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Chaining the dog of war: Comparative data

Tom Ginsburg

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Chaining the Dog of War: Comparative Data

Tom Ginsburg*

Abstract

A central function of constitutions is to address issues of international relations, especially questions of war and peace. This Article describes trends across time and space in the treatment of questions of war. It shows that constitutions continue to allocate the power of declaring war, even though such declarations have become meaningless in international law. There is also a trend toward specifying legislative involvement in approving the actions of commanders-in-chief. The assignment of war powers seems to be driven by copying from neighboring countries and a country's own previous constitutional history. In closing, the final section of this Article speculates on considerations of optimal constitutional design.

Table of Contents

I. Introduction.....	139
II. Prologue: the American Debate.....	141
III. War Powers in Other States.....	146
A. Trends across Time and Space	146
B. The Role of Regime Type.....	152
IV. Optimal Design & Positive Analysis.....	154
V. Predicting Legislative War Powers	157
VI. Conclusion.....	161

* Leo Spitz Professor of Law, University of Chicago Law School. J.D. (1997), Ph.D. (1999) University of California at Berkeley. Thanks to Jeysree Ramachandran and David King for research assistance. This paper was presented at the *Chicago Journal of International Law* symposium in October 2013.

I. INTRODUCTION

How should powers of war and peace be distributed in democratic constitutions? This question has been a central one in constitutional design since the founding of the United States, and has (if anything) gained more importance in recent years: not only are constitutions frequently rewritten around the world, but by some accounts, the number of wars has increased as well.¹ A central question is whether constitutional design can indeed affect a nation's tendency to engage in armed conflict and its performance in international crisis bargaining. And the question relates to international efforts to reduce the levels and costs of violent conflict.

To understand why constitutional design might matter requires engagement with the large literature in international relations theory on the democratic peace. Since the time of Immanuel Kant, scholars have speculated on the relationship of internal constitutional structure and war. The central findings of the democratic peace literature can be summarized briefly: (1) mature democracies generally do not go to war against each other; (2) democracies are, on the whole, no less warlike (or only slightly less warlike) than autocracies; and (3) democracies are likely to win the wars that they fight against autocracies. To illustrate, by one account, democracies win over three quarters of their wars, and over 93 percent of wars they initiate.² Putting propositions (1) and (2) together (and setting aside debate over proposition (2)),³ we can see that democracies are

¹ See Dan Lindley & Ryan Schildkraut, *Is War Rational? The Extent of Miscalculation and Misperception as Causes of War* (Feb. 9, 2005) (unpublished manuscript, University of Notre Dame, on file with author) (more major wars initiated with less chance of victory since World War II); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009) (constitutional lifespans short).

² DAN REITER & ALAN C. STAM, *DEMOCRACIES AT WAR* 29 (2003). For a different view on democracies and war, see Michael Desch, *Democracy and Victory: Why Regime Type Hardly Matters*, *INT'L SECURITY*, 5 (Fall 2002). Even though Desch questions whether democracies enjoy any advantages in conflict, he does not support the contention that there is any disadvantage associated with democracy. See REITER & STAM, *supra*; Daniel Hemel, *Picking up the Peaces: Democratic Norms, Structural Constraints, and International Security* (2007) (unpublished B.A. thesis, Harvard College) (on file with author).

³ The middle proposition of this trilemma is contested. For one view see REITER & STAM, *supra* note 2, at 29 (autocracies initiate conflicts against democracies more frequently than democracies do against autocracies) Stephen L. Quackenbush & Michael Rudy, *Evaluating the Monadic Democratic Peace*, 26 *CONFLICT MGMT. & PEACE SCI.* 268, 268 (2009) (democracies initiate wars against autocracies more frequently than autocracies do against each other); see also Michael Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, 12 *PHILOSOPHY AND PUB. AFFAIRS* 205, 225 (1983) ("Liberal states are as aggressive and war prone as any other form of government or society in their relations with nonliberal states."); William Dixon, *Democracy and the Peaceful Settlement of International Conflict*, 88 *AM. POL. SCI. REV.* 1 (1994) ("Kant was clearly wrong in his presumption that democracies are inherently peaceful.") But see James Lee Ray, *On the Level(s), Does Democracy*

more likely to go to war against autocracies because they are not fighting fellow democracies. These statistical regularities, however, are not self-explanatory, and there is a large debate on the sources of the democratic peace.⁴ Most of this literature treats states as unitary actors and does not “unpack the black box of the state” to try to understand specific institutional sources of the democratic peace.⁵ This is a weakness that can be addressed in part by the availability of fine-grained data on national constitutions.

In thinking about the project of optimal constitutional design, we need to understand *why* it is that democracies may have certain advantages in war. In particular, it would be helpful to know whether constitutional choices may have anything to do with the propensity of states to enter into conflict, as the American Framers imagined. We focus on the question of legislative involvement in war powers, which was the central concern of the US Founders. Informed by Machiavelli, the Founders thought that concentrating war powers in the executive created a risk of tyranny, and also put the national interest at stake because of the risk of selecting bad wars.⁶ Many other countries have followed this constitutional design theory, while some have not. This variation gives us the opportunity to try to understand what factors lead countries to involve the legislature in decisions about war.

This Article begins with an account of the American Founding and its influence on constitutional allocation of the power to go to war. It then engages in a descriptive exercise, demonstrating *how* states have designed war powers. Next, it speculates on the factors that would affect an optimal allocation of war powers, and then provides an empirical analysis to show that the primary determinants of design choice are probably unrelated to national security concerns. Instead, we observe that constitutional choices are determined in large part by the country’s constitutional history, with region being another important determinant.

Correlate with Peace? in WHAT WE KNOW ABOUT WAR 299, 300–2 (John A. Vasquez ed., 2000) (democracies may be more peaceful).

⁴ Indeed, there have been some recent suggestions that the democratic peace is illusory—that it is driven by trade patterns or liberal political economies rather than regime type per se. *See, for example*, Erik Gartzke, *The Capitalist Peace*, 51 AM. J. POL. SCI. 166 (2007); PATRICK McDONALD, *THE INVISIBLE HAND OF PEACE: CAPITALISM, THE WAR MACHINE, AND INTERNATIONAL RELATIONS THEORY* (2009). Maoz and Russett argue that the democratic peace is driven by political stability. Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946–1986*, 87 AM. POL. SCI. REV. 624, 630 (1993). Others focus on alliance ties. *See* Ray, *supra* note 3, at 306–7.

⁵ BARBARA GEDDES, *PARADIGMS AND SAND CASTLES: THEORY BUILDING AND RESEARCH DESIGN IN COMPARATIVE POLITICS* 193 (1993).

⁶ FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 42 (1994) (concerning the Founders’ use of Machiavelli).

II. PROLOGUE: THE AMERICAN DEBATE

War weighed heavily on the minds of the American Framers. Indeed, the failure of the Articles of Confederation to provide for sufficient national defense is conventionally thought to have been a primary motive for calling the Constitutional Convention.⁷ The Articles had granted the Congress the exclusive power to make treaties, but had not given it the power to enforce them, and states repeatedly undercut promises made at the national level.⁸ This, along with an insufficient power of taxation to raise a national army, had put the fledgling nation at risk.⁹ Another problem was that Congress could not raise funds to compensate loyalists and British merchants, as required by the Treaty of Paris of 1783, and so the British refrained from withdrawing from their forts in the north of the country. Border skirmishes involving loyalist militias in Canada persisted. To the South, the Spanish had closed the Mississippi River to American shipping in 1784.¹⁰ And to the West, Indian tribes proved formidable enemies against whom the state militias were the only real defense, as the national army consisted only of a few hundred men.

The Framers came to the war clause in a roundabout fashion. Following the general contours of the Virginia Plan, a constitutional proposal from the Virginia delegates, their initial thought was to vest in the national executive all the executive powers that had been granted to Congress under the Articles of Confederation.¹¹ When the time came to discuss the power of war, Charles Pinckney objected that giving the executive this power would render it monarchical.¹² James Wilson argued that the power was legislative rather than executive, and hence should be given to Congress.¹³ The Committee of Detail had originally given the power to “make” wars to the Congress.¹⁴ This led to a debate as to whether the power ought to be lodged in the House, or, as Pinckney argued, the Senate, which was seen as being capable of acting with greater dispatch.¹⁵ Madison and Gerry then proposed the word “declare” instead

7 FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 15–16 (1973).

8 Articles of Confederation, art. IX (1778).

9 MARKS, *supra* note 7, at 15.

10 *Id.* at 24.

11 FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 17 (1986).

12 *Id.*

13 *Id.*

14 MARKS, *supra* note 7, at 158.

15 *Id.* at 158–59. This contrasts with the notion, attributed to George Washington, that the Senate acts as a place to cool legislation. See Senate Legislative Process, US SENATE, *available at*

of “make,” as this was seen as allowing the President to make war when needed to “repel sudden attacks.”¹⁶ Roger Sherman then summarized the view that “[t]he Executive [should] be able to repel and not to commence war.”¹⁷ As the distinguished scholar Jack Rakove observes, allowing Congress to declare war “was another form of encroachment that would compromise the benefits of holding the president as responsible for the conduct of war as for the administration of government.”¹⁸ The basic arguments were about accountability and the risk of executive aggrandizement—Congressional involvement would slow down war-making except in true emergencies, and this was seen as a good constraint.

The Framers, of course, lived in a very different era, in which assumptions about military capabilities, threats to national security, and the functioning of the executive and legislature were very different from the situation today. As time has evolved, so has the practice of war-making. Wars are rarely “declared” in a formal act, as they once were: the last war declared by Congress was World War II.¹⁹ Furthermore, the theoretical advantages of legislative involvement have been debated over the course of American history as Congress and the President have sought to come to an accommodation over their respective roles in wartime.²⁰ Clearly the Founding Fathers intended a reduced role for the executive, relative to the British monarch. As Hamilton put it in *Federalist 69*, the constitutional scheme would take the powers of declaring war, raising and regulating armies *away* from the executive, who would be restricted to an operational role.²¹ Over the course of American history, however, the formal language of the Founders has given way to a more pragmatic accommodation. While the US Constitution clearly assigns to Congress the power to declare war in Article I, the United States has fought only four declared wars in its history: the War of 1812, the Spanish American War, and the two World Wars of the twentieth century. Since the Korean War, and perhaps before, presidents have

http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (last visited Apr. 11, 2014).

¹⁶ WORMUTH & FIRMAGE, *supra* note 11, at 18. JACK RAKOVE, ORIGINAL MEANINGS; POLITICS AND LAW IN THE MAKING OF THE CONSTITUTION 279 (1997).

¹⁷ WORMUTH & FIRMAGE, *supra* note 11, at 18.

¹⁸ RAKOVE, *supra* note 16, at 263.

¹⁹ BRIEN HALLETT, DECLARING WAR: CONGRESS, THE PRESIDENT, AND WHAT THE CONSTITUTION DOES NOT SAY 91 (2012).

²⁰ *Id.*; W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? (1981).

²¹ The Federalist No. 69 (Alexander Hamilton).

been routinely willing to conduct “limited” wars without Congressional authorization.²²

Congress no longer insists on formal declarations of war, which in any case have become outmoded in international law and practice. Even in the eighteenth century, writers understood that a state of war could be initiated without a formal declaration, and declaration was sometimes understood not as a formal pronouncement but simply the entry into a state of hostilities.²³ By the twentieth century, declarations of war became rare in international affairs. One interesting exception was when the US went to remove strongman Manuel Noriega from Panama, and he responded by declaring war on the United States. It did not, however, reciprocate. Globally, since 1990, a total of five declarations or statements of the existence of war have been issued, four of them in Africa.²⁴

One reason that declarations of war may have become less frequent is that they have become legally meaningless. Before World War II, international law distinguished between states of war and states of peace, with different norms applicable to state behavior. In the era before the United Nations Charter, a formal declaration of war was an act of legal significance, indicating the view that the rules governing war were in place.²⁵ However, the postwar regime moved to a less formalistic definition of war. The United Nations Charter does not speak of a state of war, but rather the threat or use of force: once an armed conflict exists, it does not matter whether it is called war or something else.²⁶ For this reason, the traditional notion that states ought to notify their counterparties of their intention to engage in war has become less relevant. Furthermore, declaring war in advance of hostilities is strategically disadvantageous: the attacker loses any element of surprise.

With the decline of declarations of war, Congress has found itself with less of a role in war policy and has sometimes sought to gain more power vis-à-vis the president. The War Powers Act of 1973 (passed over President Nixon’s veto

²² Louis Fisher, et al., *Letter to the Editor: Congress at War*, 87 FOREIGN AFFAIRS 167–69 (May/June 2008), available at <http://www.foreignaffairs.com/articles/64297/louis-fisher-ryan-hendrickson-and-stephen-r-weissman/congress-at-war>.

²³ WORMUTH & FIRMAGE, *supra* note 11, at 18.

²⁴ These are the Eritrea-Ethiopia Conflict of 1998; the Chadian civil war, which involved a declaration of war against Sudan on December 23, 2005; the Djibouti-Eritrea conflict of June 2008, and the Heglig crisis between Sudan and South Sudan, in which Sudan acknowledged the existence of war on April 11, 2012. The non-African case is the 2008 South Ossetia conflict between Georgia and Russia.

²⁵ The Hague Convention (III) of 1907 explicitly required declarations of war. See The Hague Convention (III) art. I (Jan. 26, 1910) (“The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.”).

²⁶ UN Charter art. 2, ¶ 4.

in 1973) is the centerpiece of this effort. Even as both Republican and Democratic presidents have challenged the constitutionality of the War Powers Act and asserted that they did not need congressional authorization, they have generally observed its terms. (To be sure, they have on occasion bypassed even the moderate reporting requirements of the Act).²⁷ The War Powers Act does shape executive decisionmaking. In 1993, when there was a concurrent resolution of Congress demanding withdrawal from Somalia, President Clinton complied. Presidents will also report the commitment of troops abroad, sometimes using the language “consistent with the war powers resolution.”²⁸

Congress relied heavily on the constitutional text in passing the War Powers Act. The War Powers Act begins with the statement that “[i]t is the purpose of this chapter to fulfill the intent of the Framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”²⁹ The introduction goes on to recount the constitutionally assigned powers of the Congress and the president, and asserts that the president is only able to commit forces pursuant to a declaration of war or statutory authorization, or in an emergency.³⁰ Discussions of the Constitution and checks and balances recur throughout the various committee reports that were generated as the legislation wound its way back and forth through the House and Senate. In nearly identical language the various House reports reproduce excerpts from the Constitution and emphasize that the purpose of the legislation is to “reaffirm” congressional powers granted by the Constitution.³¹ The Senate expressed a concern about Congress’s powers with respect to “undeclared” wars and also extensively referenced the views of various Framers, Supreme Court justices, and academics throughout history.³²

²⁷ Ronald Reagan ordered the invasion of Grenada without notifying Congress. Later, he sought and received authorization to deploy Marines to Beirut. Bill Clinton initiated the bombing of Kosovo in 1999 without authorization from Congress, and succeeded in defeating the Serbs less than two weeks before the ninety-day period of the War Powers Act expired. In that case, Clinton inferred congressional “authorization” from an appropriations statute that neither mentioned the War Powers Resolution nor authorized the military action. See Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, 113 Stat. (1999).

²⁸ Exec. Office of the President, *Message to Congress—Report Consistent With War powers Resolution* (Dec. 13, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/12/13/message-congress-report-consistent-war-powers-resolution>.

²⁹ War Powers Resolution, 50 USC § 1541(a) (1973).

³⁰ *Id.* § 1541(c).

³¹ See, for example, H. Rep. 93-287, 5 (June 15, 1973); H. Rep. 92-1302, 1 (Aug. 3, 1972).

³² See, for example, S. Rep. 93-220, 2 (Jun. 14, 1973); S. Rep. 92-606, 3 (Feb. 9, 1972).

This emphasis on “restoring” a constitutional balance of powers was present from the very earliest bill in the lineage of what became the War Powers Resolution. This was a bill introduced by Representative Bertram Podell of New York on April 14, 1969, which began by noting that the Constitution grants the power to declare war to Congress and stated that Congress had been losing this power to the president.³³ Constitutional considerations suffused the floor debates on the resolution as well. For example, in the debate about whether to override the presidential veto of the resolution, Representative Broomfield spoke in favor of an override, saying: “[t]his historic legislation will, if enacted into law, reestablish once and for all the traditional war-making responsibilities which the Framers of the Constitution assigned to Congress 200 years ago.”³⁴

Notwithstanding its invocation of the Constitution, Congress seems generally undermotivated to exercise its constitutional and legal prerogatives, possibly because of accountability considerations. The public seems to assign most of the blame or credit for war to the president.³⁵ If the war works out, the president will get much of the credit; if it fails, Congress does not want to share the blame and so avoids getting involved in the decision. Some might say the Korean War—which was undeclared by Congress—provides an example of this dynamic.³⁶ However, Article I of the Constitution, assigning some war powers to Congress, surely gives it a resource to be used in bargaining with the executive, should the political incentives be present.

In short, the American experience has been motivated by a fear of executive tyranny. The Founders were so concerned with this that they introduced a constraint on war powers of the president, which introduced countervailing risks. By having an executive who could respond to true emergencies, but also was constrained by Congress in instances of offensive war, the Framers sought to balance concerns of speed against deliberation. In modern language, we would characterize the deliberation as helping to “screen” wars: ensuring that the conflicts that the nation enters into are “good” wars, while eschewing “bad” wars. Bad wars would be those not in the national interest, while good ones would be those that are (and would include any war in which the country was attacked). Deliberation would slow down “bad” wars, but hopefully not hamper speedy responses to wars of necessity.³⁷

These considerations are echoed in the modern literature on the democratic peace. The basic intuition of the Founders was that legislative

³³ H. Con. Res. 91-199, 91st Cong. (1969).

³⁴ 119 Cong. Rec. 36, 203 (1973).

³⁵ Fisher et al., *supra* note 22.

³⁶ *Id.*

³⁷ See discussion *supra* at notes 14–16.

involvement in decisions about war implicates a bargaining process between the executive and legislature, which in turn might affect international relations. The modern literature on the democratic peace focuses on international state-to-state bargaining, which can potentially escalate into war. The democratic advantage in war, some theorize, results from the need to mobilize support among the public before going to war. Legislatures can play a role here, most obviously in constraining overzealous executives by requiring evidence to justify wars.³⁸ Another source of democratic advantage is signaling: when the debate about going to war takes place in public and results in a decision to fight, the counterparty can more reliably assume that the state in question is really committed. This might lead the counterparty to back down, accepting a compromise short of war. War, as has been noted by Professor Gartzke, is in the “error term”; when both parties have accurate information on capabilities and intentions they are likely to settle in the shadow of predicted outcomes.³⁹ Legislatures can contribute to this result.

III. WAR POWERS IN OTHER STATES

How have other states assigned the power of war in their constitutions? This Section presents descriptive data from the Comparative Constitutions Project on the distribution of power over war. The Comparative Constitutions Project is an ongoing multiyear effort to code the contents of all the world’s constitutions since 1789.⁴⁰

A. Trends across Time and Space

“War” writes Philip Bobbitt, “is a natural condition of the State, which was organized in order to be an effective instrument of violence on behalf of society.”⁴¹ It is therefore logical that constitutions—which are political documents designed to organize the state—typically deal with war and the use of force. Constitutional rules about war are found in multiple places, including provisions on formal declarations of war, on the designation and supervision of the commander-in-chief, and on the related area of emergency powers, which concerns how the domestic legal order can change in the event of war. We are primarily concerned with provisions that affect the likelihood of interstate

³⁸ See Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 O.J.L.S. 189 (2009).

³⁹ Erik Gartzke, *War Is In the Error Term*, 53 INT’L. ORG. 567, 568 (1999).

⁴⁰ See Comparative Constitutions Project, for a description of the coding rules and methods, along with the variables. COMPARATIVE CONSTITUTIONS PROJECT, www.comparativeconstitutionsproject.org (last visited Mar. 5, 2014).

⁴¹ PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 819 (2007).

conflict, and so focus on those related to the initiation of hostilities and the supervision of actions of the commander-in-chief.

As Table 1 indicates, there are a wide variety of approaches to the problem of declaring war. There seem to be three basic approaches. The most common (n=230) is that the executive declares war and the legislature has the power to approve it. (We do not have data on the extent to which a legislative body actually exercises the power to block declarations.) Legislative declaration (sometimes involving approval by an upper house) is the next most common scheme (n=173). Third is the executive declaring war with no approval needed (n=115). There are, however, many variations. In some systems, the legislature declares war and the head of state approves.⁴² And in some, legislative approval is restricted to an upper house.⁴³ Afghanistan's Constitutions of 1977, 1987, and 1990 required the convening of a *loya jirga* (a grand assembly representing the entire country) to approve declarations of war.⁴⁴

⁴² These include the Constitution of Venezuela, § 5(15) (1874); the Constitution of Mexico, § 5(16) (1824), the Constitution of Italy, art. 78, art. 87(9) (1947); the Constitution of Uruguay, art. 17(7), art. 81 (1830); the Constitution of Costa Rica, art. 73, art. 102 (1871); the Constitution of Cyprus, art. 50 (1960); the Constitution of Haiti, art. 73 (1867); the Constitution of Benin, (1979); the Constitution of Estonia, arts. 128–32 (1937); the Constitution of the Republic of Nicaragua, art. 42(12) 1858); the Constitution of the Dominican Republic, art. 33, art. 49 (1924); and the Constitution of Ecuador, art. 34(26) (1945).

⁴³ These include the Constitution of Colombia, art. 98(9) Dec. 1, 1885 (1886); the Constitution of Colombia, art. 173(5) (2003); the Constitution of the German Empire, art. 11 (1871); the Constitution of Haiti, art. 8(155) (1816); the Constitution of the Republic of Haiti, art. CXXVII (1846); the Constitution of the Empire of Haiti, art. 124 (1849); the Constitution of the Republic of Haiti, art. CXXIII (1874); and the Constitution of Colombia, art. 173(5) (2005).

⁴⁴ The Constitution of Afghanistan art. 67.3; art. 78.2 (1977); the Constitution of Afghanistan, art. 75.12 (1980); the Constitution of Afghanistan art. 67 (1990).

Table 1: Distribution of Legislative Powers over Declaration of War

N=745 national constitutions since 1789

	Declare War	Approve War
Head of state/government	361 (48%)	17 (2%)
Cabinet	16 (2%)	3 (0%)
First or only legislative house	119 (15%)	143 (19%)
Upper house	11 (1%)	7 (1%)
Either house	4 (0.5%)	
Both houses jointly	62 (8%)	133 (18%)
Other	23 (3%)	20 (3%)
[no approval needed]		35 (5%)
Not specified	219 (29%)	387 (52%)

Interestingly, even newly authored constitutions continue to discuss declarations of war even though state practice has moved away from this mode of interaction. This is probably just an instance of what we might call constitutional boilerplate, in which drafters simply copy language from other texts.⁴⁵ We know that constitutional design does not always approximate the ideal in which institutions are adopted after a process of rational deliberation.⁴⁶ Instead, designers are constrained by lack of time, experience and knowledge.⁴⁷ This may lead the drafters to borrow and copy, as if the constitutional language were a kind of template. We observe, for many constitutional issues, a tendency

⁴⁵ Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement*, in CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS, (A. Sajó & R. Utiz eds., 2010), 69 & 89.

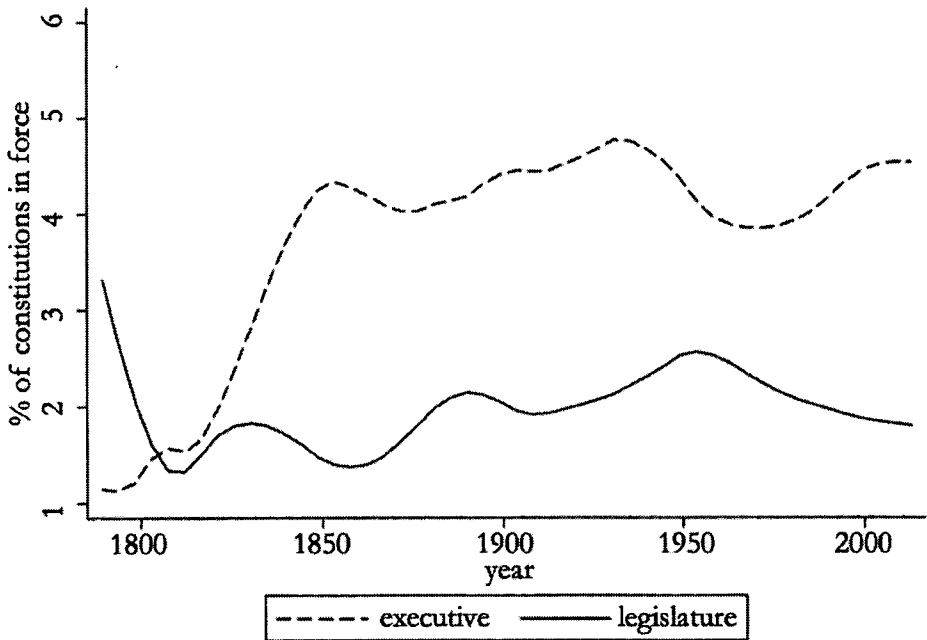
⁴⁶ JON ELSTER, SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS (2013).

⁴⁷ See Donald Horowitz, *Constitutional Design: Proposals vs. Processes*, in THE ARCHITECTURE OF DEMOCRACY 15, 19 (Andrew Reynolds ed., 2002).

for constitutions that are written within the same region and same time period to have a good deal of similarity.⁴⁸

The trend over time has been away from the American model of allowing legislatures to declare war. A more modern approach is to assign the power of approving the actions of the commander-in-chief to a legislature or other body.⁴⁹ Roughly 12 percent of historical constitutions assign this latter power to one or both legislative houses. Figure 1 demonstrates the trend graphically. As one can see, the US approach was influential in the early years of written constitutions, when there was a good deal of copying from the US in general.⁵⁰ Beginning in the early 1800s, however, the executive became the more popular assignee of the power to declare war, and this has not changed since.

Figure 1: Primary Assignment of Declaration of War Power



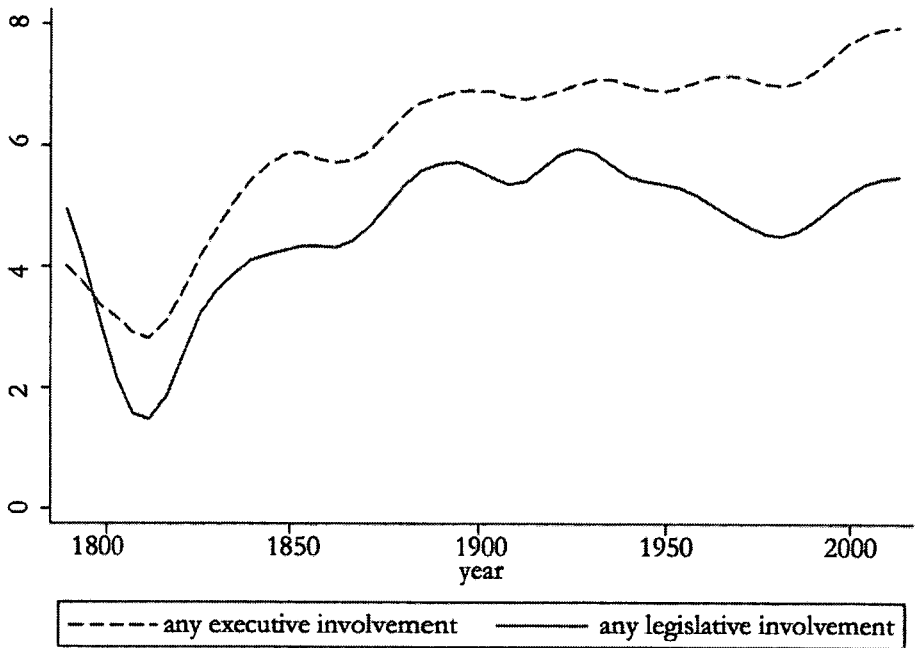
⁴⁸ Jose Cheibub et al., *Beyond Presidentialism and Parliamentarism*. BRIT. J. POL. SCI. 1 (2013).

⁴⁹ The commander-in-chief is the person with the ultimate responsibility for military decisions. Fifty-eight percent of constitutions in our data specify the Head of State as commander-in-chief.

⁵⁰ See generally, ROBERTO GARGARELLA, *The LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS 1776–1860* (2010); David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU. L. REV. 762 (2012).

However, the relative decline in popularity of formal legislative declaration of war has not meant that there is no legislative involvement in decisions about war policy. Figure 2 shows the same trend graph, but includes constitutions in which the legislature has a role in *approving* declarations of war, or approving the actions of the commander-in-chief. These forms of legislative involvement have not declined over time, and so globally, legislatures retain a major role in war policy.

Figure 2: Assignment of War or Command Power



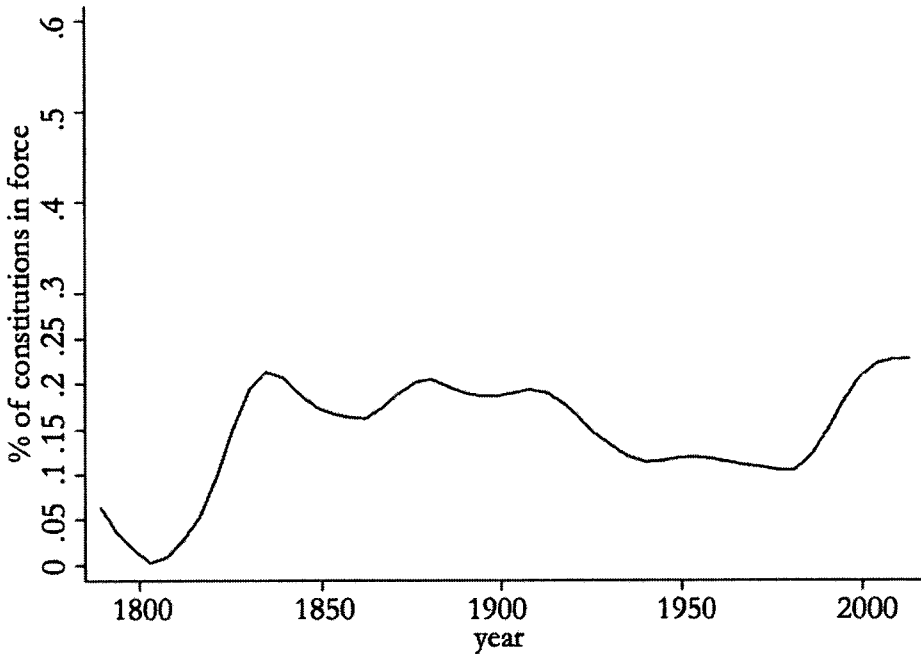
As mentioned above, the larger level of legislative involvement has been driven in part by the growth in the ability of legislatures to approve the actions of the commander-in-chief (see Figure 3). A good example of this drafting approach is the Constitution of the Maldives (2008). Article 243(b) says that:

If the President, as Commander-in-Chief, authorizes or orders the employment of the Military Service in defence of the Republic or as part of an international undertaking, the President shall without delay submit the authorization to the People's Majlis. The People's Majlis may at any time approve the authorization, or revoke the authorization.⁵¹

⁵¹ Constitution of the Republic of Maldives, art. 243(b) (2008).

This approach gives the president the authority to order the deployment of troops, but provides that the legislature must retroactively authorize it, and retains a veto over future action. While balancing the concerns of speed and deliberation that so motivated the American Founders, this approach also reflects the fact that modern conflict is unlikely to involve formal declarations of war. In addition, it moves the point of legislative involvement earlier in the process of conflict; the mere deployment of troops will trigger legislative scrutiny.

Figure 3: Legislative Power to Approve Actions of Commander-in-Chief



There is some regional variation in the data. Table 2 provides some descriptive indication of the distribution of choices in different regions, giving the percentage of constitutions in each category. We observe great variation: constitutions written in South Asia and Oceania are very likely to remain silent on the issue, while those in Latin America have a good deal of regulation. Countries of the Middle East and North Africa are very executive-centered, a fact consistent with what we know more generally about their constitutions.⁵²

⁵² NATHAN J. BROWN, CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 112 (2002).

Table 2: Distribution of Variables by Region

Universe: 745 national constitutions since 1789

Region (n)	Legislature declares war	Legislature approves war	Legislature approves actions of commander-in-chief	Executive declares war	Constitution silent on war
Latin America (318)	.26	.38	.10	.43	.35
W. Europe/N. America (124)	.10	.15	.10	.31	.58
E. Europe/post Soviet (134)	.19	.25	.20	.45	.37
Sub-Saharan Africa (217)	.12	.28	.11	.28	.49
Middle East/N Africa (72)	.11	.25	.08	.51	.38
South Asia (28)	.04	.14	.07	.14	.75
East Asia (73)	.25	.33	.16	.44	.38
Oceania (18)	0	.06	.06	.11	.89

B. The Role of Regime Type

Do different types of political systems have different provisions on war? To investigate this question we need a categorization of systems of government, which fortunately we have available from Professor Jose Cheibub and his colleagues.⁵³ Their coverage is relatively limited compared to our earlier sample, as they restrict the analysis to states after 1950. Still, the correlation between constitutional powers and regime type may be suggestive of the determinants of the assignment of legislative scrutiny or decision-making power.

Table 3 presents the distribution of powers by regime type. The results are interesting and suggest that the simple categorization of systems as democratic or dictatorial does not explain constitutional choices. The regime type most likely to include legislative role in a declaration of war is that of semi-presidential

⁵³ Jose Cheibub et al., *Democracy and Dictatorship Revisited*, 143 PUB. CHOICE 67 (2009). Dataset available at <https://sites.google.com/site/joseantoniocheibub/datasets/democracy-and-dictatorship-revisited> (last checked Apr. 14, 2014).

democracy, which features a popularly elected president serving alongside a government responsible to parliament.⁵⁴ Because of the hybrid nature of such systems, they often specify the relative powers of executive and legislature in detail, but they also apparently reflect an imperative to share the power of war declaration, and so to control the executive. For example, in the Ukraine, declarations of war are proposed by the president but actually declared by the parliament.⁵⁵ The categories of civilian and military dictatorship look fairly similar to that of presidential democracy, but monarchies almost never give the power of declaring war to the legislature.⁵⁶ Finally, parliamentary democracies generally refrain from saying anything at all about the war power.

⁵⁴ ROBERT ELGIE, *SEMI-PRESIDENTIALISM* (2011).

⁵⁵ Constitution of Ukraine art. 85.9 (1996) (powers include “declaring war upon the submission by the President of Ukraine and concluding peace; approving a decision by the President of Ukraine on the use of the Armed Forces of Ukraine and other military formations in the event of armed aggression against Ukraine”).

⁵⁶ The sole exception is a borderline case. The Constitution of Morocco of 1962 does not mention the monarch’s ability to declare war, but does say the parliament can authorize the declaration of war. This might plausibly have been coded as approval rather than declaration. *See* Constitution of Morocco, art. 51 (1962) (“Parliament shall authorize the declaration of war.”).

Table 3: Distribution of Variables by Regime Type

Universe: 490 constitutional systems for which Cheibub et al. regime variable available.

Variable (n)	Leg. declares war	Leg. approves war	Leg approves actions of commander-in-chief	Executive declares war	Const. silent on war
Parliamentary Democracy (56)	.14	.18	.10	.27	.62
Semi-presidential Democracy (26)	.58	.69	.35	.54	.08
Presidential Democracy (35)	.17	.34	.20	.34	.42
Civilian Dictatorship (187)	.21	.27	.14	.36	.40
Military Dictatorship (158)	.19	.31	.12	.38	.40
Authoritarian Monarchy (28)	.03	.18	0	.57	.39

Some of these findings seem intuitive but others are puzzling. Semi-presidential regimes, which by their nature feature a division of power between two executives and a legislature, may need more formal elaboration of the roles of various actors. But military regimes would not seem to be strong candidates to provide for legislative control of war policy, unless they are operating with a faux legislature. The parliamentary regimes may presume that all residual powers lie with parliament and so not need to state each power explicitly, but then it is puzzling why any parliamentary regime would ever stipulate that the executive has the power to declare war *without* oversight. Furthermore, recent research has emphasized that many parliamentary regimes have frequent instances of minority government.⁵⁷ In such schemes, having legislative approval of decisions of the executive might mean that government is forced to bargain with the opposition, which in turn might prevent the country from going to needless war.

IV. OPTIMAL DESIGN & POSITIVE ANALYSIS

We now turn from the descriptive to the normative. What *ought* to determine the assignment of war powers in different states? We assume that the

⁵⁷ KAARE STROM, MINORITY GOVERNMENT AND MAJORITY RULE 8 (1990).

ultimate goal of war policy is the advancement of the national interest, however conceived. Of course, much of political theory wrestles with the question of which political configuration is best situated to identify and advance the national interest. In the specific context of war, the American Founders' debates identified two considerations. First, the legislature might improve the screening of disputes, so that only wars that are in the national interest are entered into. The legislature provides a cool second opinion about the merits of the conflict. Weighted against this, however, are costs in terms of speed and accountability. If more institutions always added information and improved screening, we ought to design a war-making process that involved as many governmental bodies as possible. For example, one might require courts to review the process.⁵⁸ But a decision that is shared by multiple bodies would not only take a good deal of time to produce, it would potentially dissipate accountability.

There are other benefits from legislative involvement that have been identified in the literature on war. The importance of public support for democratic war-making was first identified by Thucydides, who emphasized the importance of leadership for democratic performance.⁵⁹ Legislatures can facilitate this support for wars, for example by demonstrating unity, or through elaborating on the rationale for going to war in legislative debates. Legislative debates thus transmit information to the public, possibly enhancing support for a war.⁶⁰

Another benefit exists on the international plane, and involves signaling.⁶¹ War is typically the last stage in a long process of conflict and bargaining between at least two states. The presence of a legislature with a voice in war policy can enhance the quality of the signal given in crisis bargaining at the international level. If a decision to go to war involves *both* an executive and legislative branch, a counterparty will have an indication of a higher level of support for the war than if only one body is involved. The counterparty will learn that there is a good deal of domestic support for war, which in turn may lead the counterparty to believe the executive branch during negotiations.

⁵⁸ We know of only one constitution that involves a judicial actor in declarations of war, the new Constitution of Hungary. In this scheme, which is somewhat complex, no approval at all is needed when parliament declares war; if the head of state declares war because parliament is unable to do so then the speaker of the house, the president of the constitutional court, and the head of government must unanimously decide on the justifiability of the declaration; parliament then decides on justifiability of declaration at its first session thereafter. The Fundamental Law of Hungary, arts. 48.3–48.6 (2011).

⁵⁹ THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR* (Richard Crawley trans., 2010) (431 BC).

⁶⁰ See generally, STEPHEN HESS, *THE WASHINGTON REPORTERS* (1981).

⁶¹ DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 2* (2006).

Legislative involvement thus provides a costly signal of seriousness and commitment, and may encourage counterparties to back down before a full-fledged war erupts. The costs come from the slow process of legislative deliberation.

The key variables in sorting out these various costs and benefits are related to the security situation that the country finds itself in at the time of constitution-making. Is the country likely to be attacked by powerful neighbors? If so, there will be a need for speedy decisions and there may be a benefit to keeping the executive's hands relatively free. Is the security situation such that the country might need flexibility to engage in offensive wars, with the element of surprise? This argues for even less constraint. On the other hand, is there a risk of executive aggrandizement, for example of a leader starting wars abroad under a pretense to gain internal political support? If so, more constraint is useful. Is the public skeptical of executive authority so that it will not likely support a war just on executive say-so? The ability of the legislature to rally support may be helpful here. Balancing these parameters is obviously a matter for local determination and we do not assert any universal optimum. But it arguably suggests that vulnerable states may, on balance, be less likely to constrain their leaders with legislative checks on war.

Should we expect, then, that these considerations of optimal design will be met in practice? To the contrary, we have sound reason to believe that such considerations might not always be given weight in constitution-making. We know that constitutional design involves a good deal of self-interest and passion, as well as rationality.⁶² As Jon Elster has argued at length, these forces might push away from optimal design for the national interest.⁶³ Passion represents strong feelings based on short term emotions; several episodes in the French Revolution were swayed decisively by the passion of the crowd.⁶⁴ Interests concern the narrow advantages of constitutional designers. For example, in the drafting of the most recent Egyptian Constitution, the judiciary and military largely insulated themselves from oversight.⁶⁵ Beyond passion and interest, constitutions typically involve a good deal of borrowing from abroad, suggesting that the project of rational design may be more heuristic than the model.

⁶² ELSTER, *supra* note 46; Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. J. 364 (1995); CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1st ed. 1913).

⁶³ Elster, *Forces and Mechanisms*, *supra* note 62, at 365.

⁶⁴ ELSTER, *supra* note 46, at 204-5.

⁶⁵ Nathan Brown, *Egypt's Rulers are About to Make the Same Mistake Morsi Did: Seeds of Discontent in a New Constitution*, THE NEW REPUBLIC (August 29, 2013), available at <http://www.newrepublic.com/article/114516/seeds-discontent-new-egyptian-constitution> (last checked Apr. 6, 2014).

Borrowing takes several forms. On the one hand, we know that there is a good deal of serial continuity in constitutional texts, and that institutions adopted early in a country's history often persist in subsequent constitutional replacements.⁶⁶ We also observe a good deal of similarity among constitutions associated with different colonial powers.⁶⁷ And we also know that constitutions are often similar to others adopted during the same era. Knowing the region, era, and country in which a constitution is written predicts many features of the constitutional text.⁶⁸

V. PREDICTING LEGISLATIVE WAR POWERS

What are the implications for the observed assignment of war powers? There are three different sets of variables that are relevant to consider. First are those characteristics of countries that do not change over time. These would include factors like colonial tradition and region that would influence the choice of war powers, as well as the provisions of a country's first constitution. Second, we need to consider time. In other areas of constitutional design, we observe trends over time that have been attributed to diffusion from abroad.⁶⁹ Third, we must consider factors that vary over time that might affect the security situation of the country. We might expect, for example, that more insecure states and those involved in ongoing conflict would be more likely to concentrate war authority in the executive, and less likely to assign war powers to the legislature.

In this Section, we run a simple empirical test of the assignment of war powers. As the primary dependent variable, we draw from the analysis presented in Figure 2 above to construct a single variable that captures whether the legislature has *any* involvement in war-making. We supplement this by conducting a parallel analysis on constitutions that are *silent* on the war power. As independent variables, we ask whether the country is a former British or French colony, what region of the world the country is found in, and the year in which the constitution was drafted. To capture constitutional legacies, we also ask whether or not the country's *first* constitution included a provision granting the legislature some role in war. This variable is coded "1" if the first constitution had such a provision and "0" otherwise. (For countries that have had only one constitution, we code the variable as a 0.)

⁶⁶ ELKINS ET AL., *supra* note 1, at 57–58.

⁶⁷ CHARLES PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES* (2007).

⁶⁸ Jose Cheibub et al., *supra* note 48.

⁶⁹ David Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

For each of our two independent variables (constitutional allocation of war power to the legislature and constitutional silence on war), we conduct a basic regression for country characteristics, and a second regression adding variables related to the security situation. We ask whether or not the state has been involved in an armed conflict in the past three years, drawing on the Correlates of War Project, which analyzes the use of force over time.⁷⁰ The prediction is that a state that is actively involved in a war or armed conflict will be less likely to assign the power to the legislature, other things equal. We also ask about the number of allies a country has, and whether it is a great power, each of which would predict a more secure environment. As control variables, we include the Polity2 index capturing the level of democracy in a country and the year of the constitutional adoption.⁷¹ (We experimented with an additional control for GDP per capita, which restricts the sample to years after World War II. Results were comparable to those reported below except that the effect for French colonial tradition fell shy of statistical significance.)

Because our dependent variable is constructed as binary, the probit model is most appropriate.⁷² The model we use is:

$$Y_{ct} = \beta_0 + \beta_1 X_{1ct} + \beta_2 X_{2ct} + \dots + \beta_k X_{kct} + u$$

In this model, Y identifies whether a constitution in country c at time t has a constitutional requirement of legislative involvement in war policy, X identifies a series of independent variables associated with the country and year in question, and u is an error term. Table 3 presents the results.

⁷⁰ Specifically, we use data from the Militarized Interstate Dispute Data Set (v. 3.0) available at <http://www.correlatesofwar.org/> (last visited Apr. 4, 2014). We focus on conflicts involving the Use of Force (level 5 in their 6-point scale) or higher.

⁷¹ Data on file with authors. In robustness checks we substituted for Polity2 the Unified Democracy Scores from Daniel Pemstein et al., *Democratic Compromise: A Latent Variable Analysis of Ten Measures of Regime Type*, 18 POL. ANALYSIS 426, 438-39 (2010); scores are available at <http://www.unified-democracy-scores.org/> (last visited Feb. 12, 2014).

⁷² The probit model assumes that while we only observe the values of 0 and 1 for the dependent variable, there is a latent, unobserved continuous variable Y^* that determines the value of Y . We assume that Y can be specified as follows:

$$Y_i = \beta_0 + \beta_1 X_{1i} + \beta_2 X_{2i} + \dots + \beta_k X_{ki} + u_i$$

and that $Y_i = 1$ if $Y^*_i > 0$; $Y_i = 0$ otherwise.

Table 3: Probit Models of Legislative Involvement in War-Making

VARIABLES	(1) Legislative involvement in war	(2) Legislative involvement in war	(3) Constitutional silence on war	(4) Constitutional silence on war
Year	0.0002 (0.0005)	0.0018 (0.0012)	9.26e-05 (0.0005)	-0.0020* (0.0011)
Democracy	0.0007 (0.0037)	0.0004 (0.0054)	0.0027 (0.0034)	0.0040 (0.0050)
French colony	0.210*** (0.0633)	0.109 (0.103)	0.0042 (0.0652)	0.169 (0.110)
English colony	0.0513 (0.0585)	0.0102 (0.0947)	0.0426 (0.0545)	0.144 (0.0943)
Latin America	0.175** (0.0782)	0.258* (0.147)	-0.156** (0.0692)	-0.347*** (0.101)
W. Europe/N. America	-0.0827 (0.0975)	0.0240 (0.173)	-0.0229 (0.0884)	-0.196* (0.109)
E. Europe/post Soviet	0.160** (0.0766)	0.238** (0.116)	-0.122* (0.0675)	-0.268*** (0.0755)
Sub-Saharan Africa	-0.148* (0.0792)	0.0234 (0.139)	0.0268 (0.0742)	-0.224** (0.102)
Mideast	-0.120 (0.0966)	0.0585 (0.149)	-0.149** (0.0730)	-0.309*** (0.0623)
South Asia	-0.334*** (0.117)	0.0683 (0.247)	0.270* (0.138)	-0.158 (0.163)
First Constitution Leg. Involvement	0.250*** (0.0460)	0.179*** (0.0676)	-0.186*** (0.0441)	-0.103* (0.0626)
Use of force Last three years		-0.0305 (0.182)		0.214 (0.188)
Number of allies		-0.0040 (0.0048)		0.0078* (0.0044)
Major power		0.0460 (0.165)		0.0253 (0.164)
Observations	723	339	723	339
Pseudo-R ²	.10	.06	.05	.05

Marginal effects reported. Standard errors in parentheses.

*** p<0.01, ** p<0.05, * p<0.1

Column 1 presents the model with only country characteristics and not variables related to security. In this model, we see that being a former French colony, and being located in Latin America or Eastern Europe all enhance the probability of involvement of the legislature in war-making. South Asia and Sub-Saharan Africa are associated with less frequent assignment of war power to the legislature. (The omitted region is East Asia, so results should be interpreted as being relative to that region.) The effects for Latin America and Eastern Europe remain significant even in the second specification (Column 2), when we introduce additional security-related variables, including whether or not the country has been recently involved in conflict, the number of allies, and whether the country is a great power. None of these variables capturing the actual security situation in the country, whether it has recently been involved in a war and so less secure, or has many allies and hence is more secure, is a significant determinant of assignment of constitutional war powers. While this is suggestive, the sample is smaller because of missing data, and our proxies are crude, so we have less confidence in the result. We cannot definitively rule out the possibility that security concerns drive constitutional choices. Furthermore, region may be correlated with the security situation—some regions are surely more war-prone. Notice also that the effect of the colonial tradition disappears in this smaller sample.

Finally, we note in these first two models that the strongest and most consistent predictor of assignment of war powers to the legislature is whether or not the country did so in its first constitution. There seems to be a kind of genetic quality to certain constitutional choices that endure over time even in very different conditions.

The next two columns repeat the analysis of a different constitutional decision: whether to say nothing at all about the assignment of war powers. Here we also observe strong regional effects: relative to East Asia, constitutions written in other regions are less likely to remain silent on war, and hence more likely to assign the power somewhere. We also observe a slight time trend away from silence (consistent with Figure 2). In Column 4, we see that as the number of allies goes up (presumably meaning that the country is more secure), constitutions are more likely to remain silent on war. This accords with intuition, although the effect is quite small. The strongest predictor, again, is the first constitution in a country's sequence. When the first constitution assigns the war power to the legislature, later drafters tend to be certain to say something about the topic, and not leave the power unspecified.

It seems that in this area of constitutional design, we observe the phenomenon that has been documented in many other areas: there is great continuity over time within a country, even if it adopts multiple constitutions. Constitutional design is typically done under conditions of intense time pressure, and by people with little experience in the field. It is somewhat natural that they

would turn to models in their work. These models may come from abroad, especially from neighbors, but also come from the country's own history. Serial continuity and regional similarity play powerful roles in constitutional design.

VI. CONCLUSION

The Founding Fathers sought to balance the need for national defense and a quick response to foreign aggression with a desire to constrain executive ambition. They balanced the two concerns in the clause giving Congress the power to declare war. Although their specific institutional design has fallen out of favor, their instinct for legislative control over executive war-making has not. This Article has demonstrated cross-national trends over time, and has also shown that a major determinant of assigning legislative powers is the region in which a country is located, as well as the earlier provisions in a country's constitutional history. This is consistent with other work on constitutional drafting. We also speculate briefly on the project of optimal constitutional design, though we are not sanguine that it obtains given the powerful role of borrowing in constitutional design.⁷³ We have no illusion that there is a universally optimal design, as such would require agreement on the normative goals of war policy. But using the criteria identified by the Founders—the risk of executive aggrandizement, the value of legislative deliberation, and the threat from the international environment—it is possible that contemporary constitutional designers can reason their way to a locally appropriate solution. Whether they are able to actually get such a solution adopted is another matter entirely.

⁷³ Tom Ginsburg, *Public Choice and Constitutional Design*, in HANDBOOK OF PUBLIC CHOICE 261–82 (Daniel Farber & Anne Joseph O'Connell, eds. 2010).