

## COMMENT

### The Anti-Federalists and Presidential War Powers

The difficult legal questions prompted by the war on terrorism have generated a lively debate over the original understanding of the President's war powers.<sup>1</sup> By now, the two sides of that debate are well known.<sup>2</sup> Congressionalists argue that the original understanding of the Declare War Clause required Congress to authorize all acts of war, except those in response to a sudden attack.<sup>3</sup> Presidentialists, on the other hand, argue that the

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1. The Declare War Clause of the Constitution provides that "[t]he Congress shall have power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8, cl. 11. For recent contributions to the debate, see, for example, Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 478-82 (2011); 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, 767-800 (2008) (discussing the Commander-in-Chief Clause); Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 138 (2007); and Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007).
  2. See, e.g., William Michael Treanor, *Fame, the Founding and the Power To Declare War*, 82 CORNELL L. REV. 695, 696-98 (1997); Stephen M. Griffin, *The National Security Constitution and the Bush Administration*, 120 YALE L.J. ONLINE 367, 369 (2011), <http://yalelawjournal.org/2011/3/25/griffin.html>.
  3. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 10 (1993) ("In language and recorded purpose the War Clause made an unmistakable point that needs no further gloss: Acts of war must be authorized by Congress."); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 8-10 (2d ed. 2004); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 3-5 (First Mariner Books ed. 2004) (1973); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER IN HISTORY AND LAW* 151 (2d ed. 1989); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 39-44 (1972); Alexander M. Bickel, *Congress, the President, and the Power To Wage War*, 48 CHI.-KENT L. REV. 131, 131-33 (1971); Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 67-70 (1995); Charles A. Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 VAL. U. L. REV. 53, 54-57 (1986) [hereinafter Lofgren, *Ultra-Whiggery*]; Charles A. Lofgren, *War-Making Under the Constitution: The Original*

Founders' revision of the Clause, from conferring the expansive power to "make War" to the power to "declare War" (the phrasing ultimately adopted),<sup>4</sup> reflected their desire to grant Congress only the relatively narrow power to legalize a conflict under international law.<sup>5</sup>

However, the voluminous war powers literature has generally neglected the state ratification debates.<sup>6</sup> In particular, no scholar has developed a comprehensive picture of the arguments made by the Anti-Federalists.<sup>7</sup> This Comment argues that the Anti-Federalist position supplies a crucial missing link in understanding the original division of war powers. Notably, some Anti-Federalists, although generally critical of the scope of the President's powers under the Constitution, advanced the opposite criticism of the Declare War

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*Understanding*, 81 YALE L.J. 672, 674-83 (1972) [hereinafter Lofgren, *Original Understanding*]; Prakash, *supra* note 1; Treanor, *supra* note 2, at 713-14; William Van Alstyne, *Congress, the President, and the Power To Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 5-7 (1972). *But see* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1551-52 (2002) (articulating a narrower version of the congressionalist argument).

4. See 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 318-19 (1911).
5. See, e.g., JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 96-100 (2005); Delahunty & Yoo, *supra* note 1, at 167; Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850-51 (1972); Eugene V. Rostow, "Once More Unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 6 (1986); Phillip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1375-83 (1994) (book review); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 906-10 (1994) (book review).
6. See JOHN YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 32-33 (2009) ("Leading accounts of the Presidency often overlook the state ratification process . . ."); *cf.* Treanor, *supra* note 2, at 713 (noting that scholars traditionally focus on the debate in the Constitutional Convention). *But see* Prakash, *supra* note 1, at 86-88 (locating support for congressionalist views in the ratification debates).
7. The war powers literature tends to address the Anti-Federalist position in the ratification debates in a cursory fashion and concentrates on events in only a few states. See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 607 (2004) (focusing on the Virginia debates); Delahunty & Yoo, *supra* note 1, at 138 (noting the position of leading Virginia Anti-Federalist Patrick Henry); Lofgren, *Original Understanding*, *supra* note 3, at 686 (discussing Henry's comments in Virginia); Prakash, *supra* note 1, at 86-87 (studying the debate in Virginia, as well as briefly noting events in Massachusetts, Rhode Island, New York, and North Carolina); Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1712 n.95 (2002) (focusing on Henry); Treanor, *supra* note 2, at 717 n.140 (noting Anti-Federalist statements in New York and Virginia, as well as the Federalist response in Connecticut); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 282 (1996) (focusing on Henry).

Clause, faulting it for concentrating power in *Congress*. For example, during the Virginia ratification debates, Patrick Henry confidently predicted that if the Constitution were ratified, the President would use his constitutional powers to make himself king and “enslave[] America.”<sup>8</sup> Yet Henry argued that Congress, and not the President, had too much of the war power.<sup>9</sup> “Congress,” noted Henry, would be able to “declare war . . . and levy your money[] as long as you have a shilling to pay.”<sup>10</sup> Henry preferred the “strong check” inherent in the mixed English system, whereby the king’s power to declare war was balanced by Parliament’s ability to fund war, and neither branch could unilaterally commit the country to a conflict.<sup>11</sup>

What explains Henry’s potentially contradictory comments? Some congressionalist scholars have argued that Henry’s assertion of an excessive grant of power to Congress demonstrates that Congress was originally understood to have the war power.<sup>12</sup> John Yoo has responded for the presidentialists, suggesting that Henry “strategically misconstrued” the division of war powers in order to make the federal government seem “entirely unchecked and, therefore, easily susceptible to tyranny.”<sup>13</sup> This Comment argues that Henry’s comments reflected a sustained Anti-Federalist objection to Congress’s war powers and had deep roots in Anti-Federalists’ philosophy of government. In so doing, it draws on source material heretofore neglected in war powers scholarship. Part I of this Comment examines the state ratification debates and contemporaneous public statements by Anti-Federalists in order to demonstrate the pervasive nature of the Anti-Federalist objection to the vesting of the power to declare war in Congress. Part II then argues that these objections are strong evidence in favor of the congressionalist understanding of the Declare War Clause.

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8. The Virginia Convention (June 5, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 943, 964 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter DOCUMENTARY HISTORY].

9. The Virginia Convention (June 9, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 8, at 1050, 1069.

10. *Id.*

11. *Id.*

12. See, e.g., Bradley & Flaherty, *supra* note 7, at 607; Lofgren, *Original Understanding*, *supra* note 3, at 686; Prakash, *supra* note 1, at 86-87; Ramsey, *supra* note 7, at 1712 n.95; Treanor, *supra* note 2, at 717 n.140.

13. Yoo, *supra* note 7, at 282; cf. Delahunty & Yoo, *supra* note 1, at 137-38 (relying on Federalist responses to Henry).

## I. THE ANTI-FEDERALIST ARGUMENT AGAINST CONGRESS'S POWER "TO DECLARE WAR"

The existence of a pervasive Anti-Federalist argument during the state ratification debates that Congress possessed too much of the war power greatly complicates the presidentialist interpretation of Patrick Henry's comments. The presidentialist argument that Henry "strategically misconstrued" the Constitution's division of war powers presupposes that the Anti-Federalists believed that the President had the constitutional power to initiate foreign wars. Yet a review of the state ratification debates and contemporaneous evidence reveals widespread evidence of the sincerity of the Anti-Federalist position, undercutting the historical credibility of the presidentialist interpretation.

Even in Henry's native Virginia, there was at least one other Anti-Federalist advancing Henry's argument. John Dawson, a member of the Continental Congress who would go on to serve in the House of Representatives, objected during Virginia's ratification debate that the Constitution gave "Congress . . . the power 'to declare war,' and also to raise and support armies."<sup>14</sup> That combination of powers worried Dawson because "the *nexus imper[ii]* of the British Constitution is . . . lost" under the American Constitution.<sup>15</sup>

Dawson's concern about the lost "*nexus imperii*" lies in contemporaneous Scottish Enlightenment thought on the separation of powers.<sup>16</sup> At the time of the ratification debates, some scholars trained in the Scottish tradition believed that it was necessary to make the separate branches of government dependent on each other in order to prevent factionalism and encourage peaceful relations between the branches.<sup>17</sup> John Witherspoon, then President of the College of New Jersey (Princeton) and a leading exponent of Scottish Enlightenment thought in America, explained in his lectures that

where there is a balance of different bodies . . . there must be always some *nexus imperii*, something to make one of them necessary to the other. . . . In order to produce this *nexus*, some of the great essential

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14. The Virginia Convention (June 24, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 8, at 1473, 1494 (John P. Kaminski & Gaspare J. Saladino eds., 1993); *see also* Prakash, *supra* note 1, at 87 n.218 (noting Dawson's comments).

15. The Virginia Convention (June 24, 1788), *supra* note 14, at 1494.

16. *See, e.g.*, 2 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 244 (Continuum Int'l Publ'g Grp. 2005) (1755).

17. *Cf.* Treanor, *supra* note 2, at 717 n.140 (attributing Anti-Federalist arguments to "one of the traditional and fundamental principles of mixed government").

rights of rulers must be divided and distributed among the different branches of the legislature. . . . [I]n the British government, the king has the power of making war and peace,—but the parliament have the levying and distribution of money, which is a sufficient restraint.<sup>18</sup>

Anti-Federalists in other states also worried about the loss of this *nexus*. In Pennsylvania, “A Federal Republican” writing in Philadelphia’s *Freeman’s Journal* echoed such concerns. “By this constitution,” wrote the anonymous author,

the Congress ha[s] power to “declare war,” as also to “raise and support armies[”]. . . . [I]f so, the *nexus imperii* even of the English constitution is lost. There the king has only the power of declaring war, and the house of parliament, that of raising money for the support of it. So . . . it seems to be wrong to give Congress this combined power . . . .<sup>19</sup>

James Wadsworth, a former delegate to the Constitutional Congress, made the same argument in the Connecticut ratification debates. Wadsworth “objected against [the Constitution],” according to the records of the debate, “because it gave the power of the purse to the general legislature; another paragraph gave the power of the sword [to the legislature]; and that authority which has the power of the sword and purse is despotic.”<sup>20</sup>

In Massachusetts, such complaints were voiced before the ratifying convention had even begun. Massachusetts towns voted to propose amendments to the Massachusetts ratifying convention “that the power over war and peace be left to the people, not to Congress.”<sup>21</sup> Anti-Federalists then took to the Massachusetts newspapers to object to Congress’s possession of both the war power and the power of the purse. One group noted that when they viewed Congress “possessed of the sword in one hand the purse-strings of the people in the other,” they saw “no security left for [the people].”<sup>22</sup> Another

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18. John Witherspoon, *Lecture XII: Of Civil Society*, in *LECTURES ON MORAL PHILOSOPHY* 87, 94 (Varnum Lansing Collins ed., Princeton Univ. Press 1912) (1822).

19. A Federal Republican, *A Review of the Constitution Proposed by the Late Convention Held at Philadelphia, 1787* (Nov. 28, 1787), reprinted in 14 *DOCUMENTARY HISTORY*, *supra* note 8, at 255, 265 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

20. The Connecticut Convention (Jan. 7, 1788), in 3 *DOCUMENTARY HISTORY*, *supra* note 8, at 547, 547 (Merrill Jensen ed., 1978).

21. 4 *DOCUMENTARY HISTORY*, *supra* note 8, at xxviii (John P. Kaminski & Gaspare J. Saladino eds., 1997).

22. Consider Arms, Malichi Maynard & Samuel Field, *Dissent to the Massachusetts Convention*, *HAMPSHIRE GAZETTE*, April 9 & 16, 1788, reprinted in 7 *DOCUMENTARY HISTORY*, *supra* note

suggested that Massachusetts was “ready to make the most unequivocal surrender . . . at the call of a Congress without check or controul—the fatal tendency and the aggregate evils that must be the certain consequence of such an imprudent resignation of the purse and the sword.”<sup>23</sup> Yet another warned the people of Massachusetts that “any government having the powers of war, peace, and revenue, has . . . engage[d] in needless and wanton expense.”<sup>24</sup>

Those concerns were later presented during the state ratification convention. Federalist Rufus King acknowledged the Anti-Federalist objection to vesting the war power in Congress. “It is an objection in some gentlemen’s minds,” noted King, “that Congress should possess the power of the purse and the sword.”<sup>25</sup> Anti-Federalist Abraham White then gave voice to the Anti-Federalist worry. “[I]n giving this power we give up every thing,” argued Judge White, “and Congress, with the pursestrings in their hands, will use the sword.”<sup>26</sup>

The argument in New York reflected the Massachusetts debates. Anti-Federalist writers lambasted the Constitution’s grant of the war power to Congress. The “Federal Farmer” wrote that “[i]t has long been thought to be a well founded position, that the purse and sword ought not to be placed in the

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8, at 1733, 1736 (John P. Kaminski & Gaspare J. Saladino eds., 2001). For the Federalist response, see Philanthrop, Commentary, *HAMPSHIRE GAZETTE*, April 23, 1788, *reprinted in* 7 *DOCUMENTARY HISTORY*, *supra* note 8, at 1743, 1744.

23. Helvidius Priscus IV, Letter to the Inhabitants of Massachusetts, *MASS. GAZETTE*, Feb. 5, 1788, *reprinted in* 5 *DOCUMENTARY HISTORY*, *supra* note 8, at 858, 859 (John P. Kaminski & Gaspare J. Saladino eds., 1998).
24. Agrippa XVI, Letter to the Massachusetts Convention, *MASS. GAZETTE*, Feb. 5, 1788, *reprinted in* 5 *DOCUMENTARY HISTORY*, *supra* note 8, at 863, 866-67.
25. The Massachusetts Convention (Jan. 21, 1788), *in* 6 *DOCUMENTARY HISTORY*, *supra* note 8, 1276, 1287 (John P. Kaminski & Gaspare J. Saladino eds., 2000). Federalist Fisher Ames also noted the existence of the Anti-Federalist objection: “[W]e have been warned,” stated Ames, “of the danger of trusting Congress with the power of the purse and of the sword.” The Massachusetts Convention (Feb. 5, 1788), *in* 6 *DOCUMENTARY HISTORY*, *supra* note 8, at 1442, 1446. Further, Rufus King and Nathaniel Gorham, in an unpublished document that may have formed the basis of a speech to the Massachusetts ratifying convention, noted that even though Congress possessed the purse and the sword, there were multiple checks that prevented Congress from unilaterally committing the country to war. Rufus King & Nathaniel Gorham, *Response to Elbridge Gerry’s Objections*, *in* 13 *DOCUMENTARY HISTORY*, *supra* note 8, at 550, 550 n.5 (John P. Kaminski & Gaspare J. Saladino eds., 1981). The Constitution, argued King and Gorham, “requires the joint consent of both branches of Congress together with . . . the [President] to declare war—this is preferable . . . as war is not to be desired and always a great calamity.” *Id.* at 554. For an earlier analysis of King and Gorham’s statements, see Prakash, *supra* note 1, at 86.
26. The Massachusetts Convention (Jan. 21, 1788), *supra* note 25, at 1287.

same hands.”<sup>27</sup> Our “wise” English “ancestors,” noted the Farmer, “have carefully separated them.”<sup>28</sup> A private letter written during the period worried that the Constitution “gives all the power both of the Sword & Purse into the hands of the [Congress] . . . open[ing] a door for despotism Tyranny, Anarchy & confusition and every evil Work.”<sup>29</sup>

Such thoughts were not limited to the press or private letters. During the New York ratification convention, Anti-Federalist John Lansing suggested that Congress was far too small a body to entrust with the power to declare war.<sup>30</sup> Illustrating the seriousness of these concerns, the New York convention actually recommended an amendment to the Constitution that would require a two-thirds supermajority for a declaration of war, rather than a simple majority vote.<sup>31</sup>

The consistent and principled Anti-Federalist position during the ratification debates discredits the presidentialist suggestion that Patrick Henry strategically misconstrued the Declare War Clause. This weakness, in turn, badly undermines the presidentialist account of the original understanding of the war powers.

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27. The Federal Farmer, Letter XVII (Jan. 23, 1788), in AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN (May 2, 1788), reprinted in 20 DOCUMENTARY HISTORY, *supra* note 8, at 1060, 1065 (John P. Kaminski et al. eds., 2004); see also Treanor, *supra* note 2, at 717 n.140 (noting the Federal Farmer’s position).
  28. The Federal Farmer, *supra* note 27, at 1065.
  29. Letter from Hugh Ledlie to John Lamb (Jan. 15, 1788), in 20 DOCUMENTARY HISTORY, *supra* note 8, at 610, 611. While private letters may be of little value in establishing the original public understanding of the Constitution, see *infra* text accompanying note 32, they are useful in the context of refuting Professor Yoo’s argument. After all, if the Anti-Federalists were executing some sort of subterfuge, it seems highly unlikely that they would be expressing such statements in private letters.
  30. The New York Convention (June 21, 1788), in 22 DOCUMENTARY HISTORY, *supra* note 8, at 1745, 1783 (John P. Kaminski et al. eds., 2008); see also Treanor, *supra* note 2, at 717 n.140 (noting Anti-Federalist objections).
  31. New York Declaration of Rights, Form of Ratification, and Recommendatory Amendments to the Constitution (July 26, 1788), in 23 DOCUMENTARY HISTORY, *supra* note 8, at 2326, 2331 (John P. Kaminski et al. eds., 2009); see also *id.* at 2268-69 (reporting vote); Prakash, *supra* note 1, at 88 & n.224 (noting amendments proposed by the New York and Rhode Island conventions, as well as campaigns for such amendments in North Carolina and Virginia). The French Foreign Ministry also evidently took notice of the idea to set a two-thirds threshold for declarations of war. Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Aug. 25, 1788), in 18 DOCUMENTARY HISTORY, *supra* note 8, at 345, 347 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

## II. IMPLICATIONS FOR THE WAR POWERS DEBATE

A convincing presidentialist interpretation of the ratification debates must establish, at the very least, that either the Federalists or the Anti-Federalists believed that the Constitution vested the war power in the President. Yet Part I has established that the Anti-Federalists thought that Congress had too much of the war power. Even if presidentialists could advance evidence suggesting that the Anti-Federalist position was a calculated one, under modern originalist doctrine that showing would be immaterial as it was the public understanding of the war power, and not the purported private opinions of individual Anti-Federalists, that was ratified into law.<sup>32</sup>

Moreover, the Federalists' response to the Anti-Federalist critique of the war powers mirrored their opponents' understanding of the Declare War Clause. During the ratification debates, the Federalists highlighted the benefits of requiring congressional approval before the United States could become embroiled in war.<sup>33</sup> Anti-Federalists and Federalists thus argued over the

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32. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

33. See, e.g., The Connecticut Convention (Jan. 7, 1788), in 3 DOCUMENTARY HISTORY, *supra* note 8, at 547, 552 (statement of Oliver Ellsworth) ("But does it follow, because it is dangerous to give the power of the sword and the purse to a hereditary prince, who is independent of the people, that therefore it is dangerous to give it to . . . Congress . . . men appointed by yourselves and dependent upon yourselves? This argument amounts to this, you must cut a man in two in the middle to prevent his hurting himself."); The Virginia Convention (June 10, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 8, at 1092, 1125 (statement of John Marshall) ("Are the people of England more secure, if the Commons have no voice in declaring war . . .?"); see also The Pennsylvania Convention (Dec. 11, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 8, at 580, 583 (Merrill Jensen ed., 1976) (statement of James Wilson) ("This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress . . ."); Lofgren, *Original Understanding*, *supra* note 3, at 686 (noting the Federalist defense of the Constitution); Treanor, *supra* note 2, at 717 (same); cf. The Virginia Convention (June 14, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 8, at 1258, 1282 (statement of James Madison) (noting that the Anti-Federalist maxim was not applicable to the Constitution because the President would have "command" of the forces); THE FEDERALIST No. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that the President's powers did not extend to "the declaring of war and to the raising and regulating of fleets and armies"). Rufus King and Nathaniel Gorham's statement examined *supra* note 25 would be another example of this type of Federalist argument. Such statements belie the presidentialists' emphasis on the power of the purse as the Federalists' intended check against presidential warmaking. See, e.g., YOO, *supra* note 5, at 154-55. While



*wisdom* of granting Congress the war power, not *whether* Congress possessed the war power. The presidentialist interpretation of the Declare War Clause is simply implausible in light of the state ratification debates.<sup>34</sup>

That still, however, leaves the problem of reconciling the Anti-Federalists' general argument against presidential power with the Anti-Federalist argument against Congress's possession of the power to declare war. I suggest that the most convincing explanation would be the simplest: the Anti-Federalists were arguing that both legislative and executive tyranny were real risks.<sup>35</sup> In one possible post-ratification world, the President could try to use his command of the army to make himself king. Yet during the consideration of the Constitution it was no secret that George Washington would likely be the first President, and Washington had already passed up the opportunity to make himself king. Therefore, the Anti-Federalists also had to demonstrate the structural flaws of the Constitution in a world in which the President did not try to destroy the Constitution. Relying upon a prominent understanding of the separation of powers, Anti-Federalists argued that the Constitution was defective because it vested Congress with too much of the war power.<sup>36</sup> We should not see such an argument as a stretch for the Anti-Federalists: the vesting of the power to authorize acts of war with the power of the purse could very well have been disconcerting to many Anti-Federalists, especially if they harbored doubts that Congress could be corrupted into declaring war.<sup>37</sup>

In sum, the Anti-Federalist arguments in the state ratification debates provide powerful evidence that the Constitution was originally understood to have vested Congress with the power to authorize acts of war. Given the Anti-Federalists' proclivity to criticize the Constitution for excessive grants of authority to the President as Commander-in-Chief, their clear fear of the

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there is no doubt that the power of the purse was seen as an important check on presidential power, the Federalists' invocation of the Declare War Clause in their response to the Anti-Federalists demonstrates that the Clause was also seen as a primary check.

34. See Saikrishna Prakash, *A Two-Front War*, 93 CORNELL L. REV. 197, 204 (2007) ("Neither Federalists nor Anti-Federalists claimed that the Constitution granted the President the power to decide to wage war against other nations.").
35. See Ramsey, *supra* note 7, at 1712 n.95 ("[T]he comments are perfectly consistent: Henry thought Congress had the war-initiation power, but the President was dangerous domestically because the President commanded the army. Henry's fear was not that the President would order the army to attack a foreign nation, but that the President would order the army to overthrow the U.S. government.").
36. See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 151-52 (Vintage Books ed. 1997) (1996) (noting the Anti-Federalist faith in the traditional axioms of constitutional design).
37. See *supra* notes 30-31 and accompanying text.

breadth of Congress's powers under the Declare War Clause augurs strongly in favor of the congressionalist understanding of the Constitution's original division of powers.

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