroic”

⁵⁰ *Id.* at 15.

⁵¹ *Id.* at 16.

⁵² *Id.*

⁵³ *Quoted in id.*

⁵⁴ *Id.*

⁵⁵ MCDUGALL, *supra* note 45, at 25–26.

⁵⁶ See GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 43–87.

⁵⁷ MCDUGALL, *supra* note 45, at 26 (“Any Americans who remained attached to the idea that their diplomacy (as opposed to their nation itself) could be different and better had that illusion punctured in the years following the Peace of Paris.”).

⁵⁸ *Id.*; GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 54–55.

⁵⁹ GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 52–53.

for the young nation to fight, rather than pay tribute to, the pirates, American weakness at sea made that course of action impossible.⁶⁰

Its inability to protect American interests in foreign affairs was perhaps the main deficiency of the Articles of Confederation that inspired the Constitutional Convention.⁶¹ Reflecting the times, the first 29 out of the 85 *Federalist Papers* relied on foreign policy arguments to make the case for the Constitution.⁶² In advocating for ratification before the state legislatures, delegates stressed the idea that continued weakness would make the nation prey to the great powers.⁶³ Madison told the Virginia Convention that he would not have supported giving Congress such an extensive tax power if it was not for the threat of foreign invasion.⁶⁴ Washington saw a new European war on the horizon and predicted that America's role in it would depend on the nation's strength.⁶⁵ If the United States could unite under a national government, its ships could supply the belligerents unmolested; if the nation remained weak, then America could not help her vessels being treated with contempt, which would drag the country into war.⁶⁶

The Antifederalists rejected the Federalists' argument that it was the Articles of Confederation that made the United States weak.⁶⁷ Instead, the lack of respect America had suffered abroad was because it was a young, sparsely populated, nation. Of course one would expect countries to take advantage of a nation in such circumstances; no form of government could correct that.⁶⁸ Further, for its safety, the United States could continue to rely on its distance from Europe, vast territory, and the interest other nations had in maintaining the balance of power.⁶⁹ The Antifederalists shared the underlying assumptions that national power depended on military capabilities and states acted in their own interests, only disagreeing with the Federalists as to the causes of American weakness.

Immediately after the French Revolution in 1789, most Americans, inspired by gratitude and a sense of shared mission, would call for the United States to

⁶⁰ *Id.* at 64–65.

⁶¹ *Id.* at 85; GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 49 (2008); YOO, *supra* note 7, at 90.

⁶² MCDUGALL, *supra* note 45, at 6.

⁶³ GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 127–28.

⁶⁴ *Id.* at 140.

⁶⁵ *Id.* at 127–30.

⁶⁶ *Id.*

⁶⁷ *Id.* at 132–33.

⁶⁸ *Id.*

⁶⁹ GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 134–35.

support the new republic on the other side of the Atlantic.⁷⁰ News of revolutionary atrocities would divide the country, however, with the Federalists opposing the revolution and the Republicans supporting it.⁷¹ Washington's policy of strict neutrality eventually won the day, with the issuance of the Neutrality Proclamation of 1793.⁷² The behavior of French Ambassador Edmond Charles Genet tipped public opinion in favor of the Federalists.⁷³ As the public overwhelmingly desired neutrality, the Republicans eventually were forced to concede many of the arguments of the Federalists, and Jefferson and others sympathetic to the revolutionary cause kept much of their enthusiasm for France to themselves.⁷⁴

In defending the Neutrality Proclamation, Hamilton, writing as "Pacificus," used the maxim that states always acted in their own self-interest to argue against the proposition that there could be gratitude between nations. One party should feel grateful towards another when it altruistically undertakes an action to help the first.⁷⁵ But since countries do not behave altruistically, any help that they provide one another is based on interests. If there was no such thing as altruism between nations, it followed that there could not be gratitude.⁷⁶ Madison's responses to Hamilton's letters did not contest Hamilton's underlying realist assumptions, but instead focused on the narrow question of executive power to issue the Proclamation.⁷⁷

2. Liberal Peace Theories

Liberal peace theories are a major source of division between foreign policy realists and idealists. These theories hold that internal liberalism—in the form of liberal trade policy,⁷⁸ democratic government,⁷⁹ or both—makes nations less likely to go to war with one another. If the Founders shared this idea, then the divergence between the interests of the nation and the human rights of the rest of the world

⁷⁰ MCDUGALL, *supra* note 45, at 28–29; GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 174–75 (2009).

⁷¹ WOOD, *supra* note 70, at 176–82.

⁷² MCDUGALL, *supra* note 45, at 29.

⁷³ WOOD, *supra* note 70, at 187.

⁷⁴ *Id.* at 188.

⁷⁵ ALEXANDER HAMILTON, 'PACIFICUS' NUMBER 4, *reprinted in* LETTERS OF PACIFICUS AND HELVIDIUS, *supra* note 48, at 28, 30.

⁷⁶ *Id.*

⁷⁷ *See* WOOD, *supra* note 70, at 185.

⁷⁸ Michael W. Doyle, *Three Pillars of the Liberal Peace*, 99 AM. POL. SCI. REV. 463, 464–65 (2005).

⁷⁹ *See* Ben D. Mor, *Peace Initiatives and Public Opinion: The Domestic Context of Conflict Resolution*, 34 J. PEACE RES. 197, 199–200 (1997) ("One of the most prominent and heated debates in current international relations literature concerns the relationship between regime type and war proneness—the so-called 'democratic peace' phenomenon."); John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT'L SEC. 87, 87 (1994) (defining the phrase).

might have been considered extremely small. An early advocate of these liberal peace theories was Thomas Paine.⁸⁰ Between January and March of 1776, Paine's *Common Sense* sold the modern equivalent of thirty million copies.⁸¹ Paine's philosophical and moral arguments are still cited by those who advocate that American foreign policy be based on humanitarian considerations.⁸²

Some of the Founders did in fact accept the idea that free trade could lead to greater peace between nations.⁸³ Despite Paine's influence, however, most international relations scholars believe that the Founders generally distrusted foreign commerce.⁸⁴ Jefferson, for instance, wrote in 1785 that he felt obliged to carry out the wishes of his constituents, who demanded the opening up of foreign markets. If it was up to him, however, America would be as isolationist as China and "all our citizens would be husbandmen."⁸⁵ Regardless of whether the Founders accepted the idea that free trade led to peace, their diplomacy with regards to commerce was based on acquiring mutual concessions. This was the favored policy of Republicans such as Jefferson and Madison, as much as it was the policy of the Federalists.⁸⁶ Whatever theoretical ideas some Founders held about what free trade could do for humanity at large, when they debated amongst themselves national interests took center stage.⁸⁷

The Founders more clearly rejected the democratic variant of the liberal peace theory.⁸⁸ In *The Federalist* No. 41, Madison argued that a stronger union would make a standing army less necessary.⁸⁹ But if the states did not unite in a stronger federal government, "[t]he fears of the weaker, or the ambition of the stronger States, or Confederacies, will set the same example in the New, as Charles VII. did, in the Old World."⁹⁰ The fact that the different states were democracies did not lead Madison to conclude that they would be any more peaceful than the monarchies of Europe.

⁸⁰ Fitzsimons, *supra* note 33, at 576–77.

⁸¹ *Id.* at 569 n. 2.

⁸² See Johann Hari, *Whither the Pro-War Left?*, 14 PUB. POL'Y RES. 168, 170–71 (2005).

⁸³ WOOD, *supra* note 70, at 189–90.

⁸⁴ Hutson, *supra* note 32, at 3–9 (showing that the Founders constantly railed against international commerce, but felt compelled to advance it because this was the wish of their constituents); Fitzsimons, *supra* note 33, at 570 (arguing against the standard position, but acknowledging that Hutson's view is that of most historians).

⁸⁵ Quoted in GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 53.

⁸⁶ WOOD, *supra* note 70, at 190–94.

⁸⁷ *Id.* at 194.

⁸⁸ MCDUGALL, *supra* note 45, at 27–28.

⁸⁹ THE FEDERALIST NO. 41 (James Madison), at 220 (J.R. Pole ed., 2005).

⁹⁰ *Id.* at 221–22.

Hamilton addressed the same issue in much the same way. There were some who argued that the states as sovereign entities would not follow the example of Europe, as they were commercial republics and thus pacific.⁹¹ Hamilton responded by appealing to logic and history.

Is it not ... the true interests of all nations to cultivate the same benevolent and pacific spirit? ... Have Republics in practice been less addicted to war than monarchies? Are not the former administered by *men* as well as the latter? Are there not aversions, predilections, rivalships, and desires of unjust acquisitions, that affect nations as well as kings?⁹²

Hamilton cited ancient and more recent history, reminding the reader that the ancient Greek republics were often fighting one another and that in more recent times the states of Holland had played a part in the major European conflicts.⁹³ Once again, the fact that the states were republics would not keep them from ending up as rivals.

The Founders were not able to merge the national interest and a humanitarian foreign policy in the way that modern liberal interventionists and neoconservatives do. If, as a normative matter, a nation should look after its own interests,⁹⁴ and the form of government or openness to trade of a country did not make it more likely to be peaceful, then there would be no sense in wasting financial or diplomatic capital on liberalizing other countries. It is little wonder that Washington's Farewell Address encouraged Americans to practice nondiscrimination in trade and commerce and not form any attachments to foreign countries.⁹⁵

B. The Founders as Normative Realists

In addition to their empirical differences, realists and idealists tend to disagree on the question of to what extent American foreign policy *should* be based on purely national interests.⁹⁶ One may see the Founders as tragic figures—idealists forced to live and operate in a realist world. Perhaps they would have gladly been global citizens if they could expect the same from less enlightened powers. After all,

⁹¹ THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 89, at 24.

⁹² *Id.*

⁹³ *Id.* at 24–25.

⁹⁴ See *infra* Part I.B.

⁹⁵ WASHINGTON, *supra* note 47.

⁹⁶ See Muravchik, *supra* note 27; Russell, *supra* note 37, at 162.

although rarely, if ever, practiced, humanitarian intervention was a well known concept at the time of the founding.⁹⁷

At the time of the Enlightenment, natural law philosophers believed that human laws should be judged by their compatibility to universal moral standards, discoverable through reason.⁹⁸ Although it has been argued that few philosophers understood the concept of natural rights as giving an individual claims against the rest of the world,⁹⁹ it is clear that the Founding Fathers believed that human beings inherently possessed certain individual freedoms.¹⁰⁰ Though these rights could be restricted for the sake of the common good, if a person did not infringe on the rights of his neighbor society was to generally leave him alone.¹⁰¹

At the time of the founding, most thinkers directly analogized the philosophy of natural law between individuals to relations between states. That is not to say there were not exceptions. Grotius believed that while subjects had an almost limitless duty to obey their sovereigns, that did not mean that a sovereign's behavior could not be so egregious that a neighboring state had the duty to act.¹⁰² For the most part, however, states were to mind their own business unless directly threatened. The international system placed a premium on such concepts as abiding by treaties, non-interference, sovereignty, and territorial integrity.¹⁰³ According to Martens, "the obligation of one nation towards another, are no more than those of

⁹⁷ See GARY J. BASS, *FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION* 4–5 (2008).

⁹⁸ Cary J. Nederman, *Introduction* to ALEXANDER PADDERIN D'ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY*, at xii–xiii (1994).

⁹⁹ See KNUD HAAKONSSON, *NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT* 5–6 (1996) (arguing that for the most part, natural law emphasized duties, rather than rights, human beings had).

¹⁰⁰ See Chester James Antieau, *Natural Rights and the Founding Fathers—The Virginians*, 17 WASH & LEE L. REV. 43, 45–51 (1960) ("In their most generalized expressions the Founding Fathers spoke of their natural rights to life and liberty, adding at times, property, and on other occasions, the pursuit of happiness."); Clarence Manion, *The Founding Fathers and the Natural Law: A Study of the Source of Our Legal Institutions*, 35 A.B.A. J. 461, 463–64 (1949) (showing that the Founders rejected parliamentary absolutism).

¹⁰¹ Antieau, *supra* note 100, at 52–54.

¹⁰² See D.J.B. Trim, *If a Prince Use Tyrannie Towards His People': Interventions on Behalf of Foreign Populations in Early Modern Europe*, in *HUMANITARIAN INTERVENTION: A HISTORY* 29, 39–41 (Brendan Simms and D.J.B. Trim eds., 2011). One early Enlightenment philosopher who appears to have foreseen the development of the modern international system was Immanuel Kant. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 218–32 (1983) (finding Hobbesian realism unable to explain the "liberal pacification" of the modern world and offering Kant's vision in its place). However, it does not appear that the German philosopher had much of a direct influence on the American Founders.

¹⁰³ HERRING, *supra* note 61, at 12–13.

individuals, modified and applied to nations.”¹⁰⁴ A sovereign state could do whatever it deemed necessary for its own security, provided it did not break any treaties, and it did not need to explain itself to other powers.¹⁰⁵ In Blackstone’s formulation, relations between countries were based “entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between” the states.¹⁰⁶ Finally, Hobbes, perhaps the most important philosopher of the Constitutional era,¹⁰⁷ was also a realist in modern terms.¹⁰⁸ The state existed to provide security for its own people, and morality had little to nothing to do with its relations with other states.¹⁰⁹ The influence of these thinkers on the Founders can be seen in their writings. Hamilton, for example, cited Vattel for the proposition that one sovereign has no right to judge the internal conduct of another.¹¹⁰

The Founders explicitly considered the question of how a statesmen should balance the interests of his fellow countrymen and those of the rest of humanity. And the records of them doing so shows that they were not only realists in the descriptive sense, but also in the normative.

As we have seen, the success of the revolutionary effort depended on French support.¹¹¹ Robert Morris was somewhat troubled by the implications of this, but believed that the interests of the new nation came first. In September 1776, he wrote the following to John Jay.

It appears clear to me that we may very soon involve all Europe in a War by managing properly the apparent forwardness of the Court of France; it’s a horrid consideration that our own Safety should call on us to involve other nations in the Calamities of War. Can this be morally right or have Morality and Policy nothing to do with each other? Perhaps it may not be good Policy to investigate the Question at this time.¹¹²

¹⁰⁴ G.F. MARTENS, SUMMARY OF THE LAW OF NATIONS 2 (W. Cobbett trans., 1795).

¹⁰⁵ *Id.* at 122.

¹⁰⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *43.

¹⁰⁷ Richard Hofstadter, *The Founding Fathers: An Age of Realism*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 62, 62 (R.H. Horowitz ed., 1986).

¹⁰⁸ See Justin Cooper, *The State, Transnational Relations, and Justice: A Critical Assessment of Competing Paradigms of the World Order*, in SOVEREIGNTY AT THE CROSSROADS?: MORALITY AND INTERNATIONAL POLITICS IN THE POST-COLD WAR ERA 3, 6 (Luis E. Lugo ed., 1996).

¹⁰⁹ *Id.*

¹¹⁰ ALEXANDER HAMILTON, ‘PACIFICUS’ NUMBER 2, *reprinted in* LETTERS OF PACIFICUS AND HELVIDIUS, *supra* note 48, at 15, 21.

¹¹¹ See *supra* notes 42–45 and accompanying text.

¹¹² *Quoted in* GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 9.

A further clue to the thinking of the time can be seen in an exchange John Adams had with the King of England in 1785 while serving as ambassador to that country.¹¹³ King George III said that he had heard that Adams did not have the most favorable view of the French. Taken aback, Adams replied that his only attachment was to his own country.¹¹⁴ The king replied that “[a]n honest man will never have any other.”¹¹⁵

The Founders accepted the individual/state analogy when they spoke of the “law of nations.” Thomas Jefferson wrote that the law of nations had three components: “1. The Moral law of our nature. 2. The Usages of Nations. and 3. Their Special Conventions.”¹¹⁶ To modern ears, “Moral law of our nature” sounds like something that may be used to justify the duty to protect civilians, but Jefferson made clear that this was not what he meant. Just as the Creator created man with certain moral duties towards other men, when men aggregate into states, those states have the same moral duties regarding one another.¹¹⁷ To Jay, “the *just* causes of war, for the most part, arise either from violations of treaties or from direct violence (emphasis in original).”¹¹⁸ These, and countless other statements, show that the Founders did not believe that what other governments did to their own people was any of their business.

As “Pacificus,” Hamilton addressed the argument that the Neutrality Proclamation showed ingratitude towards the French. He heaped scorn on those who would make France the “shrine” at which “we are continually invited to sacrifice the true interests of the country.”¹¹⁹ He rejected the idea that a concept as fuzzy as gratitude could guide relations between nations.¹²⁰ While individuals may behave altruistically towards one another, nations doing the same was unheard of.¹²¹ And this was the way things should be. Hamilton wrote that, “[i]ndeed, the rule of morality in this respect is not precisely the same between nations, as between individuals. The duty of making its own welfare the guide of its actions, is much stronger upon the former[.]”¹²²

¹¹³ *Id.* at 44.

¹¹⁴ *Id.* at 45.

¹¹⁵ *Quoted in id.*

¹¹⁶ THOMAS JEFFERSON, JEFFERSON: POLITICAL WRITINGS 555 (Joyce Appleby & Terence Ball eds., 1999).

¹¹⁷ *Id.*

¹¹⁸ THE FEDERALIST NO. 3 (John Jay), *supra* note 89, at 9.

¹¹⁹ HAMILTON, *supra* note 75, at 30.

¹²⁰ *Id.* at 28–30.

¹²¹ *Id.* at 31.

¹²² *Id.*

It was morally acceptable, of course, for one individual to act altruistically towards another. But a national leader was rarely, if ever, justified in doing the same. In a footnote, Hamilton spelled out that “[t]his conclusion derives from the reflection, that under every form of government, rulers are only trustees for the happiness and interest of their nation, and cannot, consistently with their trust, follow the suggestions of kindness or humanity towards others, to the prejudice of their constituents.”¹²³

Thomas Jefferson is widely quoted with coining the phrase “empire of liberty” in a 1780 letter.¹²⁴ Jefferson defended the bloodshed in France, writing to William Short that he would rather “have seen half the world desolated” than the French Revolution fail.¹²⁵ Considering him an expansionist president, most historians believe that as president Jefferson sought to enlarge the United States more out of a desire to spread liberty than out of classical nationalist motivations.¹²⁶ When told that annexing Louisiana could lead to disunion, for example, the president was unfazed, saying that he would wish the secessionists well in their new republic.¹²⁷

Despite the Jefferson presidency, the Hamiltonian view is considered to have prevailed among the founding generation,¹²⁸ and for most of the rest of American history.¹²⁹ And whatever Jefferson’s motivations were, his public pronouncements on foreign policy lack the idealism of his letters. In the aftermath of the Neutrality Proclamation, Jefferson realized that political expediency required him to temper his enthusiasm for the French cause.¹³⁰ The same difference between public and private statements can also be seen with regards to his expressed opinions on the Louisiana purchase. In his First Inaugural Address, President Jefferson expressed gratitude that the young nation was detached from “the exterminating havoc of one quarter of the globe” and hoped for guidance in “steer[ing] with safety the vessel in which we are all embarked amidst the conflicting elements of a troubled world.”¹³¹ While there were many assertions that the United States was a blessed

¹²³ *Id.* at 32.

¹²⁴ 4 PAPERS OF THOMAS JEFFERSON 237–38 (Julian P. Boyd ed., 1951).

¹²⁵ Quoted in WOOD, *supra* note 70, at 180–81.

¹²⁶ See ROBERT W. TUCKER & DAVID C. HENDRICKSON, *EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON* 159 (1992).

¹²⁷ *Id.* at 160.

¹²⁸ See Norman A. Graebner, *Realism and Idealism*, in 3 *ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY* 314–15 (Richard Dean Burns, Alexander DeConde, & Fredrik Logevall eds., 2002); HANS JOACHIM MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 14 (1951).

¹²⁹ See MATTHEW C. PRICE, *THE WILSONIAN PERSUASION IN AMERICAN FOREIGN POLICY* 2 (2007); YOO, *supra* note 7, at 161 (pointing out that, up until last few decades, “American war aims were usually self-interested”).

¹³⁰ WOOD, *supra* note 70, at 187.

¹³¹ Jefferson, *supra* note 36.

and exceptional country, there was no indication that part of its mission was to spread liberty to other people. In fact, Jefferson expressed satisfaction that Americans were “too high-minded to endure the degradations of the others.”¹³² While this phrase can be interpreted in a number of ways, it seems to contrast the American refusal to tolerate infringements of liberty with the passivity of other nations. The implication is that the people of the United States were uniquely qualified for republican government. Jefferson’s statements on the Louisiana Purchase in his Second Inaugural, in contrast to his private statements on the matter, emphasized nationalist expansion and said next to nothing about spreading liberty.¹³³ Though more committed to free trade, Jefferson’s Republican party was no different than the Federalists in seeking to stay out of Europe’s wars.¹³⁴

To the extent that Jefferson believed that the United States would change the world, he, like Paine, thought it would do so by setting an example for other countries.¹³⁵ Paine himself wholeheartedly supported revolutionary struggles to depose despotic government, and his *Rights of Man* was addressed to British subjects and caused the government to convict him in absentia for treason.¹³⁶ But at the same time, Paine opposed other governments interfering in these civil wars and was against the French attempts to spread their revolution by force.¹³⁷ Even these positions, moderate by today’s standards, were savaged by the Federalists.¹³⁸ According to McDougall, the founding generation believed that “the exceptional calling of the American people was not *to do* anything special in foreign affairs, but *to be* a light to lighten the world.”¹³⁹ The views of the Founders ranged from those who cared very little about changing the world in a more liberal direction, to those who wanted to put history on the right path via example. Early American leaders rejected both the descriptive and normative foundations of modern idealism.

¹³² *Id.*

¹³³ After explaining why the expanded nation would not break up, Jefferson asks “and in any view is it not better that the opposite bank of the Mississippi should be settled by our own brethren and children than by strangers of another family? With which should we be most likely to live in harmony and friendly intercourse?” Thomas Jefferson, Inaugural Address (Mar. 4, 1805). Liberty would spread, even in the case that the nation would split up, but America’s concern was living at peace with any new states.

¹³⁴ WOOD, *supra* note 70, at 622.

¹³⁵ GRAEBNER, *supra* note 128, at 313; MCDUGALL, *supra* note 45, at 20 (pointing out that radicals like Paine hoped America would change the world, but were expecting it to do so by “lead[ing] by example: one could not force men and nations to be free”).

¹³⁶ Fitzsimons, *supra* note 33, at 578.

¹³⁷ *Id.* at 578–79.

¹³⁸ *Id.* at 581.

¹³⁹ MCDUGALL, *supra* note 45, at 20.

C. Realism, Human Nature, and the War Powers

Scholars are nearly unanimous in believing that the Founders intended to place the powers over war and peace in the hands of Congress.¹⁴⁰ There were two main reasons for this choice. First of all, concentrated power was bad in and of itself. Early Americans were adamant that one man would not be able to determine when the country went to war. In a discussion on the treaty power, Hamilton wrote that “[t]he history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate ... as would be a President of the United States.”¹⁴¹ Similarly, James Wilson, considered perhaps the leading constitutional scholar of the founding generation,¹⁴² stressed that “[i]t will not be in the power of a single man, or a single body of men,” to involve the nation in war.¹⁴³

¹⁴⁰ See GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 148; Louis Fisher and David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 6–9 (1998) (“The debates and vote on the war clause make it clear that Congress alone possesses the authority to initiate war.”); GLENNON, *supra* note 2, at 80–84; IRONS, *supra* note 18, at 4, 11–27 (arguing that the evidence for the conventional view is “clear and emphatic”); SCHLESINGER, *supra* note 2, at 4–5 (“What does seem clear is that no one wanted ... to give the President general power to initiate hostilities.”); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1386–87 (1988) (holding that it is clear that “[t]he power to declare war is vested in Congress”); Raoul Berger, *War-Making by the President*, 121 PENN. L. REV. 29, 33–34 (1972) (saying that “the Framers did not leave us in doubt” that the executive would simply execute the laws and not control when the nation went to war). See also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 170–71 (1996) (arguing against the conventional position, but nonetheless noting that the scholarship is “striking [] for its uniformity of opinion”). Even Yoo, the most prominent dissenter from the conventional position, believes that the Founders created a check on the executive power to make war. YOO, *supra* note 7, at 154–55 (“There is no doubt that the Constitution provides Congress with a powerful check on warmaking, but it comes through the authority to grant or deny funds to wage war.”). Thus, accepting Yoo’s minority position would not change the conclusions reached in this Article, as his view acknowledges the fact that the Founders feared one man having the power to commit the nation to war. Part IV argues that such a check is not likely to be effective in preventing humanitarian interventions.

¹⁴¹ THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 89, at 400.

¹⁴² See Berger, *supra* note 140, at 36. See also GRAEBNER, BURNS, & SIRACUSA, *supra* note 29, at 117 (saying that Wilson “dominated the Pennsylvania Convention”); IRONS, *supra* note 18, at 20 (calling Wilson “perhaps the most influential delegate [at the Constitutional Convention] after Madison”); SCHLESINGER, *supra* note 2, at 4 (saying that Wilson was “next to Madison, the most penetrating political thinker at the convention”).

¹⁴³ Quoted in SCHLESINGER, *supra* note 2, at 4.

Of course, when the country had actually committed itself to war, only a unitary executive could make a proper commander-in-chief.¹⁴⁴ Thus, if there was to be a division of power at all regarding issues of war and peace, Congress would need to be the branch with the power to commit the country to war. Hamilton argued that while the president would be commander-in-chief, one could not say he was as powerful as the King of England since the American executive could not initiate hostilities.¹⁴⁵ Madison wrote that the war powers framework was based on “a great principal in free government, analogous to that which separates the sword from the purse, or the power of the executive from the power of enacting laws.”¹⁴⁶

The second reason that the president could not be the one to initiate wars was because the chief executive had too much of an incentive to start them. Of course, the entire system of constitutional government was based on the assumption that each branch would seek to expand its own power, and would therefore check the other two.¹⁴⁷ If executives generally benefited from wars, it followed that the president would have an incentive to be more hawkish than the national interest required. Madison, in a letter to Jefferson, wrote that all of history had shown that the executive had the most to gain by war, and thus was more likely to seek it.¹⁴⁸ Therefore, the Constitution had “accordingly with studied care vested the question of war in the Legisl.”¹⁴⁹ Madison’s theory would be called into question when, years later, he sat in the White House as Congress clamored for war with England.¹⁵⁰ Time, however, did not make him less war averse; Madison responded to events by arguing that, except in the case of invasion, not even Congress should have the right to declare war without a two-thirds majority in each house.¹⁵¹

One may ask why the Founders were not worried about errors in the other direction. Assuming that power over the federal government is a zero sum game, as the Madisonian system does, perhaps one could have predicted that Congress would want a suboptimal amount of war, simply because war, whether in the public interest or not, increased executive power. The answer is that they believed that the country was more likely to fight too many wars, rather than too few. Not only that, but the costs of unnecessary wars went beyond the money and lives

¹⁴⁴ THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 89, at 396 (“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”).

¹⁴⁵ THE FEDERALIST NO. 69 (Alexander Hamilton).

¹⁴⁶ JAMES MADISON, ‘HELVIDIUS’ NUMBER 1, *reprinted in* LETTERS OF PACIFICUS AND HELVIDIUS, *supra* note 48, at 61.

¹⁴⁷ See POSNER & VERMEULE, *supra* note 17, at 18–20.

¹⁴⁸ 6 THE WRITINGS OF JAMES MADISON 313 (G. Hunt ed., 1906).

¹⁴⁹ *Id.*

¹⁵⁰ SCHLESINGER, *supra* note 2, at 26.

¹⁵¹ *Id.*

directly lost. Madison believed that perhaps the biggest potential threat to liberty was war, since it led to taxes, standing armies, and more executive discretion.¹⁵² He blamed military establishments for extinguishing the liberties of ancient Rome and continental Europe, crediting Britain's geographical isolation for her relative freedom.¹⁵³ Jefferson held similar views on war's relation to liberty.¹⁵⁴ Therefore, although it provided for national preservation,¹⁵⁵ the Constitution was designed to otherwise avoid war as much as possible.¹⁵⁶ At the Convention, George Mason, in discussing the war powers, is recorded as saying that he was "for clogging rather than facilitating war, but for facilitating peace."¹⁵⁷

A final clue as to how the Founders' understanding of human nature shaped the way they divided the powers of war and peace comes from some of the reasons they put forth as to why nations actually went to war. When the Founders relaxed the realist assumption that nations acted as self-interested units, it was to assume that national leaders acted selfishly, or sometimes irrationally with a bias towards bellicosity. Jay reflected that "however disgraceful it may be to human nature, [] nations will make war whenever they have a prospect of getting anything by it; nay absolute monarchs will often make war when their nations are to get nothing by it," but their associates would benefit.¹⁵⁸ This once again suggests that too much, rather than too little, war was the main concern. Not only were wars not in the national interest to be guarded against, but the nation was to also seek to avoid unjust wars that did benefit the country.

Madison made the case for a stronger union based on national security grounds. Surveying the contemporary situation in Europe, he thought that if war broke out, the resulting passions would make it highly unlikely that the United States would be able to avoid "insults and depredations."¹⁵⁹ The irrational passions war stirred up was just another reason to avoid it, and part of the reason why it led to more taxation and debt.¹⁶⁰ Surely, if people would get excited and foolishly fight wars when there was little or no national interest at stake, the Founders must have considered it extremely unlikely that the public would err in the other direction.

¹⁵² JAMES MADISON, POLITICAL OBSERVATIONS, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 485, 491–92 (1865).

¹⁵³ Madison, *supra* note 89, at 221.

¹⁵⁴ Robert W. Tucker, *The Triumph of Wilsonianism?*, 10 WORLD POL'Y J. 83, 85 (1993-1994).

¹⁵⁵ MADISON, *supra* note 89, at 220 ("Security against foreign danger ... is an avowed and essential object of the American union.").

¹⁵⁶ MADISON, *supra* note 152, at 492.

¹⁵⁷ IRONS, *supra* note 18, at 21.

¹⁵⁸ THE FEDERALIST NO. 4 (John Jay), *supra* note 89, at 13.

¹⁵⁹ Madison, *supra* note 89, at 224.

¹⁶⁰ *See* Madison, *supra* note 152, at 491–92.

In The Federalist No. 6, Hamilton reflected on the “innumerable” causes of war.¹⁶¹ They included commercial rivalry and even personal animosity between leaders.¹⁶² He believed that the vast majority of wars throughout history, however, were fought over territorial disputes.¹⁶³ But those kinds of wars were at least rational. Pericles, by contrast, “in compliance with the resentment of a prostitute, at the expense of much of the blood and treasure of his countrymen, attacked, vanquished, and destroyed the city of the *Sammians*.”¹⁶⁴ Hamilton added that “[t]he influence which the bigotry of one female, the petulance of another, and the cabals of a third had in the contemporary policy, ferments, and pacification of ... Europe” were “too often descanted upon not to be generally known.”¹⁶⁵ While Federalist No. 6 was not directly addressing the relative merits of legislatures and executives, Hamilton must have realized that legislatures by their nature were less likely to start conflicts over personal slights.

To conclude, since the nature of combat required that the president be the commander-in-chief of the army, the principal of separation of powers necessitated that Congress have the power to declare war. Also, while weakness in foreign policy catalyzed the creation of the Constitution, once the centralized government was formed the Founders worried more about the nation fighting too many wars than the possibility of it fighting too few. The president always had an incentive to fight wars, whether for glory or personal vanity. This was another reason that he could not be the one with the power to initiate hostilities. When one also considers that American diplomacy, until at least the late nineteenth century, reflected a skepticism over the extent to which foreign policy could increase the well-being of non-Americans,¹⁶⁶ it is little wonder that in a world in which states constantly fought each other for vain, selfish, and frivolous reasons, and there was little hope of doing global good anyway, the young country would be best served by avoiding entanglements with other nations to the greatest extent possible.¹⁶⁷

II. THE REALIST ASSUMPTIONS OF WAR POWERS SCHOLARS

War powers scholars continue to hold the same realist assumptions as the founding generation. The functional arguments of these scholars depend on the

¹⁶¹ Hamilton, *supra* note 91, at 21–22.

¹⁶² *Id.*

¹⁶³ The Federalist No. 7 (Alexander Hamilton), *supra* note 89, at 28.

¹⁶⁴ Hamilton, *supra* note 91 at 22.

¹⁶⁵ *Id.* at 23.

¹⁶⁶ Russell, *supra* note 37, at 162.

¹⁶⁷ See LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 28 (1996) (“For the Framers [] foreign relations seemed to consist wholly of making war and making or not making treaties”).

classical model of international relations. While they often discuss material changes and new threats that have emerged since the time of the founding,¹⁶⁸ since after *The Imperial Presidency* ideological or moral changes are either ignored or treated very cursorily. I go about showing this to be the case by breaking up these scholars into two broad categories: the critics of greater executive power and its defenders.

A. Critics of Presidential Power

The term “imperial presidency” was popularized by Arthur Schlesinger, Jr.’s 1973 work of that title.¹⁶⁹ Schlesinger concluded that the Founders’ concerns about the powers of war and peace being vested in one man were still valid.¹⁷⁰ He was unique in acknowledging how ideological changes have contributed to the expansion of executive power.¹⁷¹

For the constitutional crisis had arisen in the first instance from the belief that the United States must serve as the guardian of freedom everywhere on the planet. The globalist policy called for an impassioned sense of ideological mission, a readiness to intervene unilaterally in the affairs of other states and a capacity to dispatch armed forces at will to the far corners of the world. It called, in consequence, for the concentration of authority, secrecy, speed and discretion in the Presidency.

If such interventionism was vital to national survival, Schlesinger continues, then the constitution could not stand in its way.¹⁷² But he did not think it was, and thus concluded that because such use of power does “not promote national security” and can “not succeed in its own terms,” we should at least stick to policies that conform to the Constitution.¹⁷³ Congress can regain its rightful role only when American goals abroad become less ambitious.¹⁷⁴

Schlesinger was writing in the aftermath of Vietnam, a war he believed discredited the idea that the executive branch should have exclusive control over foreign affairs.¹⁷⁵ Future scholarship should investigate whether Schlesinger’s critique of

¹⁶⁸ See YOO, *supra* note 7, at ix–x; Rostow, *supra* note 20, at 39.

¹⁶⁹ SCHLESINGER, *supra* note 2.

¹⁷⁰ *Id.* at 282–84.

¹⁷¹ *Id.* at 298.

¹⁷² *Id.* at 299.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 299–300.

¹⁷⁵ *Id.* at 296–97.

internationalism is still relevant in the post-Cold War era, in light of relatively successful humanitarian interventions such as those in Libya and Kosovo.¹⁷⁶ But the importance of Schlesinger's work is that it relies on originalism while conducting a functional analysis that acknowledges that the goals of American foreign policy have changed since the founding.

Executive critics in the decades since have simply assumed that the modern goals of American foreign policy are the same as they were at the founding. In their books, modern executive critics usually make their case about why the issue is important in their introductions and conclusions, using the bulk of their works to review the intentions of the Founders and historical practice. Irons begins *War Powers* by saying that he is “examin[ing] the most fateful questions the American people have faced in the nation’s history: why and how we go to war.”¹⁷⁷ This issue is important because of the number of American and civilian lives lost due to war, as well as the subversion of constitutional rights that conflict abroad causes.¹⁷⁸ In his conclusion, Irons regrets the extent to which the war powers have shifted to the president.¹⁷⁹ While he prefers more peaceful presidents such as William McKinley and Jimmy Carter to more hawkish ones such as George W. Bush, he regrets that in the post-World War II era “the imperatives of the American empire, have, in effect, forced” every president to take “military action to protect [its] imperial interests.”¹⁸⁰ These interests are “rooted in the demands of corporate and financial institutions for access to resources and markets.”¹⁸¹

Irons provides little evidence for this assertion. He acknowledges that Korea, for example, had little in the way of resources ripe for corporate exploitation, but maintains the importance of its strategic location in “Asia, with [its] vast resources and potential markets.”¹⁸² Of course, this theory as to why presidents fight wars explains everything, and thus nothing. One could similarly say that the Serbian intervention was fought in the interests of major corporations because Serbia is in Europe or that the motivations of the Libyan intervention were the same because that country is in Africa. Africa and Europe, no less than Asia, have “vast

¹⁷⁶ Schlesinger held on to his position to at least 1989, as he made clear in an epilogue to a new edition of *The Imperial Presidency*. See *id.* at 498 (“If [an interventionist] foreign policy is essential to the future of the republic, then the constitutional reformers are right and the nation needs a new constitution ... But if a messianic foreign policy does indeed burst the limits of the Constitution, then the wisdom of the Framers is even greater than one had supposed. For so vainglorious a foreign policy is hopeless on the merits.”).

¹⁷⁷ IRONS, *supra* note 18, at 1.

¹⁷⁸ *Id.* at 1–2.

¹⁷⁹ *Id.* at 265.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 265–66.

resources and potential markets.” Of course it may very well be the case that American wars are fought for corporate interests, but Irons does not present any public choice model or empirical evidence, such as a memoir or historical work documenting corporate lobbying, that supports his view on the motives behind the Korean War. The most Irons does is show that a handful of former defense secretaries and other high officials have moved between the private and public sectors.¹⁸³

Irons goes on to cursorily acknowledge the ideological reasons behind the Cold War, but believes that it was at least as much about conflicting national interests between the United States and Soviet Union.¹⁸⁴ He faults the current “Beltway elites” for their views that the president can unilaterally launch wars in order to defend American interests abroad.¹⁸⁵ There is little to no acknowledgement that policy making elites are motivated by their views of humanitarian intervention or a proper role for the United States in maintaining the world order—not even to argue that such views are masks for other interests.

Seth Weinberger opens his book *Restoring the Balance* by stressing how important the issue of the wars powers is in the post-9/11 world.¹⁸⁶ He lists a few reasons why unlimited presidential power in this area is problematic.¹⁸⁷ Weinberger’s concerns, like those of Irons, to a great extent regard the erosion of civil liberties.¹⁸⁸ He justifies his preferred war powers balance by arguing that it “provides the country with the means to protect itself physically from external threats and structurally from internal ones.”¹⁸⁹

Weinberger’s conclusion notes that the world has changed since the time of the founding; the Cold War in particular required a stronger executive to take quick, decisive action.¹⁹⁰ After the collapse of the Berlin Wall, the paradigm changed and Congress practically ignored Clinton’s decisions to fight wars in Kosovo and Somalia, where there were little to no American interests at stake.¹⁹¹ 9/11, of course, changed the world again, imposing new demands on the system to protect

¹⁸³ *Id.* at 267.

¹⁸⁴ *Id.* at 266.

¹⁸⁵ *Id.* at 266.

¹⁸⁶ SETH WEINBERGER, *RESTORING THE BALANCE: WAR POWERS IN THE AGE OF TERROR* 1–2 (2009).

¹⁸⁷ *Id.* at 6.

¹⁸⁸ *Id.* at 10–14.

¹⁸⁹ *Id.* at 16.

¹⁹⁰ *Id.* at 134.

¹⁹¹ *Id.*

the country.¹⁹² But the legislature must remain as a check as we give the executive enough power to defend the nation.¹⁹³

The author cites Madison for the proposition that the executive's ambition must be balanced by the ambition of Congress¹⁹⁴ and worries about a new American Caesar.¹⁹⁵ We see many of the assumptions here held by the Founders: that the balance of powers debate is one about national interest and that the president's power will aggrandize unless stopped. The idea that the United States acts for ideological or humanitarian reasons is not given any kind of serious analysis; rather, it is dismissed as something we did before 9/11 and which does not merit being part of a deep examination of the optimal balance of power between the political branches.

Michael Glennon's book on the war powers concludes with a chapter called "National Security: Congressional Oversight and Judicial Review."¹⁹⁶ He takes issue with those who argue as if "the state" is an independent entity for whose well-being foreign policy is made, instead calling for a more individual-centered approach.¹⁹⁷ To the extent that national security requires unconstitutional action, the author would rather that we acknowledge the conundrum instead of pretending that unconstitutional acts are actually legal.¹⁹⁸

Glennon ends his book by expressing his admiration for the Constitution.¹⁹⁹ Flawed as the document is, it still serves the national interest and following it is a path superior to that of "mimic[ing] the dictatorships we have vanquished."²⁰⁰ Glennon fears the imperial presidency, and wants wars to be fought in the national interest only, but never recognizes that an alternative view as to the extent of American responsibility in the modern world even exists.

B. Executive Defenders

The defenders of the president's expanded war powers fall into a few camps. Some answer the executive critics' originalist arguments, while others argue that the world has changed and thus the Constitution is outdated. Yoo takes a hybrid position, arguing that the Founders intended a constitution which allowed the war

¹⁹² *Id.* at 134–35.

¹⁹³ *Id.* at 137.

¹⁹⁴ *Id.* at 133.

¹⁹⁵ *Id.* at 139.

¹⁹⁶ GLENNON, *supra* note 2, at 283.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 284–85.

¹⁹⁹ *Id.* at 327.

²⁰⁰ *Id.*

powers to move back and forth between the president and Congress depending on the needs of the nation.²⁰¹

All of these executive defenders, however, share realist assumptions. Although they are more sanguine than executive critics about executive and American motives, one would not infer from reading them that there have been changes in value judgments since the time of the founding. They mention changes in normative ideas about how to balance the interests of the United States and the rest of the world obliquely or in passing.

Emerson, in discussing the constitutionality of the War Powers Resolution, sees his task as explaining what is to happen when Congress and the President disagree on the need to “us[e] [] the Armed Forces in defense of American lives, liberty, and property.”²⁰² He concludes that the president was meant to have an active role in the defense of the nation, although this did not mean that he could launch a war of aggression. Instead, the president could single-handedly decide to use military force only in self-defense.²⁰³ Emerson, like the Founders, only contemplates two kinds of wars. The good ones are fought to defend the country, the unconstitutional ones for imperialistic ends.

Rostow relies on Hamilton’s publications as “Pacificus” to make the case that the president is to have control over foreign policy.²⁰⁴ He considers Hamilton’s letters definitive and believes Madison’s response was lacking.²⁰⁵ And we should be thankful that this is the system we have, since if the War Powers Resolution was in effect and actually worked, the Union would not have survived the Civil War, Roosevelt could not have done what was necessary to involve the country in World War II, and Kennedy would not have been able to diffuse the Cuban Missile Crisis.²⁰⁶ He traces the controversy over the issue to the nation being unable to come to a consensus about the best system for self-defense in the modern world.²⁰⁷

²⁰¹ YOO, *supra* note 7, at 295 (“A more comprehensive approach to [originalist] sources reveals that the original understanding does no dictate a specific process for foreign affairs decisions, but instead that the Framers anticipated a more fluid, flexible process.”).

²⁰² J. Terry Emerson, *The War Powers Resolution Tested: The President’s Independent Defense Power*, 51 NOTRE DAME LAW. 187, 195 (1975-1976).

²⁰³ *Id.* at 213–14. See also Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to “Declare War”*, 29 HARV. J. L. & PUB. POL’Y 519, 531–32 (2001-2002) (arguing that the President does not have the right to launch a war of aggression).

²⁰⁴ See Rostow, *supra* note 20, at 13–15.

²⁰⁵ *Id.* at 15.

²⁰⁶ *Id.* at 2.

²⁰⁷ *Id.* at 51.

Posner and Vermeule make the case that the Constitution has failed in checking executive law-making and discretion.²⁰⁸ Believing that checks on presidential power are structural and political, they argue that presidents use signaling to enhance their credibility on issues where the public has difficulty evaluating their intentions.²⁰⁹ Some examples of this in foreign policy are Franklin Delano Roosevelt appointing Republicans to cabinet positions, Truman making alliances with Republican lawmakers, and both President Bushes seeking international support before attacking Iraq.²¹⁰ Posner and Vermeule find these situations similar in that “[a] nation or group like Nazi Germany, the Soviet Union, Iraq, or Al Qaeda ... threatens U.S. interests.”²¹¹ The public has no way of evaluating whether the American response to these threats is proper, and so the president in each situation sought out ways to increase his credibility.²¹² Posner and Vermeule assume that the goal of U.S. foreign policy, just like the goal of domestic policy, is to maximize the well-being of American citizens. They do not consider whether American politicians ever makes tradeoffs between the welfare of the United States and that of the rest of the world, much less whether they should do so.

John Yoo advocates a flexible system of war making based on originalism. According to him, the Founders’ silence on the issue of setting foreign policy indicates that they meant to leave it to the political process.²¹³ Yoo defends the power of the president to make war on two grounds. From an originalist perspective, he believes that at the time of the Founding, the “executive power” included control over a nation’s foreign affairs. Therefore, Article II, which vests the executive power in the president, provides the originalist and textualist case for the current arrangement.²¹⁴ In 2004, however, Bradley and Flaherty convincingly showed that this originalist “vesting clause thesis” could not be maintained.²¹⁵

Yoo’s second argument is pragmatic and functional. In the introduction to *The Powers of War and Peace*, he says that his functional analysis works whether one bases his worldview on realism or institutionalism, the latter which he defines as confidence that “nations can cooperate in various ways to escape a prisoner’s

²⁰⁸ POSNER & VERMEULE, *supra* note 17, at 2–5.

²⁰⁹ *Id.* at 124.

²¹⁰ *Id.* at 124–27.

²¹¹ *Id.* at 129.

²¹² *Id.*

²¹³ YOO, *supra* note 7, at 88.

²¹⁴ *Id.* at 18–19.

²¹⁵ See generally Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004). See also Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 393–97 (2011) (finding that “Yoo’s discussion of the Founding is thoroughly unconvincing on any of the national security questions that matter”).

dilemma.”²¹⁶ Neither view incorporates humanitarian intervention. Yoo believes that a unitary executive is “an ideal to guide foreign policy” because it can “take rational action on behalf of the nation in the modern world.”²¹⁷ Throughout his works, Yoo’s functional analyses assume descriptive and normative realism.²¹⁸

Yet, Yoo will occasionally relax his realist assumptions. He even acknowledges at one point that “[i]t is difficult to claim, with a straight face, that American intervention in Kosovo was necessary for purposes of national self-defense; indeed, the United States never claimed as much.”²¹⁹ More often, he blurs considerations of national interest and those of serving humanity. At one point, he argues that conflicts like those in Iraq, Afghanistan, and Kosovo represent the “demands placed on the U.S. Constitution by new forms of international cooperation.”²²⁰ Wars in the past were self-interested and against nation states or ideological foes, while “[t]oday’s wars are different.”²²¹ Yoo goes on to explain that today’s wars are often counter-terrorism operations, or fought in order to preserve the world order. For example, world leaders worried that the situation in Kosovo might destabilize Europe and provoke a conflict with Russia.²²² He then argues that it is unlikely that the United States Congress would have approved of an intervention there, where “direct national interests were hard to define.”²²³ One might retort that this was because they did not exist; Yoo’s argument about destabilization is at the very least questionable.²²⁴ But saying this directly would make the break with Yoo’s realist assumptions too explicit. Instead, Yoo says that wars used to be fought in the national interests, follows it by saying modern wars are different, and then, without ever directly acknowledging the place of idealism in American foreign policy, reverts to discussing new threats to American interests.

Any functional analysis which seeks to determine a desirable framework for action must clearly define its goals. Yoo is at times ambiguous about whether the United

²¹⁶ YOO, *supra* note 7, at 20.

²¹⁷ *Id.*

²¹⁸ See JOHN C. YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 2–3 (2006) (arguing that the country cannot afford to treat terrorism as a law enforcement issue); Yoo, *supra* note 140, at 305 (arguing that leaving foreign affairs to the political process is in the best interests of the country).

²¹⁹ YOO, *supra* note 7, at 169.

²²⁰ *Id.* at 161.

²²¹ *Id.* at 161–62.

²²² *Id.*

²²³ *Id.*

²²⁴ In fact, one of the main arguments against the American intervention in Kosovo was that it would needlessly burdened the West’s relationship with Russia. See Javier Solana, *NATO’s Success in Kosovo*, 78 FOREIGN AFF. 114, 117 (1999). Scholars believe that the motivations behind Kosovo were humanitarian. See *infra* Part III.B.2.

States does or should act in its own interests when those interests diverge with those of the rest of the world. If we simply ignore these inconsistencies and simply accept Yoo as a realist, however, then once we show the existence of humanitarian intervention the analysis must be redone. A model that seeks the optimal number of wars in the national interest might look somewhat different from one that attempts to occasionally use military force for idealist ends.

III. THE POST-COLD WAR TURN TOWARDS IDEALISM

The first half of this Part broadly summarizes some of the works of international relations scholars, who mostly agree that the United States has acted as an idealist power in the post-Cold War world. Since an entire overview of American foreign policy is beyond the scope of the Article, Part III.B discusses the clearest manifestation of American idealism: humanitarian intervention. I show that America at least occasionally fights wars that are not in the national interest through three case studies. The United States does not intervene to stop all, or maybe even most, humanitarian atrocities. Still, the scholarship shows that it does do so at certain moments when the costs are low enough and the executive is inclined.

A. The United States as a Wilsonian Power

While Marxist and postmodern critics of American foreign policy have an influence, realism and idealism are considered the two mainstream empirical and normative analytical frameworks in the study of international relations.²²⁵ Scholars argue that idealism has been one of the dominant strands, if not the most dominant strand, in American foreign policy over the course of the twentieth century.²²⁶ The past few decades especially have seen idealism, in the form preached and practiced by Woodrow Wilson,²²⁷ gradually win out amongst American policy makers.²²⁸ Ambrosius defines Wilsonianism as based on the

²²⁵ OLE R. HOLSTI, PUBLIC OPINION AND AMERICAN FOREIGN POLICY 3 (2007); CHIH-HANN CHANG, ETHICAL FOREIGN POLICY? U.S. HUMANITARIAN INTERVENTIONS 5 (2011).

²²⁶ PRICE, *supra* note 129, at 261 (quoting Henry Kissinger calling Wilsonian principles the “bedrock of American foreign-policy thinking”); LLOYD E. AMBROSIUS, WILSONIANISM IN AMERICAN FOREIGN RELATIONS 2 (2002) (saying Wilsonian principals “provided the dominant ideology for the United States” in the twentieth century); Russell, *supra* note 37, at 160 (“Wilsonianism has seized the worldview of contemporary American diplomats and statesmen”); FRANK NINKOVICH, THE WILSONIAN CENTURY: U.S. FOREIGN POLICY SINCE 1900, at 13 (1999) (writing that “Wilsonian assumptions” had become “axiomatic for American statesmen”).

²²⁷ GRAEBNER, *supra* note 128, at 322–23.

²²⁸ See Stephen M. Walt, *The Shattered Kristol Ball*, 97 NAT’L INT. 26, 26 (2008) (noting that neo-conservatives and liberal internationalists “remain a ubiquitous presence on op-ed pages and TV talk shows and in journals of opinions,” while “realists have become an endangered species inside the Beltway and a muted voice in contemporary policy debates”); Justin Logan, *Dan Drezner Is*

principals of self-determination, economic globalization, collective security, and progressive history.²²⁹ Wilson himself believed that states could one day move beyond national interests in foreign policy and instead seek the collective good of the world.²³⁰ Especially post-Cold War, American foreign policy is said to “take [] Wilsonian assumptions for granted.”²³¹ One scholar writes that “[a]lthough during the Cold War the US was identified with the most ruthless *realpolitik*, in the post-cold war world the US has been associated with the rise of a Neo-Wilsonian turn towards ethical foreign policy.”²³² Another also marks the 1990s as the era when the Western democracies transitioned from realism to idealism in foreign affairs, and believes that since the end of the 1990s national interests and humanitarian concerns have converged.²³³ Just about every modern American president has held some Wilsonian views or at least acted as a Wilsonian in some respects. Jimmy Carter ran on a repudiation of realism in foreign affairs and as President sacrificed American interests in order to push human rights.²³⁴ George H.W. Bush was called “the first real neo-Wilsonian,”²³⁵ and Ronald Reagan “the most Wilsonian of all presidents since Wilson’s time.”²³⁶ A 2009 book begins by asking “Was George [W.] Bush the heir of Woodrow Wilson?” and goes on to mention the second “Bush Administration’s embrace of Wilsonian ideals.”²³⁷ John Bolton derisively writes that “Obama’s worldview is almost exclusively Wilsonian.”²³⁸

(Partly) *Wrong about Realism*, NAT’L INT., Jan. 12, 2012, <http://nationalinterest.org/blog/the-skeptics/dan-drezner-partly-wrong-about-realism-6360> (author saying that he cannot “name three realists who served in senior policy-making positions in the last decade”); Robert W. Merry, *Kaplan and Mearsheimer: The Power of Realism*, NAT’L INT., Dec. 29, 2011, <http://nationalinterest.org/commentary/Kaplan-Mearsheimer-Power-Realism-6316?page=show> (referring to realism as “an outlook that has been in eclipse in American policy making for the better part of two decades”).

²²⁹ AMBROSIUS, *supra* note 226, at 2.

²³⁰ HOLSTI, *supra* note 225, at 9–10.

²³¹ Russell, *supra* note 37, at 162; Tucker, *supra* note 154, at 93 (in 1993, writing that it “is [] commonly assumed” that “we are witnessing today the triumph of Wilsonianism”).

²³² Alex Gourevitch, *Neo-Wilsonianism: The Limits of American Ethical Foreign Policy*, in *RETHINKING ETHICAL FOREIGN POLICY: PITFALLS, POSSIBILITIES, AND PARADOXES* 25, 25 (David Chandler & Volker Heins eds., 2007).

²³³ David Chandler, *The Other-Regarding Ethics of the ‘Empire in Denial’*, in *RETHINKING ETHICAL FOREIGN POLICY*, *supra* note 232, at 161.

²³⁴ MCDUGALL, *supra* note 45, at 166–67.

²³⁵ Gourevitch, *supra* note 232, at 40.

²³⁶ Tucker, *supra* note 154, at 84.

²³⁷ G. John Ikenberry, *Woodrow Wilson, the Bush Administration, and the Future of Liberal Internationalism*, in *THE CRISIS OF AMERICAN FOREIGN POLICY: WILSONIANISM IN THE TWENTY-FIRST CENTURY* 1, 6 (G. John Ikenberry ed., 2009). The Bush Administration is generally considered to have adopted neo-conservatism after the September 11 attacks. Martin Durham, *The American Right and the Iraq War*, 75 *POL. Q.* 257, 265 (2005). Neo-conservatism shares many of the same premises as liberal internationalism, with the main differences being neo-conservatism’s greater skepticism of

The Wilsonian worldview does not just predominate among American policy makers, but is the basis of the foreign policy of all major Western nations. According to Mead,

France, Germany, Italy, and Britain may have sneered at Wilson, but every one of these powers today conducts its European policy along Wilsonian lines. What was once dismissed as visionary is now accepted as fundamental. This was no mean achievement, and no European statesman of the twentieth century has had as lasting, as benign, or as widespread an influence.²³⁹

The question of what shifting the war powers back to Congress would mean for a Wilsonian power can be explored from a variety of angles. For example, future scholarship could investigate American commitments to preserve the world order and protect other developed democracies. Under the North Atlantic Treaty, the United States is obligated to come to the defense of any other member nation under attack.²⁴⁰ Since its founding, NATO has expanded to include twenty-eight countries.²⁴¹ The United States also has bilateral mutual defense treaties with the Philippines,²⁴² South Korea,²⁴³ and Japan.²⁴⁴ Finally, America is also arguably obliged to defend the four other members of the Southeast Asia Treaty Organization (SEATO) that are not in NATO and with which the United States does not have an independent mutual defense treaty.²⁴⁵ The fact that there appears to be little appetite amongst the general public to live up to American defense

international institutions and willingness to advocate military force. This is why neo-conservatism has been referred to as “Hard Wilsonianism.” Muravchik, *supra* note 27, at 20; Walt, *supra* note 228, at 26 (referring to liberal interventionists as the “close cousins” of neo-conservatives).

²³⁸ JOHN R. BOLTON, HOW BARACK OBAMA IS ENDANGERING OUR NATIONAL SOVEREIGNTY 11 (2010).

²³⁹ WALTER RUSSELL MEAD, SPECIAL PROVIDENCE: AMERICAN FOREIGN POLICY AND HOW IT CHANGED THE WORLD 9 (2001).

²⁴⁰ North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

²⁴¹ Jomana Amara & Martin Paskevics, *Unfulfilled Promises: The Impact of Accession on Military Expenditure Trends for New NATO Members*, 29 COMP. STRATEGY 432, 434 (2010).

²⁴² Mutual Defense Treaty, Aug. 30, 1951, U.S.-Phil., 3 U.S.T. 3947, 177 U.N.T.S. 133.

²⁴³ Mutual Defense Treaty, Oct. 1, 1953, U.S.-S. Korea, 5 U.S.T. 2368, 238 U.N.T.S. 1999.

²⁴⁴ Treaty of Mutual Cooperation and Security, Jan 19, 1960, U.S.-Jap., 11 U.S.T. 1632.

²⁴⁵ Southeast Asia Collective Defense Treaty art. 4, Sept. 8, 1954, 6 U.S.T. 81, 209 U.N.T.S. 23. It has been noted that the mutual defense language of the SEATO Treaty is somewhat weaker than that of NATO. Christopher Hemmer & Peter J. Katzenstein, *Why is There No NATO in Asia? Collective Identity, Regionalist, and the Origins of Multilateralism*, 56 INT’L ORG. 575, 578 (2002). While Article 5 of the NATO Treaty says that an attack on any member is an attack on all, Article 4 of the SEATO Treaty states that if any party to the treaty is attacked, then each member “will in that event act to meet the common danger in accordance with its constitutional processes.”

commitments abroad,²⁴⁶ means that where the war powers are placed might be very important if an American ally suffered a classic state-on-state attack.²⁴⁷

The focus of this Article, however, is humanitarian intervention. The main reason for this is that such wars are the clearest example of a foreign policy that takes into account the interests of non-Americans. While some argue for NATO expansion on realist grounds,²⁴⁸ there is no dispute about the main motivations behind the wars reviewed below. In addition to providing conceptual clarity, this makes humanitarian intervention a useful starting point in determining what returning the war powers back to Congress would mean for modern American foreign policy.

B. Humanitarian Interventions

Trim and Simms list three criteria for a humanitarian intervention.²⁴⁹ One state must (a) intervene in the affairs of another (b) state in order to (c) “nominally (and at least to some extent actually)” stop a humanitarian catastrophe. Since the end of the Cold War, the number of such interventions has increased exponentially.²⁵⁰ The early 1990s saw enthusiasm for the concept, sometimes referred to as the “Responsibility to Protect” (R2P), among leaders and intellectuals, and by the early 2000s it was an established principal recognized by international institutions.²⁵¹ Although some argue that the United States is selective when it comes to intervening to stop atrocities, no one claims that idealist foreign policy as practiced is purely altruistic.²⁵² The claim here is simply that humanitarian motives—whether directly or as manifested through political channels—occasionally lead American policy makers to take military action. It is not that they engage in wars without taking the national interest into account at all.

²⁴⁶ HOLSTI, *supra* note 225, at 118 (showing that large majorities would want the United States to stay out of the conflict if North Korea invaded South Korea or other allies were attacked by hostile powers).

²⁴⁷ Or even a terrorist attack. The only time Article 5 of the NATO treaty was invoked was after the September 11 attacks. Christian Tuschhoff, *Why NATO Is Still Relevant*, 40 INT’L POL. 101, 101 (2003).

²⁴⁸ See HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY 42–43 (2001).

²⁴⁹ D.J.B. Trim & Brendan Simms, *Towards a History of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: A HISTORY 4 (Brendan Simms & D.J.B. Trim eds., 2011). See also J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 18 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (providing a similar definition).

²⁵⁰ Matthew Jamison, *Humanitarian Intervention Since 1990 and ‘Liberal Interventionism’*, in HUMANITARIAN INTERVENTION, *supra* note 249, at 365.

²⁵¹ *Id.* at 365–66; Jon Western, *Humanitarian Intervention, American Public Opinion, and the Future of R2P*, 1 GLOBAL RESP. TO PROTECT 324, 324–25 (2009).

²⁵² See Gourevitch, *supra* note 232, at 37.

There have been at least three American interventions since the end of the Cold War that would not have occurred if it was not for humanitarian concerns. They are the armed interventions in Somalia, Kosovo, and Libya. Below, I sum up the events surrounding these wars, and note the disagreements of foreign policy experts. Regardless of whether writers support or oppose these wars, however, they all agree that the motivations behind them were humanitarian.

1. Somalia

In 1992, Somalia was experiencing one of the worst famines of the twentieth century, with 3,000 people dying a month by mid-March.²⁵³ American and UN officials found that food shipments aggravated the civil unrest, as armed gangs and civilians fought for the aid.²⁵⁴ As the Bush administration debated the proper response, it was pressured by Congress and the media to act.²⁵⁵ President Bush himself was disturbed by reports coming out of Somalia.²⁵⁶

In October, Congress passed a joint resolution calling for the deployment of troops to Somalia.²⁵⁷ By the fall of 1992, the Bush administration realized that the UN-organized relief effort had failed due to its inability to secure Somali ports.²⁵⁸ At about this time, one administration official reports that Bush did not send soldiers to Somalia because it would embolden attacks by Democratic candidate Bill Clinton that Bush was neglecting domestic issues.²⁵⁹ After the election, however, Bush made the decision to intervene and justified it to the American people exclusively on humanitarian grounds.²⁶⁰

After months of American troops on the ground, the Senate Armed Services Committee denied a UN request to disarm the Somali warlords.²⁶¹ Despite this, after nearly a year of success in delivering food the Clinton administration and UN decided that the only way to make sure that another humanitarian disaster did not reappear was to leave Somalia with functional governmental institutions.²⁶² By August 1993, however, American forces began taking casualties,²⁶³ and on October

²⁵³ KENNETH R. RUTHERFORD, HUMANITARIANISM UNDER FIRE: THE US AND UN INTERVENTION IN SOMALIA 38 (2008).

²⁵⁴ *Id.* at 38–39.

²⁵⁵ *Id.* at 39–45.

²⁵⁶ *Id.* at 41–42.

²⁵⁷ *Id.* at 54.

²⁵⁸ *Id.* at 66.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 80–81.

²⁶¹ *Id.* at 107.

²⁶² *Id.* at 119–21.

²⁶³ *Id.* at 148–50.

4, eighteen Americans were killed and seventy-four wounded.²⁶⁴ Under political pressure to end the mission as soon as possible, the Clinton administration set March 31 as the date of US withdrawal.²⁶⁵

After the decision to intervene in Somalia was made, the international community praised the act as altruistic.²⁶⁶ Experts agree that there was little to no American interest in Somalia,²⁶⁷ and the American public was only willing to tolerate a humanitarian intervention if it did not result in unacceptable levels of American casualties.²⁶⁸ Defenders of the American intervention in Somalia claim that it saved half a million lives.²⁶⁹ Mandelbaum denounces using such goals as a measure of success as having a “Mother Teresa” foreign policy.²⁷⁰ Like Hamilton, he believes that altruism is a wonderful trait in an individual, but cannot be the basis of a country’s foreign policy.²⁷¹ Regardless, all observers of the American intervention in Somalia—whether supporters, critics, or neutral—agree that it was a humanitarian intervention.

2. Kosovo

On March 23, 1999, NATO began a bombing campaign against the former Yugoslavia.²⁷² The campaign followed a decade of activism bringing Serbian abuses of Albanian civilians to light,²⁷³ and negotiations between American diplomats and the combatants involved to stop the fighting.²⁷⁴ The same day, Bill Clinton went on national television and defended the attack as necessary to protect civilians and

²⁶⁴ *Id.* at 160.

²⁶⁵ *Id.* at 160, 164.

²⁶⁶ RUTHERFORD, *supra* note 253, at 79 (“Bush’s decision was viewed by the international community as honorable and disinterested, seen as part of a new era of world cooperation over humanitarian concerns”).

²⁶⁷ *Id.* at 177 (“When George Herbert Walker Bush entered the White House in 1989, it was hard to imagine that the United States would lead a UN military operation in Somalia four years later, especially in a country that holds little economic and geostrategic value to the United States.”); Muravchik, *supra* note 27, at 24; Martha Finnemore, *Constructing Norms of Humanitarian Intervention, in THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 153, 154 (Peter J. Katzenstein ed., 1996) (“Somalia is perhaps the clearest example of military action undertaken in a state of little or no strategic or economic importance to the principal intervener.”); Mohammed Ayoob, *Humanitarian Intervention and State Sovereignty*, 6 INT’L J. HUM. RTS. 81, 85–86 (2002).

²⁶⁸ RUTHERFORD, *supra* note 253, at 162.

²⁶⁹ Muravchik, *supra* note 27, at 24.

²⁷⁰ Michael Mandelbaum, *Foreign Policy as Social Work*, 75 FOREIGN AFF. 16, 18 (1996).

²⁷¹ *Id.*

²⁷² Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & M. L. REV. 1743, 1745 (1999).

²⁷³ *Id.* at 1743.

²⁷⁴ CHANG, *supra* note 225, at 124–137.

preserve European stability.²⁷⁵ The United States saw the intervention in Kosovo as a precedent for future humanitarian missions under NATO command.²⁷⁶

Realists generally opposed the Kosovo intervention. Mandelbaum, for example, argued that the war could not succeed on its own terms.²⁷⁷ Because the United States could not justify the campaign in terms of national interest, public support would not allow for ground troops and thus NATO could not effectively defend civilians from the air.²⁷⁸ Yet even these anti-interventionist realists generally acknowledged that supporters of the war were motivated by humanitarian concerns.²⁷⁹ Kissinger notes that while the United States was concerned about human rights violations in Serbia, Iraq was taking steps towards dominating the Persian Gulf.²⁸⁰ He sees the greater response to the Kosovo conflict as evidence “[t]hat Wilsonianism had triumphed over competing traditions in American foreign policy.”²⁸¹ Liberal interventionists, on the other hand, did not question the proposition that American interests were not at stake in Kosovo. Instead, they criticized the Clinton administration for taking too long to intervene or being selective in saving European lives while ignoring man-made humanitarian disasters in Africa of equal or greater magnitude.²⁸² Once again, all sides were in agreement that what was ostensibly a humanitarian intervention actually was so.

3. Libya

The taming of Mummar al-Gaddafi’s regime in Libya was considered one of the successes of the George W. Bush presidency. After decades of seeking weapons of mass destruction (WMD) and supporting terrorism, in 2003 the Gaddafi regime rejoined the international community by abandoning its quest for WMDs and paying restitution to the relatives of the victims of the 1999 Lockerbie bombing.²⁸³

²⁷⁵ YOO, *supra* note 7, at 158.

²⁷⁶ Andrew A. Michta, *NATO Enlargement Post-1989: Successful Adaptation or Decline?*, 18 CONTEMP. EUR. HIST. 363, 368 (2009).

²⁷⁷ Michael Mandelbaum, *A Perfect Failure: NATO’s War Against Yugoslavia*, 78 FOREIGN AFF. 2, 5 (1999).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 3 (“NATO waged the war not for its interests but on behalf of its values”); KISSINGER, *supra* note 248, at 254–55 (“Wilsonian principals were the dominant driving force of Western foreign policy in the Balkans.”); Michael C. Desch, *It Is Kind to Be Cruel: The Humanity of American Realism*, 29 INT’L STUD. 415, 422 (2003) (noting that the intervention was “well-intentioned,” but pointing to unforeseen consequences).

²⁸⁰ KISSINGER, *supra* note 248, at 254–55.

²⁸¹ *Id.*

²⁸² See MCDUGALL, *supra* note 45, at 202.

²⁸³ See Bruce W. Jentleson & Christopher A. Whytock, *Who “Won” Libya? The Force-Diplomacy Debate and Its Implications for Theory and Policy*, 30 INT’L SEC. 47, 47 (2005).

President Bush and Vice-President Cheney cited Libya as a vindication of the Bush Doctrine,²⁸⁴ and neo-conservative intellectuals followed their lead.²⁸⁵

In 2011, what began as protests against the Gaddafi regime spread into a rebellion that engulfed the country.²⁸⁶ The rebels organized in the East, made some gains, and were eventually pushed back by Gaddafi's forces.²⁸⁷ On March 17, the UN, after heavy lobbying by the American ambassador, authorized the use of force in order to protect civilians in the areas about to be recaptured by the government.²⁸⁸ The war's main aim quickly became to overthrow Gaddafi, and in October 2011 he was killed by rebels.²⁸⁹

Advocates of the Libya bombing saw it as a clear case of humanitarian intervention,²⁹⁰ as did its critics.²⁹¹ Bolton wrote that there could be a good argument made for removing Gaddafi on national interest grounds, but opposed the Obama administration's undertaking of the war as a humanitarian enterprise.²⁹² Mezran does not believe that there was a national interest at stake; in fact, he argues that the American intervention increased the odds of a terrorist organization finding a haven in Libya.²⁹³ This is not the only potential harm to national security; the Libyan intervention likely had a negative effect on the cause of nuclear proliferation. Gaddafi was attacked after making peace with the United States and disarming; this can be expected to teach other leaders of "rogue states" that they would be best served by holding on to their WMDs.²⁹⁴

It was reported that President Obama decided on the necessity of intervention only after being convinced that American inaction would lead to thousands of

²⁸⁴ *Id.* at 47–48.

²⁸⁵ See Charles Krauthammer, Op-Ed., *The Doggedness of War*, WASH. POST, Dec. 26, 2003, at A35; Fred Barnes, *It Doesn't Get Any Better Than This*, WEEKLY STANDARD, Dec. 29, 2003.

²⁸⁶ Alia Brahim, *Libya's Revolution*, 16 J. N. AFR. STUD. 605, 606 (2011).

²⁸⁷ *Id.*

²⁸⁸ S.C. Res. 1973, S/RES/1973 (Mar. 17, 2011); Helene Cooper & Steven Lee Myers, *Shift by Clinton Helped Persuade President to Take a Harder Line*, N.Y. TIMES, Mar. 19, 2011, at A1.

²⁸⁹ Neil MacFarquhar, *An Erratic Leader, Brutal and Defiant to the End*, N.Y. TIMES, Oct. 21, 2011, at A16.

²⁹⁰ See Thomas G. Weiss, *RtoP Alive and Well After Libya*, 25 ETHICS & INT'L AFF. 287, 287 (2011); James Pattison, *The Ethics of Humanitarian Intervention in Libya*, 25 ETHICS & INT'L AFF. 271, 272–73 (2011).

²⁹¹ See Nikolas K. Gvosdev & Ray Takeyh, *Decline of Western Realism*, 117 NAT'L INT. 8 (2012).

²⁹² John R. Bolton, *Irresponsible: Against a "Responsibility to Protect" in Foreign Affairs*, NAT'L REV., Apr. 18, 2011, at 32.

²⁹³ Karim Mezran, *The Arab Uprisings and U.S. Policy*, 18 MIDDLE E. POL'Y 16, 19 (2011).

²⁹⁴ See Mira Rapp-Hooper and Kenneth N. Waltz, *What Kim Jong-Il Learned from Qaddafi's Fall: Never Disarm*, ATLANTIC, Oct. 24, 2011, <http://www.theatlantic.com/international/archive/2011/10/what-kim-jong-il-learned-from-qaddafis-fall-never-disarm/247192/>.

deaths.²⁹⁵ This decision, however, was not made before a struggle between realists and idealists within the President's cabinet.²⁹⁶ Among the members of the Obama administration advocating for intervention was Samantha Power,²⁹⁷ a longtime advocate of humanitarian intervention.²⁹⁸ In France, it was philosopher Bernard-Henri Lévy, concerned about Gaddafi massacring the insurgents, who convinced French President Nicolas Sarkozy to take the lead in recognizing the Libyan rebels.²⁹⁹ Thus, the Libya war was as clear an instance as one can hope to find of the world of ideas influencing the world of policy.

Even for administration officials attempting to justify the intervention after it began, it was difficult to articulate an American objective in Libya. The Secretary of Defense admitted as much to the media.³⁰⁰ When Obama tried to explain the interests at stake to the nation, he stressed that doing nothing would lead to a massacre and then said that “[i]t was not in our national interest to let that happen,” without any transition in between the two statements, almost putting the burden of proof on non-interventionists to articulate a reason for staying out.³⁰¹ The half-hearted attempts to invent a national interest were described as the “‘butterfly effect’ approach to national security ... Anything that happens in an inconsequential place may have unwanted effects in some modestly consequential place, which in turn may have some possible tangible consequence for our safety or prosperity.”³⁰² This applies not only to the “national security” justification given for the Libyan intervention, but the way President Clinton tried to justify the Kosovo war in terms of American interests.

America has a national interest in achieving this peace. If the conflict persists, there likely will be a tremendous loss of life and a massive refugee crisis in the middle of Europe. There is a serious risk the hostilities would spread to the neighboring new democracies of Albania and Macedonia, and reignite the conflict

²⁹⁵ Cooper & Meyers, *supra* note 288.

²⁹⁶ *Id.*; Erik Jones, *Power, Leadership, and US Foreign Policy*, 46 INT'L SPECTATOR 13, 13–14 (2011).

²⁹⁷ Cooper & Myers, *supra* note 288.

²⁹⁸ See SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA IN THE AGE OF GENOCIDE (2007).

²⁹⁹ Kim Willsher, *Libya: Bernard-Henri Lévy Dismisses Criticism for Leading France to Conflict*, OBSERVER, Mar. 26, 2011, at 13.

³⁰⁰ Evan Harris, *Defense Secretary: Libya Did Not Pose Threat to U.S., Was Not 'Vital National Interest' to Intervene*, ABC NEWS, Mar. 27, 2011, <http://abcnews.go.com/blogs/politics/2011/03/defense-secretary-libya-did-not-pose-threat-to-us-was-not-vital-national-interest-to-intervene/>.

³⁰¹ President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), transcript available at <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript>.

³⁰² Steve Chapman, *Robert Gates and Our 'Interest' in Libya*, CHI. TRIB., Mar. 28, 2011, http://articles.chicagotribune.com/2011-03-28/news/chi-gates-libya-obama-20110328_1_libya-military-force-civil-war.

in Bosnia we worked so hard to stop. It could even involve our NATO Allies Greece and Turkey.³⁰³

Articulating the “butterfly effect” justifications given for humanitarian interventions illustrates an important point about finding motivations behind wars: leaders will always claim that a war is in the national interest and as a general matter proving a negative is very difficult. However, to the extent that we can discern the motivations behind the interventions in Somalia, Kosovo, and Libya, experts in international relations agree that these were humanitarian missions that would not have been undertaken if decision makers were not concerned about human rights, or at least pressured by those who did.

It was not foreordained that the Obama administration would intervene in Libya. There was a realist faction within the White House, and with a different president they might have prevailed.³⁰⁴ One need not agree that idealism is the only intellectual strand in American foreign policy, nor that it is even the dominant one, as most scholars believe.³⁰⁵ Rather, simply accepting that idealism plays a prominent role in American foreign policy decision making forces us to reconsider certain aspects of the wars powers debate.

IV. UPDATING THE WAR POWERS ANALYSIS

Any discussion on whether a system of war powers works on a functional level has to begin by specifying what the goals the system should seek are. With the exception of Schlesinger, all war powers scholars have assumed that the United States government acts as a realist power, simply trying to maximize its own power and the well-being of its citizens.³⁰⁶ As this is, at most, only partly true, this Part clarifies what the results of giving the war powers back to Congress would mean for humanitarian intervention. I begin by laying out the theoretical model in Part IV.A. Part IV.B spells out what the model would predict regarding humanitarian intervention. Finally, Part IV.C investigates public opinion and congressional and presidential action in the three humanitarian interventions reviewed in Part III. We find that in each case the president was more willing to use force to stop atrocities than Congress was, and this was generally true for the reasons predicted by the model.

³⁰³ Quoted in CHANG, *supra* note 225, at 136.

³⁰⁴ Cooper & Myers, *supra* note 288.

³⁰⁵ See *supra* Part III.A.

³⁰⁶ See *supra* Part II.

A. Theoretical Model

Recent history has shown that presidents have been more willing to engage in humanitarian intervention than Congress. Here, I present a model that explains why, in the form of the five empirical claims on which it is based. First of all, we see that the public weakly supports humanitarian intervention. Thus, in a system where intensity of preferences to a great extent determines the political pressure leaders face to act in certain ways, there will be little pressure for these kinds of wars. On the other hand, the second premise of the model assumes that political leaders seek approbation for their actions. This fact, when combined with the weak public preference for humanitarian intervention, indicates that American leaders will occasionally face sufficient incentives to engage in humanitarian wars. The final three premises explain why the executive is more inclined than the legislature to engage in humanitarian interventions. Individual congressmen face a collective action problem in receiving approbation for intervening in the affairs of other states in order to save lives.³⁰⁷ Any accolades and honors that Congress can be expected to receive for acting humanely would be shared with the institution as a whole, while any legislature who began championing humanitarian intervention would bear a disproportionate amount of the costs. A legislature's opportunity cost of advocating humanitarian intervention might be delivering on a local project, the kind of legislative act for which constituents are more likely to give a congressman credit.³⁰⁸

Fourth, we may believe that leaders genuinely care about foreigners killed by their own governments. An executive will feel stronger psychological pressures to act when facing these kinds of tragedies, since individual legislatures are able to engage in a sort of psychological buck passing. There is historical evidence suggesting that presidents and others in the executive branch feel psychological pressure to act to stop atrocities overseas,³⁰⁹ as well as psychological literature indicating that

³⁰⁷ See Yvonne Rudin & Mark Pennington, *Public Participation and Local Environmental Planning: The Collective Action Problem and the Potential of Social Capital*, 5 *LOC. ENV'T* 153, 157–58 (2000) (on the concept of the collective action problem).

³⁰⁸ See THOMAS KNECHT, *PAYING ATTENTION TO FOREIGN AFFAIRS: HOW PUBLIC OPINION AFFECTS PRESIDENTIAL DECISION MAKING* 7–8 (2010).

³⁰⁹ The memoirs of the last two presidents show a concern for the human rights of those in less fortunate countries. See GEORGE W. BUSH, *DECISION POINTS* 220–21, 333–36 (2010) (Bush discussing his satisfaction with how the fall of the Taliban improved the prospects of Afghan women and the increase on spending to fight AIDS in Africa during his presidency); 2 BILL CLINTON, *MY LIFE: THE PRESIDENTIAL YEARS* 419–20, 512 (2005) (Clinton writing of being touched by the story of a Rwandan victim and explaining that the main motivation for the bombing of Serbia was to stop the killing of civilians). The extent to which leaders are sincere when they talk of their concern for human rights matters little for our purposes. A president may genuinely care about human rights or simply say he does after leaving office out of a desire for

individuals are less inclined to help others when they see bystanders in the same position to act behaving passively. Finally, even if a majority of Congress wants to undertake a humanitarian intervention and overcomes all the issues already mentioned, it may not be able to come to an agreement about the proper course to take. This is different from the situation in a war fought in self-defense, where such issues are thought of as tactical and within the proper domain of executive power.

1. The Public Weakly Supports Humanitarian Intervention

As foreign events generally have less of an influence on the public than domestic events, we would expect Americans to have less knowledge about what goes on overseas, as well as relatively weaker opinions on foreign policy. This is indeed what we find.³¹⁰ Those who oppose humanitarian intervention should not do so strongly, because the financial costs are distributed across society, rather than paid by a concentrated group with much to lose.³¹¹ At the same time, Americans who support humanitarian intervention may not lobby all that effectively for their preferences because they do not financially gain from such wars. How strong their preferences are, however, is an empirical question.

It is possible that some foreigners would be able to make effective lobbyists, since they would be seeking concentrated benefits and the costs of military action are widely distributed across society.³¹² Indeed, scholars have made arguments that certain foreign lobbies have too much influence on the issues they care about.³¹³ Yet these lobbies tend to be from groups that are relatively well-off by international standards, rather than being composed of groups that are subject to humanitarian atrocities in areas with little strategic interest to the United States. There is no known “Somali lobby” or “Tutsi lobby.” So while there may be groups who would have much to gain by lobbying Congress for the concentrated benefit of not being murdered, the fact that they are in the position of being killed *en masse*

approbation. In either case, he at least shows a desire to be thought of as a humanitarian, which should lead to policies that take the interests of the world into account.

³¹⁰ KNECHT, *supra* note 308, at 4.

³¹¹ See MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 250–54 (2009).

³¹² *Id.* Of course, I am speaking of financial costs. Those who fight the wars as soldiers carry a large, concentrated burden, but the military establishment is not known for being dovish in foreign affairs. In fact, many public choice scholars argue that government workers seek to create more, not less, work for themselves. *Id.* at 342–46 (on the agency expansion hypothesis).

³¹³ See JOHN J. MEARSHEIMER & STEPHEN M. WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY (2007); Nancy Bernkopf Tucker, *China-Taiwan: US Debates and Policy Choices*, 40 SURVIVAL 150, 158–59 (1998) (“Washington policy-makers consider the Taiwan lobby to be second only to its Israeli counterpart in its persuasive powers and national reach.”).

in the first place—even setting aside issues of language and cultural difficulties and distance—indicates that they would be in no position to make effective lobbyists.

Humanitarian intervention is extremely popular among the American public. Polling has shown that between just under two-thirds to 83 percent of the American population believes that the United States should act to prevent atrocities committed by governments against their own people, at least as a general proposition.³¹⁴ However, there are good reasons to believe that that popularity does not translate into Congress taking steps to enact these preferences, and much depends on the way the question is framed. In 2005, Eichenberg reviewed polling data on American attitudes towards foreign intervention. He found a difference in political support for humanitarian and peacekeeping missions, even when pertaining to the same conflict.³¹⁵ For example, a survey question that asks whether the United States should participate in “stopping the fighting” in Rwanda is classified as a peacekeeping question, while one that asks whether the United States should simply deliver food aid is classified as gauging the public’s attitude on a humanitarian intervention.³¹⁶ He finds that “support for almost any question that mentions peacekeeping is generally low and very stable”³¹⁷ and “[o]verall public support does indeed vary with the purpose of the mission: support for traditional ‘realpolitik’ missions is generally higher than for ‘interventionist,’ humanitarian missions.”³¹⁸ Surveyors have taken the humanitarian intervention/peacekeeping distinction into account and now often mention that Americans might become involved in the fighting when soliciting opinions on potential humanitarian interventions.

Western shows that public support for humanitarian intervention is a “permissive” condition; the American people support humanitarian interventions, but will not “demand” that their government carry them out. Nor will they penalize leaders for refusing to act.³¹⁹ For example, the pressure to intervene in Somalia came from government bureaucrats and NGOs rather than the general public, and the Clinton administration suffered no discernable political costs for ignoring the mass killings in Rwanda.³²⁰ Jentleson and Britten note that “[t]here is no standing constituency for using military force, but there is also not an overwhelming

³¹⁴ Western, *supra* note 251, at 330–31.

³¹⁵ Richard C. Eichenberg, *Victory Has Many Friends: The U.S. Public and the Use of Military Force, 1981–2005*, 30 INT’L SEC. 140 (2005).

³¹⁶ *Id.* at 161.

³¹⁷ *Id.* at 162.

³¹⁸ *Id.* at 149.

³¹⁹ *Id.* at 331–33.

³²⁰ *Id.*

blocking group.”³²¹ This argument is consistent with the finding that the public is relatively indifferent towards foreign policy.³²² Another caveat that must be added is that the public will prefer just about any alternative to military force to deal with a problem.³²³

Thus, we can predict that American leaders will be passive in the face of humanitarian tragedies. This is indeed what we find, and it is precisely this criticism of selectivity that critics of American policy point to.³²⁴ Still, there is a countervailing force pushing policy makers in the opposite direction. This is the second assumption of the model, and it explains the fact that we do actually see some humanitarian interventions in practice.

2. Politicians Seek Approbation, Especially from the Elite

Cowen and Sutter have constructed a model in which presidents seek fame, defined as “approbation at a national or global level.”³²⁵ The Founders understood this motivation, believing that war brings glory to the executive, making it the branch too eager to initiate hostilities.³²⁶ Jay reflected on the reasons that absolute monarchs made war, among them “purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, [or] ambition.”³²⁷ Madison argued that in war, “laurels are to be gathered; and it is the executive brow they are to encircle.”³²⁸ In modern terms, one manifestation of the executive desire for glory takes the form of presidents being concerned about their legacies.³²⁹ Today, of course, glory does not come from being a great conqueror, but acting in ways that win approbation in the modern world.³³⁰

³²¹ Bruce W. Jentleson & Rebecca L. Britton, *Still Pretty Prudent: Post-Cold War Public Opinion on the Use of Military Force*, 42 J. CONFLICT RESOL. 395, 415 (1998).

³²² Matthew A. Baum, *Sex, Lies, and War: How Soft News Brings Foreign Policy to the Inattentive Public*, 96 AM. POL. SCI. REV. 91, 92 (2002).

³²³ Jentleson & Britton, *supra* note 321, at 415.

³²⁴ See Ayoob, *supra* note 267, at 85–86.

³²⁵ Tyler Cowen & Daniel Sutter, *Politics and the Pursuit of Fame*, 93 PUB. CHOICE 19 (1997).

³²⁶ See Fisher & Adler, *supra* note 140, at 6–9; *supra* Part I.C.

³²⁷ THE FEDERALIST NO. 4 (John Jay).

³²⁸ See Louis Fisher, *To War or Not to War*, LEGAL TIMES, Mar. 10, 2008.

³²⁹ See Lindsey Boerma, *Legacy Concerns Seen as Bush Officials Claim Their Share of Credit for bin Laden Killing*, NAT'L J., May 4, 2011, <http://www.nationaljournal.com/politics/legacy-concerns-seen-as-bush-officials-claim-their-share-of-credit-for-bin-laden-killing-20110503>; Clifford D. May, Op-Ed., *Arafat's Legacy: He Chose to Lead a Holy War, Not Peace*, WASH. TIMES, Aug. 17, 2001, at A19 (“It has been said by many that Mr. Clinton pushed so hard for peace last year because he was seeking a legacy.”); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. CONTEMP. PROB. 1, 11 (1994).

³³⁰ See STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011) (on the triumph of humanitarian and utilitarian values in the modern era).

A corollary of this assumption is that leaders will be especially concerned about how they are viewed by other elites, both during their term and after they retire. Members of the elite will write the history books, decide whether future catastrophes are blamed on this administration or the next, and collectively decide what a leader's legacy will be. Humanitarian intervention in particular has wide acceptance among the modern Western establishment.³³¹ This reflects the fact that the contemporary elite culture of the West reinforces internationalist, humanitarian norms. Huntington has demonstrated that American elites, consistently and across a variety of issues, tend to be more internationalist than the general population.³³² He coined the term "Davos man," to refer to those who have more culturally and morally in common with other elites than they do with their own countrymen.³³³ Huntington writes that, within nations, "[s]omeone whose loyalties, identities and involvements are purely national is less likely to rise to the top in business, academia, the media and the professions than someone who transcends these limits."³³⁴

Thus, despite the fact that there is no domestic American constituency that has a direct economic interest in humanitarian intervention, the existence of such undertakings is explained by cultural and ideological factors. The American people are generally indifferent to supportive of humanitarian intervention and the idea has wide acceptance among policy elites. These two assumptions, however, tells us nothing about whether the legislature or executive is more likely to support these kinds of wars.

3. Congress Has a Collective Action Problem in Claiming Credit for Humanitarian Interventions

Of course, legislatures are members of the elite, just as presidents are. But there are reasons why we may expect them to care less about approbation in the field of foreign affairs than the executive does. The most important reason is that there is a collective action problem in Congress, in that any individual Congressman would share the praise or blame for preventing or failing to prevent a humanitarian atrocity with the institution as a whole. This is implicit in the Founders' arguments that the executive is more prone to war because of the "glory" it entails. Indeed, the public judges the president on national issues, while evaluating members of

³³¹ See *supra* note 251.

³³² SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 327–32 (2004).

³³³ Samuel P. Huntington, *Dead Souls: The Denationalization of the American Elite*, 75 NAT'L INT. 5 (2004). For a more sympathetic take on the global elite, see DAVID ROTHKOPF, SUPERCLASS: THE GLOBAL POWER ELITE AND THE WORLD THEY ARE MAKING (2008).

³³⁴ Huntington, *supra* note 333, at 8.

Congress based on their records on domestic and local concerns.³³⁵ Legislatures are better to able to take credit for local, narrow accomplishments than achievements on the national and international plane.³³⁶ Thus, the president has more motivation to act to stop humanitarian atrocities, whether he is seeking reelection, to be well liked generally, or both. This logic applies to claiming credit among the elite class as much as it does to gaining approbation among the general public.

There is historical evidence for this assumption. After leaving office, President Clinton said that his biggest regret was not intervening in Rwanda.³³⁷ In his final days in office, he had been frantically working on a solution to the Palestinian-Israeli problem, and commentators consider this use of time to have been motivated by legacy concerns.³³⁸ Clinton may very well have genuinely desired peace in the Middle East and regretted not stopping the Rwanda slaughter, but to the extent to which he sought approbation for his actions as president he had an extra motivation to intervene in foreign states that would have had much less of an influence on individual legislatures.

4. The Psychology of Buck Passing

Even if executives are completely altruistic, it makes sense that an individual president will feel more psychological pressure to stop a humanitarian atrocity than a member of a large institution who can share in the guilt of remaining passive with others. Psychological research shows that individuals are less likely to act to help others when there are other bystanders around.³³⁹ For example, when a person sees an individual stealing, he is less likely to report him when he sees other individuals witnessing the theft and remaining silent.³⁴⁰ Further, as the number of passive individuals present increases, the less likely an individual is to behave altruistically.³⁴¹ This leads to the hypothesis that a single executive might be more willing than any individual legislature to take action to stop a humanitarian catastrophe for psychological reasons unrelated to considerations of fame. Of course, this is not meant to morally equate leaders who do not support

³³⁵ KNECHT, *supra* note 308, at 7–8.

³³⁶ STEARNS & ZYWICKI, *supra* note 311, at 254–55.

³³⁷ Christy Mawdsley, *An Interest in Intervention: A Moral Argument for Darfur*, 10 AFR. STUD. Q. 95, 102 (2008).

³³⁸ See CLINTON, *supra* note 309, at 624–27 (telling of his efforts to make peace between the Palestinians and the Israelis near the end of his presidency); May, *supra* note 329.

³³⁹ See James M. Hudson & Amy S. Bruckman, *The Bystander Effect: A Lens for Understanding Patterns of Participation*, 13 J. LEARNING SCI. 165, 168–69 (2004); Bibb Latané & Steve Nida, *Ten Years of Research on Group Size and Helping*, 89 PSYCHOL. BULLETIN 308, 308 (1981).

³⁴⁰ Latané & Nida, *supra* note 339, at 311.

³⁴¹ Hudson & Bruckman, *supra* note 339, at 169; Latané & Nida, *supra* note 339, at 317.

humanitarian interventions with bystanders who decline to help a stranger in distress; obviously, the moral questions surrounding humanitarian intervention are much more complex than those involved in day-to-day personal decision making. But to the extent that leaders genuinely believe in humanitarian intervention, those who make up part of a collective body may feel less psychological pressure than a single executive to commit forces when they believe it is morally necessary.

5. The Nature of Humanitarian Interventions

In a war of national defense, after Congress declares war, the Commander-in-Chief and the military determine the best way to defeat the enemy. In a humanitarian intervention, however, the goals are usually less clear.³⁴² Congress may therefore be less willing to explicitly delegate power in such situations. For example, just days after the nation was attacked on 9/11, Congress passed a joint authorizing the president to go after the perpetrators.³⁴³ Similarly, after Congress became convinced that Saddam Hussein had weapons of mass destruction, it authorized the president to use force to enforce UN resolutions against his regime.³⁴⁴ In the case of Kosovo, however, the Clinton administration was placed in a difficult situation, being criticized by Congress before and after the war began both for doing too much and doing too little.³⁴⁵ In a humanitarian intervention, questions arise over how victory is to be defined, whether ground troops should be used, how much the United States is to take responsibility for what goes on in the country, and how much risk members of the armed services are to take for the sake of civilians. Saddam Hussein, the Taliban, or even Al Qaida may be defeated, but a nation can never be sure that it has permanently accomplished the mission of stopping the people of another country from killing one another.

We can imagine a Congress divided into three camps of equal size. One faction wants to send ground troops into a country to stop a government from committing humanitarian atrocities against its citizens, another wants to simply conduct airstrikes, and the last wants to stay out of the conflict. While a majority (two-thirds) of Congress may want to intervene, nothing happens because no single position has majority support. This could be the case even if all the interventionists would rather have some kind of action instead of none at all, because neither of the first two factions wants to give up on its first choice.

³⁴² This is indeed one of the main criticisms of humanitarian interventions. See Jim Whitman, *A Cautionary Note on Humanitarian Intervention*, 34 GEOJOURNAL 167, 170–73 (1994).

³⁴³ Joint Resolution of Congress Authorizing the Use of Force, Pub. L. 107-40, 115 Stat. 224 (2001).

³⁴⁴ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

³⁴⁵ Steven B. Redd, *The Influence of Advisors and Decision Strategies on Foreign Policy Choices: President Clinton's Decision to Use Force in Kosovo*, 6 INT'L SUD. PERSP. 129, 134–35 (2005).

B. The Implications of the Model

What we see is a public that is generally indifferent to foreign affairs, but that weakly supports humanitarian intervention by large margins. Congress will be unlikely to feel much pressure to act when facing such tragedies. The President, on the other hand, deals with the same public but has a few reasons why he would be more likely to intervene. First of all, he is more likely to be judged by the public based on his performance in foreign affairs. Second, as the Founders wrote, presidents seek fame and the executive has more of a legacy interest in acting in ways that bring approbation in foreign affairs. Both these reasons for relative presidential initiative and congressional passivity are explained by the collective action problem Congress faces: individual members are less likely to receive praise or blame for any action, or inaction, they take. While the model also explains why the president is more likely to be willing to fight wars in the national interest, whether just or unjust, any gap in war-proneness between the president and Congress should be magnified in the case of humanitarian intervention for two reasons. First, there is the internationalist-nationalist division between the American elite and the masses.³⁴⁶ Second, in humanitarian intervention the goals are not as clear as they are in wars fought in self-defense, and Congress may have more difficulty agreeing on a proper course of action in the former.

Just as the model predicts that the president is more likely to take action to engage the United States in foreign wars in which the country has little national interest, it predicts that Congress will be relatively passive after the fact. The empirical data shows that the public weakly supports humanitarian intervention, and even when it does not the costs of such operations are widely distributed, indicating that there will not be any effective lobbies present to force Congress to take meaningful steps to stop the president once he commits the nation to these unwanted wars. The upshot of the analysis is that when it comes to humanitarian intervention, the default rule for who gets to declare war is very important. Presidents will generally be much more willing to use military force than Congress is. If it was possible to construct a “war powers act that worked,”³⁴⁷ humanitarian interventions would become much less common, if not nonexistent.

Partisans of the R2P may seek to harness the presidential desire for glory, discussed by the Founders, towards humanitarian goals. While this is certainly not the kind of glory or fame that the framers had in mind, we may believe that the change in values since their time makes executive thirst for glory a reason to put the wars powers in the hands of the president, instead of keeping it away from

³⁴⁶ See *supra* notes 331–334 and accompanying text.

³⁴⁷ Ely, *supra* note 140.

him. Those skeptical of humanitarian intervention, whether on moral³⁴⁸ or practical grounds,³⁴⁹ may argue that the growth of the concept makes it more necessary than ever to have Congress decide when the nation commits to war.

C. Three Case Studies: Somalia, Kosovo, and Libya

1. The First Post-Cold War Humanitarian Intervention

In the summer of 1992, Somalia was experiencing a dire famine.³⁵⁰ The U.S. Office of Foreign Disaster Aid indicated that more than two-thirds of the Somali population may have been facing starvation.³⁵¹ In June, eighty-eight members of Congress sent President Bush a letter urging him to give priority to the situation in Somalia.³⁵² As unarmed humanitarian missions organized by the UN were being attacked by armed gangs, pressure mounted for armed intervention.³⁵³ At the end of August, under American pressure, the UN Security Council passed Resolution 775, authorizing “all necessary measures” to ensure that food reached those who needed it.³⁵⁴ While the United States began providing air lifts for relief parties, the situation on the ground deteriorated.³⁵⁵

In early October, a resolution asking the president to deploy armed personnel to Somalia passed both houses of Congress.³⁵⁶ Legislatures continued to lobby the president to intervene and on December 4 the UN Security Council voted to support intervention.³⁵⁷ The first American soldiers arrived in Somalia in less than a week.³⁵⁸ After American forces started taking casualties, however, the Clinton administration decided to withdraw under intense political pressure.³⁵⁹ The members of the Bush administration, including the president himself, were reported to have been motivated by a concern over the humanitarian catastrophe

³⁴⁸ See Holzgrefe, *supra* note 249, at 29–30.

³⁴⁹ See BRIAN D. LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPALS IN INTERNATIONAL LAW AND WORLD RELIGIONS 232–36 (2002); Eric A. Posner, Op-Ed., *The Humanitarian War Myth*, WASH. POST, Oct. 1, 2006, at B7 (arguing that “experience shows that humanitarian war is an oxymoron”); Mandelbaum, *supra* note 277, at 2–6; Whitman, *supra* note 342, at 170–73.

³⁵⁰ RUTHERFORD, *supra* note 253, at 38.

³⁵¹ *Id.* at 39.

³⁵² *Id.*

³⁵³ *Id.* at 39–45.

³⁵⁴ S.C. Res. 775, S/RES/775 (Aug. 28, 1992); RUTHERFORD *supra* note 253, at 51.

³⁵⁵ RUTHERFORD, *supra* note 253, at 53.

³⁵⁶ *Id.* at 54.

³⁵⁷ Piers Robinson, *Operation Restore Hope and the Illusion of a News Media Driven Foreign Policy*, 49 POL. STUD. 941, 945–46 (2001).

³⁵⁸ *Id.*

³⁵⁹ RUTHERFORD, *supra* note 253, at 160–64.

in Somalia.³⁶⁰ Taking these reports at fact value, we see that there are still psychological motivations for executives to begin wars, even though they are not the same motivations that existed at the time of the founding.³⁶¹

The Somalia intervention appears to be a case where the president and Congress were relatively united. Both sought intervention at the beginning, and both wanted to withdraw after the United States began taking casualties. However, Somalia may be a special case. Support for going into Somalia was higher than support for other humanitarian interventions that came after it.³⁶² This indicates that after Somalia the American public came to better understand that humanitarian intervention may occasionally lead to casualties, even when the thought is not prompted by the survey question.³⁶³ The mission may have led the public, now understanding that humanitarian intervention is a type of war, to become less supportive of such engagements. In any event, it is important to note that neither the Clinton nor the Bush administration was forced into or out of Somalia by Congress. At the beginning and at the end of the conflict, the behavior of the two administrations roughly tracked public opinion. However, the Senate Armed Services Committee did reject a UN request to disarm Somali warlords,³⁶⁴ a mission which was undertaken by the Clinton administration. Thus, in Somalia we see a relatively hawkish executive and a passive Congress, although the gap in behavior between the branches was not as large as it would be in the cases of Kosovo and Libya.

2. Congress Waffles on Kosovo

On March 23, 1999, the Senate passed a resolution urging the United States and NATO allies to attack the former Yugoslavia in order to stop Serbian forces from killing Albanians.³⁶⁵ The House refused to do the same,³⁶⁶ and one day later, NATO began bombing the former Yugoslavia.³⁶⁷ The very same day, the House passed a resolution which expressed support for American soldiers and made clear the reservations of some members of the legislature about the attack, but did not approve of the war.³⁶⁸ Just over a month later, it rejected a Senate vote authorizing

³⁶⁰ *Id.* at 41–42, 78 (“National Security Adviser Brent Scowcroft said there was pressure from guilt over the perception that the West cared little for the problems of black or Muslim populations. Scowcroft wanted to show that the US decision not to intervene in Bosnia was due to circumstances and not the Muslim faith.”).

³⁶¹ *See supra* Part I.C.

³⁶² *See* Eichenberg, *supra* note 315, at 157.

³⁶³ *See supra* notes 315–318 and accompanying text.

³⁶⁴ RUTHERFORD, *supra* note 253, at 271.

³⁶⁵ S. Con. Res. 21, 106th Cong. (1999).

³⁶⁶ YOO, *supra* note 7, at 157.

³⁶⁷ Redd, *supra* note 345, at 130.

³⁶⁸ H.R. Res. 130, 106th Cong. (1999).

the use of force against the Serbs by a tie vote.³⁶⁹ At the same time, the House explicitly rejected a resolution calling on the president to withdraw all troops from the conflict, and along with the Senate appropriated funds for the mission.³⁷⁰

Here we see a clear case of the president wanting to undertake a humanitarian intervention in a case where Congress would not have done so. The fact that Congress would not have taken active steps to intervene in Kosovo could have been predicted from the fact that only 46 percent of the population supported the use of force in Kosovo before hostilities were initiated, and that number barely budged after the war began.³⁷¹ At the same time, there was not the political will to take meaningful steps to stop the intervention.

President Clinton would claim to have been motivated by humanitarian concerns in deciding to intervene in Kosovo.³⁷² Others have expressed doubts about this claim, and argue that the main motivations were political.³⁷³ While some congressmen also wanted to intervene to stop the ethnic cleansing in the former Yugoslavia, the body as a whole was too split to have come up with a policy.³⁷⁴ Regardless of how we judge Clinton's sincerity, he ended up initiating a war that Congress certainly would not have authorized on its own.

3. Obama Overthrows Gaddafi

In mid-February 2011, protests broke out in the Eastern Libyan city of Benghazi against the repressive rule of Mummar al-Gaddafi.³⁷⁵ As the unrest spread, the government responded quickly with a crackdown that killed dozens of people.³⁷⁶ The international community responded by freezing Libyan assets and applying

³⁶⁹ YOO, *supra* note 7, at 158.

³⁷⁰ *Id.*

³⁷¹ Eichenberg, *supra* note 345, at 169.

³⁷² CLINTON, *supra* note 309, at 512.

³⁷³ Redd, *supra* note 345, at 134–40; JOHNSON, *supra* note 23, at 119 (“The American public and many critics around the world were skeptical about both the claims and the motivation for the [Kosovo] attacks because three days earlier Clinton had publicly confessed to his sexual liaison with Monica Lewinsky.”).

³⁷⁴ Redd, *supra* note 345, at 136 (discussing “the diversity of opinion emanating from Congress” and stressing “how difficult it was to take a particular course of action based solely on what Congress wanted to do because Congress itself presented no clear consensus about what should be done”).

³⁷⁵ Neil MacFarquhar, *Unrest Spreads, Some Violently, in the Middle East*, N.Y. TIMES, Feb. 17, 2011, at A1.

³⁷⁶ Anthony Shadid, *Clashes in Libya Worsen As Army Crushes Dissent*, N.Y. TIMES, Feb. 19, 2011, at A1.

sanctions on the regime.³⁷⁷ At the beginning of March, the rebels claimed that they were close to overthrowing Gaddafi.³⁷⁸ By the middle of the month, however, Gaddafi's troops were closing in on the rebel stronghold of Benghazi.³⁷⁹ On March 14, the United Nations Security Council began considering a no fly zone.³⁸⁰ Three days later, with Gaddafi's forces within 100 miles of Benghazi, the UN Security Council passed a resolution approving a no fly zone over Libya and authorizing all necessary steps to stop the killing of civilians.³⁸¹ The United States had been instrumental in pushing through the Resolution at the UN.³⁸² Days later, the NATO bombing campaign began.³⁸³

Glennon believes that there was enough time for Congress to consider whether the Libyan intervention was justified.³⁸⁴ He argues that since the UN considered the situation in Libya for five weeks, the potential for a humanitarian crisis was foreseeable and the legislature should have had a chance to decide whether American involvement was necessary.³⁸⁵ This ignores how quickly the situation in Libya was developing. While there were protests, clashes, and turmoil in Libya for at least five weeks before Resolution 1973 was passed, Gaddafi did not begin closing in on the rebels until less than two weeks before the Resolution. At the time the UN was debating the no fly zone, the Obama administration had been preoccupied with similar events in Tunisia, Egypt, Saudi Arabia, Yemen, and Bahrain,³⁸⁶ not to mention domestic policy concerns. A humanitarian catastrophe was foreseeable in any one of those countries, but Congress would not have had the time to debate whether intervention could be justified in each one and under what conditions. The Obama administration had only become convinced of the need for a no fly zone the very week the UN Resolution passed.³⁸⁷

³⁷⁷ Kareem Fahim & David D. Kirkpatrick, *Qaddafi's Forces Are Hitting Back at Libyan Rebels*, N.Y. TIMES, Mar. 1, 2011, at A1.

³⁷⁸ *Id.*

³⁷⁹ Anthony Shadid, *At Crossroads, Libya Rebels Vow to Stand or Die*, N.Y. TIMES, Mar. 14, 2011, at A1.

³⁸⁰ Anthony Shadid & Kareem Fahim, *Air Attacks By Qaddafi, and an Offer of Amnesty*, N.Y. TIMES, Mar. 15, 2011, at A4.

³⁸¹ S.C. Res. 1973, S/RES/1973 (Mar. 17, 2011); Dan Bilefski & Mark Landler, *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. TIMES, Mar. 18, 2011, at A1.

³⁸² Cooper & Myers, *supra* note 288.

³⁸³ David D. Kirkpatrick, Steven Erlanger, & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi's Forces*, N.Y. TIMES, Mar. 20, 2011, at A1.

³⁸⁴ Michael J. Glennon, *The Cost of 'Empty Words': A Comment on the Justice Department's Libya Opinion 7* (Harv. Nat'l Sec. J. Forum) available at <http://ssrn.com/abstract=1810922>.

³⁸⁵ *Id.*

³⁸⁶ Cooper & Myers, *supra* note 288.

³⁸⁷ *Id.*

In any event, even if Congress had been theoretically able to approve the Libyan intervention before the Gaddafi government had routed the rebels, it is unlikely that it would have done so. In June 2011, ten congressmen filed suit against the Obama administration, claiming that the war was illegal.³⁸⁸ Even months after the bombing began, a spokesman for the House majority leader said that the President had failed to show that the Libyan intervention was in the national interest or conducive to American policy goals.³⁸⁹ Speaker Boehner himself demanded that the White House provide a legal justification for the Libya intervention.³⁹⁰ On June 24, 2011, the House of Representatives refused to authorize the war by the overwhelming margin of 295 to 123.³⁹¹ The same day, the very same body refused to cut off funding for the mission.³⁹²

We see the same pattern of Congressional passivity that we saw in the Kosovo intervention.³⁹³ Reflecting its constituency, Congress does not set a high enough priority on foreign policy to take drastic action to stop a *fait accompli*. It would not have approved of the Libya intervention *ex ante*, but it did not end it. Obama began an attack that could not be justified in terms of the national interest, but instead did what he thought required by morality and/or concerns over the health of his legacy.³⁹⁴

CONCLUSION

The Founding Fathers designed a framework for making war that assumed that nations acted exclusively in their own interests.³⁹⁵ They believed that the Congress was in the best position to determine when the country needed to defend itself.³⁹⁶ Some war powers scholars argue that technological changes and terrorism force us to reconsider whether such a system is still adequate.³⁹⁷ These scholars, however,

³⁸⁸ *White House Defends U.S. Role in Libya Mission Amid Congressional Backlash*, FOX NEWS, June 15, 2011, <http://www.foxnews.com/politics/2011/06/15/white-house-defends-legality-libya-mission/>.

³⁸⁹ *Id.*

³⁹⁰ Jeff Zeleny, *Candidates Show G.O.P. Less United On Goals of War*, N.Y. TIMES, June 15, 2011, at A1.

³⁹¹ Jennifer Steinhauer, *House Rebuffs Libya Mission; No Funds Cut*, N.Y. TIMES, June 24, 2011, at A1.

³⁹² *Id.*

³⁹³ The fact patterns were so similar that an explanation is required. Both wars were humanitarian interventions, in which the President responded to international pressure to act and Congress refused to either support the war or cut off funding. The model presented in this Article hopes to provide this explanation.

³⁹⁴ See Cooper & Myers, *supra* note 288 (reporting on how Gaddafi's public rhetoric indicating that he would slaughter the rebels convinced the White House to intervene).

³⁹⁵ See *supra* Part I.

³⁹⁶ See *supra* Part I.C.

³⁹⁷ See *supra* note 20.

never consider the undeniable fact that values have changed since the founding: people are more likely to consider the interests of those unlike themselves and this is reflected in the American tilt towards idealism in foreign policy.³⁹⁸

This article takes no position on humanitarian intervention. On the one hand, if the United States government can prevent an atrocity for relatively little costs, from a utilitarian perspective the case for intervention seems unassailable.³⁹⁹ However, the very premise of the case, that the United States can in the long run effect meaningful change abroad, has been challenged.⁴⁰⁰ And there are still those who take the Hamiltonian view that representatives of a free people have the moral obligation to pursue the interests of their own citizens first.⁴⁰¹

To this, the internationalists can respond that the American population has itself accepted humanitarian intervention, albeit weakly.⁴⁰² Because of the collective action problems Congress faces, the internationalists could say that the president is in the best position to enact the preferences of the nation.⁴⁰³ Under this argument, it is the American people who have decided that the United States should be an idealist power and the law scholar is simply proposing the best way to enact majority preferences.

What the interventionists must realize, however, is that without the ability of the president to unilaterally commit the nation to war there will be fewer humanitarian interventions, if any at all. If the power to make war was still exclusively in the hands of Congress, the Serbian and Libyan, and likely Somali, interventions would never have happened.⁴⁰⁴ The United States did not intervene in Rwanda, but the fact that President Clinton claims that not doing so is his greatest regret⁴⁰⁵ indicates that his conscious was bothering him about it, he regrets not acting for the sake of his legacy, or both. These motivations that influence a president have

³⁹⁸ See *supra* Part III. The triumph of idealism in foreign policy is just one of several manifestations of the modern acceptance of a humanitarian ethic. See PINKER, *supra* note 330, at 647–60 (discussing the “expanding circle” of human empathy).

³⁹⁹ See R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. INT’L L.J. 435, 445–46 (1988–89).

⁴⁰⁰ See *supra* note 349.

⁴⁰¹ See *supra* note 348.

⁴⁰² See *supra* Part IV.A.1.

⁴⁰³ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) (arguing that, in setting administrative policy, “because the President has a national constituency, he is likely to consider ... the preferences of the general public, rather than merely parochial interests”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994).

⁴⁰⁴ See *supra* Part IV.C.

⁴⁰⁵ Mawdsley, *supra* note 337, at 102.

little effect on individual congressmen, who tend to be more parochial and better able to shift the blame for not acting in the face of tragedy.⁴⁰⁶

Of course, some have argued that the Kosovo intervention was a failure,⁴⁰⁷ and the jury is still out on Libya. We may believe that the Founders were wise in creating a government that only sought the happiness of its own people, and that a president who seeks glory by doing good is no less dangerous than a president who seeks the same by being an imperialist.⁴⁰⁸ Further, our system of government, it can be argued, gives Congress the power to make law, and law-making is not simply about getting the result that the majority desires; individual legislatures and Congress as an institution are supposed to take cardinal preferences into account. If 80 percent of the population supports humanitarian intervention but the majority does not care enough to prioritize the issue, then we may say that the system works as it is supposed to when this preference is not enacted.

The Article takes no position on whether the original understanding of the war powers should control or whether humanitarian intervention is normatively desirable. What it seeks is to do is make explicit that the assumptions about international relations that war powers scholars hold are mistaken, or at least incomplete. There is no reason that the branch in the best position to decide when the interests of the nation are threatened must also be the same branch that can give us an optimal amount of humanitarian intervention.⁴⁰⁹ With regards to the

⁴⁰⁶ See *supra* Part IV.A.3–4.

⁴⁰⁷ See Mandelbaum, *supra* note 277.

⁴⁰⁸ Thinkers have put forward a tragic view of the human condition, which sees the quest for moral perfection as leading to a great deal of human suffering. See STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 287–93 (2003) (“We are all members of the same flawed species. Putting our moral vision into practice means imposing our will on others. The human lust for power and esteem, coupled with its vulnerability to self-deception and righteousness, makes that an invitation to a calamity...”); THOMAS SOWELL, *A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES* 17–19 (2002) (on the unconstrained vision of the human condition).

⁴⁰⁹ In both national interest and humanitarian wars the gains are widely distributed amongst the population. Thus, a public choice model would predict little pressure on Congress for either. See STEARNS & ZYWICKI, *supra* note 311, at 250–54. However, the preferences that people have might be stronger in one case than the other. I suspect that it is the case that preferences are strong enough in wars of national interest that Congress would often actually declare war, just as it gave the president the power to go after those who planned 9/11 and invade Iraq. Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (authorizing the president “to use the Armed Forces of the United States ... in order to (1) defend the national security of the United States against the threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”); Joint Resolution of Congress Authorizing the Use of Force, Pub. L. 107-40, 115 Stat. 224 (2001) (giving the president authority to “use all necessary force against those ... he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001...”). When

latter kind of war, however, Congress is not likely to authorize the optimal number on its own initiative, unless we believe that that number is close to zero.

compared to congressional intransigence regarding humanitarian interventions, we may hypothesize that what determines whether Congress approves of a war is whether the American people can be convinced that such a war is in the national interest. *See supra* Part III.B. This is consistent with data showing that the public is more supportive of realist missions and less supportive of Wilsonian wars. Eichenberg, *supra* note 315, at 149.