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## AN ORIGINALISM FOR FOREIGN AFFAIRS?

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Originalism and foreign affairs are both popular topics of current scholarly inquiry. Much of the recent work on foreign affairs<sup>1</sup> focuses on history, but it generally does not fully engage debates on originalism as a method of modern constitutional interpretation.<sup>2</sup> Most scholarship that defends originalism as a methodology has said little explicitly about how it relates to foreign affairs: this literature is replete with references to cases such as *Roe v. Wade*<sup>3</sup> and

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1. Foreign affairs, as I am using the term here, includes war power and war prosecution; the focus is on the constitutional aspects of foreign affairs law.

2. There is a considerable body of foreign affairs scholarship that makes claims about the substance of the Constitution's original meaning. There is little work, by contrast, from foreign affairs scholars that explicitly adopts (or rejects) originalism as a method of interpretation. Examples of work analyzing originalism in foreign affairs include GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 7–13 (2004); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 24–25 (2005); Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 *LAW & CONTEMP. PROBS.* 169 (2004); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 *COLUM. L. REV.* 1450 (2006) (book review) [hereinafter Ramsey, *Toward a Rule of Law in Foreign Affairs*]. Other foreign affairs scholarship that considers the place of history in modern constitutional interpretation includes David M. Golove, *Against Free-Form Formalism*, 73 *N.Y.U. L. REV.* 1791 (1998) (responding to Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *HARV. L. REV.* 1221 (1995)); Michael D. Ramsey, *Textualism and War Powers*, 69 *U. CHI. L. REV.* 1543, 1548–69 (2002); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 *COLUM. L. REV.* 2154, 2162–68 (1999); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 *YALE L.J.* 845 (1996) (book review).

3. 410 U.S. 113 (1973).

*Brown v. Board of Education*,<sup>4</sup> but look in vain for discussions of *Youngstown*,<sup>5</sup> *Dames & Moore*,<sup>6</sup> or the President's power to initiate war.<sup>7</sup>

This symposium contribution began with what seemed like a simple enough question: What does originalism require in the area of foreign affairs? One answer is that originalism requires historical inquiry, and indeed, much has been written on the original understanding of the Executive Vesting Clause, the Declare War Clause, the treaty power, and so on. But I mean the question in a different way, or at least to start in a somewhat different place: What are the normative reasons in favor of originalism, and how do they apply in the area of foreign affairs?

This Article describes several normative arguments for originalism and then attempts to apply them to foreign affairs. It contends that these arguments are at best underdeveloped and at worst weak when it comes to many constitutional issues that arise in the foreign affairs area. First, originalism is still largely a theory about how courts should behave, but a significant portion of foreign affairs issues are resolved by the Executive Branch and Congress, not the courts. It is sometimes unclear why the political branches themselves are bound by original meaning and how interpretation by the political branches is related to interpretation by judges. Second, and consistent with its focus on judicial review and individual rights, originalism appears at times to have little to say about the relationship between executive and congressional power, including if and how the courts should mediate this relationship. Third, pragmatic or consequentialist justifications for originalism are potentially weak in the area of foreign affairs, particularly given the profound changes over time in the Presidency as an office, the military and economic strength of the United States, the conduct of war, and the content of international law. Finally,

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4. 347 U.S. 483 (1954).

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *But see* MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 51–114 (2007) (evaluating *Youngstown* based on history and original understanding); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 229–30 (2002) (defending Justice Black and Justice Jackson's *Youngstown* opinions partially on originalist grounds).

6. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). *But see* Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1622–23 (1989) (describing *Dames & Moore* as an opinion that seems to “flatly . . . contradict many of the premises of originalism that are incompatible with nonoriginalism”).

7. *But see* Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972). There are other examples as well. The point here is that as a whole, scholarship defending originalism has been very focused on a certain set of issues and cases, which by and large does not include foreign affairs. The leading works on originalism—such as ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997), and ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)—say nothing about foreign affairs. For more examples and further discussion of this point, see *infra* text accompanying notes 26–106.

foreign affairs may be an area in which original understanding is particularly hard to discern and in which the constitutional text leaves many questions open. All of these factors may generate difficulties for originalism in other areas of constitutional law,<sup>8</sup> but the focus here is on foreign affairs and those who suggest, argue, or assume that originalism as a modern method of constitutional interpretation applies, full-force, in this context.<sup>9</sup>

Originalists could, for the reasons canvassed above and described in greater detail below, clarify and strengthen their normative arguments if they focused greater attention on foreign affairs, particularly non-judicial constitutional interpretation, the relationship between executive and congressional power, and consequentialist problems. Some originalists might argue that foreign affairs is largely the domain of constitutional construction, not interpretation.<sup>10</sup> In this view, interpretation is limited to the original meaning of the text.<sup>11</sup> But if original meaning does not resolve an issue with sufficient certainty, these theorists permit courts, the political branches, and/or the public as a whole to engage in “constitutional construction”<sup>12</sup> or to apply “constitutional principles.”<sup>13</sup> Thus, when original meaning of the text is vague, ambiguous,<sup>14</sup> or otherwise under-determinative,<sup>15</sup> these theories all permit the construction of the Constitution to adapt to the times. In this way, originalism might work out some of the tension with foreign affairs, particularly if the constitutional text is vague or ambiguous with respect to some aspects of the relationship between Congress and the President. This means in turn, however, that defining the point at which constitutional principles or construction becomes permissible is important to understanding the practical application of originalism to foreign affairs. Unfortunately, this gate-keeping issue has received little attention from even those scholars who tout the limits

8. Some also reflect limitations on much constitutional theory, not just originalism.

9. See, e.g., LAWSON & SEIDMAN, *supra* note 2; Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123 (2007); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 48, 51 n.23 (2007); Ramsey, *Toward a Rule of Law in Foreign Affairs*, *supra* note 2; John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1221 (1999).

10. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

11. BARNETT, *supra* note 10, at 118.

12. *Id.* at 121–28; WHITTINGTON, *supra* note 10, at 5–14.

13. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 304–05 (2007).

14. See BARNETT, *supra* note 10, at 118–21 (explaining and distinguishing between “vague” and “ambiguous”).

15. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473–76 (1987) (explaining that some constitutional provisions are under-determinative, but not indeterminate).

of originalism. This neglect is lamentable from another perspective as well: if we shift focus from defending or attacking originalism and look instead at possible points of engagement between different interpretive views, this issue is significant. If most everyone thinks that original meaning is important, originalism might offer some ways to understand exactly where its usefulness begins to drop off.

For foreign relations scholars, particularly those focused on history, the intent of this contribution is to encourage greater engagement with the methodology of contemporary constitutional interpretation. It may be that the debates in the field are largely about the content of history itself, not about what role history should play in modern interpretation. To the extent we are concerned with how courts, Congress, and executive branch lawyers actually decide constitutional questions, however, it is not enough to simply describe history (original or otherwise); instead, we need an understanding or theory of why, how, and what kind of history is relevant.

### I. ORIGINALISM(S) AND FOREIGN AFFAIRS: PROBLEMS

“Originalism,” as used here, means the interpretation of the Constitution in accordance with the original public meaning of the text, unless that meaning cannot be determined with sufficient confidence. This definition obviously glosses over many important fissures within originalism, including different views as to its proper object.<sup>16</sup> Most contemporary originalists use original public meaning<sup>17</sup>—as opposed to the intent of the Framers or ratifiers—and this Article does as well. Because there seems to be something approaching a consensus that the original meaning of constitutional text is, at least, an important part of interpretation,<sup>18</sup> the focus here is on theories that require more—those that advance original public meaning as the preferred or

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16. This use of the term “object” is from Berman. Mitchell N. Berman, *Originalism is Bunk* 6–7 (July 14, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1078933>.

17. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 620–29 (1999); see also Stephen M. Griffin, *Rebooting Originalism*, 2008 *U. ILL. L. REV.* 1185, 1186; Lawrence B. Solum & Robert W. Bennett, *A Dialogue on Originalism Occasioned by Bennett’s Electoral College Reform Ain’t Easy*, 101 *NW. U. L. REV. COLLOQUY* 31, 41 (2006), <http://www.law.northwestern.edu/lawreview/Colloquy/2006/4/LRColl2006n4Solum&Bennett.pdf> (describing the move from original intent to original public meaning originalism as “a sort of Copernican revolution in constitutional theory”). *But see* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 48 (2006) (employing a hypothetical reconstruction of the meaning that a “reasonable” observer would have attributed to the Constitution in 1788).

18. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *OHIO ST. L.J.* 1085, 1086 (1989); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1745 (1996).

exclusive tool of constitutional interpretation, unless that meaning is unclear.<sup>19</sup> Another point bears clarification: this paper is about how government officials and courts actually interpret the Constitution, and I use “originalism” to mean that they should do so according to the original public meaning of the document.<sup>20</sup>

Because it is impossible to comprehensively analyze all of the work on originalism, this Article focuses on three normative defenses: the liberty-based justification for originalism advanced by Professor Barnett, the popular sovereignty account of Professor Whittington, and the pragmatic justification for originalism advanced by Professors McGinnis and Rappaport. To be perfectly clear, the goal of the paper is not to critically evaluate these arguments in favor of originalism. It is, instead, to apply these arguments to foreign affairs. If, in other words, we lived in these originalist worlds, what would foreign affairs look like and why?<sup>21</sup>

It may also be helpful to provide two examples of the kinds of constitutional questions that arise in foreign affairs. For the first example, assume that historical research demonstrates that the original public meaning of the Declare War Clause was that Congress alone would have the authority to initiate hostilities through the use of force and that the President’s power was limited to responding to attacks on the United States.<sup>22</sup> Assume further that the President has long used force abroad without the authorization of Congress in order to protect U.S. property, citizens, or interests. For the second example, assume that the Constitution’s original public meaning was that sole executive agreements could not have force as domestic law.<sup>23</sup> Assume further that sole

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19. Finally, this Article is premised on a contested assumption: originalists bear the burden of persuasion. Originalism is, generally speaking, not the way courts or the Executive Branch and Congress actually interpret the Constitution in the area of foreign affairs, so originalists have the burden of explaining why their approach should be adopted. Cf. Ramsey, *Toward a Rule of Law in Foreign Affairs*, *supra* note 2, at 1474 (“Nonoriginalism is, as an initial problem, not a positive constitutional theory . . .”). Much of the most recent scholarship on originalism focuses in one way or another on whether originalists bear the burden and what the nature of that burden is. See Berman, *supra* note 16, at 21–22, 69–79; Griffin, *supra* note 17, at 1197–1205.

20. Hence, to use Professor Solum’s language, this Article assumes that the “Constitution’s semantic content is fixed by facts at time of drafting and ratification” and asks how and why “constitutional practice” should be bound “by that content.” Lawrence Solum, Colby & Smith on Originalism (and a Comment About the Meaning of Originalism), on Legal Theory Blog, <http://lsolum.typepad.com/legaltheory/2008/02/thomas-colby-an.html> (Feb. 15, 2008, 16:15 EST).

21. This Article also puts aside questions of *stare decisis*.

22. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 60–116 (1974); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699–700 (1972). *Contra* YOO, *supra* note 2, at 143–55.

23. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 173–83 (1998).

executive agreements have long been used to settle claims against foreign nations and that sometimes these agreements displace state law (i.e., have domestic legal effect).<sup>24</sup> A President bound by originalism in the interpretation of his own constitutional authority would, in the first example, not be able to use force to protect U.S. property abroad. An originalist court, in the second example, could not give domestic legal effect to the sole executive agreement.

#### A. *Originalism: Just for Courts?*

Keith Whittington describes the originalism of the 1970s and 1980s as:

a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions. Above all, originalism was a way of explaining what the Court had done wrong, and what it had done wrong in this context was primarily to strike down government actions in the name of individual rights.<sup>25</sup>

This version of originalism, with its focus on restraining courts, judicial deference to legislative majorities, and attacking cases like *Roe* and *Griswold*,<sup>26</sup> seems at least partially beside the point for foreign affairs.<sup>27</sup> Many of the most important foreign affairs issues are, at least currently, resolved largely outside the courts by the Executive Branch and Congress—for example the relative power of each branch to initiate war—and the principles of judicial restraint seem ill-suited to fully resolve issues raised by cases such as *Youngstown*, *Dames & Moore*, and *Garamendi*.<sup>28</sup> This is so in part because the goal of judicial restraint does not itself tell us anything about the relationship between executive and legislative power.<sup>29</sup> Perhaps originalism does not apply to the President's interpretation of his power, but it seems incongruous to argue that the President is not bound to use originalism to

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24. *United States v. Pink*, 315 U.S. 203, 229–30 (1942); *United States v. Belmont*, 301 U.S. 324, 330–31 (1937).

25. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004) (footnote omitted); see also John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83 (2003).

26. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see BORK, *supra* note 7, at 153–55, 161–67; Edwin Meese III, Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in 19 U.C. DAVIS L. REV. 22, 26–29 (1985); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 550–54 (2006); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); Whittington, *supra* note 25, at 602–03.

27. See generally Balkin, *supra* note 13, at 308 (arguing that “[f]rom the perspective of [theories of judicial restraint], non-judicial interpreters are marginal or exceptional cases that we explain in terms of the standard case of judicial interpretation”).

28. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

29. See Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353, 359–60 (2008).

interpret the scope of his own power but the courts must use originalism when they interpret the President's power.<sup>30</sup>

When early originalists turned their attention to foreign affairs, as Edwin Meese did in 1988, some sounded themes that would become the staple of future originalist foreign affairs scholarship: executive primacy and the limited (or non-existent) role that the courts should play in policing the boundary between executive and legislative authority.<sup>31</sup> But this work either ignored original understanding at all<sup>32</sup> or seemed to take as its starting point that the political branches should be bound by original meaning, rather than really defending this proposition.<sup>33</sup> Other originalists have reached opposite historical conclusions. Raoul Berger, an influential original intent originalist,<sup>34</sup> extensively canvassed original history and concluded that the President's contemporary power over foreign affairs is far greater than what the Framers and ratifiers intended; he thus argued that "[i]f present exigencies demand a redistribution of powers in which Congress was originally fully to share," then "that decision ought candidly to be submitted to the people in the form of a proposed amendment."<sup>35</sup> Indeed, to this extent, Berger does not fit Whittington's description: Berger did argue that "[t]he Court has not shrunk from taking over the functions of a legislature," but he also maintained that in

30. Berman makes a similar point:

Accordingly, proponents of judicial Originalism who rely on arguments that would not themselves support universal Originalism (intentionalists being the most obvious counter-example) must explain how such cross-fertilization can proceed when different interpreters are entitled to rely on significantly different interpretive methodologies or, alternatively, why there should be—even how there could be—something closer to acoustic separation between judicial and extra-judicial constitutional exegesis.

Berman, *supra* note 16, at 25–26. A recently published essay by Michael Ramsey considers the reverse proposition: the President is bound by originalism, but the courts are not. See Ramsey, *supra* note 29.

31. Edwin Meese, III, *Constitutional Fidelity and Foreign Affairs*, 43 U. MIAMI L. REV. 223, 224–25, 229 (1988); accord Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 695, 700–01 (1990).

32. See Bork, *supra* note 31.

33. See Meese, *supra* note 31, at 228–29. Meese appears to suggest that the political branches should follow original meaning—and that Congress should accordingly “respect executive prerogatives concerning the conduct of foreign policy”—because if Congress did so, courts would have fewer cases to decide. Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 12 (1988). Here, the desire to limit the work of the courts is the engine driving the analysis of how Congress and the Executive Branch should behave.

34. Johnathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253, 253, 255 (2001).

35. Berger, *supra* note 7, at 54; accord Lofgren, *supra* note 22.



the context of foreign affairs the Court “with excessive modesty . . . abdicates its main function—policing of constitutional boundaries.”<sup>36</sup>

Theories of originalism began to shift focus in the late 1980s and the 1990s.<sup>37</sup> In 1986, Antonin Scalia argued that originalists should identify their doctrine as concerned with original meaning instead of original intent.<sup>38</sup> As Professor Solum describes, many theorists soon adopted this approach, and the “new originalism” which emerged has as its “core idea” the view “that the original meaning of the [C]onstitution is the original public meaning of the constitutional text.”<sup>39</sup> In Whittington’s view, new originalism is also “an argument about what judges are supposed to be interpreting and what that implies, rather than an argument about how best to limit judicial discretion.”<sup>40</sup> To the extent this description is accurate,<sup>41</sup> this shift might mean that the new originalism holds more promise for those seeking answers to foreign affairs questions. Yet two features of most contemporary originalism suggest that its relevance to such questions may remain modest.

First, as Whittington’s phrase “what judges are supposed to do” suggests, originalism seems to remain largely (in practice if not in theory) about the actions of judges, as opposed to the Legislature or executive branch officials. Professor Berman refers to this as the “subjects” of originalism— “[m]any originalist theses concern only how judges should act; they are agnostic regarding how other readers should interpret the Constitution.”<sup>42</sup> Berman defines contemporary originalism as addressing “what courts must do, not what all interpreters must do.”<sup>43</sup>

Whittington, a prominent new originalist, at times appears to explicitly limit his defense of originalism to “constitutional interpretation by the judiciary,”<sup>44</sup> although elsewhere he is less clear.<sup>45</sup> And Whittington writes that:

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36. Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577, 625–26 (1980).

37. See Whittington, *supra* note 25; Lawrence B. Solum, *Semantic Originalism* 13–21 (U. Ill. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

38. Solum, *supra* note 37, at 18.

39. *Id.* at 19.

40. Whittington, *supra* note 25, at 609.

41. Cf. Balkin, *supra* note 13, at 308 (arguing that contemporary originalism improperly focuses on judicial restraint).

42. Berman, *supra* note 16, at 11.

43. *Id.* at 25.

44. WHITTINGTON, *supra* note 10, at xi, 160.

45. “Although the judicial obligation to engage in constitutional interpretation is not unique to the courts, since each branch is bound by the sovereign will . . .” *Id.* at 153; see also *id.* at 135–36.

[A] great deal of the originalism debate is driven by a particular concern with the work of judges and how best to justify and guide their decisions to lay aside the public policies endorsed by elected representatives. The originalism debate speaks to the nature of constitutional interpretation generally, but it is particularly motivated by and concerned with constitutional interpretation within a very specific institutional context. For both originalists and their critics, competing understandings about constitutional authority underwrite the institutional authority of the judiciary to speak for the text and the particular approaches to constitutional interpretation that the courts might employ.<sup>46</sup>

Less explicitly, Randy Barnett begins his book, *Restoring the Lost Constitution*, with the observation that “[h]ad judges done their job, this book would not need to be written.”<sup>47</sup> Barnett’s book targets judicial review of state and federal laws and argues that the judicial “presumption of constitutionality” applied to acts of Congress is wrong and should be replaced instead with a “presumption of liberty.”<sup>48</sup> Again, foreign affairs issues are frequently resolved by the political branches, wholly or partially outside the courts,<sup>49</sup> and thus originalism (as theorized by Whittington and others) may have little to say about them.<sup>50</sup>

Second, an originalism focused on the courts—and individual rights<sup>51</sup>—may not have much to say about separation of powers as between Congress

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46. Keith E. Whittington, *Let’s Call the Whole Thing Off?*, 22 CONST. COMMENT. 365, 375 (2005) (book review).

47. BARNETT, *supra* note 10, at 1.

48. *Id.* at 151–353.

49. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996); Flaherty, *supra* note 2; John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293 (1993); Ramsey, *Toward a Rule of Law in Foreign Affairs*, *supra* note 2, at 1474.

50. There is voluminous literature on constitutional interpretation outside the courts. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829* (2001); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1359–78 (2001); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1274–79 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221–22 (1994); James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215 (2000) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

51. Cf. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727 (1988) (“For most commentators, the civil liberties area has been the battleground on which the original understanding debate has been fought.”).

and the President.<sup>52</sup> This is not necessarily so, but if the project of originalism is to provide a theory of why courts are permitted to strike down statutes, for example, that theory may not help us figure out when the President's power to act ends and that of Congress begins, because in either case the courts are reviewing the actions of a democratically accountable actor. As it turns out, however, both Barnett and Whittington argue that originalism is required of all government officials, although precisely why this is so and what it would actually mean is left somewhat unclear. They also both at least seem to suggest that the courts should play a strong role in policing the limits the Constitution places on government authority, and separation of powers issues are not identified as exceptions.

### 1. Barnett

Professor Barnett argues that “political actors,” including judges, may not “disregard” the original limits that a written Constitution places on their authority, because if they do so the Constitution’s legitimacy is undermined.<sup>53</sup> This defense of originalism requires that the original, written constitution be “legitimate”<sup>54</sup> to begin with.<sup>55</sup> A constitution is legitimate, in turn, if it ensures that every law restricting freedom is “necessary to protect the rights of others without improperly violating the rights of those whose freedom is being restricted.”<sup>56</sup> If the Constitution is legitimate in this sense, we are bound by the laws created pursuant to its terms; the lawmaking process, which provides legitimacy to the commands of government officials, must be preserved or “locked in” through originalist interpretation of the written text.<sup>57</sup>

This definition of legitimacy, as well as the justification for originalism that follows, seem to have nothing specific to say about separation of powers between the President and Congress, except to the extent such actions have an impact on freedom. To take our first example, some offensive uses of military force by the President acting alone might intrude upon the power of Congress

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52. Robert Bork describes *The Tempting of America* as a book about “the tendency of the judiciary to invade the province of the legislature” and notes that foreign affairs is a different area of separation of powers. Bork, *supra* note 31, at 695 (citing BORK, *supra* note 7).

53. BARNETT, *supra* note 10, at 109–10, 116–17. Barnett also argues that “practical considerations” are enough to justify originalism. *Id.* at 109.

54. Barnett obviously uses the term in a normative sense. A “legitimate lawmaking process is one that provides adequate assurances the laws it validates are just.” *Id.* at 48.

55. See Trevor W. Morrison, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 849–52 (2005) (book review) (discussing this aspect of Barnett’s argument).

56. BARNETT, *supra* note 10, at 9–10, 44–45, 48, 276.

57. *Id.* at 4, 103–13, 116–17.

to “Declare War,” but not “restrict freedom.”<sup>58</sup> Therefore, adherence to original meaning seems unnecessary as legitimacy does not depend upon “locking in” this feature of the Constitution. In other words, this argument is unavoidably linked to the content of the Constitution that ensures legitimacy. The “lock in” argument simply does not explain why we need originalism with respect to features of the Constitution that need not be locked in.

Barnett apparently disagrees; he argues that once the Constitution is deemed “good enough” (i.e., it is legitimate), then it is necessary to “lock in” the entire document.<sup>59</sup> Even assuming that this follows,<sup>60</sup> Barnett’s approach requires the President to adhere to original meaning not because the Constitution is “good enough” in terms of how it defines presidential power, but instead based on the merits of other aspects of the Constitution—namely those that relate to individual freedom.

Although Barnett seems to acknowledge that some structural features of the Constitution must be locked in although they do not protect liberty,<sup>61</sup> he might argue that the decision to commit troops or otherwise use force does infringe upon liberty because it requires individual members of the armed forces to take particular actions. It is unclear, though, how the liberty-based rights that Barnett describes would work in the context of voluntary military service and for uses of military force (launching a missile) that involve little or no immediate risk to our own armed forces. In any event, if liberty is implicated in the decision to use force, this raises other questions, as consideration of the second example illustrates.

58. See *id.* at 49–52. If actions of the President are excluded, then the difficulty is that Barnett’s theory does not apply to a whole category of government action—one that is particularly important in foreign affairs.

59. *Id.* at 110–13, 277; see also *id.* at 48 (“A law that violates principles of federalism may be improper even though it does not infringe upon . . . rights . . .”).

60. Barnett argues that this follows from the “writtenness” of the Constitution. He offers at least three ways in which legitimacy and writtleness are related. “First, constitutional legitimacy depends on what the writing says.” *Id.* at 116–17. “Second, assuming that the lawmaking process initially established by the written constitution is legitimate . . . [the] writing helps assure that the[] provisions will be respected over time.” *Id.* at 117. Neither helps here. Third, however, Barnett also suggests that legitimacy itself requires a commitment to writtleness: “[D]eviations from the original meaning of a written constitution will undermine the legitimacy of a lawmaking process, one of whose components is the commitment to a written constitution.” *Id.* at 110 n.60. Given the underlying definition of legitimacy, it is still unclear (at least to this reader) why writtleness must preserve the original meaning of the Constitution in ways unrelated to individual freedom. Barnett also describes the benefits of writings—such as notice and clarity—that are only preserved if we adhere to the original meaning of the writing. But to this calculus we might add the disadvantages of writings; in other words, this seems to shift to a consequentialist defense of originalism. See *infra* Part I.B.

61. See BARNETT, *supra* note 10, at 48, 110–13, 277.

What does Barnett's theory provide with respect to the second example, which involved presidential lawmaking? This, too, must be teased out, as Barnett does not address this kind of issue directly. The deprivation of property is involved, and executive actions seem to qualify as "law,"<sup>62</sup> thus enforcement of the sole executive agreement must be both "necessary" and "proper."<sup>63</sup> Although these requirements would seem (based on the Necessary and Proper Clause) to apply only to acts of Congress, Barnett acknowledges that he uses these terms somewhat differently from their meaning in the Constitution.<sup>64</sup> "A 'proper' exercise of power is one that is within the jurisdiction of the branch or department in question . . ."<sup>65</sup> As, per our hypothetical, this sole executive agreement is beyond the power of the President acting alone (thus presumably not within the President's "jurisdiction"), it would not be "proper." Perhaps these actions by the President do not constitute "law" at all and thus stand outside Barnett's argument. If so, it is unclear that the arguments Barnett advances in favor of originalism apply to presidential actions.

Barnett explicitly rejects any argument that originalism requires the political question doctrine<sup>66</sup> and would apparently apply a presumption of liberty in this context, making it difficult for the President to prevail. Congressional executive agreements would share the same fate (assuming they are inconsistent with the original public meaning of the Constitution<sup>67</sup>). More so than the presidential initiation of war, these results are understandable from an individual liberties perspective because insisting upon the lawmaking procedures provided in the original Constitution makes it more difficult to deprive people of property. Nevertheless, abandoning the political question doctrine, employing a "presumption of liberty" in the context of foreign affairs, and strict enforcement by the court of the constitutional boundaries between executive and legislative powers could radically transform foreign affairs and dramatically reduce the power of the President while enhancing that of the courts—all which goes entirely unnoticed in Barnett's book.

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62. *See id.* at 49–52.

63. *Id.* at 51 ("[A] law must be both necessary to the protection of the rights of others and proper insofar as it does not violate the rights of those upon whom it is imposed . . .").

64. *Id.* at 47–48.

65. *Id.* at 274.

66. BARNETT, *supra* note 10, at 128–30.

67. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 764 (2002) ("[W]hile scholars vigorously disagree about whether congressional-executive agreements may be legitimately used today, few would disagree that the original meaning of the Constitution prohibited them.").

## 2. Whittington

Whittington's work on originalism is also largely concerned with judicial review,<sup>68</sup> but his defense of originalism is ultimately based on popular sovereignty and consent, which Barnett rejects.<sup>69</sup> Whittington argues that the Constitution is authoritative because it is a product of the sovereign will, which must be distinguished from the government itself.<sup>70</sup> "[T]he people," in their sovereign capacity"—i.e. in a constitutional convention—"do not always exist,"<sup>71</sup> and when they do not, "the only available expression of the sovereign will is the constitutional text."<sup>72</sup> All branches of government are bound by this expression of sovereign will; originalism is required so that the text operates as a "constraint" on the people's agents.<sup>73</sup> Many disagree, of course, that the need for constraint requires originalism.<sup>74</sup> The point here, however, is that despite the focus on judicial review, Whittington's theory actually obligates all three branches to engage in constitutional interpretation (and presumably to limit their power as required by originalist interpretation), because all are bound to the constitutional text as the expression of sovereign will.<sup>75</sup>

With respect to extrajudicial interpretation, the theory becomes somewhat unclear. According to Whittington, "government agents"—apparently this includes Congress and the President—enjoy two sorts of political authority.<sup>76</sup> First, "[t]hey are chosen by and responsible to the electorate . . . to ensure . . . the public good"; second, "they are empowered by the sovereign people to use

68. Whittington has also written extensively on constitutional construction, which is not concerned with judicial review. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

69. BARNETT, *supra* note 10, at 9. This Article puts aside Whittington's argument based on the written nature of the Constitution, WHITTINGTON, *supra* note 10, at 50–61, which seems largely directed to the courts. It is the discussion of popular sovereignty that best engages the questions posed at the beginning of this Article.

70. WHITTINGTON, *supra* note 10, at 110–13, 124–27.

71. *Id.* at 135.

72. *Id.*

73. *Id.* at 56.

74. Berman, *supra* note 16, at 61–63; see also Christopher L. Eisgruber, *Early Interpretations & Original Sins*, 95 MICH. L. REV. 2005, 2009–13 (1997).

75. WHITTINGTON, *supra* note 10, at 153 ("[T]he judicial obligation to engage in constitutional interpretation is not unique to the courts, since each branch is bound by the sovereign will . . ."); *id.* at 136 ("The text alone is present in normal politics, and therefore no organ of the government is authorized to speak in the name of the people. The sovereign people are not present."); *id.* at 159 ("[A]lthough government officials are legally bound by the terms of the Constitution, they are only contingently constrained by the terms of constitutional constructions."); see also *id.* at 56 ("The people can constrain their governmental agents only by fixing their will in an unchanging text.").

76. *Id.* at 135.

the resources of government to fulfill specified ends.”<sup>77</sup> Judges, by contrast, have only the second sort of political authority, which means they are limited to enforcing the Constitution itself: “The judiciary’s particular claim to authority can come only from the accuracy of its efforts to interpret the Constitution.”<sup>78</sup>

Whittington does not, however, directly answer some of the questions that this arrangement poses. For example, what is the relationship between constitutional interpretation by the political branches and that of the courts?<sup>79</sup> Whittington says that “the judiciary . . . is functionally elevated above the other branches in terms of its specialized capacity to interpret [sovereign] will.”<sup>80</sup> Courts, on this account, serve as “neutral arbiters” while government officials are “interested parties in disputes over constitutional meaning.”<sup>81</sup> Should courts accordingly refuse to defer to the Executive Branch’s interpretation of the Constitution?<sup>82</sup> Indeed, despite the reasons he gives here to be skeptical of constitutional interpretation by the other branches, elsewhere Whittington emphasizes the limitations and weaknesses of the courts, defends extrajudicial constitutional interpretation, and suggests a complicated relationship between interpretation by the courts and that of the political branches.<sup>83</sup> The work on extrajudicial constitutional interpretation does not, however, discuss originalism.

Whittington also emphasizes at length that the sovereign will of the people must be preserved through a fixed text that limits the power of government.<sup>84</sup> Must the judiciary always enforce the sovereign will in this way? In other words, to take the first example from the beginning of this paper, if originalist analysis shows—to the requisite level of certainty—that Congress alone has the power to initiate hostilities, must the *courts* step in to prevent the President from using troops for this purpose? If Congress does nothing and the President exceeds the limits of the authority he is given by the sovereign will of the people, how can the courts legitimately *fail* to act? Whittington suggests a

77. *Id.*

78. *Id.* at 154; *see also id.* at 46, 56–57, 152–59.

79. *Cf.* William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1335 (2006) (questioning how the Executive and Legislative Branches should interpret the Constitution).

80. WHITTINGTON, *supra* note 10, at 153.

81. *Id.*

82. *Id.* at 154 (“Such arguments do not support a unique capacity in the courts to engage in constitutional interpretation, but they do indicate a special obligation by the courts to interpret the fundamental law and particular reason for respecting their judgment.”).

83. *See* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848 (2002) (“The authority to interpret the Constitution is shared by multiple institutions and actors within our political system, and tends to flow among them over time rather than remain fixed in a stable hierarchical or segmented distribution.”).

84. WHITTINGTON, *supra* note 10, at 56.

strong role for the courts. He writes: “Interpretative approaches that allow judicial restraint in relation to some parts of the text implicitly assert that the other branches of government directly embody the deliberate popular will relative to those aspects of the text.”<sup>85</sup> If other branches disregard the constitutional limitations on their own authority, and the courts employ “judicial restraint,” then “consensual . . . government is undermined, replaced with a selective reordering of constitutional values by government officials who claim an authority superior to the fundamental law under which they hold their offices.”<sup>86</sup>

Finally, the relationship between construction and interpretation is not entirely clear. Because *interpretation* of the text is the effectuation of the sovereign will, while constitutional *construction* is not, it seems that courts must not rely on the latter when doing the former. Yet Whittington is open to a flexible relationship between the interpretive work of the political branches and that of the courts.<sup>87</sup> It seems, however, that when courts are engaged in interpretation, while they might be able to defer to the Executive Branch’s interpretation of the Constitution, they must be quite careful to distinguish between that and construction by the Executive Branch. This appears to be an especially awkward and difficult inquiry for the courts, and one that could substantially complicate the application of originalism to foreign affairs.

### B. *Originalism and Outcomes*

Originalism is also sometimes defended on pragmatic or consequentialist grounds. Professors McGinnis and Rappaport, for example, argue that because the Constitution was enacted by supermajoritarian rules, there are strong reasons to think that its provisions will have “good consequences” that are “socially desirable.”<sup>88</sup> Judges should adhere to original meaning (including the Framers’ own “interpretative rules”) in order to sustain and preserve these good consequences.<sup>89</sup> This defense of originalism does not tell us how the political branches should behave—although presumably they must adhere to the original text, too, for the same reasons.

Would McGinnis and Rappaport endorse a strong role for the courts to enforce the boundaries between executive and congressional authority, if this is necessary to preserve the results of supermajoritarian deliberation that is

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85. *Id.* at 155. Whittington does elsewhere discuss the political question doctrine, apparently sanctioning its use when “traditional tools of interpretation . . . could not penetrate to the core of the debate and decisively settle [the] controvers[y].” WHITTINGTON, *supra* note 68, at 154.

86. WHITTINGTON, *supra* note 10, at 155.

87. See Whittington, *supra* note 83, at 848.

88. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 384–85 (2007).

89. *Id.* at 384, 389–91.



memorialized in the Constitution? They may believe that the Framers' own interpretative rules foreclose a strong judicial role in foreign affairs, but what if that is unclear or wrong?<sup>90</sup> And what if courts are poorly suited to enforce boundaries between the branches today?

More broadly, what if originalist interpretation leads to really bad contemporary results? The authors consider this kind of objection briefly at the end of the paper, noting that even if critics point to "a constitutional provision that is widely believed to be defective," such a provision does not undermine their argument "that the Constitution taken *as a whole* is of high-enough quality that its original meaning should be enforced."<sup>91</sup> This response would seem to hinge, however, on the importance of the provision in question. Their example is the provision that prevents foreign-born citizens from becoming President, but as Professor Jefferson Powell has put it: "In the area of foreign affairs . . . the interpretations we give the Constitution can implicate the survival of the Republic itself."<sup>92</sup> What if the provision that leads to bad results is one that relates to national security, and it poses a substantial threat to the nation *itself*? In this situation, it seems hard to defend an original construction of the Constitution *as a whole* on consequentialist grounds.<sup>93</sup>

Foreign affairs is indeed cited by others as a context in which originalism should be rejected on consequentialist grounds. Professors Posner and Vermeule reject originalism during times of crises (which has some, albeit imperfect, overlap with foreign affairs), based on the high decision costs of originalist reasoning (hard to do, requires painstaking historical research) which are more harmful during emergencies when delay is more costly.<sup>94</sup> Also, during emergencies the benefits of history are lower, and the costs of tying judges to history are higher because emergencies come from unanticipated events and need experimental, creative, forward-looking policy.<sup>95</sup> Finally, historical changes since the framing, including an increase in

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90. David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

91. *Id.* at 396.

92. H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1476 (1999); *see also* Treanor, *supra* note 79, at 1333 ("Few areas of constitutional law have produced as much heated debate as the war powers area, heat produced in no small part by the passionate belief that this is a subject of incalculable consequence.").

93. McGinnis & Rappaport may not think that applying originalism in the context of foreign affairs leads to bad results. But it seems that the success of their argument depends upon a particular concept of foreign affairs at the framing—one that continues to lead to good results today.

94. Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313, 319 (2007).

95. *Id.* at 319–20; *see also* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

the power of the presidency<sup>96</sup> and of the United States,<sup>97</sup> as well as changes in international law<sup>98</sup> and the conduct of war, may all work to make originalism unattractive in the area of foreign affairs, especially to pragmatists. Although *stare decisis*, which is defended by some originalists, might help answer these concerns, foreign affairs, as described above, lack judicial precedent in many important areas of interpretation.

### C. *Original Uncertainty & Changes over Time*

History itself has always posed a variety of threats to originalism.<sup>99</sup> These threats may, depending on your view of history, be enhanced in the context of foreign affairs. Some have argued that this is an area in which the original meaning of constitutional text is especially hard to determine.<sup>100</sup> Certain textual commitments of authority—like the power to make “Rules concerning Captures on Land and Water” and to “grant Letters of Marque and Reprisal”<sup>101</sup>—not only refer to things whose original meanings are difficult to understand at all in modern terms, but also to things that went virtually unnoticed during the framing of the Constitution.<sup>102</sup>

Second, even if we are able to determine the original meaning of the text, that text still may not answer many foreign affairs questions.<sup>103</sup> Examples may (depending on your view of the Constitution’s text) include the power to terminate treaties,<sup>104</sup> the status of non-treaty international agreements, and whether or not the President has primary, exclusive power in the area of foreign affairs.<sup>105</sup> As Martin Flaherty observes, “[p]recisely because the Founding generation had resolved so little, rather than so much,” key

96. Monaghan, *supra* note 51, at 736–37; see WHITTINGTON, *supra* note 68, at 159–62; G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

97. See Monaghan, *supra* note 51, at 736.

98. See Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683 (2005).

99. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

100. See Flaherty, *supra* note 2, at 171.

101. U.S. CONST. art. I, § 8, cl. 11.

102. See Treanor, *supra* note 79, at 1339–40 (arguing that the Declare War Clause “was not a first order issue for” the Framers and that, therefore, “they fashioned a text that neither fully captured their intentions nor resolved the types of issues that have become pressing to us”).

103. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 201 (5th rev. ed. 1984); HENKIN, *supra* note 49, at 14–15.

104. See *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C.), *rev’d*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

105. See, e.g., Powell, *supra* note 92.

constitutional questions have been “worked out over time by the three branches in light of the likely consequences,” and although this “result also frequently obtains in domestic constitutional issues, in foreign affairs it is close to systemic.”<sup>106</sup> Not everyone agrees with this assessment of history;<sup>107</sup> to the extent it is correct, however, originalism would seem to provide fewer answers to constitutional questions.

## II. FOREIGN AFFAIRS AND ORIGINALISM: ANSWERS?

### A. *Answers from Originalism: Constitutional Construction & Principles*

Several developments in originalist theory might smooth out the relationship with foreign affairs. In particular, originalists have increasingly acknowledged that original meaning does not fully resolve all questions about the Constitution, because the text can be both vague and ambiguous.<sup>108</sup> As an example, the 1988 Guidelines on Constitutional Litigation provided that government lawyers should make their arguments to courts based on original understanding:

[C]onstitutional language should be construed as it was publicly understood at the time of its drafting and ratification and government attorneys should advance constitutional arguments based only on this “original meaning.” To do this, government attorneys should attempt to construct arguments based solely on the ordinary usage of the words at the time the provision at issue was ratified. . . . Where the text of a particular provision is ambiguous or vague, arguments may then be premised on the structure of the government as defined elsewhere in the text of the Constitution, and on other sources indicating the intent of those who drafted, proposed, and ratified that provision (i.e., the Founders). It should be remembered, however, that the aim of any extratextual analysis is only to elucidate the meaning of the actual constitutional text at issue.<sup>109</sup>

Today’s originalists like Barnett, Whittington, and Professor Balkin would not agree. All acknowledge that original meaning sometimes runs out, and then someone (e.g., a judge, executive branch official, the general public) does something else; Barnett and Whittington call the something else “constitutional

106. Flaherty, *supra* note 2, at 171–72 (footnote omitted); accord EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 171 (4th rev. ed. 1957). *Contra* RAMSEY, *supra* note 5.

107. See RAMSEY, *supra* note 5.

108. BARNETT, *supra* note 10, at 118–30.

109. Post & Siegel, *supra* note 26, at 547 n.13 (2006) (quoting Office of Legal Policy, U.S. Dep’t of Justice, *Guidelines on Constitutional Litigation* 3–4 (Feb. 19, 1988), available at <http://www.acslaw.org/pdf/guidelines.pdf>). Earlier views of exclusivity: “The Constitution’s true meaning, based on its original understanding, should be the sole basis for court rulings.” Edwin Meese III, *A Return to the Founders*, NAT’L L.J., June 28, 2004, at 22.

construction.”<sup>110</sup> This has obvious importance for the first and second difficulties discussed in the preceding section: original public meaning may be under-determinative because the text in question is vague, ambiguous, or leaves gaps. It may also ease some of the tension between Barnett’s and Whittington’s theories of originalism and foreign affairs; much of that tension is generated by executive power, about which neither says much of anything. Moreover, a sufficiently plastic originalism<sup>111</sup> might permit outcomes that pragmatists think are correct.

Consider the first example set out at the beginning of the paper, involving the President’s power to use force in light of the Declare War Clause. Assuming, as the first example does, that the original public meaning of the Declare War Clause was to give Congress (not the President) the power to initiate hostilities through the use of force, then Barnett’s theory requires adherence to original meaning—and thus may require fundamental changes to the current balance of power between Congress, the President, and the courts—even when such adherence appears to have nothing to do with individual freedom. Whittington’s theory appears to require the same result, which is related to the popular sovereignty rationale he advances. The difficulty here is that the Executive Branch must also interpret the Constitution’s limits on its own authority, and it is unclear if (and why or why not) the *courts* are obligated to enforce the original boundaries of the President’s authority. But each theory acknowledges that original meaning is sometimes under-determinative; if that is the case with the Declare War Clause, then these results are not required. Indeed, under these circumstances, the Executive Branch is not limited to originalism—constitutional construction “fills the unavoidable gaps in constitutional meaning when interpretation has reached it[s] limits.”<sup>112</sup>

In other words, originalism works for foreign affairs because this area of constitutional law is so uncertain that originalism itself does not require originalism! This leads to a vitally important question: What amount of under-determinacy (and of what sort) permits construction? This is an important

110. BARNETT, *supra* note 10, at 121; WHITTINGTON, *supra* note 10, at 158.

111. More precisely, it might not be that originalism itself is more plastic, but instead that it simply requires less.

Although originalists might well insist that the proper goal of those interpreting the Constitution is to realize the meaning that was imbued in that text by the founders, they should also recognize that such interpretive efforts will not exhaust what can be done with the text. Originalists qua originalists are only concerned with the bare minimum of how we must live if we are to adhere to the requirements of the Constitution. That bare minimum may be easy or hard to satisfy, but it is what the Constitution was written to demand of government officials.

Whittington, *supra* note 46, at 380.

112. BARNETT, *supra* note 10, at 121.

question for understanding the requirements of originalism in foreign affairs, at least for these theorists. Moreover, to the extent those theories are premised (implicitly or explicitly) on good outcomes, drawing this line might be extremely important to evaluating those theories. Yet on this point, they say very little.

Barnett tells us that where the constitutional text is genuinely vague or where “the limits of historical inquiry” are reached, construction can begin.<sup>113</sup> Is the Executive Vesting Clause “genuinely vague?” Does interpretation of the Declare War Clause exceed the limits of historical inquiry? The first question seems almost as difficult as figuring the scope of the Vesting Clause itself; both seem to assume that Barnett’s terms are self-executing and easy to apply, but they are not.

Although Professor Balkin’s defense of originalism was not discussed above, it bears mention that his puts a great deal of pressure on this question as well. He distinguishes between text that is “rule-like, concrete and specific” and that which is “abstract, general or offers a standard.”<sup>114</sup> For the first, we<sup>115</sup> are limited to the original meaning of the words.<sup>116</sup> For the second, however, we can resort to underlying principles.<sup>117</sup> Again, to understand whether the Executive Vesting Clause is “abstract” and “general,” or “concrete” and “specific” is quite possibly as difficult as deciding whether the clause includes any foreign affairs powers. Construction and underlying principles might resolve many of the tensions between originalism and foreign affairs, basically by concluding that originalism does not apply in this area. To know that, however, would require a much more robust understanding of the preconditions for the resort to construction and underlying principles.

Whittington’s discussion of constitutional construction illustrates this point with respect to both examples raised at the beginning of this paper. Whittington lists “executive agreements” as an example of constitutional

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113. *Id.* When restating the conditions under which construction is appropriate, Barnett does not mention the “limits of historical inquiry.” *Id.* at 126.

114. Balkin, *supra* note 13, at 305.

115. Balkin explicitly expands the subjects of originalism beyond the courts, to the people. *Id.* at 308.

116. *Id.* at 305.

117. *Id.* Balkin explains the application of this theory to abortion in great detail. Indeed, a significant advantage of his version of originalism is that it permits the interpretation of the Constitution to respond to “social movements and political mobilizations.” *Id.* at 300–03. He does not explicitly address how this theory applies to change generated in other ways—through the practice of the Executive Branch, for example—although he does note that these precedents are “entitled to considerable weight.” *Id.* at 306. The focus of Balkin’s article is not so much providing a normative reason in favor of originalism (although he does do this at the outset of the paper), but more applying it to abortion. For these reasons, his work was not discussed in detail at the beginning of the paper.

construction at the outset of his book on this topic.<sup>118</sup> Yet there is strong evidence that the original understanding of the Constitution would not permit such agreements to have domestic legal effect.<sup>119</sup> Why, then, is this an appropriate area for “constitutional construction?” Whittington does not discuss the relevant history or constitutional text. Whittington also uses war powers as an example of constitutional construction, in particular the War Powers Act of 1973. First noting the “judicial restraint” in the areas of foreign affairs and war powers, which he traces back to the *Curtiss-Wright* opinion, Whittington goes on to describe what he terms “executive aggrandizement of warmaking powers . . . after World War II.”<sup>120</sup> This is followed by an interesting discussion of how Congress and the President understood the Constitution during the debates around the War Powers Act.<sup>121</sup> Here again, the turn away from original history seems to come very quickly and without discussion.

Once the preconditions for moving beyond originalism are adequately defined, the questions become textual and historical: Are the relevant foreign affairs provisions actually indeterminate according to whatever standard applies? This question leads back to history.

### B. *Answers from Text and History*

Justice Jackson’s opinion in *Youngstown* has been described as one that is “often seen among the most anti-originalist opinions in the modern canon.”<sup>122</sup> It is also frequently described as functionalist, not formalist.<sup>123</sup> But as it turns out, it is hard to find contemporary originalists who are explicitly critical of it.<sup>124</sup> Indeed, Professor Paulsen defends a somewhat modified version of Jackson’s opinion in exactly the same way that the originalists above sanction non-originalist reasoning: he concludes that Jackson’s approach is appropriate when the “Constitution’s text, structure and histor[y]” do not yield a “satisfactorily clear” “‘right’ answer,” or when the situation “involves overlapping spheres of authority.”<sup>125</sup> Again, and for the same reasons as

118. WHITTINGTON, *supra* note 68, at 12.

119. Ramsey, *supra* note 23, at 218–31.

120. WHITTINGTON, *supra* note 68, at 174.

121. *Id.* at 174–75.

122. Flaherty, *supra* note 2, at 172; *see also* RAMSEY, *supra* note 5, at 53 (noting that Jackson did not “grapple[] with how the Constitution’s text *originally* allocated foreign affairs power”).

123. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 442 (2007); *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522–31, 1527 n.55, 1528 n.59 (1991).

124. John Yoo refers to “fans of *Youngstown*,” suggesting that he is not one, but he does not make the disagreement explicit. John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, in CATO SUPREME COURT REVIEW 2005–2006, at 83, 97 (Mark K. Moller ed., 2006).

125. Paulsen, *supra* note 5, at 229–30.

discussed above, if a criterion like “satisfactorily clear” is going to do this much work in foreign affairs, we cannot really understand how originalism applies until it is defined more carefully.

History can also partially resolve the tension between foreign affairs and originalism by demonstrating that the President had substantial foreign affairs power pursuant to the original meaning of the Constitution. One difficulty for originalists is that the President’s actual power has expanded substantially since the framing, but if the Constitution sanctions that expansion, then the tension is minimized. Originalists have indeed concluded that the President has broad power in foreign affairs, including “residual” or default power. One potential source of such power is the Article II Vesting Clause, and another is the presidential oath. The first has been comprehensively defended as a historical matter,<sup>126</sup> while the second has not.<sup>127</sup> The point here is that if one takes this particular view of history, originalism will be easier to defend in foreign affairs.

Similarly, history and text might show that the Framers created a flexible approach to foreign affairs issues in which Congress and the President vie for power and the courts have a very limited role in foreign affairs.<sup>128</sup> Professor Lawson reasons that “the best account of the Constitution’s original meaning” is a “deferential judicial role in crisis management.”<sup>129</sup> This follows from the Article II Vesting Clause, which Lawson argues vests the President with a “package of powers” and includes the “principle of reasonableness,” which “essentially enshrines common sense into the law.”<sup>130</sup> The reasonableness principle expands the deference afforded to the President during war and other emergencies. It appears that originalism not only permits such deference, but compels it; this is also “precisely the deferential . . . role in crisis management that history has . . . produced.”<sup>131</sup>

Putting aside the merits of these arguments, the point here is that if history and text point to a flexible arrangement of power consistent with the current practice by all three branches, then many of the potential objections to originalism are eliminated. The two examples posed at the beginning of the paper, for instance, no longer hold, because the underlying assumptions about what history shows are wrong.

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126. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). *Contra* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 592–626 (2004).

127. See Paulsen, *supra* note 50, at 257.

128. YOO, *supra* note 2, at 24.

129. Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 293 (2007).

130. *Id.* at 305–07; see also LAWSON & SEIDMAN, *supra* note 2, at 55.

131. Lawson, *supra* note 129, at 293.

### III. CONCLUSION

Some normative justifications for originalism fit uncomfortably with foreign affairs and frequently fail to answer the very questions that arise most often in this area. Barnett's theory appears (depending on your view of the original meaning of the text) to require significant changes to contemporary constitutional law of foreign relations, simply in order to lock in largely unrelated features of the Constitution. Whittington's theory tells us little about the line between interpretation and construction, and little about what the courts are supposed to be doing in relation to executive authority. Moreover, the insistence on "constitutional constraint[s]" on the "people's agents" through a written text with a "fixed meaning" sits in uncomfortable juxtaposition with the quick move to constitutional construction in foreign affairs, and with little analysis of what that "fixed meaning" might have been. Professors McGinnis and Rappaport support originalism because it commits us to supermajoritarian text, but this consequentialist justification must presuppose at least an acceptable allocation of foreign affairs power.

Ironically, some of the very things that make originalism difficult to apply to foreign affairs simultaneously steer foreign affairs back toward history. The lack of judicial opinions in this area make issues of judicial review less pressing but also enhances the salience of history—both original and evolving. History is essential to understanding the relationship between executive authority and war and the struggle and acquiescence of Congress vis-à-vis the President. And yet, even with history as the coin of the interpretive realm, originalism itself seems to be an awkward fit.





# **RESPONSES**

