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A Lockean Defense of the Political Question Doctrine's Application in War Powers Cases

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This article offers a Lockean natural law justification for political question doctrine, which in turn provides a clear philosophical perspective on America's war powers controversy, dispensing with constitutional arguments and replacing them with an evaluation of government's actions according to its political power. In light of Lockean concerns, the War Powers Resolution –a perennial point of disagreement between the U.S. Congress and President –is found to be redundant and counter-productive. The true test of legitimacy of a decision regarding war is responsiveness to the will of the people, a standard which also precludes the judiciary from interfering in such matters. In this way, the political question doctrine cannot be understood as a judicial check on political prerogative but a restatement of necessary abstention.

INTRODUCTION

Despite nearly two centuries of evidence to the contrary,[1] scholars seem to insist that the federal judiciary has a role to play in deciding whether and how the United States should do battle and when to bring its troops home.[2] To the perplexity and frustration of some of this view's proponents, courts traditionally have taken a rather passive stance on the war powers question.[3] Justiciability doctrines have long thwarted litigants' efforts to avoid induction into the armed

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1. For a catalogue of this evidence, *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL L. REV. 167, 176–86 (1996) (describing history of congressional and judicial reticence regarding executive decisions to commence or sustain military action). I intend neither to defend nor to attack what has been described as Professor Yoo's "plenary executive power" argument, which has received extensive criticism as influencing President George W. Bush's domestic implementation of national security measures. Rather, insomuch as Yoo's presentations of relevant war powers history appear duly supported by authority, they are useful here. *Cf.* Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1 (1999) (showing, indirectly, by independent historical account, that Yoo's view of history is well-founded); Peter Raven–Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994).

2. *See, e.g.*, Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 188–91 (1998) (arguing a "political loggerhead" in the form of a "war power disagreement between the President and Congress is properly within the realm of judicial resolution"); John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988) (proposing modifications to the War Powers Resolution, intended to make it effective, which would require court involvement); *See also* Yoo, *supra* note 1, at 171 nn.1–2 (discussing similar scholarship).

3. *See, e.g.*, Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275 (1993) (detailing district court claims asserting Vietnam War's unconstitutionality, offering protracted expression of incredulity as to courts' justiciability-based dismissals, and complaining Supreme Court's denial of review was its unexplained approval of war and endorsement of government).

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forces,[4] to enjoin the President's military orders,[5] and to contest war taxing and spending[6]—despite each claim's assertion that the military actions anticipated or then underway were "unconstitutional."[7] Among these mechanisms of judicial abstention is the political question doctrine, introduced in Part I.

As it exists today in American war powers jurisprudence, the doctrine and its application are subject to criticisms, and some of these difficulties are acknowledged in Part II. But an alternative, extraconstitutional justification can be found in John Locke's articulation of the social contract and in his presentation of the natural law principles undergirding it.[8] If he were to comment on the doctrine today, Locke would likely explain that the decision to introduce troops into hostilities, or to leave them there, presents the *premier* political question — one judges should not touch.[9] Part III presents this Lockean natural law justification.[10]

Locke's work is relevant as a matter of constitutional interpretation because it figured prominently among the political theorists with which the Framers were familiar.[11] He is unique, however, among influential social contractarians in

4. *E.g.*, *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971) (affirming dismissal of state's objection to draft on political question grounds in light of "jointly supportive actions of the two branches to whom the congeries of the war power have been committed"); *United States v. Mitchell*, 246 F. Supp. 874 (D. Conn. 1965) (holding defendant, until actually inducted into military, lacked standing to challenge constitutionality of Selective Service Act), *rev'd on other grounds*, 354 F.2d 767 (2nd Cir. 1966).

5. *E.g.*, *The Prize Cases*, 67 U.S. 635 (1863) (sustaining President Lincoln's naval blockade on alternative grounds: executive has power and discretion in national defense, and even if Lincoln exceeded his power, Congress ratified his actions by retroactive approval); *Doe v. Bush*, 323 F.3d 133, 136–37 (1st Cir. 2003) (affirming dismissal of suit by congressmen and military personnel on ripeness grounds and, alternatively, on political question grounds where resolutions contemplative of action against Iraq — and continued military funding — had "provided enough indication of congressional approval to put the question beyond the reach of judicial review"); *Orlando v. Laird*, 443 F.2d 1039 (2nd Cir. 1971) (holding soldier's suit to enjoin enforcement of his Vietnam deployment orders presented nonjusticiable political question), *cert. denied*, 404 U.S. 869 (1971); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (holding enlistee's claim nonjusticiable on political question and ripeness grounds); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissing, on ripeness grounds, suit by fifty-four members of Congress who sought to enjoin President's offensive operations in Persian Gulf).

6. *See, e.g.*, *Pietsch v. President of the United States*, 434 F.2d 861, 863 (2nd Cir. 1970), *cert. denied*, 403 U.S. 869 (1971) (dismissing, for lack of standing, taxpayer's complaint to enjoin Government's collection of surtax to be spent on "unconstitutional" war).

7. *See* Yoo, *supra* note 1, at 182 ("By relying on doctrines including political questions, ripeness, mootness, and standing, and by refusing to grant a writ of certiorari, the Court has studiously avoided becoming embroiled in war powers disputes.").

8. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (T. Hollis ed., A. Millar et al. 1764), *available at* http://files.libertyfund.org/files/222/0057_Bk.pdf. To avoid confusion, Locke's original emphases (which are abundant and not altogether helpful) have been omitted from quoted passages unless otherwise noted.

9. As explained *infra* in Part III, Locke would posit that nature renders judicial intermeddling with war decisions alarmingly unwise, and perhaps even futile in America's case.

10. For a summary of the Lockean justification, *See infra* paragraph accompanying note 11.

11. Clearly there are numerous other political theorists — some Locke's contemporaries and others not — whose works are relevant and would add complexity to this discussion. *See* 2 JULIUS GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 431 (1969) ("American lawyers were conversant with writings on international law from Grotius to Vattel and with a variety of opera on natural law much cited in the polemics on the eve of the Revolution."). But a comparative analysis of the influence of various writers on the Framers is not necessary to the model of posthumous doctrinal justification that I have attempted to implement here. It is sufficient for present purposes that Locke was among the sources consulted by the relevant minds. *See* Louis Fisher, *The Unitary Executive And Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 569–70 (2010) (describing Locke as providing one of the "strong executive models" from which the Framers could have chosen); Ronald

that his account most plainly presents a dependent relationship between certain fundamental assumptions underlying the social contract (which I will describe) and the *legitimacy* of the resulting government. Hobbes, for example, cannot provide this thrust because his political theory forecloses dethronement of the ever-legitimate sovereign.[12] And for Rousseau, war is purely governmental — one of the fruits of societal encroachment on his rather idyllic state of nature.[13] Thus Rousseau's version of the social contract does not emphasize natural man's assumptions about war powers as much as Locke's.[14]

This article explores how Locke might criticize judicial tampering with military operations as a betrayal of the expectations implicit in our decision to relinquish certain powers to the commonwealth, and thus a breach of the social contract. His conception of natural law and social contract offers a defense for the pattern of judicial restraint in America's war cases via the political question doctrine.[15] It may also provide a deeper explanation of contemporary congressional inaction in the context of war.

I. Developmental and Modern Understandings

The political question doctrine, as invoked today, owes its phraseology to the ineffable creativity of Justice Brennan, who in *Baker v. Carr* advised against

J. Krotoszynski, *The Shot (Not) Heard "Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. Rev. 1, 15 (2010) (explaining that the Framers' thinking on "institutional incentives to resist encroachments against one branch by the other branches of the federal government . . . was undoubtedly influenced significantly by the writings of Enlightenment political philosophers who strongly advocated the separation of legislative, executive, and judicial powers, such as John Locke and Montesquieu"); John Yoo, *Unitary, Executive, or Both?*, 76 U. Chi. L. Rev. 1935, 1984 (2009) ("Political theory developed by thinkers such as John Locke, Baron de Montesquieu, and William Blackstone, as well as Anglo-American constitutional history from the seventeenth century to the time of the framing, established that foreign affairs was the province of the executive branch of government."); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 12 U. Pa. J. Const. L. 609, 616 (2000) ("While it is generally accepted that the work of the Framers was influenced by the writings of many political theorists, including Montesquieu, Hume, Harrington, among others, it was John Locke whose ideas formed the core ideological foundation of the new American nation." (Footnotes omitted)); *See also infra* note 12.

12. *See* Kristen D.A. Carpenter, *Promise Enforcement in Public Housing: Lessons from Rousseau and Hundertwasser*, 76 Tul. L. Rev. 1073, 1076 n.7 (2002) (stating that "unlike Locke and Rousseau's models, the sovereign [in the Hobbesian model] remains outside the [social] contract and thus definitionally cannot be unjust").

13. *See* Jean-Jacques Rousseau, The Social Contract and Discourses 11 (G.D.H. Cole ed. & trans., J.M. Dent & Sons 1923), *available at* http://files.libertyfund.org/files/638/0132_Bk.pdf (arguing war is purely societal—the endeavor of governments, not individuals in nature).

14. Unlike Rousseau, both Locke and Hobbes posited a natural state from which individuals were given strong reasons to ascend. But unlike Hobbes, who believed that the sovereign could do no wrong, Locke made ample provision for rebellion.

15. *See* William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 Notre Dame L. Rev. 1365, 1442–44 (2004) (observing that "the judicial branch has largely abstained from the inter-branch war power fray on political question grounds," and that this fact, given a 'sustained pattern of executive practice and congressional acquiescence," has had the effect of imbuing the president with "a significant and exclusive measure of power to employ military force, even absent any congressional declaration of war or statutory authorization").

resolving cases presenting "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving" that issue.[16] The *Baker* Court actually held the plaintiff's legislative mal-apportionment claim against his state to be justiciable, but nevertheless used the opportunity to define the doctrine with more loquacity than had previous Justices.[17] Indeed, prior to *Baker*, the doctrine's meaning and scope were disputed. Some scholars had described proper application of the doctrine as an act of mere constitutional interpretation and adherence, and *not* one of discretion or juridical prudence.[18] Others were more pragmatic, viewing the doctrine as stemming from prudential concerns such as the unpredictability of results and the political unaccountability of judges.[19]

While Justice Brennan's prolific paragraph gave a nod to both textual *and* prudential grounds for the political question doctrine,[20] the prevailing justification for its application in war powers decisions is focused on constitutional text.[21] The Constitution grants Congress, among other powers, the power to declare war,[22] raise and support armies,[23] and to provide and maintain a navy.[24] The President is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"[25] and is vested with "the executive Power"[26] and a duty to "take Care

16. 369 U.S. 186, 217 (1962). Justification for applying the doctrine also appears to exist when it becomes impossible for courts to decide the issue without "an initial policy determination of a kind clearly for non-judicial discretion;" where a court cannot undertake "independent resolution" of the issue "without expressing a lack of the respect due coordinate political branches of government;" and where there is "an unusual need for unquestioning adherence to a political decision already made" or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

17. Justice Frankfurter, for one, had described redistricting claims as drawing courts into a "political thicket" that courts ought not enter, lest such tampering "cut very deep into the very being of Congress." *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

18. *E.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959). A possible extension of Wechsler's theory would suggest that judges in the Vietnam war context, for example, should be seen as having dutifully complied with the Constitution rather than as having abused their "discretion" to withhold judgment in foreign affairs matters.

19. *E.g.*, Alexander Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961). For Bickel, the basis of the doctrine centered on "the court's sense of *lack of capacity*, compounded. . . [by] the inner vulnerability of an institution which is *electorally irresponsible* and has no earth to draw strength from." *Id.* (emphases added). Since Bickel's rationalization of the doctrine properly acknowledges the profound disconnect between the people and the judiciary, his understanding represents a closer match to the natural law justification discussed herein.

20. The "prudential" grounds are those described *supra* in note 19.

21. *See, e.g.*, *Massachusetts v. Laird*, 451 F.2d 26, 31 (1st Cir. 1971). The court found a political question, but believed it was "important to rule as a matter of *constitutional interpretation* if at all possible," and so rejected "pragmatic, if realistic, considerations." *Id.* (emphasis added). Citing the Supreme Court, the court decided to give "dominant consideration to the first decisional factor" in *Baker*, namely: whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department of government. *Id.* (quoting *Powell v. McCormack*, 395 U.S. 486, 521 (1969)).

22. U.S. CONST. art. I, § 8, cl. 11.

23. *Id.* at cl. 12.

24. *Id.* at cl. 13.

25. *Id.* at art. II, § 2, cl. 1.

26. *Id.* at § 1, cl. 1.

that the Laws be faithfully executed."[27] Courts read this textual configuration as "giving some essential powers to Congress and others to the executive," thus committing war issues "to both [political] branches, whose *joint concord* precludes the judiciary from measuring a specific executive action against any specific clause in isolation."[28] And because a "joint concord" exists even absent a declaration so long as Congress funds the war and the President wages it, the courts step aside.[29] In such cases, no Article III "case" or "controversy" exists for the judiciary to resolve.

II. Doctrinal Shortcomings

The traditional political question doctrine rubric, as shown by its application during and following the Vietnam War, has proven misleading and largely incomplete. Its prominence during that war inspired scholarly criticisms of all three governmental branches[30] as well as congressional responses to the doctrine.[31] Encouraged by suggestions that a political question defect might be overcome if a war effort was determined not to be the product of a "joint concord"[32] or "mutual participation"[33] by Congress and the President, litigants strove to locate a conflict between those political branches that might render justiciable their claims that the war was unconstitutional.[34] Tantalized by the possibility that prudential grounds for the doctrine might be set aside in grave enough circumstances, scholars insisted judicial intervention was necessary to "restore the effectiveness of the responsible political branch."[35] And, perhaps hoodwinked into believing war questions might

27. *Id.* at § 3, cl. 4.

28. *Massachusetts v. Laird*, 451 F.2d 26, 33 (1st Cir. 1971) (emphasis added). But neither a "joint concord" between the branches, nor the practical inevitability of courts' willingness to find a congressional declaration of war in many forms, are what *make* the question non-justiciable. Rather, the prohibition against unelected judges deciding war issues is instead a necessary result of the United States operating to exercise its political power within the limits of that power. *See infra* Part III.

29. *See, e.g., Massachusetts v. Laird*, 452 F.2d at 34; *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003); Bradford, *supra* note 15, at 1444.

30. *See* Yoo, *supra* note 1, at 171 n.2 (citing a litany of such Vietnam-era criticisms).

31. Perhaps most notable among such reactions is the War Powers Resolution, Pub. L. No. 93148 (1973) (codified at 50 U.S.C. §§ 1541–48 (2006)).

32. *Massachusetts v. Laird*, 451 F.2d at 33.

33. *Orlando v. Laird*, 443 F.2d 1039, 1042 (2nd Cir. 1971).

34. *See generally* Schoen, *supra* note 3. (briefing dozens of case examples); *See also* Yoo, *supra* note 1,, at 186–88 (commenting on war cases decided during the presidential administrations of Ronald Reagan and George Bush). Noteworthy also, though written several years after the end of the Vietnam conflict, is Justice Powell's concurring opinion in *Goldwater v. Carter*, which illustrates the pervasiveness of the idea that a political question would become justiciable if only Congress and the President reach a constitutional "impasse." 444 U.S. 996, 997–1002 (1979). But such a conflict cannot exist unless the President locks horns with a *majority* of both Houses of Congress, and in such an event, veto override (or, if necessary, the impeachment power) may be available to solve the dispute. And of course, even if a veto-proof majority is *not* available, the issue is still resolved—but in favor of the executive. *See Id.* at 997–98; Ely, *supra* note 2, at 1411 n.91.

35. Warren F. Schwartz & Wayne McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 Tex. L. Rev. 1033, 1047 (1968). Schwartz and a law review staff member collaborated to announce that waging war without court oversight "circumvent[s] the very political process that the [Framers] intended as a check on the President's power to commit American forces to combat." *Id.* But as explained *infra* in the discussion accompanying notes 36,–28, judicial interference with the actions or inactions of the people's

become justiciable if it could but provide courts a "judicially discoverable and manageable standard,"[36] Congress fashioned the War Powers Resolution.[37]

These efforts have been punctuated by disappointment, and this may have something to do with the fact that the political question doctrine as incanted since *Baker* rests on shaky footing. As Professor Henkin's unique argument points out, the doctrine's precedential underpinnings are unstable.[38] Examining the decisional tributaries of the *Baker* touchstone, Henkin finds that although the political question doctrine was not developed through cases calling for "extra-ordinary abstention," courts seem to invoke it to exercise abstention without ever questioning whether the case resembles precedent that would advise *against* a wholesale abandonment of the issue, in other words, courts using the doctrine today are more deferential than were the courts producing the opinions upon which the doctrine is based.[39] Under Henkin's analysis, the *Baker*-inspired categorical model of the doctrine would appear a departure from its jurisprudential moorings, rendering "ordinary" what was once "extra-ordinary" restraint.[40] Moreover, the modern doctrine's apparently convenient phraseology encourages courts to neglect other means by which to avoid improper incursion of the political branches by the judiciary, such as limiting relief to a declaratory judgment rather than issuing injunctions that those branches might not obey.[41]

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elected representatives, be they cowards or cavaliers, is *the principle* way to "circumvent" the political process. Moreover, that process is not merely a "check" on the President or Congress; it is the very wellspring of those branches' legitimacy. Schwartz thoroughly misunderstood representative democracy, a staple of which is that the "*effectiveness* of the responsible political branch" can be "restored" only by the people's election of *more effective* officials.

36. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). Despite war-making decisions being committed to coordinate political departments, some judges appear to have held the self-empowering belief that because the Constitution authorizes Congress to "declare" war, it provides a judicially manageable standard. *E.g.*, *Orlando*, 443 F.2d at 1042 ("[T]he war-declaring power . . . contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war."). But *what*, exactly, are the courts actually equipped to assess by virtue of such a "standard?" The only evaluation conceivable under this "standard" should be deciding whether a declaration has taken place—but then what? Even Congress recognized the futility of this reasoning, and enacted the War Powers Resolution in an attempt to fill this gap, trying to make a "manageable" standard become a meaningful one at last. *See infra* discussion accompanying notes 38–12.

37. War Powers Resolution, Pub. L. No. 93148 (1973) (codified at 50 U.S.C. §§ 1541–48 (2006)).

38. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 607–22 (1976) (analyzing relevant Supreme Court precedent and finding modern *Baker* version of political question doctrine to be "an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts").

39. *Id.* at 600–01 (observing that "cases which are supposed to have established the political question doctrine required no . . . extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain").

40. *Id.* Professor Henkin would appear to consider war powers issues justiciable, at a minimum, since they are not cast by precedent into a class of disputes requiring extraordinary abstention. *See Id.* at 624.

41. *See Id.* at 617–24. Said Henkin, "I do not exclude that wisdom might sometimes advise the courts to stay their hand. They can usually do that where necessary, I believe, *within the context of judicial review*, by invoking established principles permitting a court to withhold relief for "want of equity." *Id.* at 617. As suggested *infra* in Part III, Henkin's appreciation of abstention precepts *not* centered around the political question doctrine supports an argument that judicial passiveness in war powers quandaries is underlain by *more* than just a doctrine produced by precedent and constitutional interpretation. What ought to be seen as lying at the core of such juridical reservation is an institutional sensitivity to the rights and duties of the political branches under the authority vested in them by the people.

Particularly in light of the current doctrine's arguably crude craftsmanship and the unhappy confusion[42] created by its liberal and indiscriminate application, it stands in need of defense. If he could survey the doctrine today, John Locke would likely explain that it is natural law[43] — and not doctrinal sleight of hand — that forbids unelected judicial branch from answering the nation's war questions. In fact, he might argue that judicial reliance on the political question doctrine in war powers cases has produced the right result, but for reasons different from those he would articulate.

III. A Lockean Appreciation for the Political Question

Justice Brennan, of course, was not the first jurist to acknowledge political questions. Not long after the ink on the Constitution had dried, Chief Justice John Marshall made an illuminating distinction: "Questions in their nature political, *or* which are, by the constitution and laws, submitted to [a political branch], can never be made in this court."[44] This statement would appear to recognize that while some issues are *made* nonjusticiable by positive law, others are that way naturally. John Locke's thinking on natural law provides confirmation for, and perhaps guided,[45] the Chief Justice's thinking. The Framers themselves were certainly not ignorant of such ideas.[46] The revolution-enabling ethos of Locke accommodated nationalistic claims more readily than illiberal Hobbesian rhetoric or the "pre-liberal doctrines" of Grotius,[47] and Locke's work was at least as popular with the architects of the fledgling United States government as with the Whigs plotting against King James II.[48]

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42. *See Id.* at 623.

43. As used herein, the term "natural law" or "natural law principles" comprises (1) the unwritten rules by which individuals operate in the state of nature, (2) these individuals' natural purpose in creating a commonwealth, and (3) superimposition of these rules and purposes against a commonwealth to evaluate its legitimacy as such—all as principally spelled out by John Locke. *See infra* Part III.

44. *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (emphasis added).

45. *See* Arthur E. Wilmarth, *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 Geo. Wash. L. Rev. 113, 116–17, 119 (2008) (describing Locke's heavy influence on Justice James Wilson, who was one of Marshall's predecessors, and stating that Marshall himself "echoed the Revolutionary generation's reliance on the social contract theory of John Locke" on certain questions); John C. Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 Yale L.J. 1607, 1614–15 (1992) (noting how Marshall's contemporaries on the Court disagreed over the role of natural law in statutory construction).

46. *See* Yoo, *supra* note 1, at 199. "As the Framers sought to establish the separation of powers in the federal Constitution, it was only natural that they referred to the political theorists of their day," and Locke was certainly among these. *Id.*; *See also* W.H. Bond, Thomas Hollis of Lincoln's Inn: A Whig and His Books (Cambridge University Press 1990). Bond describes, among other things, Hollis's involvement in distributing the writings of Locke to those who would become the Framers of the Constitution. *Id.*; *See also infra* note 47. Not incidentally, it is to Hollis's 1764 edition of Locke's treatises that I have cited throughout this discussion.

47. Jeremy Rabkin, *Grotius, Vattel, and Locke: An Older View of Liberalism and Nationality*, 59 Rev. Pol. 293, 293 (1997) (providing the relevant comparison); *See also* Hans Kohn & Craig J. Calhoun, The Idea of Nationalism: A Study in Its Origins and Background 180 (2005) (describing Locke's influence on English thought and American nationalism as "infinitely deeper" than that of Hobbes).

48. *See* Ronald Hamowy, The Encyclopedia of Libertarianism 542–43 (2008) (describing Locke's ideas and their centrality to Whig ideology during the Glorious Revolution); 2 Thomas Babington Macaulay, The History of England from the Accession of James II 481–82 (J.B. Lippencott & Co. 1881) (noting the role of

The Lockean natural law justification for the political question result[49] can be summarized as follows: individuals in the state of nature, each having full autonomy and unbounded power to secure their lives and substance by force, relinquish that power to society, trusting its strength to better secure their lives, liberties and properties. Because of the character of people's power in the state of nature and their purpose in ceding that power to society, their government's legitimacy — or political power — and its war power are interdependent.[50] Thus, the decision to wage war, *in its very nature*, is a political one, and those who control it must be at all times beholden to the majority. To the extent any force insulates those in government who wield the war power against those who supply it,[51] or frustrates the unitary execution of that power,[52] that government is illegitimated. By invoking the political question doctrine in war powers disputes, federal judges properly avoid compromising the government's political power.[53]

So first, the rudiments of civil society bear discussion. With these fundamentals in place, I then address how Locke might define political power, what he would recognize as its source, and the form and function of government required to sustain that power. Finally, proceeding upon the argument that a government must act within the scope of its political power, I discuss the behavior of the three branches in the context of war powers. This exercise reveals that Locke would view the political question result as the sensitivity of the American form of government (whether innate, learned, or bitter) to the natural boundaries within which it may operate legitimately.[54]

A. Locke's Fundamentals

> To understand political power right, and derive it from its origin[], we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature,

social contract theory in the Whig plan); *cf.* RALPH BARTON PERRY, SHALL NOT PERISH FROM THE EARTH 41 (1940) (describing Locke as "America's philosopher par excellence — the most widely read and the most influential").

49. This "result" is the regular juridical implementation of the political question doctrine to render war powers controversies non-justiciable.

50. Political power, in the Lockean sense, is summarily defined *infra* in the paragraph accompanying notes 54.

51. The indispensability of the majority is discussed *infra* in the text accompanying notes 54.

52. Locke's requirement of a unitary executive power is explained *infra* in the discussion accompanying notes 54.

53. *Cf. infra* text accompanying notes 54, –35.

54. Whether these boundaries are *constitutional* ones is altogether another issue that, in light of American history, seems to have been answered in the affirmative by a number of presidential administrations (including that of George W. Bush), notwithstanding the volumes of scholarship contending either side of the question. *See generally* John C. Yoo, Memorandum Opinion for the Deputy Counsel to the President, Office of Legal Counsel, U.S. Dept. of Justice, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925/htm (reviewing history of what appears to be an unbridled war power in the President).

without asking leave, or depending upon the will of any other man.[55]

Thus, to come to the meaning of things political,[56] and thence to the meaning of political power, we first consider Locke's perception of the state of nature, with special focus on the basic character of man's powers in such a state.[57] Men are born into nature with a "title to perfect freedom," having an "uncontrolled enjoyment of all the rights and privileges of the law of nature."[58] The first of these rights, or "powers," is a profound *autonomy*—man's power "to do whatever he thinks fit for the preservation of himself."[59] So each one must act as "judge for himself."[60] He is "equal to the greatest, and subject to no body."[61] The second right is his power to *execute* the laws of nature and to "punish the crimes committed against that law."[62]

A crucial point for Locke is that man's natural powers are not corporate; they can only be exercised according to the control of a single mind in a single instant. Suppose Adam, a starving man in the state of nature, being always robbed of his food by Brutus (a rogue of superior size and strength), plots to prevent further harassment by killing this thief in his sleep. Though others may counsel Adam against the act, *he alone* is judge under the laws of nature[63] as he stands over his sleeping foe with knife in hand. He alone decides whether he will, by cutting Brutus's throat, execute *his* judgment.

Having such broad power in nature, why does man decide to enter civil society? As Locke answers quite simply, "in the state of nature there are many things wanting."[64] Three of nature's principal "defects"[65] are its lack of settled law

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55. LOCKE, *supra* note 8, at 195.

56. "Politics," incidentally, has been defined as the 'science of the organization and administration of the state." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004). To the extent this definition conveys the importance of the concerns at issue during the people's "organization" of their government (that is, in a raw, *formative* sense) to the word's meaning, it is useful. For purposes of this discussion, I define "political" as an adjective describing those issues or powers of elected government that, unless resolved or exercised (respectively) by representatives immediately accountable to the electorate, fall outside the boundaries of that government's legitimacy. The decision to commit troops to battle or otherwise provide for societal defense is thus *the* preeminent "political" issue.

57. I say "man" because just as Locke has made no attempt to use "gender-neutral" words, neither have I, for simplicity's sake.

58. LOCKE, *supra* note 8, at 269.

59. *Id.* at 308.

60. *Id.* at 270.

61. *Id.* at 305.

62. *Id.* at 200, 203. "The state of nature has a law of nature to govern it, which is that law [that] teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions." *Id.* at 197. And so that "the law of nature [may] be observed, which willeth the peace and *preservation of all mankind*, the *execution* of the law of nature is, in that state [of nature] put into every man's hands . . . ." *Id.* (Locke's emphases).

63. *Id.* at 270. "[E]ach transgression [of the laws of nature] may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like." *Id.* at 203. As Adam is being starved to death by Brutus's thievery, punishment by death may fit the crime—and apparently, in Adam's judgment, it does.

64. *Id.* at 306.

65. *See Id.* at 310.

for resolution of disputes, the unavailability of impartial judges, and the absence of an enforcer of rights — or a "power to back and support the sentence when right, and to give it due execution."[66] In our hypothetical,[67] Adam now fears and must prepare for retaliation by Brutus's allies,[68] who are not at all concerned with whether Adam was just "getting even."[69] This arrangement places Adam's life and property in perpetual jeopardy, subjecting him to a state of war, so that he seeks a safer alternative: civil society.[70]

B. Political Power: The Form and Function of Security

> Political power is that power, which every man having in the state of nature, has given up into the hands of the society . . . with this express or tacit trust, that it shall be employed for their good, and the preservation of their [lives, liberties, and estates] . . . . And this power has its origin[] only from *compact and agreement*, and the *mutual consent* of those who make up the community.[71]

When man "puts on the bonds of civil society,"[72] he cedes to that society both his autonomy[73] and his power to execute natural law.[74] Essentially, he gives up his right to wage private war.[75] The social contract[76] is struck when others relinquish the same powers, each consenting[77] "to join and unite into a community, for their comfortable, safe, and *peaceable* living one amongst another, in a *secure*

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66. *Id.* at 306–07. The persistence of the last of these three defects, Locke suggests, would make fruitless the remedying of the first two. Laws and judges are, of course, of little use absent "power to back and support the sentence when right, and to give it due execution." *See Id.*

67. *Supra* paragraph accompanying note 66..

68. Perhaps such allies were those with whom Brutus shared spoils of his thievery, or who paid him to raid Adam's supply.

69. *Id.* at 334. Use of force "always puts him that uses it into a state of war, as the aggressor, and renders him liable to be treated accordingly." *Id.* Locke acknowledges as a "great law of nature" this maxim: "Whoso sheddeth man's blood, by man shall his blood be shed." *Id.* at 202 (quoting *Genesis* 9:6 (King James)).

70. *See Id.* at 206–12. "To avoid this state of war . . . is one great reason of men's putting themselves into society." *Id.* at 211. *But see* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 11 (G.D.H. Cole ed. & trans., J.M. Dent & Sons 1923), *available at* http://files.libertyfund.org/files/638/0132_Bk.pdf (arguing war is purely societal—the endeavor of governments, not individuals in nature).

71. LOCKE, *supra* note 8, at 349–50 (emphases added). The bracketed language in the quotation in the text replaces the word "property," as Locke's meaning of the word is more comprehensive than our own: "[L]ives, liberties, and estates ... I call by the general name, property." *Id.* at 306.

72. *Id.* at 279.

73. *Id.* at 309. The natural man gives up this powerful autonomy knowing that it will be "regulated by laws made by the society ... which confine the liberty he had by the law of nature." *Id.*

74. *Id.*

75. *See Id.* at 270–71. Man's exercise of his right in nature to use force in self-preservation constitutes the "prosecution of his own private judgment." *Id.* But use of "force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war." *Id.* at 209. Man cannot wage this warfare in civil society: he has "quitted his power" to society "for the execution of the judgments of the *common-wealth*." *Id.* (emphasis added); *See also Id.* at 206–12.

76. *See generally* ROUSSEAU, *supra* note 13 (coining the term 'social contract").

77. LOCKE, *supra* note 8, at 353 (explaining that civil society cannot rise unless "founded on . . . the *consent* of the people").

enjoyment of their properties, and a greater *security* against any that are not of it."[78] A government that does *not* provide for its people's security fails to perform its duty under the social contract.[79] Security requires a particular governmental *form* and *function.*

Given man's status in nature and his purpose in removing himself from that state, both the form and function of the resulting government must enable it to compensate for each of the defects in the state of nature.[80] This requires that its form is majoritarian, and that its function is unitary. Locke makes this clear, stating that a legitimate government must be as "one body, *with a power to act as one body*, which is only by the will and determination of the *majority*."[81] (The fact that Locke had kings in mind when he said this, rather than an elected executive, can be seen as a product of the context within which he was writing; it does not prevent the application of his ideology to a debate arising from American constitutional law.)

Remedying nature's defects requires that the government act as supreme lawmaker, and this by the will of the majority. The legislative is superior among all government powers, but only because its laws embody the "public will;"[82] that is, "the judgments of the common-wealth."[83] Provided the legislative is immediately responsible to the people,[84] its *form* may vary — but its *function* must tend always to the *preservation* of society.[85] Interference with this legislative function, or alteration of legislative form so that it is not accountable to the people regarding their defense, dissolves civil society.[86]

But government must also provide a supreme executor of laws, and this power must be unitary as concerns the protective use of force.[87] Warfare "admits not a

78. *Id.* at 279 (emphases added).

79. *See Id.* at 269 ("[N]o political society can be, nor subsist, without having in itself the power to preserve the property.").

80. *Cf. supra* text accompanying notes Error! Bookmark not defined.(listing defects).

81. LOCKE, *supra* note 8, at 280 (emphases added). Majority rule is the mechanism by which the "mutual consent" of the people entrusts their executive power of the law of nature to society. *See Id.* at 349–50.

82. *See Id.* at 331.

83. *Id.* at 271. Man gives up his executive power of the law of nature with the understanding that "the judgments of the common-wealth . . . indeed are *his own* judgments, they being made by himself, or his representative." *Id.* The people's link to the legislative is for this reason essential to the government's political power.

84. It is critical to a government's legitimacy that the legislative be "only a fiduciary power to act for certain ends." *Id.* at 328. Those "ends," as I have shown, are public preservation. *Id.* at 329. Thus, the people must always hold the 'supreme power to remove or alter the legislative . . . whenever that end is manifestly neglected, *or opposed.*" *See Id.* at 328 (emphasis added). That end is necessarily "opposed" when the legislative is unlinked from public accountability, as an insular legislative becomes free to shirk its security duties. In such an event, the government's political power ceases to exist, as the "[public] trust must necessarily be forfeited, and power devolve into the hands of those that gave it, who may place it anew where they shall think best *for their safety and security.*" *Id.* (emphasis added).

85. *See Id.* at 305–10.

86. *See Id.* at 388 (explaining a dissolution of government is achieved by action that "in effect takes away the legislative").

87. *See Id.* at 327.

plurality of governors."[88] The *function* of executing the collective judgment of the majority is distinct from that of the legislative, but its *form* is still a product of laws — and therefore a product of the will of the majority. But because man, in giving up his own right to execute the laws of nature, "has given a right to the common-wealth to employ *his force*" in executing the laws,[89] the power of the executive must be as effective as that which the man relinquished — it must be capable of exercise by a single, supreme will, not a "plurality."

> War and peace cannot be made for politic societies, [except] by the *supreme power* of such societies; because war and peace, giving a different motion to the force of such a politic body, *none can make war or peace, but that which has the direction of the force of the whole body*, and that in politic societies is only the supreme power.[90]

Society must be able to execute its judgments just as Adam did; as one body.[91] Otherwise, its power and function as protector of the public security is ineffectual. Locke made this very clear in recognizing the need for a single mind to control both the executive power and the federative power,[92] which "contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities *without* the common-wealth."[93] The "management of the security and interest of the public" in foreign affairs does not lend itself "to be[ing] directed

88. *Id.* at 291. The Framers were keenly aware that "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a *single hand.*" THE FEDERALIST NO. 74, at 385 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (emphasis added), *available at* http://files.libertyfund.org/files/788/0084_LFeBk.pdf. "The direction of war, implies the direction of the common strength: and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority." *Id.* Hamilton appears to have been reading right out of Locke's playbook. *Compare Id.* ("direction of the common strength"), *with* LOCKE, *supra* note 8, at 152 ("direction of the force of the whole body").

89. *Id.* at 271 (emphasis added). In our system, man provides "his force" when he is drafted into or otherwise joins the military. This burden of *individual* force being necessary for governmental exercise of power is most keenly realized in a draft scenario.

90. *Id.* at 152.

91. *Id.* at 280.

92. It seems to have been self-evident to Locke that natural law requires that the force underlying society's security and defining its identity among other commonwealths be entrusted to a *unitary exercise* of political power, notwithstanding that power's having its origin in majoritarian means:

> Though the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated, and placed at the same time, in the hands of distinct persons: for both of them requiring the force of society for their exercise, it is almost impracticable to place the force of the common-wealth in distinct, and not subordinate hands; or that the executive and federative power should be placed in persons, that might act separately, whereby the force of the public would be under different commands: which would be apt some time or other to cause disorder and ruin.

Id. at 327. Indeed, history appears to have proven Locke correct regarding the potential for "disorder and ruin." *See, e.g.*, J. Terry Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME L. 187, 204–07 (1975) (relating a number of disastrous consequences resulting from Articles of Confederation allowing the Continental Congress "to dangerously interfere with the conduct and planning of military affairs during the Revolution").

93. LOCKE, *supra* note 8, at 325–26 (emphasis added). This should be understood as equivalent to a "foreign relations" power.

by antecedent, standing, positive laws," but is principally subject to natural law, which requires unitary execution.[94]

The foregoing principles support an amplified definition of what Locke described as "political power."[95] Political power is a government's authority to preserve its people's lives, liberties and properties by the unitary execution[96] of their collective judgment[97] by force, and it arises and is sustained by the people's cession of their power (of autonomy in self-preservation) to society for regulation and exercise by governors subject to removal by the people. Thus, political power and the power to wage war are inexorably codependent. It seems fair, then, to conclude that political power is both the source and the outer perimeter of a government's legitimacy.

C. Realizing Responsibility

The Lockean natural law justification for the political question doctrine offers a new perspective on America's war powers controversy,[98] dispensing with constitutional arguments and replacing them with evaluation of the government's actions according to its political power.[99] The preceding discussion presented what are essentially the two key principles underlying this justification. First, since government cannot exercise any power not *given* it by the people of which it is comprised,[100] and because these can cede no more than they hold, the substance of man's natural rights and privileges delimits the scope of a legitimate government's authority. Second, since all commonwealths "are in the state of nature one with another"[101] (that is to say, a society as an *entity* must relate to other societies as men relate to one another in nature, each their own judge and protector), the manner in which a government proceeds to exercise its authority must resemble that of a man in nature, whose defenses founder and whose sustenance fails absent effective execution of his rightful powers.

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94. *Id.* at 326; *See also* Yoo, *supra* note 1, at 199–200.

95. Compare the definition in this paragraph with the language given *supra* in the text accompanying note 71.

96. *See supra* text accompanying notes 87–94 for an explanation of why the executive must be "unitary" in its function.

97. The "majoritarian" legislative is discussed *supra* in the text accompanying notes 81–86.

98. This discussion's underlying Lockean theoretical framework is of ancient vintage. Yet it serves to put "new" meat on the war powers debate, which has become so purely academic that it is little more than a bone fought over and gnawed on by scholars. I have tried to give it nutritional value. *See supra* text accompanying notes 42–43.

99. War powers debates of the constitutional, textual variety boil down to justiciability arguments. No academic explanation of the relevant constitutional provisions seems to be of any consequence if courts ultimately are powerless (or unwilling) to hold the government to their pronouncements.

100. *See infra* note 84 and accompanying text.

101. LOCKE, *supra* note 8, at 361; *See also* Pasquale Pasquino, *Locke on King's Prerogative*, POL. THEORY, April 1998, at 198, 204 ("[T]he irreducible plurality of political communities . . . leaves each community in the state of nature"); *cf.* THOMAS HOBBES, LEVIATHAN 264 (Aloysius Martinich ed., Broadview Press, 2002) (1651) ("[T]he law of nations and the law of nature is the same thing. And every sovereign hath the same right in procuring the safety of his people that any particular man can have in procuring the safety of his own body.").

Under the Lockean natural law lens, a government "by the people, [and] for the people"[102] (to borrow Lincoln's characterization) may exercise its war powers legitimately only under the exclusive scrutiny of the "great tribunal of the American people."[103] The appropriateness of focusing the war powers debate on Locke's notions of political power is made manifest not only by the panoply of justiciability mechanisms by which courts have refused the issue,[104] but more dramatically by the political branches' healthy appetite for control — and their distaste for public accountability—in war matters.[105]

For example, the Lockean claim as to the immutably political nature of war appears corroborated by what might be described as Congress's "political cowardice" in the warfare context.[106] A glance at the War Powers Resolution[107] shows how "politically toxic" war decisions are[108] and how "disorder and ruin" could result from the administering of any antidote (including judicial intervention) that would create a disjuncture between the people and the elected branches in matters of war.[109] The War Powers Resolution aims to create a standard by which courts may judge whether Congress has declared war, authorized it, or "mutually participated"[110] in the decision to wage it, and purports to forbid such authority being "inferred"[111] from any provision of law that does not 'specifically authoriz[e] the introduction of United States Armed Forces."[112]

Professor Ely believes that Congress had "decided it could not count on itself to decide [war] issues unless forced to," and that the War Powers Resolution "was designed to exert such force."[113] This is inconsistent with the resolution's own

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102. *See* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

103. Abraham Lincoln, First Inaugural Address, at ¶ 31 (Mar. 4, 1861), reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 10110 (1989) [hereinafter Lincoln Inaugural].

104. *See* Yoo, *supra* note 1, at 182.

105. I use "healthy" as advised by THE FEDERALIST NO. 51, *supra* note 83, at 268 (Alexander Hamilton). "Ambition must be made to counteract ambition" to keep war decisions within the scope of the government's political power. *Id.* The Framers expected war powers to take center stage whenever the elected branches competed for political supremacy; that is, they *intended* the issue to be volatile enough to provide the branches with fodder against each other in the event either imprudently handled their war powers. *Id.*

106. *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (coining the quoted phrase). Assuming a congressional majority really *does* oppose a particular war decision by the President, Congress's failure to decide political questions like these—in light of its purse-based checking power—suggests either an "inability to agree upon how to alter the status quo . . . or . . . *political cowardice.*" *Id.* (emphasis added).

107. 50 U.S.C. §§ 1541–48 (2006). For a more detailed discussion of the War Powers Resolution's text and a Vietnam-era analysis of its provisions, *See* Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975). Additionally, while the War Powers Resolution's constitutionality is still an open question, it is one I do not address. For that discussion, read Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984).

108. Aaron Nielson, *An Indirect Argument for Limiting Presidential Power*, 30 HARV. J.L. & PUB. POL'Y 727, 728 (2007) (reviewing JOHN C. YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005), and finding fault).

109. LOCKE, *supra* note 47, at 327.

110. *See Orlando v. Laird*, 443 F.2d 1039, 1042 (2nd Cir. 1971).

111. 50 U.S.C. § 1547(a) (2006).

112. *See Id.* §§ 5, 8(a)(1).

113. Ely, *supra* note 2, at 1379–80. Ely is wrong, of course, in claiming it is Congress's duty to decide "whether to commit American troops to combat." The Framers were clear: what Congress properly decides is

proclamation that "[f]orces engaged in hostilities . . . without a declaration of war or specific statutory authorization . . . shall be removed by the President *if the Congress so directs* by concurrent resolution."[114] A concurrent resolution, of course, requires majorities.[115]

But even assuming Ely is right, why would Congress think itself so undependable? If the War Powers Resolution was indeed Congress's attempt to render war powers cases justiciable so as to "exert [a] force" on itself, it has failed.[116] It succeeded only in revealing Congress's awareness of the restrictions on its political power, its sensitivity to public criticism of its war decisions, and its eagerness to avoid both stimuli through abdication in the guise of responsibility.

Though the ineffectiveness of its provisions is likely the result of a lack of political consensus,[117] Locke would label the War Powers Resolution a natural law faux pas that may be translated as Congress's willingness to gamble with the people's security and the lives of troops in order to protect its members' political careers.[118] If America's security is truly jeopardized by a war, it is *doubly* jeopardized by a Congress preferring to delay action by jumping through statutory hoops, like a sixty-day clock,[119] rather than make the necessary decision outright.[120] To Locke, the imposition of such complexities is tantamount to breach of the social contract, making a suit brought under the War Powers Act a perfect candidate for the political question doctrine.

The legislative is obligated to preserve the people's security through laws.[121]

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whether to *supply* the troops to begin with. *See* THE FEDERALIST NO. 24, *supra* note 83, at 117–18 (Alexander Hamilton).

114. 50 U.S.C. § 1544(c) (2006) (emphasis added).

115. For what should be obvious reasons, a veto-proof congressional majority will *never* need the judiciary if it wants to end a war, as it can either vote to pull war funding (a decision fraught with "political" consequences) or, in certain cases, *impeach* the President. *See* Yoo, *supra* note 1, at 248–49 (explaining that because "Article I already vests the legislature with the power of impeachment," it is proper to "conceptualize the war clause as vesting the legislature with a judicial function").

116. *See* Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 646 (2006) ("The War Powers Resolution, which limited the circumstances under which the President could use military force and imposed various reporting requirements when the President did use force, has been ignored.").

117. *See generally* Note, *Realism, Liberalism, and the War Powers Resolution*, 102 HARV. L. REV. 637 (1989).

118. Such a "translation" of the War Powers Resolution might easily read as follows:

> Though we (members of Congress) may be completely opposed to war and may have the votes to cut off its funding, we fear political consequences more than we fear the continuance of a bad war. So we're shifting *all* accountability onto the President. First, we'll keep the standing army, which the President is free to command. Once war begins, we'll pretend our hands are tied for 60 days [50 U.S.C. § 1544(b) (2006)], buying time to see how the war fares politically. If it fares well, we just keep quiet about the reporting requirements. [Id. § 1543.] If hostilities drag on for fifteen years and war becomes unpopular, we simply accuse the President of acting unilaterally—while at the same time proudly declaring to voters, "We have always supported our troops."

119. *See Id.* § 1544(b).

120. *See generally* Elia V. Pirozzi, *The War Power and a Career-Minded Congress: Making the Case for Legislative Reform, Congressional Term Limits, and Renewed Respect for the Intent of the Framers*, 27 SW. U. L. REV. 185 (1997).

121. LOCKE, *supra* note 47, at 305–10.

If a war jeopardizes national security rather than achieving greater protection, Congress can end it — without courts or the War Powers Resolution — using its appropriations power.[122] But as long as Congress funds the military,[123] a President waging war "unilaterally"[124] is only functioning exactly as he is *required* in order to fulfill the government's duty under the social contract.[125] For Locke, the only permissible "checks" on the President's decision-making are the voting power of the people and the spending and impeachment powers of their elected Congress.[126] An unelected federal judiciary that interferes with war decisions, having its ear bent by anything short of a congressional majority,[127] corrupts the necessarily unitary function of the executive.[128]

But Locke might also argue that a more disastrous consequence of such judicial intermeddling is that it would free Congress from accountability to the people in war matters.[129] The government holds in trust each individual's right to make rules for self-preservation as he sees fit. If national security policy is crafted through processes bearing no relationship to the government's political power (that is, without invoking the representative will of the majority), that trust is forfeit. Such maneuvers substitute the will of electorally irresponsible[130] judges for the will of the people.[131] Rather than "restor[ing] the effectiveness of the responsible political

122. This is precisely how Congress ended U.S. involvement in Indo-China. *See* Raven–Hansen & Banks, *supra* note 1, at 911–23. Sufficiently emboldened in the wake of President Nixon's Watergate troubles, Congress thwarted further military action in Vietnam by placing restrictions on war appropriations. *See Id.* at 872, 880, 916. This funding cut "was binding, unmistakable in its sweep, and the purest expression . . . of checking "the Dog of war" by a refusal to pay." *Id.* at 916.

123. It is impossible to overstate the significance of Congress's appropriations power with respect to war controversies. *See generally* Kate Stith, *Congress's Power of the Purse*, 97 YALE L.J. 1343 (1988); Raven–Hansen & Banks, *supra* note 1. But some scholars are not satsified with Congress's ability to control war absolutely if it has the votes. These prefer to insist that war measures are unconstitutional, even where *authorized* by way of defense appropriations, unless "affirmatively" approved. *E.g.*, Ely, *supra* note 2, at 1384.

124. *See* Geoffrey S. Corn, *Clinton, Kosovo, And The Final Destruction Of The War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1167 (2001) ("[T]here is no historical gloss which empowers the President to initiate combat operations based on unilateral executive authority.")

125. As already explained, the social contract—by which the government comes to hold political power—requires that the power to use the public's force in executing its judgments must be unitary. *See supra* notes 87–94 and accompanying text. While the present discussion is not a constitutional text-based argument, it is hard to resist noting that the "Commander in Chief" power is not a *qualified* power; it is limited only to the extent Congress refuses to "raise [or] support" the armed forces subject to Presidential command. *See* U.S. CONST. art. II, § 2, cl. 1; *Id.* § art. I, § 8, cl. 11.

126. *See* LOCKE, *supra* note 8, at 324, 327 (describing the legislature's "right to direct how the force of the common-wealth shall be employed for preserving the community and the members of it" but emphasizing that anything that puts "the force of the public . . . under different commands . . . would be apt some time or other to cause disorder and ruin").

127. Included among "anything short of a congressional majority" would be an action by members of Congress seeking injunctive relief against the President under the War Powers Resolution. A handful of unhappy legislators cannot override the judgment of the *current* Congress by waving in the face of the judiciary a resolution passed by a *former* Congress.

128. *See supra* text accompanying notes 87–94.

129. As intimated *supra* in the text accompanying note 86, for the judiciary to distance the legislative from its source of political power would be tantamount to dissolution of the government. Members of Congress have no incentive to make difficult but necessary national security decisions if the courts do it for them.

130. Bickel, *supra* note 19, at 46.

131. *See Bancoult v. McNamara*, 443 F.3d 427, 433 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1125 (U.S.

branch,"[132] judicial resolution of the war question actually renders Congress *irresponsible* to the public and therefore ineffective.[133] Legislators' fear of public criticism for failure to "support the troops" should not allow them to sidestep their duty.[134] Fortunately (Locke might say), courts appear to have recognized this.[135]

CONCLUSION

Under the Lockean ideas explored above, government may not legitimately decide on war by counter-majoritarian methods, so the judiciary cannot end it. Congress may. But if it does not, war must be deemed the will of the people. Government makes its people secure, but it cannot make them virtuous. Even judicial review will be ineffectual in mitigating the harm of imprudent war decisions absent astute judges.[136] Impractical academic furor over "unconstitutional" war

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2007). The *Bancoult* court appears to have recognized that the government's exercise of its Federative power, described *supra* notes 92–94 and related text, 'should be undertaken only by those *directly responsible to the people whose welfare they advance or imperil.*" *Id.* (emphasis added). These are decisions "for which the judiciary has neither aptitude, facilities nor *responsibility.*" *Id.* (emphasis added).

132. *Cf. supra* note 35 and accompanying text.

133. Even if it declared itself the "responsible" branch *pro tempore*, the judiciary would be an ineffective safeguard. Pending a determination on the legality of his war, or even at the first sign of such opposition, a President could make a call ordering nuclear strikes. *See* Ely, *supra* note 2, at 1420–21 n.118 ("Blitzkrieg strikes are effectively beyond the reach of any set of legal restraints.").

134. As even Professor Ely has noted,"[t]he idea that pulling the financial plug on a war represents a failure to 'support our boys in the field' doesn't really make sense, because an order to withdraw can always be accompanied by ample provision to protect the boys as the withdrawal is proceeding." Ely, *supra* note 2, at 1399.

135. For examples of decisions recognizing judicial interference as incongruous with the government's political power, review *supra* notes 5–7 and cases from Schoen, *supra* note 3. Puzzlingly, some scholars entertain "considerable doubt that the political process can effectively check the President in committing further forces [to war.]" Schwartz & McCormack, *supra* note 35, at 1047. And a few judges, perhaps bitterly aware that they lack political power, are likewise dubious. *E.g.*, *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (finding political question and dismissing for lack of jurisdiction). In *Atlee*, the dissenter complained: "If the Executive or the Legislature acts unconstitutionally, it is not a sufficient remedy that at some future date on election day leaders may be replaced . . . ." *Id.* at 709 (Lord, C.J., dissenting). Such reasoning depends on a flawed assumption—one unsupported by history—that it is possible to identify a *constitutional* violation by a political branch in matters of war. *See supra* note 34 (discussing impossibility of unconstitutional "impasse" between Congress and President). More importantly, the public's "remedy" against disastrous war decisions by a berserker President lies not in the courts, but in Congress's power of the purse, and its impeachment power (if it can but muster the courage to wield it). *See supra* notes 34, 115,123.

136. Suppose America becomes so stupefied as to reelect not only a President who has exercised an erratic "manifest destiny" command of the military for four years, but *also* a Congress that acquiesced in funding that President's bizarre and dangerous use of force. At that point, perhaps the nation's volunteer-based army will begin to dry up. If it does not, we can conclude that Americans are proud and willing to fight "unjust wars." If it does dry up, and Congress reinstates the draft to compensate, and yet the people *still* vote as if content to be conscripted into an engine of offensive warfare, the conclusion is the same: the people and their government are violators of the laws of nature, taking and destroying without justification. Only another commonwealth of superior military strength—or acts of God—can prevent this from continuing. An extrapolitical "check" on the elected branches is uncalled for when they carry out the expressed wishes of the people. "But," scholars might say, "this is precisely why the judiciary must be able to review war decisions!" I answer that the value of such review (if any existed) would be short-lived. The government would hasten to replenish the judiciary with judges who would condone its acts. Congress might even eliminate federal district and circuit courts altogether. *See* U.S. CONST. art. I, § 8, cl. 9. A nation mired in such a valueless bog is left with only "the better angels of [its] nature" to extract it. *See* Lincoln Inaugural, *supra* note 103, at ¶ 35. Of course, "[i]f angels were to govern men,

decisions should give way to enthusiasm for legal phenomena that — like the political question doctrine — keep the government inside the boundaries of and in communion with its source of political power.[137]

neither external nor internal controls on government would be necessary" in the first place: THE FEDERALIST NO. 51, *supra* note 88, at 269 (Alexander Hamilton).

137. *See* Note, *The Appropriations Power as a Tool of Congressional Foreign Policy Making*, 50 B.U. L. REV. 34 (1970). With both the President and Congress "claiming the support of the Constitution, arguments dealing with the legality of particular actions are likely to be unproductive." *Id.* at 38. The judiciary "will be unable, if not for constitutional reasons, at least for *practical* reasons, to resolve the conflict." *Id.* (emphasis added). I maintain that natural law and political power, as described herein, are chief among such "practical" reasons.