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. . . . . Introduction

A few years ago, I read a lengthy article in a prominent law journal about the constitutional power to declare war. The article ably presented opposing views regarding the enduring debate between those who argue for congressional preeminence over war-related decisions and those who believe that the president possesses great war-making discretion. But, the author offered a startling categorical finding that he said "all scholars have missed": namely, that "the Founders denied the President a veto over congressional decisions to wage war. . . ."[1] This finding was, in turn, offered by the author as decisive support for greater congressional power over war-related decisions. "Wow," I thought. Had the author uncovered a previously unknown letter by the likes of James Madison, for example, stating in unambiguous terms that declarations of war could not be vetoed by the president? Such a finding would be of major historical and constitutional significance. And, was it true that *all* scholars had missed this finding?

On its face, such a claim would seem to contradict a straight reading of the Constitution. According to Article I, sec. 7, "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States" for signature or veto. The succeeding paragraph in sec. 7 further explains that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall

[1] William Michael Treanor, "Fame, the Founding, and the Power to Declare War," *Cornell Law Review* 82(May 1997): 700.

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be presented to the President of the United States. . . ." Passage of bills requires a simple majority vote in both houses. If the president chooses to veto, Congress may override the veto by a two-thirds vote.[2] The only exceptions are measures that require a two-thirds vote on initial passage: proposed constitutional amendments and treaties (which only require approval from the Senate). It has long been understood that presidents may not obstruct these measures passed by super-majorities. Yet, a declaration of war requires only a simple majority vote of both houses, suggesting that presidents could, indeed, veto a declaration of war (although it has never occurred in the five times war has been declared in American history).[3]

As I read the balance of the article, I discovered that the author had not, in fact, uncovered any new historical evidence. His emphatic and categorical assertion that the Constitution's founders expressly denied the president a veto over declarations of war was not based on any newly discovered evidence but rather on familiar quotations and other related sources from the country's early history in which early presidents, constitutional founders, and others referenced the sentiment that Congress alone possessed the power to start war.[4]

It turns out that the author's flat assertion that the founders denied the president a veto over war declarations was simply not supported by the evidence presented and in all likelihood is false (or at least a highly debatable proposition), and his other emphatic assertion – that "all scholars" had missed or overlooked this matter – was demonstrably false. In 1951, for example, the noted presidential scholar, Clinton Rossiter, wrote this in his classic book on the commander-in-chief (CIC) power: "But of course the President could veto a declaration of war, something that [President Grover] Cleveland for one was probably quite ready to do – in the case of war with Spain."[5] In a 1918 article, constitutional scholar,

[2] If the president does nothing, the bill automatically becomes law after ten days, unless Congress by its adjournment prevents return of the bill, in which case it is pocket-vetoed.
[3] The number of separate declarations of war is actually greater than five because Congress in some instances passed multiple declarations for single conflicts, such as World War II. The five instances of formal war declaration are the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. These declarations were enacted as joint resolutions, which do cross the president's desk for signature or veto.
[4] Treanor, "Fame, the Founding, and the Power to Declare War," 700.
[5] Clinton Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca, NY: Cornell University Press, 1976; first published 1951), 66.

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Simeon E. Baldwin, wrote, "As a declaration of war takes thus the shape of a special Act of Congress, it requires, like any other bill, order, vote, or resolution, the approval of the President." Later in his article, Baldwin says that "Two things are certain, when the functions of the President are considered with respect to their relation to a declaration of war. He has the right . . . to communicate to Congress, before such a declaration is made, the facts and circumstances that in his opinion may call for it. It is also of no force, unless he approve it. . . . He must, as in the case of any other measures of legislation, approve the whole or disapprove [i.e., veto] the whole."[6] Whereas the matter of a presidential veto of a war declaration receives little attention in modern writings on the war power, extant writing and evidence pretty clearly support the proposition that presidents may, indeed, exercise such a veto.[7] And, it is obvious that the matter had not been "missed" by "all scholars."

I mention this article not so much because of its subject matter but rather because of its inappropriate (and, as it turns out, inaccurate) overstatement and its mischaracterization of the literature on the subject. Both traits are startling because they are rarely, if ever, seen in such bald form in the scholarly literature of other disciplines. In fact, it is customary to dampen, if not excise, inflated rhetoric of this sort and for the obvious reason that it is unnecessary, unwarranted, unprofessional, and risky: no matter how carefully one conducts research, unbounded assertions about trends in research usually run afoul over claims like "all" and "none." More to the point, the facts should speak well enough for themselves, and the conclusions should not outrun the evidence.

Yet, in the many hundreds of law journal articles I have read in the last two decades while studying the two primary subjects of my research – the American presidency and gun control – I have often found overstated claims, rhetorical excesses, gaps in basic research, and conclusions that simply did not follow from the evidence presented. I subsequently discovered that I was not the first to puzzle over this. An article published in a prominent law journal a few years ago that was based on an analysis of more

[6] Simeon E. Baldwin, "The Share of the President of the United States in a Declaration of War," *The American Journal of International Law* 12(January 1918): 1, 10. See also Clarence A. Berdahl, *War Powers of the Executive in the United States* (Urbana, IL: University of Illinois Press, 1921).

[7] Constitutional Convention delegate James Madison, as president, signed the declaration of war that commenced the War of 1812 on June 18, 1812, an action that supports the prima facie case for the ability of the president to also veto such an act. http://britannica.com/eb/article-9032132/war-of-1812, accessed on September 12, 2006.

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than two hundred law journal articles noted the same phenomenon in legal publications: "stridently stated, but overly confident, conclusions. . . ."[8] A book about six prominent legal writers observed a similar phenomenon in noting that the six have promoted "simple, elegant, and utterly wrong conclusions almost at every turn."[9]

I should quickly add that I have read many outstanding and illuminating law review articles. Undoubtedly, there is much superb writing to be found in these pages.[10] Yet, the central problem is not that there is no limit to superb writing and analysis but rather that there is no floor to dreadful writing and analysis. To understand the principles of legal training and the workings of law reviews is to understand why there are so few restraints on so much of its writing. The presence of no little wayward writing on constitutional subjects in the professional writings of the legal discipline – at least, as I observed it in the two otherwise divergent subjects of the American presidency and gun control that have comprised my primary areas of research for more than twenty years – was one observation that eventually spawned the argument of this book:[11] that law reviews are a breeding ground for wayward constitutional theorizing. Such defective theories, in turn, may not only distort academic debate and popular understanding of important constitutional principles but also generate wayward public policy.

This argument finds immediate support from several distinctive features of the legal publishing realm. Nearly all of the hundreds of law reviews published by America's law schools are run by law students, meaning that students choose what to publish and what form those publications will take. The articles published are not, with the rarest exceptions, subject to any kind of peer review, meaning that the decision to publish is not based on any expertise-based assessment of articles' logic, accuracy, significance, or relationship to the larger literature to which it purports to

[8] Lee Epstein and Gary King, "The Rules of Inference," *The University of Chicago Law Review* 69(Winter 2000): 7. See also their discussion of the penchant for the overstatement of claims in law review articles (49–50).

[9] Daniel A. Farber and Suzanna Sherry, *Seeking Certainty: The Misguided Quest for Constitutional Foundationalism* (Chicago: University of Chicago Press, 2002), ix. Farber and Sherry examine the views and writings of Robert Bork, Antonin Scalia, Richard Epstein, Akhil Amar, Bruce Ackerman, and Ronald Dworkin.

[10] For the sake of full disclosure, I have published five articles in law reviews. This experience helped provide me with a fuller understanding of how the law review process works.

[11] I first advanced this argument in Robert J. Spitzer, "The Constitutionality of the Presidential Line-Item Veto," *Political Science Quarterly*, 112(Summer 1997): 261–84.

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contribute. To return to the example cited at the beginning of this Introduction, how could a law student be expected to know that "all scholars" had not, in fact, missed the truth of what the president can and cannot veto?

Further, the law review publishing realm is incomparably vast: in 2006, there were more than 1,100 law publications, meaning that a persistent author could find a publishing outlet for nearly any kind or quality of writing. And, the principles and norms of the legal profession, as taught in law schools, are markedly different from – indeed, at odds with – those of every other academic discipline: legal training (understandably and properly) emphasizes and elevates the principles that are the hallmark of American law in practice, including the adversary principle and the preeminence of client loyalty as advanced by advocacy for the client's interests, even if it results in the presentation of something less than the truth. No wonder some academic legal writing sounds more like Perry Mason's melodramatic summation to a jury than like a carefully (if tediously) phrased and parsimoniously constructed academic argument couched in qualifiers that are less dramatic but more accurate.

In the light of these traits, it is not difficult to explain the all-too-typical strident tone and basic factual lapses as a logical, even natural consequence of legal training and legal publications. If one thinks of the author of the law journal article described previously as a lawyer making a case to a jury, the sureness of tone and emphatic assertion of fact are suddenly explicable. And, the ability for an error-laced article on an important matter of constitutional law to find its way into print in a prestigious law review is also explicable given that the article was never subject to peer review by, in this case, experts on the constitutional basis of the war power. I do not mean to suggest that the system of peer review, gold standard though it is in every other academic discipline, is a perfect or foolproof system – far from it. But, it possesses the saving virtue of providing the best system yet devised to separate good, publishable research from that which is defective. That is why it continues to be used in every other academic discipline. Peer review is neither vanity nor snobbery but rather an acknowledgment that the best judges of competent work are those who already have detailed knowledge of the subject matter. The simple but incontrovertible fact is that no such expertise-based barrier exists in law publishing.

The problems I have described are by no means new, or news, to the legal community because it has engaged in much laudable examination

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of and soul-searching about the values that underlie legal education and the system of student-run law reviews that attach to virtually every law school. Yet, virtually no attention has been turned to the pivotal question of what, if anything, this means for our understanding of the Constitution and constitutional law. For law is not just a profession, like plumbing or teaching; rather, it is also an academic enterprise, with an academic literature like every other academic discipline – except that law scholarship is not like that of every other discipline. It is those differences, and their consequences for our understanding of constitutional meaning in politics and policy, that are the focal point of this book.

To be sure, the argument of this book offers a serious criticism of the constitutional writings of the legal community. But, although critical, this book is emphatically not about lawyer-bashing. The legal community and the American judicial system sustain far too many cheap shots, from scurrilous political attacks to the endless stream of lawyer jokes. Although I am not a lawyer, I revere the law and those who study and practice it. I have encouraged many of my students to attend law school to pursue this noble and necessary profession. Further, as a political scientist, I have spent much of my professional career studying aspects of the law, and I share an abiding love and respect for constitutional law, a connection underscored by the long and intimate relationship between the fields of law and political science. It is no coincidence that the foremost constitutional scholar of the first half of the twentieth century, Edward S. Corwin, was, in fact, a political scientist.[12]

The phenomenon I describe here is not the product of scheming or unscrupulous lawyers nor of any nefarious individual behavior. This is not a tale of academic fraud. Rather, it is a by-product of institutional forces shaped through the growth and maturation of American legal education spanning more than a century. The ability of institutions to shape behavior is well understood in political science, and it is a phenomenon that applies not just to the nation's governing institutions but to academic disciplines

[12] Corwin actually received his doctoral degree in history from the University of Pennsylvania in 1905, but this came at a time when political science was not yet a fully formed discipline. As a faculty member at Princeton, Corwin was a founding member of the Politics Department, of which he was the first chair and where he was later named the McCormick Professor of Jurisprudence. Political science can thus rightly claim Corwin for itself. See Glenn H. Utter and Charles Lockhart, eds., *American Political Scientists* (Westport, CT: Greenwood Press, 1993), 52.

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and professional occupations as well.[13] To state the matter differently, this is not a case of "rotten apples spoiling the barrel"; there is, instead, a problem with the barrel.

Outline of the Book

Chapter 1 describes the basic principles and tenets that compose law school education. These principles, including the adversary system, preeminent loyalty to a lawyer's client, and zealous advocacy, are well suited to the American system of justice. But, they are poorly suited to the endeavor of academic inquiry and stand in stark contrast to the principles and norms of academic inquiry as they are found in every other academic discipline. Chapter 2 examines the professional publishing realm of legal scholarship: law reviews. I first examine their history, their relationship to law as an evolving and maturing profession, and the origins and consequences of student control over these publications. When legal writing in such publications expanded beyond its traditional areas of case analysis (i.e., explication of specific court cases) and doctrinal writing (i.e., analysis of a body or doctrine of law) to encompass an ever-expanding realm of subjects and disciplines in the last several decades, it opened the door wide to the problems described in this book. Scholarship is defined not by who writes it, or whether that writing includes values or other normative concerns, but rather by the process by which it finds its way into print. In the case of law, that process is deeply flawed.

Chapters 3 through 5 examine in considerable detail three specific cases of wayward constitutional theorizing cultivated in the pages of law reviews – that is, constitutional theories that, by virtue of their law journal provenance, acquired a degree of legitimacy and respect as "scholarly" constitutional doctrine that is, I argue, unwarranted. Chapter 3 describes a constitutional theory arguing that the president possesses a constitutionally based item veto power – that is, a preexisting power to veto portions or items of legislation. This theory gained such currency that, at one point, a sitting president publicly pledged to exercise such a power, notwithstanding any ensuing litigation. Chapter 4 examines a new interpretation of the

[13] For example, former American Political Science Association president, Theodore J. Lowi, argued that "U.S. political science is itself a political phenomenon and, as such, is a product of the state." "The State in Political Science: How We Become What We Study," *American Political Science Review* 86(March 1992): 1.

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president's power as CIC as it has been expounded during the George W. Bush presidency. The provenance of this theory proves to be more complex because it arose as part of a wide-ranging and grandiose theory of executive power called the "unitary theory," which also has roots in law reviews. Chapter 5 examines a different subject, the Second Amendment's right to bear arms. In this instance, an interpretation of this right emerged in law reviews dubbed the "individualist view" in opposition to the prevailing militia-based or "collective" view that has understood the amendment's reference in the second half of the wording (i.e., the right to bear arms) in concert with the first half of the amendment's sentence referencing arms-bearing as pertaining to service in a government-organized and -regulated militia. Chapter 6 offers a brief conclusion, including a discussion of possible reforms that might ameliorate the problems described herein.

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1 . . . . . The Logic, and Illogic, of Law

"It is not what a lawyer tells me I *may* do; but what humanity, reason, and justice tell me I ought to do."

Edmund Burke, "Speech On Conciliation With America"
March 22, 1775

1. In an interview with reporters on July 25, 1989, President George H. W. Bush disclosed an eyebrow-raising decision: it was his intention, he said, to exercise a selective or item veto over some piece of legislation if the appropriate circumstance arose where he believed that some provision of an otherwise acceptable bill merited such an action.[1] This pronouncement by the first President Bush was startling for two reasons: first, no other president in American history had ever claimed to possess, much less attempted to exercise, an item veto under the terms of the veto power's description in the Constitution (although many presidents have asked that the power be given to the president); and second, no legal or constitutional change in the president's power had been made to accommodate an item veto.

2. Two weeks after the devastating attacks by terrorists against American targets, launched on September 11, 2001, the Deputy Assistant Attorney General in the Office of Legal Counsel, John Yoo, authored a lengthy memorandum in which he staked out an unprecedentedly sweeping, even grandiose definition of President George W. Bush's powers pertaining to

[1] Michael B. Rappaport, "The President's Veto and the Constitution," *Northwestern University Law Review* 87(Spring 1993): 736, note 2.

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military actions against other nations and terrorist groups. According to this analysis, the president's constitutional CIC powers were essentially unbounded; they could not, the memorandum asserted, be limited or constrained by Congress or the courts.[2] In subsequent memoranda, Yoo and others reiterated these vast power claims as the country girded for a protracted conflict with Islamist fundamentalist terrorists, and President Bush took every opportunity to embrace and extol this view of the powers of his office.

3. In March 2007, the U.S. Court of Appeals for the District of Columbia Circuit ruled, for the first time in American history, that a gun law was unconstitutional based on the Second Amendment's right to bear arms. In the case of *Parker v. District of Columbia*,[3] two members of a three-judge panel struck down a District of Columbia law barring DC residents from keeping handguns in their homes. The ruling was stunning because it contradicted four Supreme Court cases and nearly fifty lower federal court decisions spanning more than a century, all of which have concluded (or accepted the view) that the Second Amendment protects citizen gun ownership only when those citizens are serving in a government-organized and regulated militia, as the Second Amendment says. According to the *Parker* majority, the Second Amendment protects an individual's right to own guns, even for purposes that include hunting and personal self-protection.

These three seemingly disparate disputes over constitutional meaning have several traits in common. First, they all articulate what are claimed to be constitutionally based powers or rights, based on what purports to be careful scholarly research. Second, they all contradict received wisdom. Third, all of these constitutional theories were born, cultivated, and legitimated in the pages of law reviews, a venue deigned to be "scholarly" rather than political or polemical. Fourth, in each instance, the constitutional theories described reverberated beyond the academic world's narrow confines, influencing national public debate, and even public policy, on these profoundly important constitutional matters. And fifth, they are all based on constitutional and historical analysis that is – or so I argue

[2] John C. Yoo, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," Memorandum Opinion for the Deputy Counsel to the President, September 25, 2001, accessed at http://www.usdoj.olc/warpowers925.htm on September 12, 2006.

[3] 478 F.3d 370 (D.C.Cir. 2007).

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