

WAR AND CONSTITUTIONAL DESIGN

Tom Ginsburg*

Paper prepared for conference on The Law and Economics of International Law

University of Chicago Law School, November 15, 2013

version 1.0

* * *

“ a king is not by himself capable of examining into the causes of war and the possibility of a mistake on his part is not unlielklye and such a mistake would bring great evil and ruin to multitudes. Therefore war ought not to be made on the sole judgment of the king, nor, indeed, on the judgement of a few, but in that of many, and they wise and upright men.”

-Francisco de Vitoria (1532)

* * *

In late August 2013, U.S. President Barack Obama, along with his close allies David Cameron of Britain and Francois Hollande of France, considered a military response to Syrian government chemical attacks on civilians. Prime Minister Cameron went to parliament to ask for support, but on August 30 he lost the vote 285-272, and announced that he would respect parliament's decision. The French parliament also debated the issue, although it was not constitutionally required to hold a vote. And, a few days later, Obama surprised observers by

* Leo Spitz Professor of International Law, University of Chicago Law School. Thanks to Adam Chilton, Eric Posner, Mila Versteeg, and Matt Waxman, along with audiences at the PIPES Workshop and the Conference on the Law and Economics of International Law, University of Chicago Law School, for helpful comments. Albert Chang, David King and Jeyshee Ramachandran provided helpful research assistance. Robert Schub provided great help with data.

announcing that he would also consult with the U.S. Congress in considering his decision, though he carefully refrained from saying he would abide by the resolution. As Members of Congress remained aloof on the issue and it appeared that Obama would lose the vote, Vladimir Putin emerged as an unlikely savior, seizing on an offhand comment of Secretary of State John Kerry and proposing a peaceful resolution under which Syria would dismantle its chemical weapons in exchange for the U.S. foregoing an attack. The Congressional vote never happened, and neither did the strike.

Would Obama have attacked Syria without Congressional authorization? We can only speculate. But what is not in doubt is that the decisions, by both Cameron and Obama, to approach reluctant legislative bodies for approval raised the costs of military action, and contributed to the executive backing down from earlier threats. And it was precisely this effect that the framers of the U.S. Constitution had in mind when they designed our constitutional scheme to chain the proverbial “dogs of war.”¹ The overall scheme of the Constitution, wrote John Jay, would prevent government officials from needlessly provoking foreign powers.² Jay went on to argue that “not only fewer just causes of war will be given by the national government, but it will also be more in their power to accommodate and settle them amicably.”³

(The first two rows of Figure 1 attempt to capture this intuition in the framework of the academic literature on war: where conflict is typically modeled as exclusively involving two

¹ 15 THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed., 1958); The Dogs of War phrase comes from Shakespeare's *Julius Caesar* (iii. 1. 274). See generally Francis D. Wormuth and Edwin B. Firmage, *TO CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW* (1989).

² Federalist Papers, letter 4.

³ Jay, Federalist Papers Letter 3.

unitary states, the founders recognized that internal features of state decision-making would affect outcomes on the international plane.)

The framers, of course, lived in a very different era, in which assumptions about military capabilities, threats to national security, and the functioning of the executive and legislature were very different from the situation today. But in light of the lingering hagiographic views of the framers' wisdom, it is worth asking whether constitutional design can indeed affect a nation's military outcomes. The question is surely relevant in an era of ubiquitous constitutional design. Somewhere between five and ten countries every year will be engaged in overhauling their constitutions, and might be interested to know whether anything they say might actually affect national security.⁴ And the question relates to international efforts to reduce the levels and costs of violent conflict.

To understand why constitutional design might matter, we need to delve into the large literature in international relations theory on the democratic peace. The central findings of this literature can be summarized briefly: (1) mature democracies generally do not go to war against each other; (2) democracies are, on the whole, no less warlike (or only slightly less warlike) than autocracies; and (3) democracies are likely to win the wars that they fight against autocracies.⁵

⁴See generally, Zachary Elkins et al, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

⁵ The middle proposition of this trifecta is contested. For one view, see Dan Reiter & Alan C. Stam, *DEMOCRACIES AT WAR* (2003) (autocracies initiate conflicts against democracies more frequently than democracies do against autocracies) and Quackenbush and Rudy (2006) (democracies initiate wars against autocracies more frequently than autocracies do against each other.) See also Michael Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, 12 *PHILOSOPHY AND PUBLIC AFFAIRS* 205, 225 (1983) ("Liberal states are as aggressive and war prone as any other form of government or society in their relations with nonliberal states."); William Dixon, *Democracy and the Peaceful Settlement of International Conflict*, 88 *AMERICAN POLITICAL SCIENCE REVIEW* 1, 1 (1994) ("Kant was clearly wrong in his presumption that democracies are inherently peaceful." But see James Lee Ray, *On the Level(s), Does Democracy*

To illustrate, by one account, democracies win over three-quarters of their wars, and over 93 percent of wars they initiate.⁶ Putting propositions (1) and (2) together (and setting aside debate over proposition (2)), we can see that democracies are *more* likely to go to war against autocracies (because they are not fighting fellow democracies, while autocratic governments do fight autocracies). These statistical regularities, however, are not self-explanatory, and there is a large debate on the sources of the democratic peace.⁷ In thinking about the project of optimal constitutional design, we need to understand *why* it is that democracies have certain advantages in war. In particular, it would be helpful to know whether constitutional choices may have anything to do with these outcomes, as the American framers imagined. Only if we can determine that constitutional choices make a difference can we answer the contested normative question of how much room to give the executive in war-making.⁸

Correlate with Peace? in John A. Vasquez, ed. WHAT WE KNOW ABOUT WAR 299, 300-302 (2000) (democracies may be more peaceful).

⁶ Reiter and Stam, *supra* n. 5, at 29. For a different view on democracies and war, see Michael Desch, *Democracy and Victory: Why Regime Type Hardly Matters*, 27 INT'L SECURITY 5 (2002). Even though Desch questions whether democracies enjoy any advantages in conflict, he does not support the contention that there is any disadvantage associated with democracy. See Dan Reiter, *Exploring the Bargaining Model of War*, 1 PERSPECTIVES ON POLITICS 27 (2003); Daniel Hemel, *Picking Up the Peaces, Democratic Norms, Structural Constraints, and International Conflict*, Bachelor's Thesis, Harvard College, March 2007.

⁷ Indeed, there have been some recent suggestions that the democratic peace is illusory—that it is driven by trade patterns or liberal political economies rather than regime type per se. See, e.g., Erik Gartzke, *The Capitalist Peace*, 51 AM. J. POL. SCI. 166-91 (2007); Patrick McDonald, THE INVISIBLE HAND OF PEACE: CAPITALISM, THE WAR MACHINE, AND INTERNATIONAL RELATIONS THEORY (2009). Maoz and Russett argue that the democratic peace is driven by political stability. Zeev Maoz and Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946-1986*, 87 AM. POL. SCI. REV. 624 (1993). Others focus on alliance ties. See Ray, *supra* n.5, at 306.

⁸ Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006); see also Eric Posner and Adrian Vermuele, THE EXECUTIVE UNBOUND (2011).

This paper examines the internal structure of constitutional war-making power as a possible source of democratic advantage. In particular, it asks whether legislative involvement in decision-making about war, or supervision of military authorities, leads to better war selection and performance. In doing so, draws on data from the Comparative Constitutions Project, which measures features of formal constitutions for independent nation-states since 1789, as well as data from the Militarized Interstate Disputes dataset of the Correlates of War Database, frequently used in the study of conflict. By examining internal features of state structure beyond regime type, the paper opens up a new line of inquiry into the domestic sources of the democratic peace. Other lines of research in international law, such as scholarship human rights, have gone much further to unpack the state and examine the domestic sources of international behavior.

The argument here is that legislative involvement in war decisions implicates a bargaining process between the executive and legislature, which can interact with the international level of bargaining to affect outcomes of conflict. Legislatures can restrain overly ambitious executives, mobilize support, and affect the quality of signaling to other states. We focus especially on legislative powers to declare or approve war, or otherwise approve the actions of a commander in chief.

To be sure, constraints on formal decision-making about war are only a subset of potential tools that might be used in the bargaining process between executive and legislature. The budget process, for example, will determine who controls military capabilities, and a powerful legislature can do much with audit and oversight mechanisms as well. Regulations about the chain of command, including designation of a commander in chief, will play a role. The relationship between civil and military authorities may also be specified in the constitution, for example through a requirement that the head of the military or minister of defense be a

civilian. This can serve as a form of agency control to minimize aggrandizing militaries. Some constitutions also have restrictions on the armed forces, including restrictions on whether officers can hold public office.⁹ Finally, a small number of constitutions outlaw anything but defensive war,¹⁰ or in very rare cases abolishing the armed forces entirely, as in post-war Japan's famous "peace constitution" and in Costa Rica.¹¹ These constitutional constraints also make a difference in practice.

In this paper, we focus on the decision to *go* to war, rather than these collateral institutions, which admittedly affect the decision-making environment for military action. An underlying assumption, which we will defend, is that constitutional assignment of powers is one factor that affects the interaction between legislature and executive. One need not assume that actual behavior perfectly conforms to the constitutional text to believe that the formal assignment of constitutional power can lead an actor to defend its prerogatives.

The paper proceeds as follows. We first review, in Part I, the literature on domestic constraints on warmaking, and their role in war selection and success. We then examine specific constitutional institutions that are implicated in this argument, and describe the data from the Comparative Constitutions Project. Part III conducts an empirical analysis. We show that legislative involvement in war decision-making reduces the propensity of states to use force abroad. In so doing, this paper seeks to help identify the precise institutions which serve to constrain or empower democracies, and so sheds light not only on the democratic peace but also on optimal constitutional design.

⁹ Some 11% of national constitutions have such a restriction.

¹⁰ See Constitution of Kuwait [1962], Art. 68; Constitution of Bahrain [1973], Art.36.

¹¹ Const. Costa Rica [1949], Art. 12; Const. Japan [1947], Art. 9.

I. **Why Do Democracies Succeed? The Virtues and Vices of Legislative Involvement in Warmaking**

A. *Legislative power over warmaking*

Wars result from a complex set of calculations by domestic actors in (at least) two different states.¹² Before going to war, states typically engage in what is known in the literature as crisis bargaining, a communicative process of signaling about capabilities and resolve.¹³ This bargaining process allows countries to, in many cases, anticipate the costs and benefits of a war and reach a negotiated agreement, without the costs that a war would impose. If this bargaining process worked perfectly, we would never observe actual war, which by definition involves the destruction of human and material resources. However, in a world of imperfect information about capabilities and intentions, bargaining problems, and agency problems in the decision-making process, armed conflict does occur.

A key question for constitutional designers from the very beginning of the modern era has been how to “chain the dogs of war”, as the American founders put it.¹⁴ Recognizing that war is the most serious decision that a leader can take, the American founders debated whether to allow the executive to make the decision unconstrained, as might a monarch. Instead, the framers quite

¹² James D. Fearon, *Rationalist Explanations for War*. 49 INT’L ORG. ___ (1995); Eric Posner and Alan Sykes, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 168-71 (2013) (summarizing argument about role of information on decisions to go to war).

¹³ Russell J. Leng, *Escalation: Crisis Behavior and War*, in John A. Vasquez, ed., WHAT DO WE KNOW ABOUT WAR? 235 (2000)

¹⁴ Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Powers of Congress in History and Law* (University of Illinois Press 1989).

self-consciously located the power of declaring war in the U.S Congress.¹⁵ As Table 1 below shows, some 25% of all constitutions written thereafter have followed suit, vesting the war declaration function in one or two houses of the legislature.¹⁶ A further 38% of constitutions have some role for the legislature in approving declarations of war or deployment of troops.¹⁷ Thus nearly half of all constitutions involve the legislature in the process of making decisions about war.

TABLE 1 HERE

B. Why Legislative Involvement Might Help

How might legislative involvement change the propensity of states to become involved in war? Several lines of argument from the democratic peace literature are particularly relevant here. One set of arguments focuses on the institutional structures of democratic governance. Legislatures can, most obviously, constrain over-zealous executives who wish to go to war by raising the costs of doing so, requiring evidence to justify the decision, and limiting budgets. So, for example, writing on the US, William Howell and Jon Pevehouse show that Congress has indeed constrained presidents in war policy, notwithstanding the dearth of formal declarations of war.¹⁸ They show that Presidents are systematically less likely to exercise military force when

¹⁵ U.S. Const. Art. I, Sec. 8.

¹⁶ Data on file with author. 131 of these constitutions give it to the first house; 11 to the second house; 67 give it to both houses acting jointly. Some five cases (Nicaragua 1939 and 1974; El Salvador 1872; Morocco 1962 and Italy 1947 allow either of two houses to declare war.)

¹⁷ Data reflect further coding since earlier paper with Paul Diehl, *Irrational War and Constitutional Design: A Response to Professors Nzelibe and Yoo*, MICH. J. INT'L L. (2006).

¹⁸ William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (Princeton, 2008).

their partisan opponents retain control of Congress.¹⁹ Since such partisan constraints are by definition more likely in democracies than in autocracies, we might observe that democrats engage in fewer foreign adventures.

Legislative involvement has several other theoretical advantages for war policy beyond constraint. Legislatures can also mobilize support for popular wars, for example by demonstrating bipartisan support, or through elaborating on the rationale for going to war. Congressional deliberation and debate can be a crucial mechanism for transmitting information to the public, possibly generating support.²⁰ This support in turn can enhance the quality of the signal given in crisis bargaining at the international level. If a decision to go to war involves *both* an executive and legislative branch, a counter-party will have an indication of the level of support for the war. It will assume that there is a good deal of domestic support, which in turn, may lead the party to believe the executive branch during negotiations. Legislative involvement thus provides a costly signal of seriousness and commitment. Not only will a country with legislative involvement avoid “bad” wars entered into by an overzealous executive, but it will have bargaining advantages vis-à-vis other states because executive representations of public support will be more credible.

Beyond enhancing the ability to send signals in international crisis bargaining, legislatures may contribute to the ability to *receive* signals. While the executive branch may have the exclusive ability to communicate with foreign powers on behalf of the state, it may have

¹⁹ “The partisan composition of Congress, however, matters most for proposed deployments that are larger in size and directed at less strategically important locales. Moreover, congressional influence is often achieved not through bold legislative action but through public posturing—engaging the media, raising public concerns, and stirring domestic and international doubt about the United States’ resolve to see a fight through to the end. “But see Louis Fisher and Ryan Hendrickson, letter in *Foreign Affairs* 2008

²⁰ *See generally* Stephen Hess, *THE WASHINGTON REPORTERS* (1981).

to provide evidence of these communications to legislators to gain support. Legislators can, through probing questions and their own stock of information, provide for alternative interpretations of evidence. We know that wars sometimes arise from misperception—the Six Day War between Israel and its Arab neighbors is a good example.²¹ *Ceteris paribus*, more institutions involve more independent evaluations of information, and hence may reduce the noise in received signals from abroad. Like the Condorcet jury theorem, more institutions assessing evidence might lead to higher quality aggregate decision-making.²²

C. Why Legislative Involvement Might Hurt

If these were the only considerations, one might expect that more constraints would always be helpful because they would raise the quality of signals sent and received, help generate more public support, and play a screening role to filter out wars without sufficient justification or popularity. The normative implication might be to add additional constraints on warmaking, such as supermajority approval requirements, judicial approval, or a public referendum before going to war. More decisionmakers would screen bad wars and generate more support for good wars. But there are, as always, countervailing considerations.

Proponents of executive-centered decision argue that only the executive can act with the speed and decisiveness needed to be effective.²³ Legislative involvement in war-making, in this

²¹ Leng, *supra* n. 13, at 251. Michael Oren, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2003).

²² We might call this a Condorcet accountability theorem: when independently accountable institutions agree on a result, the overall level of accountability is even greater.

²³ Nzelibe and Yoo, *supra* n.8.

view, can cause potentially harmful delays, leading to failure to launch “good” wars.²⁴

Proponents of this view share certain assumptions with proponents of congressional *ex ante* approval, such as John Hart Ely, who argue that deliberation can also prevent or delay “bad” wars.²⁵ But they see a greater risk from too little war than from too much war.

Another argument sometimes advanced in favor of exclusive executive control is accountability. For example, in the United States, the president is the only actor elected with a national mandate. To be fair, some political science literature suggests that the House of Representatives is the governmental actor that is most responsive and accountable to public opinion (a terrifying thought as I write in late 2013).²⁶ But proponents of executive control over warmaking argue that because the public attributes responsibility to the executive for foreign

²⁴ Id.

²⁵ John Hart Ely, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993). Recent events, however, call into question the idea that that Congress plays a role in delaying war. For example, Congress passed the Authorization for the Use of Military Force within a week of the September 11 attacks, yet several weeks passed before large numbers of troops were actually deployed in Afghanistan. The delay in launching the invasion of Iraq was due not to any congressional opposition or authorization process, but rather resulted from the President’s explicit choice to seek United Nations Security Council approval *after* obtaining congressional support. The Iraq experience thus demonstrates that unilateral presidential initiatives need not proceed in a speedy fashion, and that congressional approval *ex ante* may not delay essential hostilities. [check this note]

²⁶ Thomas J. Rudolph, *Who’s Responsible for the Economy? The Formation and Consequences of Responsibility Attributions*, 47 AM J. POL. SCI. 698 (2003) (presenting data and institutional reasons for the public’s attribution of greater responsibility for the economy to Congress than to the president, among other actors); James A. Stimson, Michael B. MacKuen, & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 559–60 (1995) (indicating that regression estimates show the House to be more responsive than the president, who in turn is more responsive than the Senate).

policy, the president should be given more power in this arena.²⁷ Power, in other words, should follow accountability, and not the other way around.

Finally, it is often argued that the legislative power of the purse provides enough of a mechanism for accountability. Should Congress, in the US context, decide that a war entered into by the executive is a poor choice, it can always cut off funds.²⁸ In this sense, the executive can be held accountable to public opinion *ex post* control, in other words, can substitute for *ex ante* control, and so ensure that the executive is accountable for its actions. In short, speed and accountability are the primary virtues of an executive-centered war policy, and so suggest symmetric vices of legislative involvement.

D. Discussion

On close examination, many of the arguments for executive dominance are less powerful than they first appear. As Paul Diehl and I have argued, the argument that the executive will bear the blame for war policy, and hence should have the primary say, does not defeat the possibility that collectively the executive and legislature may be more accountable than either of them individually.²⁹ The two actors represent different electoral constituencies or coalitions, or at least their constituencies are not completely coterminous. In the United States, for example, to the extent that approval must come from both Congress and the president, joint decision-making is accountable to a broader national constituency and to many more diverse groups. To illustrate this point, imagine a situation wherein the president is slightly more hawkish than the median voter and Congress much more dovish. Here, allowing the president, not Congress, the exclusive

²⁷ Nzelibe & Yoo, *supra* note 8, at 2522.

²⁸ John Yoo, *THE POWERS OF WAR AND PEACE* (2006).

²⁹ Diehl and Ginsburg, *supra* n. 17. [check this paragraph]

role in deciding whether to go to war will produce a more “accountable” policy because the president’s position is closer to that of the median voter. Nevertheless, requiring the president to bargain with Congress before initiating hostilities has the potential to move the expected policy further in the direction of the median voter. Hence, certain negotiated outcomes will be closer to the position of the median voter than allowing either actor to act alone.³⁰

Indeed, assuming that a sole executive is always superior to one constrained by a legislature is to assume that the executive is *always* closer to the median voter than is the legislature on war policy. There is no particular reason to believe that this assumption is valid. The assumption includes an additional requirement, not only that the president’s position is always closer to that of the median voter in absolute terms, but also that legislature and the executive are always biased in the same direction. In other words, in the U.S. context, if the president is more hawkish than the median voter, Congress is even more hawkish; if the president is more dovish than the median voter, Congress is even more so. Only if this alignment were universally true would a system of sole presidential decision-making always be more representative than a system that requires bargaining before war.

In terms of the use of ex post funding as a substitute, it is important to recognize that decisions about war have a path-dependent quality to them. Once launched they are difficult to reverse, and ex post legislative involvement must confront problems of sunk costs and path dependency. For this reason, ex post constraint through funding has a very poor record in the United States; conversely, even some opponents of the initial decision to go to war in Iraq later

³⁰In our example, it is also possible to produce bargain outcomes that are further from the position of the median voter than a president-only policy. This would not be true were Congress’ position closer to that of the median voter than the president’s, in which case bargaining would *always* produce more accountable policy.

supported the surge. President Barack Obama, who campaigned on ending the wars in Afghanistan and Iraq, found himself supporting a surge in Afghanistan. This suggests that ex post constraints are qualitatively different from ex ante constraints, implying that greater legislative involvement in the initial authorization stage might prevent the downstream choice of two bad alternatives, the worse of which is to terminate funding.

The international relations literature has identified an agency problem called “gambling for resurrection” to which democracies are particularly susceptible.³¹ Suppose an executive has initiated a conflict that goes badly. While the national interest would be best served by ending the conflict, the leader may fear electoral defeat for doing so. Such leaders will have an incentive to “gamble for resurrection,” escalating conflicts with a low probability of victory in the hope that they will avoid an otherwise likely electoral loss. Note how a leader who has entered into the conflict without legislative support may have even *less* incentive to end it; having commenced hostilities alone, the leader would be admitting error by ending the conflict in a context in which blame cannot be deflected to the legislature. *Ex ante* legislative involvement can thus decrease the incentive to “gamble for resurrection” because both branches will share the blame for bad outcomes.³²

For all these reasons, legislative involvement might be good for a nation’s war-making policy, regardless of the nature of the counter-party. How might it have an effect on crisis bargaining? Might the need to obtain legislative support generates net benefits on the international plane? Some have argued that democratic states are at a disadvantage in conflicts with non-democratic opponents because democratic executives must consult with or secure

^{31.} George W. Downs & David M. Rocke, *Optimal Imperfection: Domestic Uncertainty and Institutions in International Relations* 56 (1995).

^{32.} *Id.*

approval from other domestic institutions. This contention is based on the alleged risk that potential opposition to or dissent from the executive's action will undermine the resolve, and thereby the bargaining position, of the country in international confrontations. However, the great weight of studies of the effectiveness of democracies in coercive bargaining and war suggest that better outcomes emerge from consultation and consensus.³³

One reason consultation might be helpful is that it might make threats are more credible.³⁴ Shultz contrasts two theories of the democratic advantage in war: an institutional constraint argument, that democratic leaders face higher political costs from waging war and hence are likely not to select losing battles; and an informational theory that suggests that the support of the public provides a better explanation for why war selection is more careful. As he puts it "The institutional constraints argument suggests that democratic leaders generally face higher political costs for waging war. As a result, when a state is challenged by a democracy, the target has reason to doubt that the challenge will actually be carried out. Targeted states should be more likely to resist when threatened by a democracy than when threatened by a state that is not similarly constrained. The informational perspective, on the other hand, suggests that democratic governments are better able to reveal their true preferences in a crisis. Relative to non-democracies, they are less likely to engage in bluffing behavior, meaning that the threats

³³.See Kurt Taylor Gaubatz, *Elections and War: The Electoral Incentive in the Democratic Politics of War and Peace* (1999); Paul K. Huth & Todd L. Allee, *The Democratic Peace and Territorial Conflict in the Twentieth Century* (2002); Bruce Bueno de Mesquita & David Lalman, *War and Reason: Domestic and International Imperatives* (1992); William J. Dixon, *Democracy and the Peaceful Settlement of International Conflict*, 88 Am. Pol. Sci. Rev. 14 (1994).

³⁴ Check this para. *Do Democratic Institutions Constrain or Inform?*

Available at <http://www.rochelleterman.com/ir/sites/default/files/schultz%201999.pdf>

they do make are more likely to be genuine. As a result, the target of a threat made by a democracy should be less inclined to resist or further escalate the crisis.”

Shultz tests these competing hypotheses and finds that the likelihood of reciprocation is lower when the initiating state is a democracy than when it is not, a result that is consistent with the predictions of the informational perspective. When executive action is undertaken with broad domestic support, Schultz reports that democracies are highly effective, indeed more successful than their non-democratic counterparts in similar circumstances.³⁵ Even when democracies face dissent, their success rates are no worse than those of non-democracies.³⁶ These findings suggest that, whether or not political opposition is mobilized, seeking support or approval for threats and action does not put democracies at a disadvantage. From a signaling standpoint, there appears to be no disadvantage—and indeed some potential advantages—to consultation with the legislature. Relatedly, democratic controls can help democracies make commitments that endure over time, making them better “contracting partners” in international negotiations.³⁷

In sum, public debate and participation in decision-making help to transmit clear and reliable information regarding the intentions of democracies to other states. In dictatorships, in contrast, information on intentions and capabilities may be more difficult to discern. This can impede bargained solutions and lead to more wars.³⁸ Dictatorships may also lack means of

³⁵ Kenneth A. Schultz, *Democracy and Coercive Diplomacy* 174 (2001).

³⁶ Schultz, at 174.

³⁷ See also Charles Lipson, *Reliable Partners: How Democracies Have Made a Separate Peace* (2003) (democratic institutions allow more credible commitments)

³⁸ Levy, Gilat; Razin, Ronny (2004). *It Takes Two: An Explanation for the Democratic Peace.* *Journal of the European Economic Association* 2 (1): 1–29

ensuring credibility of promises they do make, both domestically and internationally.

Democracies are better able to make commitments, in part because of domestic constitutional structures, which gives them an advantage in bargaining.³⁹ This implies that dictatorships which share these constitutional features might be able to gain some similar advantages.

II. Can Constitutions Matter? Lessons from the US

These theoretical advantages of legislative involvement have been debated over the course of American history as Congress and the President have sought to come to an accommodation over their respective roles in war time.⁴⁰ Clearly the founding fathers intended a reduced role for the executive, relative to the British monarch. As Hamilton put it in Federalist 69, the Constitutional scheme would take the powers of declaring war, raising and regulating armies *away* from the executive, who would be restricted to an operational role.⁴¹ Over the course of American history, however, the formal language of the founders has given way to a more pragmatic accommodation. While the U.S. Constitution clearly assigns to Congress the power to declare war in Article I, the United States has fought only four declared wars in our history: the War of 1812, the Spanish American War, and the two World Wars of the 20th Century. Since the Korean War, presidents have been routinely willing to conduct “limited” wars without Congressional authorization.

This leads to the question of whether formal requirements matter at all. To be sure, the question is a bit tricky because constitutional language is obviously not dispositive on its own.

³⁹ Lipson, *Reliable Partners: How Democracies Have Made a Separate Peace* (2003)

⁴⁰ See Brien Hallett, *Declaring War: Congress, the President and What the Constitution Does not Say* (2012); Taylor Reveley, *War Powers of the President and Congress* (1981).

⁴¹ Federalist

Obama's decision referred to at the outset of this paper was surprising precisely because it seemed to be unnecessary according to constitutional convention, and he did not frame his request in terms of a declaration of war under Article I, Sec. 8. One might think, then, that text is superfluous.

However, Congress has at times demanded executive recognition of its constitutional power in war policy, even if it has not insisted on formal declarations of war. The War Powers Act of 1973 (passed over President Nixon's veto in 1973) is one famous example. Even as both Republican and Democratic presidents have challenged the constitutionality of the War Powers Act, and asserted that they did not need congressional authorization, they have generally observed its terms. (To be sure they have on occasion bypassed even the moderate reporting requirements of the Act.⁴²) The War Powers Act does shape executive decision-making. In 1993, when there was a concurrent resolution of Congress demanding withdrawal from Somalia, President Clinton complied. Presidents will also report the commitment of troops abroad, sometimes using the language "consistent with the war powers resolution".

Congress relied heavily on the constitutional baseline in passing the War Powers Act. The War Powers Resolution begins with the statement that "[i]t is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction

⁴² Ronald Reagan's decision to invade Grenada was made without notification of Congress, though he later sought and received authorization to deploy Marines to Beirut. Bill Clinton initiated the bombing of Kosovo in 1999 without any authorization from Congress, and succeeded in defeating the Serbs less than two weeks before the 90-day period of the War Powers Act expired. In that case, Clinton inferred congressional "authorization" from an appropriations statute that neither mentioned the War Powers Resolution nor authorized the military action. See 1999 Emergency Supplemental Appropriations Act, Pub. L. 106-31

of United States Armed Forces into hostilities.”⁴³ The introduction goes on to recount the constitutionally assigned powers of the Congress and the President, and asserts that the President is only able to commit forces pursuant to a declaration of war or statutory authorization, or in an emergency.⁴⁴ Discussions of the Constitution and checks and balances recur throughout the various committee reports that were generated as the legislation wound its way back and forth through the House and Senate. In nearly identical language the various House reports reproduce excerpts from the Constitution, and emphasize that the purpose of the legislation is the “reaffirm” Congressional powers granted by the Constitution.⁴⁵ The Senate expressed a concern about Congress’s powers with respect to “undeclared” wars and also extensively referenced the views of various Framers, Supreme Court Justices, and academics throughout history.⁴⁶

This emphasis on “restoring” a constitutional balance of powers was present from the very earliest bill in the lineage of what became the War Powers Resolution. This was a bill introduced by Representative Bertram Podell’s of New York on April 14, 1969, which began by noting that the Constitution grants the power to declare war to Congress and stated that Congress has been losing this power to the President.⁴⁷ Constitutional considerations suffused the floor debates on the resolution as well. For example, in the debate about whether to override the presidential veto of the resolution, Representative Broomfield spoke in favor of an override saying: “This historic legislation will, if enacted into law, reestablish once and for all the

⁴³ Pub. L. 93-148, H.J. Res. 542, Sec. 2(a) (Nov. 7, 1973).

⁴⁴ Id. at Sec. 2(b)-(c).

⁴⁵ See, e.g., H. Rep. 93-287 (June. 15, 1973); H. Rep. 92-1302 (Aug. 3, 1972).

⁴⁶ See, e.g., S. Rep. 93-220 (Jun. 14, 1973); S. Rep. 92-606 (Feb. 9, 1972).

⁴⁷ H. Con. Res. 91-199.

traditional warmaking responsibilities which the framers of the Constitution assigned to Congress 200 years ago.”⁴⁸

Notwithstanding its invocation of the Constitution, Congress seems generally unmotivated to exercise its constitutional and legal prerogatives, possibly because of the accountability considerations mentioned above. If the war works out, the president will get much of the credit; if it fails, Congress does not want to share the blame and so avoids getting involved in the decision. But the baseline assignment of powers does give Congress a resource to be used in bargaining with the executive, should the political incentives be present.

Regardless of whether the formal language of the constitution is followed, we believe that political institutions will tend to guard their formal assignment of decision-making rights over a particular category of policy. A formal provision it may serve to empower the legislature in internal bargaining with the executive over war policy. For example, in the U.S. context, no doubt the constitutional provision assigning declaration of war power to Congress helped to motivate the legislature to pass the War Powers Act in the first place. (Consider the counterfactual of a constitution in which Art. 1, Sec. 8 did not provide Congress *any* war powers. The War Powers Act might not have been enacted at all.)

Another possibility, not explored here, is that the presence of a constitutional provision asserting the power of war may serve as a proxy for *other* legislative powers relevant to war. So

⁴⁸ Cong. Rec. H 9642 (Nov. 7, 1973).

constitutions that assign war power to the legislature are systems in which the legislature is relatively strong.⁴⁹ This may indicate a legislative ability to constrain the executive.

For now, we take it as an assumption that assignment of formal powers does have implications for domestic bargaining, though this is no doubt false with regard to some constitutional systems. Furthermore, we have little historical cross-national data on the internal politics of war, so it is tricky to test whether constitutional constraints have had a direct effect in individual conflicts.

The long debate over legislative control of war suggests an empirical implication that has not been directly tested with fine-grained constitutional data. If proponents of legislative involvement are correct that legislatures can help with selection or screening, states that have more constraints on warmaking should do better at war *whether they are democratic or autocratic*. *Ceteris paribus*, we expect them to select fewer wars. But wars that they enter into should be won with a higher probability.

III. Data Sources and Methods

A. Democracy & Constitutional Data

How might we test these conjectures? The literature has tended to use democracy as a *proxy* for domestic constraints.⁵⁰ Alternatively, it uses general indicators of political constraints

⁴⁹ In a subsequent analysis I plan to test this conjecture with an index of legislative power from the CCP.

⁵⁰ See e.g. Christopher Layne, *Kant or Cant: The Myth of the Democratic Peace*. 19 International Security 5, 13 (structural argument “focuses on an independent variable—decisional constraints embedded in a state’s domestic political structure—that is associated with, but not exclusive to, democracies”).

such as POLCON, which is an indicator of the number of veto points.⁵¹ Executive constraints are defined generally according to the relative authority of a country's chief executive and the legislature, without regard to *specific* powers such as the ability to declare or fund a war. But as is well known, there is great internal variety within each of the categories of democracy and autocracy, including variation on internal constitutional arrangements.⁵² This variation can provide analytic leverage on the democratic peace debate, and the particular sources of democratic advantage.

To take one example of the state of the literature, Schultz's paper relies on Polity III, which is a relatively crude measure of internal democratic constraints. So even if Schultz has shown that democratic institutions "inform," we don't really know *which* democratic institutions generate the bargaining advantage. Using new data from the Comparative Constitutions Project, which measures features of formal constitutions for independent nation-states since 1789, this paper begins to help identify the precise institutions which serve to constrain. In particular we focus on the extent to which internal involvement of legislatures in war-making have an effect on war selection and performance, as the informational theory would predict.

To evaluate these conjectures, we use MID dataset v3.10, which includes all Militarized Interstate Disputes (MIDs) from 1816 to 2001. The dataset authors define an MID as "cases in which the threat, display, or use of military force short of war by one member state is explicitly directed towards the government official representatives, official forces, property, or territory of

⁵¹ Heinz, POLCON III Database.

⁵² See the studies in Tom Ginsburg and Alberto Simpser, eds. CONSTITUTIONS IN AUTHORITARIAN REGIMES (2013); Mila Versteeg and Dennis Galligan, THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (2013).

another state.”⁵³ This excludes all conflicts between states and non-state actors, as well as disputes that do not include military elements. But it also includes conflict short of war, typically defined as a conflict involving more than 1000 battle deaths.⁵⁴

To measure democracy, we have a number of potential indicators. In evaluating states as democracies, anocracies, or autocracies, many scholars rely on the Polity III dataset, which furnishes a combined index of a nation’s regime type as well as specific indicators on “[the] competitiveness of political participation, [the] openness of executive recruitment, and [the] extent of constraints on the chief executive.”⁵⁵ POLITY has the advantage of longitudinal coverage back to the early 19th century, and we use it in our main regressions. Another standard measure with good temporal coverage is from Przeworski, Alvarez, Cheibub, and Limongi (PACL), who develop a binary indicator of countries as democratic or autocratic.⁵⁶

⁵³ Jones, Daniel M., Stuart A. Bremer, and J. David Singer. "Militarized Interstate Disputes, 1816-1992: Rationale, Coding Rules, And Empirical Patterns." *Conflict Management and Peace Science* 15.2 (1996): 163-212. Web. Page 168.see also Ghosh, Fatten, and Glenn Palmer. "Codebook for the Militarized Interstate Dispute Data, Version 3.0." *Correlates of War*. N.p., 14 Apr. 2003. <http://www.correlatesofwar.org/COW2%20Data/MIDs/MID_v3.0.codebook.pdf>

⁵⁴ Check this.

⁵⁵ Edward D. Mansfield and Jack Snyder, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* (2005); Edward D. Mansfield and Jack Snyder, *Democratic Transitions, Institutional Strength, and War*, 52 *Int'l Org.* 297 (2002); *See also* Vipin Narang and Rebecca M. Nelson, *Who Are These Belligerent Democratizers? Reassessing the Impact of Democratization on War*, 63 *Int'l Org.* 357 (2009).

⁵⁶ Przeworski, Adam, Michael E. Alvarez, José Antonio Cheibub and Fernando Limongi. 2000. *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990*. Cambridge: Cambridge University Press. An alternative available only for post 1945 observations is the Unified Democracy Scores (UDS), a composite measure that is more reliable than its component metrics. See Daniel Parnstein, Steven Meserve, and James Melton, *Democratic Compromise: A Latent Variable Analysis of Ten Measures of Regime Type*, 18 *Political Analysis* (2010).

We also draw on the Comparative Constitutions Project, a dataset coding formal provisions of national constitutions for all independent nation-states since 1789, a total of 893 unique constitutional systems.⁵⁷ In particular we examine the assignment of powers to initiate and approve war. We construct several variables of interest: WARLEG, which assesses whether either house of the legislature is involved in declaring war (roughly 24% of constitutions); WAREXEC, which asks whether the government or head of state declares war (50% of constitutions); and WARNONE, for constitutions which are silent on the war power (29% of constitutions).⁵⁸

Legislatures can also be involved in approving declarations of war that are made by an executive, or decisions of the commander in chief. WARAPLEG captures whether the legislature is involved in approving war (some 38% of constitutions); and COMAPLEG, which asks whether the legislature must approve decisions of the commander in chief (some 12% of constitutions).⁵⁹ In some of the regressions that follow, we use a variable WARANYLEG which captures whether a state has the legislature involved in *either* the declaration or approval of war.

⁵⁷ See description at www.comparativeconstitutionsproject.org

⁵⁸The remainder of constitutions assign the power to an “other” category or stipulate that it will be determined by law. Roughly 5% of constitutions seem to assign the power of declaring war to *both* the legislature and executive. An example is the Constitution of the Peoples Republic of China (1954), which gives the Chairman the power to “proclaim a state of war” (Art. 40) at the same time that it gives the People’s Congress the Power to “decide on matters of war and peace.” (Art. 27)

⁵⁹ Examples include the Constitution of the Maldives, Art. 243(b) (2008) (“If the President, as Commander in Chief, authorizes or orders the employment of the Military Service in defence of the Republic or as part of an international undertaking, the President shall without delay submit the authorization to the People's Majlis. The People's Majlis may at any time approve the authorization, or revoke the authorization.”)

A word is in order about the distinction between approving actions of the commander in chief and involvement in declaring war. In the era before the United Nations Charter, a formal declaration of war was an act of legal significance, indicating the view that the rules governing war were in place. The United Nations Charter, however, speaks of “armed conflict” and prohibits the “threat or use of force.”⁶⁰ This is a functional definition, indicating that the formal law of war is triggered not by a special state of affairs between the nations concerned, but by the presence of hostilities. Modern constitutions to some degree reflect this shift, by moving away from language about formal declarations of war, toward legislative approval of the deployment of troops or decisions of the commander in chief in general. From the perspective of crisis bargaining, this involves the legislature earlier in the temporal sequence (see row 3 in Figure 1).⁶¹

Some of these constitutional attributes are found in similar frequencies whether in democracy or autocracy, while others vary. Table 2 below shows the distribution of variables in constitutional systems by whether they are democratic. Democracies seem to have a greater propensity to involve the legislature in a supervisory role over decisions of the commander in chief. But legislative approval or declaration of war is equally likely in both regime types. Interestingly, democracies are more likely to be silent on war powers, something we will return to later. And, perhaps unsurprisingly, executives are likely to have the dominant role in autocracies.

TABLE 2 HERE

⁶⁰ Art. 2(4)

⁶¹ For a helpful analysis of the threat to use force in the context of U.S. law, see Matthew C. Waxman, *The Power to Threaten Force*, 123 Yale Law Journal (2014).

B. Dyadic Analysis: Use of Force & War

To determine whether these constitutional variables affect war, we estimate a series of logit models using cross-sectional time series data. We adopt many of the conventions of the democratic peace literature in conducting the analysis. First, we adopt a dyadic framework, in which the unit of analysis is the country-dyad-year. This is the standard approach, and makes sense given our emphasis on the communicative nature of legislative involvement. The MID dataset identifies, for any conflict, an initiator (“state 1”) and a target state (“state 2”). Because many pairs of states in the international system will not face a realistic possibility of entering into a conflict with each other, we restrict the analysis to “politically relevant dyads.”⁶² These are defined as dyads that are either contiguous or involve a great power, which might realistically encounter the state. This restricts the sample, but reasonably so. Including the Iceland-Zimbabwe dyad would simply introduce noise.

The dependent variable in this analysis is drawn from the levels of hostility indicator from the MID database.⁶³ This indicator has six levels ranging from “No Hostility” to “War”. We focus on the two highest levels of conflict, “War”, and “Use of Force”, which is a lower level of conflict that falls below the conventional number of fatalities defining war. A “War” or “Use of Force” for our purposes occurs when both states in the dyad have at least that level of hostility vis-à-vis each other. (All Wars count as Use of Force in this analysis.)

The set of control variables potentially useful in a study such as this is large. Mansfield and Snyder, for example, include whether or not the country in question was a major power,

⁶² Douglas Lemke and William Reed, *The Relevance of Politically Relevant Dyads*, 45 J. Conflict Res. 126 (2001)

⁶³ The *cwhost* variable in the MID dataset.

whether the country in question was engaged in a civil war in each year studied, and the distribution of power between the country in question and its neighbors.⁶⁴ Other common variables used in the literature are the number of allies possessed by a country in a given year, the number of years of peace, and measures of absolute power.

In the regressions that follow, we use a standard set of variables that are arguably at the core of the democratic peace model.⁶⁵ First we assess the relative power between the two states in the dyad. This measure draws on the Correlates of War measure of capabilities, and captures the share of total capability held by the first state in the dyad.⁶⁶ We also ask whether the dyads are jointly democratic; the prediction of the democratic peace literature is that such dyads will not enter into conflict and so it is important to control for such dyads if we are to isolate the effect of constitutional variables.⁶⁷ We also ask if the countries in the dyad are allies, with the obvious prediction that this will reduce the probability of conflict.⁶⁸ Finally, we control for contiguity. States that are next to each other are more likely to enter into conflict, possibly because of the depth and frequency of their contacts, and also because territorial disputes are a major source of international conflict.⁶⁹ In unreported robustness checks, we introduce controls for the number of years of peace between the countries in the dyad, along with squared and

⁶⁴ Mansfield and Snyder, *supra* n. 55.

⁶⁵ We are grateful to Robert Schub for the do-files to allow us to run the model.

⁶⁶ Specifically $\text{cap}_1/(\text{cap}_1+\text{cap}_2)$

⁶⁷ We rely on the POLITY II coding to define democracy as any state that scores at least a 7 in a particular year.

⁶⁸ This is drawn from the Correlates of War Alliance variable in which alliance scores of less than 4 are counted. They include formal military alliances, as well as lower levels of affiliation.

⁶⁹ Paul K. Huth, *Territory: Why Are Territorial Disputes between States a Central Cause of International Conflict*, in John A. Vasquez, ed., *WHAT DO WE KNOW ABOUT WAR?* 85 (2000).

cubed terms. These are included to control for past conflicts among states. The peace-years polynomials did not affect the results and so we leave these out of the main reported specifications.

Each regression takes the form of

$$\text{CONFLICT}_{ijt} = \beta_0 + \beta_1 \text{CONST}_{ijt} + \beta_2 \text{RELCAP}_{ijt} + \beta_3 \text{JDEM}_{ijt} + \beta_4 \text{ALLY}_{ijt} + \beta_5 \text{CONT}_{ijt} + e$$

where CONFLICT captures whether country i and country j , in year t , experience a militarized interstate dispute [FORCE | WAR] between them; CONST represents an attribute of the formal constitution in force in country i and/or j ; and RELCAP, JDEM, ALLY, and CONT represents the set of dyad-level control variables described above. In keeping with the literature, we cluster the standard errors at the level of the dyad.

The constitutional variables tested are described in the previous section. We test sequentially whether they are found in state 1 and state 2, respectively, and denote this with the suffix 1 or 2 at the end of the variables. For the regressions reported in Tables 3-6, we use WARANYLEG, which captures whether a legislature is involved in either declaring or approving war.

Tables 3 and 4 in the Appendix present the results. The basic results are consistent with the democratic peace literature. Relative capabilities matter, so that as the relative power of state 1 increases, so does the use of force or war. Democratic dyads are less likely to enter into conflict in every specification, as are allied dyads. Contiguous states are more likely to experience conflicts.

Controlling for these factors, constitutional variables have some effect. Whether the dependent variable is the use of force or war, legislative approval of the actions of the commander in chief makes a state less likely to initiate conflict. For war, legislative declaration or approval also reduces the probability that a state will initiate conflict, and legislative involvement in the target state reduces the probability of escalation to either use of force or war. Finally, constitutional silence in *either* state also matters, reducing the probabilities of conflict.

To investigate the effect of regime type, we examine the basic regression for use of force and war for subsets of democracies vs. dictatorships, dictatorships vs. democracies, and dictatorships vs. dictatorships. We leave out the fourth conceptual possibility, democracies vs. democracies, in light of the basic result of the democratic peace literature. Tables 5 and 6 examine the effect of legislative involvement, in state 1 and state 2 respectively, for each pair of regime types.

The result is surely intriguing. Legislative war power in the initiator state matters only in dictatorships that are paired with democracies; legislative war power in the target state matters when the target is a democracy responding to a dictatorship, or a dictatorship responding to a democracy. In all cases, it reduces the probability of conflict. In dyads composed of two dictatorships, legislatures do not matter.

C. Effect on Outcomes

To evaluate the effect of war powers on outcomes, we examine 3647 disputes for which an outcome is coded by the COW database. These outcomes range from a win by Side A to a win by side B, with intermediate outcomes indicating yielding by one side or the other, or a stalemate. For purposes of this study, we aggregate the categories of outright win and yield by

the counterparty to create categories `Win_By_A` and `Win_By_B`. Most disputes, however, do not have either outcome: over half of disputes end in stalemate. (There are several other categories of outcome, with relatively small numbers of data points.)

For each of these outcome variables, we run a series of logit regressions with constitutional variables on the right hand side, controlling only for relative power. Many of the other variables used to predict dispute initiation are not likely to matter as much for outcomes, and so we use this simpler framework.

We examine sequentially the effect of legislative involvement in war in state A and state B on probability of “win by A”; then do the same for “Win by B”. The results presented in Table 7 are, on first glance, in some tension with the result of the democratic peace literature that democracies win conflicts. Our results show that legislative involvement is associated with loss and stalemate, not victory. If the legislature is involved in state A, state A is less likely to win (Model 1). But state A is also less likely to win if the legislature is involved in the target state B! (Model 3). And state B is less likely to win if the legislature is involved in state A (Model 7).

To understand this result, recall again that most outcomes are not wins. Running the same regressions with stalemate as the dependent variable shows that legislative involvement on either side increases the likelihood of a draw. This is, to some degree, consistent with the informational account of legislative involvement. If legislatures are screening wars, then legislative involvement in *either* side should increase the probability of settlement of all but the closest cases. Only when there is a genuine ambiguity over the likely outcome will conflict escalate. Like the selection of disputes for litigation, the selection of conflicts will tend to lead to

only close cases being fought, particularly when there are better institutions for information production.⁷⁰

But why would legislative involvement be positively correlated with loss? One possibility is that legislatures are equally subject to the “gambling for resurrection” dynamic that has been identified for democratically elected executives. That is, once a legislature does commit to supporting military adventures, it will have difficulty backing down when the conflict goes badly. To admit defeat is to risk electoral loss. While this might lead the legislature to screen bad conflicts in the first place, once a conflict achieves a certain level of seriousness, legislative involvement can actually prevent a helpful settlement from materializing. This is consistent not only with the idea that legislatures can produce helpful information, but that they independently contribute to political resolve and commitment, which for some disputes at least may be problematic.

⁷⁰ George Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, *Journal of Legal Studies*, Vol. 13, No. 1. (Jan., 1984), pp. 1-55.

D. Further Discussion: The Virtues of Silence

One nice advantage of constitutional mechanisms is that they are found in both democracies and autocracies. While the traditional view has been to characterize authoritarian constitutions as shams, a new line of research is beginning to examine how they function and may serve to solve internal problems of credible commitments, agency control and coordination within authoritarian regimes.⁷¹ This paper has shown that the effects of legislative involvement in warmaking matter most when authoritarians confront democracies. Even in an authoritarian regime, legislatures may play a role in providing information, and chaining the proverbial dogs of war.⁷²

Constitutions that are totally silent on the war process are associated with less conflict. This is an interesting finding and goes to a core question in constitutional debates: what is the virtue of trying to specify written constraints on political power? The founding fathers in the United States believed that words *could* constrain, and that explicit allocations of power would serve to restrain its exercise. This assumption rested largely on the Madisonian scheme of self-aggrandizing political branches that would serve to check each other. From this perspective, it is obvious that one needs to use words to “chain the dogs of war.”

Consider, however, the virtues of silence. In times of threat, it will not necessarily be clear *who* has the power to respond to it. There may be a case-by-case reconsideration of which

⁷¹ See e.g. Jennifer Gandhi, *POLITICAL INSTITUTIONS UNDER DICTATORSHIP* (2008); Andreas Schedler, *THE POLITICS OF UNCERTAINTY: SUSTAINING AND SUBVERTING ELECTORAL AUTHORITARIANISM* (2013); Milan Svolik, *THE POLITICS OF AUTHORITARIAN RULE* (2013).

⁷² See generally, Daniel Hemel, *Picking up the Peaces: Democratic Norms, Structural Constraints, and International Security*, Undergraduate Thesis, Harvard College, 2007 (on file with author).

constitutional actor is in the best position to do what; there may also be arguments from precedent. Constitutional silence may trigger a second-order debate about the allocation of power that will consume additional political and discursive resources. Deciding who is the “decider” is costly. *Ceteris paribus*, one would expect this to *slow down* the process of warmaking when delay is feasible. In cases of true emergency, however, there may be an immediate consensus that one actor is in the best position to respond. Constitutional silence, therefore, might serve to slow down the process of entering into luxury wars, while allowing quick action with regard to wars of necessity.

In an unreported analysis, we decompose legislative involvement into its subtypes. The results suggest that legislative *declaration* of war seems to have little substantive effect. Legislative *approval* of declarations made by the executive, on the other hand, is associated with less conflict. This finding might spark an interesting normative debate on optimal design—it may be that there is virtue in having the legislature as the second actor in the process rather than the first. It may also be the case that legislatures in the position of declaring war are more likely to be found in systems in which they are the *only* actor involved. This would be consistent with the information theory, but requires further investigation.

E. Conclusion

The democratic peace literature has come a long way since Immanuel Kant. His initial musings on the unwillingness of popularly elected governments to commit their citizens to war have been refined through a generation of sophisticated theorizing and empirical analysis. Yet certain questions remain unanswered. We do not have a precise sense of which institutions in democracies tend to lead to the statistical regularities: what are the mechanisms of information

transmission and bargaining advantage? Constitutional rules about warmaking may be part of the story.

TABLES & FIGURES

Table 1: Distribution of Legislative Powers over War

N==745 national constitutions since 1789

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

Table 2: Distribution of variables by democracy/autocracy

Universe: 691 systems for which Przeworski democracy coding available

Variable (n)	Warleg	Warapleg	Comapleg	Warexec	Warnone
	Leg declares war (n)	Leg approves war (n)	Leg approves actions of commander in chief **	Executive declares war (n)**	Const. silent on war(n) **
Autocracy (549)	.26 (141)	.39 (218)	.15 (80)	.55 (300)	.24 (134)
Democracy (160)	.28 (39)	.38 (54)	.21(30)	.37 (53)	.41 (59)

** = difference of means significant at .01 level.

Table 3: Constitutional Variables and Use of Force

VARIABLES	(1) force	(2) force	(3) force	(4) force	(5) force	(6) force	(7) force	(8) force
relative capability	0.453*** (0.163)	0.464*** (0.161)	0.473*** (0.166)	0.398** (0.165)	0.465*** (0.166)	0.400** (0.166)	0.464*** (0.168)	0.415** (0.168)
joint dem	-1.034*** (0.247)	-1.002*** (0.253)	-1.007*** (0.248)	-1.020*** (0.250)	-1.020*** (0.248)	-1.042*** (0.248)	-0.984*** (0.249)	-1.011*** (0.247)
ally	-1.046*** (0.142)	-1.038*** (0.143)	-1.005*** (0.147)	-1.043*** (0.147)	-1.018*** (0.148)	-1.052*** (0.146)	-0.951*** (0.148)	-0.982*** (0.148)
contiguous	2.263*** (0.168)	2.260*** (0.168)	2.281*** (0.174)	2.248*** (0.169)	2.272*** (0.177)	2.244*** (0.169)	2.259*** (0.174)	2.231*** (0.170)
waranyleg1	-0.0706 (0.123)							
waranyleg2		-0.245* (0.134)						
comapleg1			-0.530*** (0.188)					
comapleg2				-0.340 (0.271)				
warexec1					0.148 (0.120)			
warexec2						0.0495 (0.128)		
warnone							-0.562*** (0.175)	
warnone2								-0.618*** (0.214)
Constant	-6.969*** (0.201)	-6.912*** (0.191)	-6.962*** (0.191)	-6.893*** (0.188)	-7.071*** (0.188)	-6.949*** (0.206)	-6.903*** (0.189)	-6.826*** (0.185)
Observations	211,622	211,622	202,004	202,004	202,004	202,004	202,004	202,004

Robust standard errors in parentheses; *** p<0.01, ** p<0.05, * p<0.1

Table 4: Constitution Variables and War

VARIABLES	(1) war	(2) war	(3) war	(4) war	(5) war	(6) war	(7) war	(8) war
relative capability	0.652** (0.287)	0.688** (0.281)	0.706** (0.287)	0.611** (0.298)	0.696** (0.288)	0.611** (0.301)	0.646** (0.308)	0.692** (0.289)
joint dem	-1.763** (0.699)	-1.713** (0.698)	-1.811*** (0.695)	-1.755** (0.695)	-1.824*** (0.691)	-1.792*** (0.693)	-1.746** (0.687)	-1.780** (0.697)
ally	-1.258*** (0.283)	-1.242*** (0.283)	-1.179*** (0.287)	-1.303*** (0.298)	-1.206*** (0.287)	-1.321*** (0.298)	-1.211*** (0.298)	-1.131*** (0.285)
contiguous	2.013*** (0.303)	2.004*** (0.303)	1.952*** (0.304)	1.947*** (0.307)	1.951*** (0.310)	1.946*** (0.305)	1.928*** (0.309)	1.931*** (0.303)
waranyleg1	-0.457* (0.237)							
waranyleg2		-0.725*** (0.279)						
comapleg1			-0.785* (0.430)					
comapleg2				-0.594 (0.375)				
warexec1					0.0835 (0.230)			
warexec2						-0.0283 (0.245)		
warnone2							-1.149** (0.527)	
warnone1								-0.584** (0.276)
Constant	-8.586*** (0.357)	-8.530*** (0.358)	-8.639*** (0.341)	-8.616*** (0.351)	-8.741*** (0.319)	-8.661*** (0.396)	-8.525*** (0.349)	-8.594*** (0.340)
Observations	211,622	211,622	202,004	202,004	202,004	202,004	202,004	202,004

Robust standard errors in parentheses; *** p<0.01, ** p<0.05, * p<0.1

Table 5: Effect of Legislative Involvement in State 1 By Dyad Type

VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)
Dyad type	Democracy v. Dictatorship	Dictatorship v. Democracy	Dictatorship v. Dictatorship	Democracy v. Dictatorship	Dictatorship v. Democracy	Dictatorship v. Dictatorship
Level of Conflict	force	force	force	war	war	war
relative capability	0.628*	0.407	0.422**	0.211	0.00907	0.591
	(0.363)	(0.387)	(0.200)	(0.414)	(0.601)	(0.392)
ally	-1.040***	-0.867*	-1.162***	-0.135	[omitted]	-1.478***
	(0.357)	(0.479)	(0.155)	(0.623)		(0.351)
contiguous	1.953***	2.366***	2.467***	0.741	3.511***	2.337***
	(0.294)	(0.409)	(0.293)	(0.508)	(0.888)	(0.538)
Waranyleg1	-0.204	-0.416*	0.0464	-0.391	-1.168*	-0.392
	(0.263)	(0.246)	(0.152)	(0.424)	(0.698)	(0.289)
Constant	-6.770***	-6.710***	-7.220***	-7.644***	-9.176***	-8.862***
	(0.368)	(0.295)	(0.356)	(0.425)	(0.738)	(0.706)
Observations	40,491	40,491	105,070	40,491	32,643	105,070

Robust standard errors in parentheses

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

Table 6: Effect of Legislative Involvement in State 2 By Dyad Type

	(1)	(2)	(3)	(4)	(5)	(6)
Dyad type	Democracy v. Dictatorship	Dictatorship v. Democracy	Dictatorship v. Dictatorship	Democracy v. Dictatorship	Dictatorship v. Democracy	Dictatorship v. Dictatorship
Level of conflict	force	force	force	war	war	war
relative capability	0.628*	0.418	0.416**	0.252	-0.0657	0.632*
	(0.356)	(0.397)	(0.197)	(0.405)	(0.628)	(0.379)
ally	-1.010***	-0.891*	-1.161***	-0.0882		-1.485***
	(0.356)	(0.493)	(0.159)	(0.625)		(0.352)
contiguous	1.958***	2.344***	2.469***	0.767	3.489***	2.321***
	(0.292)	(0.407)	(0.294)	(0.507)	(0.889)	(0.536)
waranyleg2	-0.578**	-0.754**	0.0349	-1.226**	-2.871***	-0.214
	(0.241)	(0.342)	(0.167)	(0.557)	(1.098)	(0.332)
Constant	-6.679***	-6.522***	-7.215***	-7.534***	-8.769***	-8.916***
	(0.331)	(0.316)	(0.347)	(0.398)	(0.657)	(0.704)
Observations	40,491	40,491	105,070	40,491	32,643	105,070

Robust standard errors in parentheses

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

Table 7: Effect on outcomes

EQUATION	VARIABLES	(1) win_by_A	(2) win_by_A	(3) win_by_A	(4) win_by_A	(5) win_by_B	(6) win_by_B	(7) win_by_B	(8) win_by_B
win_by_A	relcap	0.211 (0.152)	0.177 (0.151)	0.0900 (0.153)	0.133 (0.152)				
	waranyleg	-0.364*** (0.108)							
	comapleg		-0.179 (0.174)						
	waranyleg2			-0.531*** (0.111)					
	comapleg2				-0.619*** (0.200)				
	Constant	-1.603*** (0.0964)	-1.705*** (0.0918)	-1.485*** (0.101)	-1.655*** (0.0922)				
win_by_B	relcap					-0.00733 (0.198)	0.00111 (0.197)	0.0469 (0.198)	0.0150 (0.197)
	comapleg2						-0.681** (0.274)		
	comapleg								-0.338 (0.242)
	waranyleg2					-0.0800 (0.138)			
	waranyleg							-0.393*** (0.143)	
	Constant					-2.302*** (0.133)	-2.278*** (0.118)	-2.216*** (0.123)	-2.312*** (0.117)
Observations		2,771	2,770	2,771	2,766	2,771	2,766	2,771	2,770

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Table __: Effect of constitutional variables on outcomes, controlling for relative capability

	Initiator win	Target win	Stalemate
Legislative involvement in declaration: initiator	_-***	_-***	+*
Legislative involvement in declaration: target	_-***	-	+*
Legislative approval of commander action: initiator	-	-	+***
Legislative approval of commander: target	_-***	_-**	+***

Note: "win" includes yield by counterparty. *** p<0.01, ** p<0.05, * p<0.1

Figure 1: Sequence of Play

Classic War Model

State A initiates → State B responds → [settlement/escalation to MID] → [settlement/War]

Chain the Dogs of War

Executive A initiates → State B responds → [settlement | escalation to MID] → [settlement | War]

Leg
↓

Modern Constitutional Approach

Executive A initiates → State B responds → [settlement | escalation to MID] → [settlement | War]

Leg
↓