

MERIWETHER LEWIS, THE AIR FORCE, AND THE SURGE: THE PROBLEM OF CONSTITUTIONAL SETTLEMENT

by
Samuel Issacharoff*

Much of the Constitution concerns structural divisions of authority among the political branches. Some of the most significant constitutional commands, such as responsibility for warfare, are also the least likely to be presented for judicial review. This Article addresses how constitutional norms come to be created and enforced in areas relatively untouched by dispositive case law. The examples chosen are the authority for the Louisiana Purchase, the creation of an independent Air Force, and the problem of managing the scope of war. The argument is that the institutional accommodations between the branches take on, over time, the role of “constitutional settlement,” a defined set of expectations about the duties and powers of the Executive and Congress. Although necessarily less settled than judicial resolution of cases, the constitutional settlement informs much of the operational structure of our Constitution.

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I. INTRODUCTION

Constitutional lawyers gravitate to the observed universe of decided cases and reasoned judicial analysis. Decisional law gives a hard edge to the imprecision of constitutional commands. For all the efforts at analytic rigor in generating first-order constitutional principles, the fact of actual results and final judgments, rulings and dissents, arguments that prevail

* Reiss Professor of Constitutional Law, New York University School of Law. This Article was first presented as the Higgins Lecture at Lewis & Clark Law School on March 18, 2008. My thanks to Dean Robert Klonoff and the colleagues who commented on the lecture at the time. Josh Stillman provided critical research assistance on this project.

and fail, all lend to the judicial enterprise a patina of certainty befitting our basic laws.

Centuries have now passed since Chief Justice Marshall decreed that it is emphatically the province of the judiciary to interpret the Constitution.¹ For as much as robust judicial review remains the core of what we understand to be constitutional law, doubts surface with great regularity even over this fundamental feature. Generations of politicians have denounced what is perceived as judicial overreaching. At least once a generation, a new movement proposes to curb the role of the imperial judiciary, whether claiming the mantle of democracy, or popular constitutionalism, or departmentalism or whatever the passing term might be. Occasionally, political frustration with the judiciary leads to proposals to pack the Supreme Court, alter the forms of judicial selection, or surgically restrict the jurisdiction of the courts or their injunctive powers. These efforts tend to fade as well, as somehow the courts and our political culture achieve if not a reconciliation, at least some form of stasis.

We can look back at twentieth-century constitutional history and identify two clear periods of deep controversy over the role of our judicially-enforced Constitution. In the first, the period of substantive due process stretching from *Lochner v. New York*² to the New Deal, and in the second, running roughly from *Brown v. Board of Education*³ to *Roe v. Wade*⁴, the Court staked itself firmly in the great disputes of the time. The extent to which the Court responded to elite opinion or asserted itself as a stalwart actor against the political tides remains a subject of dispute, as my colleague Barry Friedman has well addressed.⁵ But over time, the intensity of the disputes faded and both the courts and the political branches moved on to a new set of issues.

We begin the twenty-first century with a different order of questions confronting our constitutional tradition than in the twentieth century. The issues of the day concern our national security and ask troubling questions about the extent of federal executive power in combating an ill-defined foe, seemingly as ready to strike at home as abroad. To an extent, and the limits will be the focus of this Article, we can play out some of the challenges presented by the Age of Terrorism across the

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

² 198 U.S. 45 (1905).

³ 347 U.S. 483 (1954).

⁴ 410 U.S. 113 (1973).

⁵ See Barry Friedman, *The History Of The Countermajoritarian Difficulty, Part One: The Road To Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History Of The Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History Of The Countermajoritarian Difficulty, Part Three: The Lesson Of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History Of The Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth Of An Academic Obsession: The History Of The Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

familiar terrain of judicial oversight over our constitutional arrangements.

In previous writings, I have turned to the role of the judiciary in ensuring that the challenges to our security do not compromise the divided authority of Congress and the executive in the conduct of war. Relying on Justice Jackson's famous typology of executive authority from the Steel Seizure cases, I have argued that the Court has forced⁶ and should force⁷ the executive branch to secure political approval for actions compelled by military exigency. The decided cases of the post-9/11 period, from *Hamdi*⁸ to *Rasul*,⁹ have reinforced the central lessons from the *Youngstown* decision, that executive prerogative is at its apex when approved by Congress. Conversely, when the Executive acts without congressional approval, or in the face of congressional disapproval, the range of executive prerogative drops accordingly.¹⁰

In this Article, however, I want to turn away from the courts to the innumerable settings where the lines of governmental structure under the Constitution cannot, or will not, resolve the tension among contested claims of authority between different governmental actors. I want to focus on areas that do not concern individual rights, in which particular citizens are vested with claims against the polity and for which courts are the forum of easy recourse. The conflicts I want to engage only infrequently present themselves in forms that are ripe, that bear litigant standing, and that are manageable. We can posit, for example, that for every *Chadha*¹¹ in which a justiciable question of constitutional allocation of power is posed, there are dozens, hundreds, maybe thousands of interbranch accommodations that are resolved outside the judicial arena.

It is useful here to turn to the distinction drawn by Keith Whittington between the quintessentially judicial act of constitutional interpretation, and that which he terms constitutional "construction."¹² In the latter, the roughly hewn divisions of authority in the Constitution are given operational force by the give and take of non-judicial actors who must make the machinery of government operate. Questions of constitutional authority, or even the lines of constitutional argument, are far more precarious than when there is some guidance from the Court.

⁶ Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism*, 5 THEORETICAL INQUIRIES L. 1 (2005).

⁷ Samuel Issacharoff, *Democracy in Time of War*, OXFORD J. LEGAL STUD. (forthcoming 2008).

⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁹ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 641 (1952).

¹¹ *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding one-chamber legislative vetoes unconstitutional).

¹² KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1 (1999).

Turning then to constitutional settlement outside the courts, I want to return to a debate I first ventured into in an essay I wrote with Noah Feldman a year ago in the online journal *Slate*.¹³ Our subject was the proposal then floating in Congress to compel a recall of the troops sent to Iraq under the “surge” offensive. In that article, we expressed our skepticism over the constitutional authority of Congress to engage in such direct oversight of the specific conduct of military operations. Our argument was that “boots on the ground” was the classic war-making power of the Executive and that efforts to control the actual conduct of war were beyond the constitutional authority of Congress.

Our argument predictably ran counter to the tenor of the times, particularly in the liberal climes of the academy. Iraq was then a catastrophe, at perhaps the worst stage in terms of violence and the demise of any stable political solution. The war was championed by a president with record-low levels of public support. The interim 2006 elections were widely understood to be a referendum on continued support for American involvement in Iraq, with nearly unprecedented shifts in popular sentiment against the incumbent party.¹⁴ Under these circumstances, how could any assertion of congressional power run afoul of the Constitution? All the more so when, during the first years of the Iraq fiasco, Congress had so utterly failed in its oversight powers.¹⁵ Prior to the 2006 elections, not once did Congress under the control of Republicans hold meaningful hearings over the conduct of the Iraq War, the national disgrace at Abu Ghraib, the continued detentions at Guantanamo, or even the cost overruns in the military’s no-bid contracting practices.¹⁶

Despite sharing the desire for Congress to “get in the game,” we recoiled at the thought of expanded legislative power to define the conduct of military engagements. Our claim was that such congressional management of the war effort would upset the constitutional division of authority between the power of Congress to declare war and budget for it, and the President’s role as Commander in Chief, with its attendant responsibility for the unified military hierarchy. Much tension surrounds

¹³ Noah Feldman & Samuel Issacharoff, *Declarative Sentences*, SLATE, Mar. 5, 2007, <http://www.slate.com/id/2161172/>.

¹⁴ For data on the scale of the shift, see Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121 (2007).

¹⁵ This confirms the point ably argued by Darryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2005).

¹⁶ See UNITED STATES H.R., COMM. ON GOV’T REFORM—MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, CONGRESSIONAL OVERSIGHT OF THE BUSH ADMINISTRATION (Jan. 17, 2006), *available at* <http://oversight.house.gov/documents/20060117103554-62297.pdf>; Thomas E. Mann & Norman J. Orenstein, *When Congress Checks Out*, FOREIGN AFFAIRS, NOV/DEC. 2006, at 67, *available at* <http://www.foreignaffairs.org/20061101faessay85607/norman-j-orenstein-thomas-e-mann/when-congress-checks-out.html> (describing lack of congressional hearings on, *inter alia*, conduct of Iraq War).

the overlapping commands of the Article I powers of Congress and the military powers given to the executive in Article II. Given the uncertainty of the text, the question became whether Congress, consistent with our constitutional tradition, assume a significant role in the actual conduct of war, in effect displacing the military judgment of a faltering president?

My aim in this Article is not to assess the propriety of the military judgments on troop deployment levels in Iraq, from the failed Rumsfeldian efforts to do it “light” to the ongoing attempt to restore order with greater military force. That judgment will be made by history. Rather, I want to ask what it means to say that one approach or the other is constitutionally permissible, constitutionally mandated, or constitutionally prohibited. The hard question for constitutional lawyers is: what does it mean to ask such questions in the current and likely continued absence of judicial interpretations that offer the prospect of a definitive ruling?

In attempting to answer these questions, I want to propose an approach rooted in institutional settlement. Before turning to the debates over the surge itself, I will begin by examining two aspects of federal power in the U.S. that are no doubt significant in the modern era, yet whose constitutional pedigree is suspect: the Louisiana Purchase and the creation of an independent Air Force. The argument will be that our Constitution must incorporate not only the text and the judicial constructions of it, but the accommodations reached by the political branches in the difficult task of actually administering a constitutional democracy.

II. THE LOUISIANA PURCHASE

It is fitting to begin a Lewis & Clark Law Review article with a brief discussion of the contribution made by its namesakes to constitutional law. For all the heroism rightfully recognized in the overland exploration of Lewis and Clark, relatively little attention is paid to their role in constitutional history. The conventional account of the Lewis and Clark mission rightly emphasizes that their object was to explore the territories acquired through the Louisiana Purchase. Significantly, however, their mission was well along before the territories had been acquired, indeed before the negotiations with Napoleon had even begun. Almost upon assuming office, President Jefferson showed himself eager to press the westward expansion of the United States and his selection of Meriwether Lewis to lead an exploration of military and commercial prospects in the interior of the nation was a first step taken to realize the young Nation’s expansionist objectives. From the start, however, Jefferson held deep reservations about the capacity of the federal government to undertake this mission given its limited powers. Jefferson’s doubts about the constitutionality of a publicly-funded exploratory expedition organized by the federal government led him to cast the mission as primarily

commercial, rather than military or scientific, in order to fit clearly within an enumerated Article I power of Congress.¹⁷

But the real constitutional inquiry begins in a remote outpost in St. Louis when Meriwether Lewis confronted Colonel Carlos Dehault Delassus, the Spanish governor of the Upper Louisiana, now reluctantly subject to the newly installed Bonapartist authority of France. Lewis sought permission to push north into the Spanish territories to set camp for the winter of 1804. Delassus refused Lewis's request and apparently questioned the authority for the U.S. to claim any right to the territories. History has not preserved for us the actual details of the exchange between the two men. Nonetheless, we do know that Delassus did not permit Lewis to proceed until he was ordered to actually transfer sovereignty, thereby assuring that at least the French overseers of Spain and its territories recognized the American acquisition as being final.¹⁸

But what if Colonel Delassus wanted to resist further? What if he wanted to preserve the Spanish claims to the territories, even if the Napoleonic forces in Europe could not be resisted? What if Delassus had asked Lewis by what authority the American president could claim the power to purchase territories for the federal government? The short answer is that had he done so, Delassus would have engaged a raging dispute consuming the Executive and Congress over just this issue.

The Louisiana Purchase was undoubtedly one of the great constitutional crises that was never submitted to the courts for adjudication.¹⁹ At issue was whether the federal government could transfer a significant portion of the public fisc in order to acquire territories to be held by the federal government and not be part of any state. The Purchase occurred only two years after Jefferson assumed office following the tumultuous election of 1800.²⁰ That election was no

¹⁷ Jefferson wrote, "The interests of commerce place the principal object [of the Lewis and Clark expedition] within the constitutional powers and care of Congress That it should incidentally advance the geographical knowledge of our own continent can not but be an additional gratification." JON KUKLA, *A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE DESTINY OF AMERICA* 261 (2003) (quoting Thomas Jefferson, Message to Congress (January 18, 1803), *available at* <http://www.loc.gov/exhibits/lewisandclark/transcript56.html>).

¹⁸ The meeting between the two is recounted in STEPHEN E. AMBROSE, *UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST* 122–23 (1996).

¹⁹ SANFORD LEVINSON & BARTHOLOMEW H. SPARROW, *Introduction*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803–1898* at 1, 3 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

²⁰ See, e.g., JOHN. E. FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2005); Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 2000–03 (2003) ("The presidential election of 1800 . . . is remembered primarily for the confusion in the counting of votes for president and vice president, . . . and the resulting election . . . being thrown into the House of Representatives. . . . [T]he

doubt the most contentious in American history, made all the more so by the simple fact that it was the first time that an election had resulted in the removal of a head of state and his replacement by his challenger. The stakes were enormous. The division between the Federalists and Antifederalists rang to the core of the role of government in American society, and the nascent political parties charged each other with treasonous intent to subordinate the American experiment to further the aims of either Britain or France. In light of the accusations by the Federalists that Jefferson was compromised by his affinity for France,²¹ the authority of the President to deliver a sizeable portion of the federal treasury to Napoleon and thereby assist the French war effort was highly problematic, to say the least. The two basic constitutional questions raised by the Purchase were: was there a constitutional power to acquire new territory by treaty, and was there a constitutional power to incorporate new states into the union from this new territory acquired after the Constitution's ratification.²²

Confronted with the tantalizing purchase, Jefferson exclaimed in disbelief, "More difference of opinion seems to exist as to the manner of disposing of Louisiana, than I had imagined possible!"²³ Jefferson sensibly doubted the power of the federal government to expand geographically and acquire new territories, a power Jefferson assumed would require a constitutional amendment.²⁴ This was a matter of tremendous constitutional moment, one that would later resurface dramatically in *Dred Scott*,²⁵ in which Chief Justice Taney struck down the Missouri Compromise, in part, on the lack of federal power to hold territories without a clear plan of integration as states.²⁶ Although this part of *Dred*

stakes in . . . 1800[] completely dwarfed any potential divisions in [the] 2000 [election].").

²¹ See, e.g., CONNOR CRUISE O'BRIEN, *THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION, 1795–1800*, 230 (1996) ("The most serious charge of the Federalists against Jefferson [in the late 1790s] was that he was 'the head of a French party determined to change the entire system of [American] Government.'").

²² DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 245 (1994).

²³ KUKLA, *supra* note 17, at 310 (quoting Letter from Thomas Jefferson to DeWitt Clinton (December 2, 1803), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 282, 283 (Paul Leicester Ford ed., 1897)).

²⁴ Jefferson wrote, "it will be safer not to permit the enlargement of the Union but by amendment of the Constitution." Letter from Thomas Jefferson to Albert Gallatin (January 1803), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 241 n.1, (Paul Leicester Ford ed., 1897).

²⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

²⁶ See *id.* at 447 ("There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies . . . to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.").

Scott is now obscured by its role in prompting the Civil War,²⁷ the issue remained unsettled until the *Insular Cases*²⁸ at the end of the 19th century. Even there, the Court split 5-4 on the critical question of the inherent power of the federal government to expand the geographic reach of the United States.²⁹

The source of constitutional concern came from the text itself. The Constitution has no specific and clear textual grant allowing for territorial acquisition. Article Four, Section Three provides that “New states may be admitted by the Congress into this Union,” that states cannot be formed within other states, that two states cannot be joined without the support of Congress and the States’ respective legislatures, and that “Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”³⁰ However, the Constitution was silent regarding the President and the Senate’s ability to acquire land and commit to eventual statehood for the territories via the treaty-making power, and the Louisiana Purchase treaty went so far as to contain a clause guaranteeing that the inhabitants of the territory would be incorporated into the Union.³¹

Federalist opponents of Jefferson, still smarting from the election of 1800, seized on the constitutional uncertainties to challenge the authority of the President. The addition of new territories threatened to dilute the voting power of the original states to the constitutional compact.³² That issue had been joined at the Constitutional Convention and two rival plans had been submitted for the power to admit new states. Randolph’s Virginia Plan would have limited new states to those “lawfully arising *within the limits of the United States*,”³³ while Patterson’s

²⁷ See, e.g., Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 67 (2007) ([M]any people believe that Dred Scott hastened the Civil War . . .).

²⁸ The *Insular Cases* were a group of cases decided in the early twentieth century addressing the extraterritorial effect of the Constitution. See *Dorr v. United States*, 195 U.S. 138 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Hawaii v. Mankichi*, 190 U.S. 197, 211, 217 (1903); *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States (Dooley I)*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244, 246–48 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States (Dooley II)*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

²⁹ *Downes v. Bidwell*, 182 U.S. 244 (1901).

³⁰ U.S. CONST. art. IV, § 3.

³¹ See EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE* 44, 65 (1920). The text of the Louisiana Purchase Treaty is reproduced in KUKLA, *supra* note 17, at 350–53, and online at <http://www.earlyamerica.com/earlyamerica/milestones/louisiana/text.html>.

³² See BROWN, *supra* note 31, at 1.

³³ *Id.* at 15.

New Jersey plan contained no such geographic restriction.³⁴ The restriction was inserted, omitted, re-inserted, and finally omitted again in the course of constitutional drafting.³⁵ Gouverneur Morris suggested the final language was intentionally left vague in the face of disagreement,³⁶ though he later asserted, possibly for his own political reasons, that the general intention of the Convention was not to erect a meaningless “paper barrier” to the inevitable westward expansion of the nation.³⁷ On the other hand, supporters could argue that the states had ceded their preexisting sovereign right to acquire territory via conquest or treaty to the federal government by ratifying the Constitution.³⁸ Conquest and compact were the only possible means the states previously had to acquire territory, and all preexisting state powers were either ceded to the federal government or retained.³⁹ Because the Constitution prohibits states from waging war or entering into agreements with other states or foreign nations for the transfer of territory, these powers were clearly not retained.⁴⁰ Since the Constitution contains no express prohibition on acquiring territory, the Purchase was *intra vires*.⁴¹

Jefferson’s own Attorney General, Levi Lincoln, conceded that the constitutional case for the acquisition of new territories was weak.⁴² He believed that the Constitution limited the physical territory of the United States to the boundaries of the states that had ratified the Constitution and the territories then in U.S. possession; new states could only be formed out of this land,⁴³ the very argument to be echoed by Chief Justice Taney many years later in *Dred Scott*, where he asserted that the “Territories Clause only referred to the territories in existence at the time of ratification.”⁴⁴ Jefferson concluded that a constitutional amendment was required, and dedicated himself to its drafting.⁴⁵

Ultimately, all of these uncertainties had to be put aside due to the realities of the situation. Desperately strapped for cash, Napoleon offered the entire landmass, and for the bargain price of \$15 million (though, notably, it did not include the much sought after Floridas).⁴⁶ The

³⁴ *Id.*

³⁵ *Id.* at 17.

³⁶ *Id.* at 16.

³⁷ *Id.* at 31.

³⁸ *See id.* at 57.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 18.

⁴³ *Id.* at 19–20.

⁴⁴ LEVINSON & SPARROW, *supra* note 19, at 8.

⁴⁵ MAYER, *supra* note 22, at 251. The various potential amendments drafted by Jefferson and his cabinet during the summer of 1803 are reproduced in KUKLA, *supra* note 17, at 359–61.

⁴⁶ LEVINSON & SPARROW, *supra* note 19, at 8.

proposed sale would double the physical size of the country,⁴⁷ incorporating the land that would ultimately become ten separate states, as well as parts of Montana and Wyoming.⁴⁸ The treaty arrived in July of 1803, and was held open for ratification only until October 30th; Jefferson had to convene Congress earlier than scheduled to meet this deadline.⁴⁹ There was little doubt that the Republic could not be held back by prolonged constitutional uncertainty. "The sheer size of the [purchased territory] inevitably magnified and accentuated the constitutional question."⁵⁰ This was the great historic opportunity for the early expansionist objectives to be realized and, in colloquial terms, it was unlikely that the territories would often come on the market.

In the end, the Nation had to act, even if none of these constitutional doubts were to have been resolved, at least formally. Even Jefferson never completely abandoned his narrow interpretation of the constitutionality of expansion, but he later came to defend the Purchase as a matter of constitutional practice in the face of pressing exigency. Writing several years after the purchase, and in a tone strikingly reminiscent of Lincoln during the Civil War, Jefferson would maintain that a

strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.⁵¹

Once consummated, the Louisiana Purchase took on the quality of truth revealed. The constitutional objections that roiled the government dissipated and the new understandings of the power of the federal government seemed as manifest as the altered geographic boundaries of the Republic. By the time the Supreme Court addressed the issue in 1828, the constitutionality of the purchase had been long settled as a practical matter. Little was at stake when Chief Justice Marshall solemnized the transaction: "The Constitution confers absolutely on the Government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."⁵²

⁴⁷ *Id.* at 19.

⁴⁸ *Id.* at 4.

⁴⁹ BROWN, *supra* note 31, at 23.

⁵⁰ MAYER, *supra* note 22, at 246 (citation omitted).

⁵¹ BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 66 (5th ed. 2006) (quoting letter from Thomas Jefferson to J.B. Colving, Sept. 20, 1810).

⁵² *Am. Ins. Co. v. Canter*, 26 U.S. (1 Peter) 511, 542 (1828).

Subsequently, the Louisiana Purchase would serve as authority for the purchase of Florida from Spain, the annexation of Texas, the post-War acquisitions of Arizona, California, New Mexico, and Utah from Mexico, and later on the acquisition of Hawaii and the post-Philippine War expansion into the Far East.⁵³ Most notably, when Secretary of State Seward proposed the Alaska Purchase, opponents were derided for invoking arguments that “paralleled the foolish reluctance of some in 1803 to accept the Louisiana Purchase.”⁵⁴ Proponents of the new acquisition freely invoked the Louisiana Purchase as authority for the new credo that “[i]t is . . . the destiny of our Anglo-Norman race to possess the whole of Russian America, however wild and inhospitable it may be”⁵⁵ This, too, would be presented to the Court as a *fait accompli*, such that in *De Lima v. Bidwell*, in 1901, the court made a one-sentence reference to annexation as a self-evident power of the federal government: territory gained “by conquest or treaty . . . is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by act of Congress.”⁵⁶

In the century of Manifest Destiny, the “Louisiana Purchase served as the great precedent” for all subsequent constitutional debates about expansion.⁵⁷ What was contested in 1803 was, by the end of the century, fully settled by the fact that all institutional actors came to rely, as a settled fact, on the geographic expanse of the Republic.⁵⁸ As constitutional historian Mark Graber argues, “[s]ettlements take place, not when official law is pronounced, but when persons opposed to that constitutional status quo abandon efforts to secure revision.”⁵⁹ We may still find the travails of Meriwether Lewis awe-inspiring; we have long ceased to worry about the constitutional authority of his charge to explore the Nation’s westward expanse.

⁵³ See Julian Go, *Modes of Rule in America’s Overseas Empire*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803–1898*, *supra* note 19, at 209, 212.

⁵⁴ Richard E. Welch, Jr., *American Public Opinion and the Purchase of Russian America*, in *AN ALASKA ANTHOLOGY: INTERPRETING THE PAST* 110–11 (Stephen W. Haycox & Mary Childers Mangusso eds., 1996).

⁵⁵ Charles Sumner, Speech of Hon. Charles Sumner of Massachusetts on the Cession of Russian America to the United States 12–14 (1867).

⁵⁶ *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901).

⁵⁷ BROWN, *supra* note 31, at 3.

⁵⁸ For a sweeping discussion of the “doctrine of discovery” and its role as the ideological wellspring of expansion, see ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* 99–114 (2006).

⁵⁹ Mark A. Graber, *Settling the West: The Annexation of Texas, The Louisiana Purchase, and Bush v. Gore*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803–1898*, *supra* note 19, at 85.

III. THE AIR FORCE

A few years ago, I had the unwelcome task of penning a memorial tribute to the great constitutional theorist John Hart Ely.⁶⁰ Ely's primary concern was finding a principled justification for judicial review, something quite different than the matter at hand here. In the course of that review, however, I mentioned in passing that textualism or originalism alone could not reach the evolution of a society and its technology over a matter of centuries. The example I gave was the existence of the Air Force. As a matter of text and constitutional design, the military powers of the federal government in the original Constitution were limited to the Army and Navy, and their operations on land and by sea. The Constitution is quite clear that all powers not specifically commanded to the federal government are reserved as the powers of the States. I suggested that an ahistorical literalism could lead to a proposal to devolve air power back to the States, a self-evidently preposterous outcome.

But how do we avoid that conclusion? The text is strikingly precise on questions of military power. The specific provisions grant Congress the following authority: "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years";⁶¹ and "To provide and maintain a Navy."⁶² Nor are these clauses isolated. Congress is specifically tasked with the power, "To make Rules for the Government and Regulation of the *land* and *naval* Forces."⁶³ This is coupled with the ability to authorize military activity on a similarly defined basis: "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on *Land* and *Water*."⁶⁴ What's more, the residual military powers are seemingly reserved to the States.⁶⁵

Some of these constitutional concerns may have been allayed by the fact that American air power through World War II was concentrated in what was known as the U.S. Army Air Corps and Air Forces, not only a part of the Army, but subject to its two-year budgeting cycle. Since 1947, however, the Air Force has existed as an independent branch of the

⁶⁰ Samuel Issacharoff, *The Elusive Search for Constitutional Integrity*, 7 STAN. L. REV. 727, 727 (2004).

⁶¹ U.S. CONST. art. I, § 8, cl. 12.

⁶² U.S. CONST. art. I, § 8, cl. 13.

⁶³ U.S. CONST. art. I, § 8, cl. 14 (emphasis added).

⁶⁴ U.S. CONST. art. I, § 8, cl. 11 (emphasis added). The Constitution also grants the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

⁶⁵ "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art. I, § 8, cl. 16.

armed forces, one whose constitutional ground source may legitimately be questioned.

I did not give this particular point much more thought until a few years later when I found myself among the list of constitutional lawyers who had—needless to add—misconstrued this issue, at least according to some of the contributors on the popular weblog, *The Volokh Conspiracy*, and to some of its devoted followers.⁶⁶ With the intensity characteristic of the internet, many electrons were spilled in increasingly amusing and peculiar discussions of the ways in which the Air Force could be reconciled textually to the actual Constitutional commands. Thus, for example, we could extrapolate from the fact that even at the time of the Founding, bullets could fly through the air. In setting up the issue for discussion, one of the *Conspiracy* contributors tried to finesse the constitutional issue: “Planes that fly through the air are no more constitutionally problematic than bullets that fly through the air, or balloons (whose military use was contemplated even at the time of the Founding).”⁶⁷ Which way this cuts is uncertain, since the fact of flying ordinance or even balloons would indicate that flight was within the contemplative reach of the Framers.⁶⁸ Once in the domain of speculation, however, an easy alternative argument moves outside the framework of text altogether, as advanced by one of the many postings on point: “the Constitution permits air forces because . . . [h]ad flight existed in 1789, the Constitution would have surely permitted an air force.”⁶⁹ Alternatively, an argument could be made that since the Air Force could theoretically be quartered within the Army or Navy—a significant assumption—then the ability to spin it off as an independent entity is no more constitutionally problematic than, presumably, a corporate reorganization.⁷⁰

At this point, the debate starts to trail off into semantic silliness. Thus, following the debate on the blogs, some individual could claim that armies operate on land, while navies operate in fluids. Since air is a fluid, the Air Force is simply another navy; after all, the original name for

⁶⁶ The Air Force and the Constitution (Jan. 28–Feb. 01, 2007), http://volokh.com/posts/chain_1170032632.shtml.

⁶⁷ Posting of Ilya Somin to The Volokh Conspiracy, http://volokh.com/posts/chain_1170032632.shtml (Jan. 28, 2007, 7:03pm).

⁶⁸ See Malla Pollack, *Dampening the Illegitimacy of the United States' Government: Reframing the Constitution from Contract to Promise*, 42 IDAHO L. REV. 123, 197–98 (2005) (“By the date the Constitution was drafted, newspaper-reading Americans would have known of balloons capable of carrying humans aloft. One Mr. Carnes of Maryland had flown a hot air balloon; gentlemen in Philadelphia were taking up a subscription to fund a more grandiose balloon launch. Learned speculation raised the possibility of ancient, secret uses of air balloons, including Roman use of balloons for rapid transmission of military information.” (citations and footnotes omitted)).

⁶⁹ Posting of Charles Thomas to The Volokh Conspiracy, <http://volokh.com/posts/1170032632.shtml#182456> (Jan. 28, 2007, 11:29pm).

⁷⁰ Michael Rappaport, Is an Independent Air Force Constitutional? (Jan. 30, 2007), http://rightcoast.typepad.com/rightcoast/2007/01/is_an_independe.html.

airplanes was “air ships,”⁷¹ but, on the other hand, a literal translation of the title of the French Air Force yields “army of the air.” Leaving aside the entertainment value of such arguments, the simple reality is that the Air Force is an established part of the American war power, a constitutional “fact on the ground,” even if in this case it operates aloft.

IV. THE SURGE

A line runs between the Executive and Legislative powers over the conduct of war under our Constitution. The President has power as Commander in Chief, but Congress controls not only the budgetary process, but the ability to “declare” war. The text does little to specify the scope of congressional power, but that is not the end of the inquiry. Nonetheless, at an irreducible minimum, as Justice Jackson put it, the constitutional designation as Commander in Chief, “undoubtedly puts the Nation’s armed forces under Presidential command.”⁷² To define what that means, we need to turn to a brief history.

Under the Articles of Confederation, Congress held the power to “make” war, as opposed to the presumably more limited authority to “declare” war. According to Jack Rakove, the leading historian of the constitutional framing, the change occurred late in the session of August 17, after a “cryptic but momentous debate.”⁷³ The usual reference point for clarifying textual uncertainty—Madison’s notes of the Convention—are silent on the import of the change in language.⁷⁴ Nonetheless, Rakove concludes that,

Though Congress could still exert great influence through its power of the purse, allowing it to *make* war (in the sense of directing operations) 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.⁷⁵

Indeed, most of the debate at the Convention focused on the power to respond militarily outside of the formal declaration of war, something that reflected the contemporary European practice of engaging in hostilities short of all-out declared war, with its various formalities such as sending a delegate to the enemy’s capital to announce the initiation of

⁷¹ Posting of Dave Hardy to The Volokh Conspiracy, <http://volokh.com/posts/1170032632.shtml#182432> (Jan. 28, 2007 10:29pm).

⁷² *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

⁷³ JACK RAKOVE, *ORIGINAL MEANINGS* 263 (1996).

⁷⁴ *Id.*

⁷⁵ *Id.* See also Charles A. Lofgren, *War-making Under the Constitution: the Original Understanding*, 81 YALE L.J. 672 (1972) (summarizing the Convention’s debate on this issue and outlining varying interpretations of language change).

hostilities.⁷⁶ “In point of fact, however, European states had not made such declarations for well over a century.”⁷⁷

Without history to provide a clear resolution, the meaning of this clause remains an active topic of debate academically to this day. Nonetheless, we have somehow managed to soldier through for the past two centuries, through numerous military engagements both large and small, despite the legal and scholarly uncertainty. In place of judicial determinations, American politics has provided answers over the past two centuries as the political branches have had to figure out how to rise to this country’s defense.⁷⁸ In their majestic overview of the source of executive power over warfare, Professors David Barron and Marty Lederman sum up the early *modus vivendi* as allowing the president complete control over tactical military decisions, while Congress oversaw the decisions to deploy troops and set out their overriding objectives.⁷⁹

Certainly before the Civil War, including during the expansion of executive power in the Quasi War with France, there was a general sense, not much tested, that Congress would not have the power to “minutely manage the conduct of war”⁸⁰ While this was the general understanding, it was by no means clear how it would play out in practice or how the close questions between necessary congressional oversight and improper efforts at management of war would be resolved. Our history in times of grave conflict reveals an institutional battle between Congress and the Executive over warcraft. At times, most notably in Lincoln’s decision to prepare for war without congressional authorization and in Franklin Roosevelt’s deployment of assistance to England behind the back of Congress, the executive clearly transgressed.⁸¹ Neither president defended the legality of the actions taken, but claimed exigency and sought subsequent congressional approval. Similarly, when

⁷⁶ Lofgren, *supra* note 75, at 681.

⁷⁷ *Id.* at 691.

⁷⁸ See Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45 (2007) (arguing that the “declare war” clause vests Congress with exclusive power to decide whether to engage in war, except when the President responds defensively to attacks); Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123 (2007) (criticizing Prakash’s historical analysis and concluding that the “declare war” clause does not vest Congress with authority outside of spending power to constrain the President’s military actions); Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007) (disagreeing with Prakash’s view that the “declare war” clause constrains the President’s authority to respond offensively to attacks).

⁷⁹ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 964 (2008) (summarizing the first eight years of constitutional dialogue between legislative and executive branches over war powers allocation).

⁸⁰ *Id.* at 980.

⁸¹ The extent of the constitutional excesses are well set out by Barron and Lederman. *Id.* at 997–1005 (describing Lincoln’s unilateral military actions); *id.* at 1042–51 (describing Roosevelt’s pre-World War II unilateral military deployments).

Congress sought to indirectly subject Andrew Johnson to Senate approval with regard to specific troop deployments in the aftermath of the Civil War,⁸² a weakened President acquiesced, although his constitutional reservations were enough to prompt one of the Bills of Impeachment against him.⁸³ That extreme form of congressional intervention has also not been repeated.

But, for the most part, despite the tensions in times of extreme stress, the history is one of accommodation, such that by the time of the famous Civil War cases, Chief Justice Chase could write in *Ex Parte Milligan* that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.”⁸⁴ Chase would clearly have excluded from the bounds of congressional reach “the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.”⁸⁵ This is the power that my colleague David Golove refers to as a “robust exclusivity.”⁸⁶ In more modern guise, the accommodation is expressed in Justice Jackson’s famous casting of executive power as being at its zenith when accompanied by congressional approval, and at its lowest ebb when acting in defiance of Congress.⁸⁷

There are, to be sure, a handful of cases that reveal how difficult the boundary lines are to draw with any precision. The most famous is the 1804 case *Little v. Barreme*,⁸⁸ in which a Danish ship (the *Flying-Fish*) was seized coming from a French port pursuant to a presidential order, but where Congress had only authorized seizures of ships going to French ports. In a short opinion, the Court did credit that the Act of Congress “gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not

⁸² The Act required all military orders to go through the General of the Army (Ulysses S. Grant) before issuance, effectively giving Grant rather than Johnson final say over all tactical matters. *Id.* at 1022–23. Senate approval was required if the President wanted to remove the General or otherwise over-ride his decisions. *Id.* Barron and Lederman conclude that this effectively displaced the President from his constitutional perch as Commander in Chief. *See id.* at 1023–24.

⁸³ *Id.* at 1023 (“[In the] Ninth Article of Impeachment against Johnson, . . . the House accused Johnson of trying to . . . induce [Army Major General William] Emory, as Commander of the Department of Washington, to disregard the [Senate approval] law by acting upon Johnson’s direct orders, without Grant’s participation.”).

⁸⁴ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 134, 139 (1866) (Chase, C.J., concurring in the judgment).

⁸⁵ *Id.*

⁸⁶ David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1855 (1998) (building on Chief Justice Chase’s opinion to define executive power concerning actual deployment of troops in battle).

⁸⁷ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–54 (1952) (Jackson, J., concurring); *see also* Issacharoff & Pildes, *supra* note 6.

⁸⁸ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

bound to a *French* port.”⁸⁹ There are some even broader statements, such as the line from *Talbot v. Seeman* in which Chief Justice Marshall writes that “[t]he whole powers of war [are] by the Constitution of the United States, vested in Congress.”⁹⁰ But even the constitutional scholars who have looked to these centuries-old cases to find a broad reserved power for Congress actually to manage the conduct of war admit that such a statement is greatly exaggerated when read out of context.⁹¹

Indeed, for the most part, a rough consensus has held on the relative powers of Congress and the President in the conduct of war. Part of the reason for the relative acceptance of this division of labor was the simple fact of the technological limitations of communication. For most of our history, the lines of military communication were so difficult that oftentimes the events had simply outrun the capacity of even the Commander in Chief to be able to control the conduct of military affairs, let alone permit congressional oversight. John Adams would wait weeks to hear how his commands had been implemented during the naval skirmishes with France. During the early days of the Civil War, when the action (or non-action) was focused on the Army of the Potomac and the frontlines were within view of the Capital, angry Republicans in Congress demanded that General McClelland appear for repeated interrogation before Congress about his failure to engage.⁹² Even then, the Congress did not order an alternative military strategy and instead used their political power to attempt to pressure the President. By the time the conflict was truly engaged, the limited means of communication again made even presidential oversight complicated. For example, the correspondence from Lincoln to Grant at the time of the decisive sweep through Vicksburg shows that Lincoln was writing long after the battles had been waged and was at one point trying to reconstruct why it was that Grant had turned east rather than proceed all the way to the Gulf after taking Vicksburg.⁹³

Those days are behind us. As I remarked caustically in the press, it is certainly technologically possible to put a speaker phone in the well of Congress and have 535 would-be commanders bark out orders to our field command.⁹⁴ Technology, rather than restricting the scope of congressional reach, might actually facilitate oversight and further disrupt what seemed like a constitutional settlement. Barron and

⁸⁹ *Id.* at 177–78 (The other cases that more or less stand for the same proposition are *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800) and *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801)).

⁹⁰ *Talbot v. Seeman*, 5 U.S. at 28.

⁹¹ BARRON ET AL., LETTER OF CONSTITUTIONAL SCHOLARS TO CONGRESS 2 (2007).

⁹² See generally BRUCE TAP, OVER LINCOLN’S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR (1998).

⁹³ Letter from Abraham Lincoln to General Ulysses S. Grant (July 13, 1863), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 710–11 (Roy P. Basler ed., 2d ed., Da Capo Press 2001) (1946).

⁹⁴ Jeffrey Rosen, *In War Time, Who Has the Power?*, N.Y. TIMES, Mar. 4, 2007, § 4 at 4.

Lederman argue that since the early conflicts over the Korean War, there has been a perceptible expansion of congressional efforts to control the dictates of warfare.⁹⁵ To be fair, their argument is primarily intended to counter irresponsible claims that military threats grant unfettered executive power over all matters touching on military issues. In the context of a frontless war against a non-state threat, that argument—taken to its extreme by various zealots—would basically undermine any form of accountability. But even the examples of attempted congressional control, such as limitations on the expansion of the Vietnam conflict to neighboring countries,⁹⁶ are peripheral to the core conduct of a war on matters such as troop deployments, battle commands, and the like.

When Congress sought in its proposed legislation over the surge to dictate absolute troop levels, dates for specific troop reductions, and limitations on the terms of engagement while troops remain in the battlefield, the issues pushed much further into the domain of war conduct rather than war oversight. The line falls somewhere, and in my view, this was on the side that compromised the military structures necessary for national defense. I say this not because of any claimed military expertise and not because of any view that no country could organize its military to respond to parliament rather than the executive—though I am skeptical whether such collective lines of authority could successfully ensure a credible command structure in times of war and the necessary political accountability for warfare subsequently. Ultimately, though, the argument is that our revealed institutional practices have drawn a different line to demarcate the powers of the Executive and Congress. That line is the product of ongoing tension between the branches in times of great stress, with much testing of its boundaries. It yields a rough, if still evolving, consensus through most of our history. It may, of course, prove insufficient in future challenges, and future generations may decide to jettison it in favor of different forms of organization of our military defense. But, for the present, it is part of our constitutionally enshrined heritage.

V. SETTLEMENT AND CONVENTIONALISM IN CONSTITUTIONAL LAW

At the end of the day, the key question becomes one of asking what it means to proclaim a constitutional answer to the various assertions of power by the federal government or its branches. In each of the cases cited—the power to expand territorially, the ability to create a new military force, or the ability to control military actions legislatively—it is possible to yield multiple answers from the constitutional text. It is

⁹⁵ Barron & Lederman, *supra* note 79, at 1058–59.

⁹⁶ Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 8, 84 Stat. 1942, 1943 (1971) (prohibiting use of funds for troops in Cambodia without prior notification of the congressional leadership).

possible to imagine that territorial expansion might require positive action from the existing states, much as a corporate merger might require approval by existing shareholders.⁹⁷ Or we could imagine a reserve power to the states to expand beyond the national militias. Or we could even imagine vesting the war-making power in the legislative branch, with the likely creation of a military command modeled as an administrative agency, and with appropriate congressional committee oversight. While it is possible to envision such forms of governance and perhaps even to square them with the constitutional text, it is clear that these are not the governmental structures that we do have.

It is hardly a novel insight that constitutional governance shares with the common law a principle of institutional settlement that merits substantial respect, at least presumptively. As Joseph Story commented long ago, “the most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their own single merits.”⁹⁸ For Justice Story, this meant a “single hand” at the helm in times of war,⁹⁹ with a corresponding but less-defined obligation to consult with Congress.¹⁰⁰

The concept of settlement and the presumption of legitimacy afforded to inherited custom is quite central to the common law, which itself subscribes to the principle, “tempore et per tempus cujus contrarium memoria non existit,” usually translated as “the memory of man runneth not to the contrary.” This concept can be found in church records of the 14th century, in Littleton’s *Tenures* in the 16th century, and repeated again by the major English legal authorities Coke and Blackstone.¹⁰¹ In that wonderful English way, there was even a date certain beyond which the lack of memory was established. During the reign of Edward I, in 1275, it was decreed that no legal actions could be entertained before the time of Richard I in 1189, as that was the date that would mark the beginning of historic memory for legal purposes.¹⁰²

⁹⁷ For instance, Senator Pickering of Massachusetts argued against the Louisiana Purchase, claiming that “in like manner as in a commercial house, the consent of each member would be necessary to admit a new partner into the company.” BROWN, *supra* note 31, at 56.

⁹⁸ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §408, at 392 (Leonard W. Levy ed., De Capo Press 1970) (1833).

⁹⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1408, at 340–41 (Leonard W. Levy ed., De Capo Press 1970) (1833). To be fair, however, Story was relying on *Federalist* No. 74 for the rejection of a plural executive. The concept of congressional control over warfare was not truly considered.

¹⁰⁰ *Id.* §1171, at 92.

¹⁰¹ See, e.g., REGISTER OF RALPH OF SHREWSBURY, BISHOP OF BATH AND WELLS, 1329–1363 2 (Thomas Scott Holmes ed. 1896); LITTLETON, TENURES § 170 (Wambaugh ed. 1903); ALEXANDER M. BURRILL, NEW LAW DICTIONARY AND GLOSSARY 984 (John S. Voorhies 1851).

¹⁰² Helen M. Cam, *Historical Revisions*, 11 HIST. 143, 148 (1926).

But if our memory runs not to the contrary at present, such an account cannot explain how this pattern came to emerge in the first place. The respect owing to established legal traditions shares a problem with all conventional political theories, from its classic formulation in Edmund Burke¹⁰³ and on forward, of how to account for change. If the claim to legitimacy and pedigree of a practice is that it has emerged over time, then there is always the corresponding claim that another practice may be in the process of emerging and may rightfully claim its due over time. Further, Burke himself recognized that conventional claims could only dictate caution in change, not a prohibition on change altogether: "A state without the means of some change is without the means of its conservation."¹⁰⁴

A constitutional order with a strong dose of common-law judicial definition and a proclaimed fidelity to precedent pushes in a Burkean direction. As expressed by Bruce Ackerman in the first of his books on American constitutional development, this yields a conventional understanding of American constitutional law as

the patterns of concrete decision built up by courts and other practical decisionmakers over decades, generations, centuries. Slowly, often in a half-conscious and circuitous fashion, these decisions build upon one another to yield the constitutional rights that modern Americans take for granted, just as they slowly generate precedents that the President and Congress may use to claim new grants of constitutional authority. The task of the Burkean lawyer or judge is to master these precedents, thereby gaining a sense of their hidden potentials for growth and decay.¹⁰⁵

Although Ackerman's object is to describe the moments at which this staid, evolutionary story is dramatically cast asunder, the observation of the customary working of constitutional settlement is apt. This is the principle that guided the Court in its most difficult recent decisions, those addressing the boundaries of executive power over domestic security. As Justice Kennedy fittingly formulated the concern in *Hamdan v. Rumsfeld*,¹⁰⁶

[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by

¹⁰³ As most forcefully articulated in EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner ed., Yale Univ. Press 2003) (1790). For another account in law, see the classic formulation of common-law settlement by Blackstone: "the memory of man runneth not to the contrary." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 76 (George Sharswood ed., J. B. Lippincott Company 1908) (1765).

¹⁰⁴ BURKE, *supra* note 103, at 19.

¹⁰⁵ BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 17 (1993).

¹⁰⁶ 548 U.S. 557 (2006).

reliance on standards tested over time and insulated from the pressures of the moment.¹⁰⁷

VI. CONCLUSION

Institutional settlement, what Justice Kennedy terms the “customary operation” of the political branches, actually reinforces the imprecise divide in war-making authority between Article I and Article II of the Constitution. Much of the most significant constitutional law in the post-September 11 period has dealt with rebutting menacingly broad claims of executive unilateral authority. But Congress, no less than the Executive, may be prone to react impulsively to the perceived failures of the moment and to claim an exaggerated role in the conduct of war. That a failed war effort may legitimately prompt a demand for greater executive accountability is not only not objectionable, it should be constitutionally mandated. Ultimately, however, the conduct of the war must follow the chain of military command. Congress’s powers are left not only to those textually committed to it by Article I, but also to the forms of oversight that have developed over time, for the most part successfully.

¹⁰⁷ *Id.* at 637 (Kennedy, J., concurring).