

An Originalism for Foreign Affairs?

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Scholarship on both originalism and foreign affairs has increased dramatically during the past ten years. But despite the historical focus of much work on foreign affairs,¹ this literature has not seriously engaged questions about methodology in general, or originalism in particular.² Most scholarship that defends originalism as a methodology has said little explicitly about it relates to foreign affairs: this literature is replete with references to cases like *Roe v. Wade* and *Brown v. Board of Education*, but look in vain for discussions of *Youngstown*,³ *Dames & Moore*,⁴ or the President's power to initiate war.⁵

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

² As Michael Ramsey has observed “most leading war powers scholars” are “not also leading theorists of originalist interpretation;” he notes Charles Lofgren an exception. Michael D. Ramsey, *Textualism and War Powers*, 69 UNIV. CHI. L. REV. 1543, 1553 (2002). There is, of course, historically-oriented foreign affairs scholarship that includes some explicit engagement with methodology, but none of it offers any sort of sustained argument defending originalism. See, e.g. William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L. J. 1333 (2006); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450 (2006); GARY LAWSON AND GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE* 7-13 (2004); JOHN YOO, *THE POWERS OF WAR AND PEACE* at 24-25 (2005); Martin Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW AND CONTEMPORARY PROBLEMS 169 (2004); Martin Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); Carlos Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); David 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)); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1221-22 (1999) Jane Stromseth, *Understanding Constitutional War Powers: Why Methodology Matters*, 106 YALE L. J. 845 (1996). There are other examples as well. The point here is that as whole, foreign affairs scholarship has focused far more on describing history than on presenting methodological arguments explaining why history is relevant.

³ *But see* Michael Paulsen, *Youngstown Goes to War*, 19 Const. Commentary 215, 230 (2002) (defending Justice Black and Justice Jackson's *Youngstown* opinions partially on originalist grounds); MICHAEL RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS*, 51-114 (evaluating *Youngstown* based on history and original understanding).

⁴ *But see* Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TULANE LAW REV. 1599, (1989) (describing *Dames & Moore* as an opinion that seems to “flatly contradict many of the premises of originalism that are incompatible with non-originalism”).

⁵ *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 those dealing with foreign affairs.

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 historical, and 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 somewhat different place: what are the positive reasons in favor of originalism, and how do they apply in the area of foreign affairs?

This article provides an initial, descriptive answer to this question and concludes that there is an uncomfortable and unclear relationship between contemporary originalism and many aspects of foreign affairs law. It describes several positive accounts of originalism and explains why they are hard to apply in the context of foreign affairs. The difficulties arise in part because some defenses of originalism – especially Randy Barnett’s natural rights view -- appear simply irrelevant to many key issues in foreign affairs. Other justifications of originalism, like Keith Whittington’s popular sovereignty approach, have important application to foreign affairs but their proponents have not resolved key questions that such application would raise. Consequentialist defenses of originalism beg the question of what happens if originalist reasoning leads to very bad results in the area of foreign affairs. Finally, there are aspects of foreign relations law that make doing originalism particularly difficult, whatever the justification. These issues may generate difficulties for originalism in many other areas of constitutional law, particularly separation of powers, but the question I pose focus here is about foreign affairs and those who suggest, argue, or assume that originalism applies, full-force, in this context.⁶

Originalist scholarship itself increasingly recognizes the limits of originalism. This could create the space in which tensions with foreign affairs get resolved. Some originalists, for example, permit courts, the political branches, and/or the public as a whole to engage in “constitutional construction” or to apply “constitutional principles” when original meaning does not resolve an issue with sufficient certainty. When original meaning of the text is not clear or where that text (although clear) does not address a particular issue, these theories all permit the application of the constitution to change over time. In these ways, originalism might work out some of the tension with foreign affairs, particularly if the relationship between congress and the president turns out to be one of those areas that lacks certainty. Not surprisingly, perhaps, originalists have suggested precisely this argument. This means in turn, however, that defining the point at which constitutional principles or construction become permissible, is likely to be critical 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 of originalism.

Happily for proponents of originalism, the original meaning of the Constitution’s text might also resolve some of the tensions between foreign

⁶ See, e.g., Ramsey, *Toward a Rule of Law in Foreign Affairs*, *supra* note __; Lawson and Seidman, *The Constitution of Empire*, *supra* note __; Yoo, *Clio at War*, *supra* note __; Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, n. 23 (2007); Robert Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123 (2007).

affairs and originalism as a theory. It can do so, as the preceding paragraph explained, by being sufficiently indeterminate so as not to require originalism at all. Similarly, if the President's primacy in foreign affairs is confirmed by the original meaning of the text, if the text itself was originally understood to permit changes over time but not to permit the courts much role in policing the relationship between executive and congressional authority, then many problems described in the first section of the paper may be partially or fully resolved. Less happily, at least for those drawn to originalism but who do not share this view of history, it may be hard to see why the positive case for originalism applies in foreign affairs.

I. Originalism(s) and Foreign Affairs: Problems

“Originalism” as used here means the interpretation of the constitution solely in accordance with the original public meaning of the text, unless that meaning cannot be determined with sufficient confidence.⁷ This definition obviously glosses over many important fissures within originalism, including different views as to its proper object.⁸ Most contemporary originalists use original public meaning⁹ -- as opposed to the intent of the framers or ratifiers -- and this paper 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,¹⁰ the focus here is on theories that require more -- those that advance original public meaning as the exclusive tool of constitutional interpretation, unless that meaning is unclear.¹¹ 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.¹²

⁷ This is adapted from Mitchell N. Berman, *Originalism is Bunk* at 8 (draft from 12/30/07, available on SSRN).

⁸ This use of the term “object” is from Berman, *Originalism is Bunk* at 6 – 7.

⁹ Berman, *Originalism is Bunk* at 7; Barnett, An Originalism for Nonoriginalists, 45 *Loy. L. Rev.* 611 (1999); see also Lawrence B. Solum, *A Dialogue on Originalism*, 101 *NW. U. L. REV. COLLOQUY* 31 (2006) (describing the move from original intent to original public meaning originalism as “a sort of Copernican revolution in constitutional theory.”)

¹⁰ Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *Ohio St. L.J.* 1085, 1086 (1989); Martin Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1745 (1996).

¹¹ Berman describes this (what he calls strength) as the distinctive aspect of originalism, and notes that “this is how Originalism is generally understood both by its critics and by commentators purporting neither to praise nor to bury.”). *Originalism is Bunk* at 15-17. Finally, the paper is premised on a contested assumption: originalists bear the burden of proof. Originalism is, generally speaking, not the way courts or the executive branch and Congress actually interpret the Constitution in the area of foreign affairs, and so originalists have the burden of explaining why their approach should be adopted. Cf. Ramsey, *Toward a Rule of Law* (“nonoriginalism is, an initial problem, not a positive constitutional theory...”).

¹² 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 why “constitutional practice” should be bound “by that content.” *Legal Theory Blog*, February 15, 2008, <http://lsolum.typepad.com/legaltheory-/2008/02/thomas-colby-an.html>

And because it is impossible to comprehensively analyze all of the work on originalism in this article, it focuses on three positive accounts: 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?¹³

It may also be helpful to provide two examples of the kinds of constitutional questions that arise in foreign affairs. First, 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.¹⁴ 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. Second, assume that the Constitution's original public meaning was that sole executive agreements could not have force as domestic law.¹⁵ Assume further that sole 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).¹⁶ 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. This paper explores whether the normative justifications advanced in favor of originalism require these results and the extent to which those justifications apply more generally to foreign affairs.

A. *Originalism and 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

¹³ Also putting aside questions of stare decisis. It should also be clear that this article puts aside a whole host – even a cottage industry – of questions raised by constitutional theory, including the relationship between “adjudication” and “interpretation”

¹⁴ Charles A. Lofgren, *War-Making Under the Constitution: The original Understanding*, 81 YALE L.J. 672, 699-700 (1972); RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 60-116 (1974); *contra* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

¹⁵ See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 173-83 (1998)

¹⁶ *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

was primarily to strike down government actions in the name of individual rights."¹⁷

This version of originalism, with its focus on restraining courts, judicial deference to legislative majorities, and attacking cases like *Roe* and *Griswold*,¹⁸ seems at least partially beside the point for foreign affairs.¹⁹ 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 principals of judicial restraint seem ill-suited to fully resolve issues raised by cases like *Youngstown*, *Dames & Moore* and *Garamendi*. 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,²⁰ and because there is a discontinuity between saying that the President, for example, is not bound to use originalism to interpret the scope of his own power but the courts must use originalism when they interpret the President's power.²¹

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.²² But this work either ignored original meaning at all²³ or seemed to take as its starting point that the political branches should be bound by original meaning, rather than really defending this

¹⁷ Keith Whittington, *The New Originalism* 2 GEO. J.L. & PUB. POL'Y 599 (2004); see also John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J. L. & PUB. POL'Y 83 (2003).

¹⁸ Keith Whittington, *The New Originalism*, at 602-603; Robert Post & Reva Siegal, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 550-554 (2006); Edwin Meese III, *Remarks before the D.C. Chapter of the Federalist Society Lawyers Division*, 19 U.C. DAVIS L. REV. 22, 26-29 (1986) (emphasizing judicial restraint and deference to Congress); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 153-155, 162-167 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 854 (1989) (discussing originalism as a theory of judicial review).

¹⁹ See generally, Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMM 101, 117 (2008) (arguing that "from 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").

²⁰ See Berman (it is not at all clear that a majoritarian argument for originalism requires courts to enforce the original understanding of horizontal separation of powers).

²¹ 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." Originalism is Bunk at 25.

²² Edwin Meese, *Constitutional Fidelity and Foreign Affairs*, 43 U. MIAMI L. REV. 223, 224-225, 229 (1988); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L. Q. 693 (1990).

²³ Bork, *Erosion*.

proposition.²⁴ Other originalists reached the opposite historical conclusions. Raoul Berger, for example, an influential original intent originalist,²⁵ 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" the "that decision ought candidly to be submitted to the people in the form of a proposed amendment."²⁶ Indeed, to this extent, Berger does not fit Whittington's description: Berger did argue that the "the Court has not shrunk from taking over the functions of the legislature" but he also maintained that in the context of foreign affairs the Court "with excessive modesty [] abdicates its main function – policing of constitutional boundaries."²⁷

Whittington goes on to describe how originalism changed in the late 1980s and the 1990s. The "new originalism" that emerged is "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."²⁸ To the extent this description is accurate²⁹ 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.³⁰ Professor Berman refers to this as the "subjects" of originalism—"many originalist theses concern only how judges should act; they are agnostic regarding how other readers should interpret the Constitution."³¹ Berman defines contemporary originalism as addressing "what courts must do, not what all interpreters must do."³²

²⁴ Edwin Meese, *Constitutional Fidelity* at 228. 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, *Towards 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.

²⁵ Johnathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253 (2001).

²⁶ Berger, *Presidential Monopoly* at 54. Lofgren

²⁷ Raoul Berger, *The President's Unilateral Termination of the Tiawan Treaty*, 75 NW. U. L. REV. 577, 625-626 (1980).

²⁸ Whittington, *The New Originalism*, supra note __ at 609;

²⁹ Cf. Balkin, *Abortion and Original Meaning*, supra note __ at 117 (arguing that contemporary originalism improperly focuses on judicial restraint.)

³⁰ Discuss adjudication v. interpretation here. Lawson.

³¹ *Originalism is Bunk*, supra note __ at 11.

³² Berman, *Originalism is Bunk*, supra note __ at 25.

Whittington, a prominent new originalist, appears to explicitly limit his defense of originalism to “constitutional interpretation by the judiciary,”³³ although elsewhere he is less clear.³⁴ And Whittington writes that

...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.³⁵

Less explicitly, Randy Barnett begins his book, *Restoring the Lost Constitution*, with the observation that “[h]ad judges done their job, the book would not need to be written.”³⁶ 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.”³⁷

Again, to the extent that foreign affairs issues are resolved by the political branches, wholly or partially outside the courts, originalism may have little to say.³⁸ Moreover, foreign affairs law transpires outside the courts to a greater extent than other areas of constitutional law.³⁹ Second, an originalism focused on the courts – and individual rights⁴⁰ -- may not have much to say about

³³ KEITH WHITTINGTON *CONSTITUTIONAL INTERPRETATION* xi, 160 (1999).

³⁴ “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 135, 136.

³⁵ Keith Whittington, *Let’s Call the Whole Thing Off?* (book review), 22 *CONST. COMMENT.* 365, 375 (2005)

³⁶ RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* (2004)

³⁷ *Id.* at 151-353.

³⁸ There is voluminous literature on constitutional interpretation outside the courts. See, e.g., James E. Fleming, *The Constitution Outside the Courts*, 86 *Corn. L. Rev.* 215 (2000); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *DUKE L.J.* 1335, 1359-78 (2001); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 *GEO. L.J.* 217, 221-22 (1994); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *HARV. L. REV.* 1359, 1362 (1997).

³⁹ Ramsey, *Toward a Rule of Law* at 1474 (contrasting foreign affairs with other areas of constitutional interpretation and concluding that “in foreign affairs, though, Court intervention is rare and often insufficient to build a body of doctrine.”); Flaherty: Henkin

⁴⁰ 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.”)

separation of powers as between Congress and the president.⁴¹ This is not necessarily so, but if the project of originalism is to provide a theory of judicial review, 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.

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.⁴² This defense of originalism requires that the original, written constitution be “legitimate”⁴³ to begin with.⁴⁴ 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.”⁴⁵ If the Constitution is legitimate in this sense, we are bound by the laws created pursuant to its terms. But 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.⁴⁶

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 (perhaps) to the extent such actions impact freedom. Some offensive uses of military force by the President acting alone might intrude upon the power of Congress to “Declare War,” but not “restrict freedom.” Therefore, adherence to original meaning seems unnecessary, as legitimacy does not depend upon “locking in” this feature of the Constitution. Barnett 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.⁴⁷

⁴¹ Robert Bork describes *The Tempting of America* as a book about “tendency of the judiciary to invade the province of the legislature” and notes that foreign affairs is a “different area” of separation of powers. Robert Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. Q. 693, 695 (1990).

⁴² BARNETT, RESTORING THE LOST CONSTITUTION at 109-110; 116-117. Barnett also argues that “practical considerations” are enough to justify originalism. *Id.* at 109.

⁴³ 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

⁴⁴ See Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 849-852 (2005) (discussing this aspect of the Barnett's argument).

⁴⁵ BARNETT, RESTORING THE LOST CONSTITUTION at 9-10, 44-45, 48, 276.

⁴⁶ Barnett, 4, 109-113, 116-117.

⁴⁷ 48 (“A law that violates principles of federalism may be improper even though it does not infringe upon rights”); 110-113; 277

Assuming that this follows,⁴⁸ Barnett's approach seems to require the President to adhere to original meaning, but 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 liberties. To put the point a bit differently, Barnett has written that: "Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials – including judges – must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer." This confirms what the discussion in the footnote suggests: at base, this argument for originalism is a consequentialist one, but it is difficult to see how it works for the constitutional as whole if the criteria for "sufficiently good" do not evaluate many key foreign affairs issues.⁴⁹

What does Barnett's theory provide with respect to the second example, which involved presidential law-making? 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 do appear to qualify as "law," and thus enforcement of the sole executive agreement must meet the "necessary and proper" standard.⁵⁰ On the question of whether the President may do this acting alone – assuming it is clear that President and Senate could do this together by treaty -- Barnett would apparently ask whether the restriction on liberty is "proper."⁵¹ A 'proper' exercise of power is one that is "within the jurisdiction of the branch or department in question," and as 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."

Barnett explicitly rejects any argument that originalism requires the political question doctrine,⁵² and would apparently apply a presumption of liberty in this context, making it very difficult for the President to prevail.

⁴⁸ Barnett argues that this follows from the "writtenness" of the Constitution. Barnett offers at least three ways in which legitimacy and writtenness are related. First, constitutional legitimacy depends on what the writing says. *Id.* at 116. Second, assuming that the lawmaking process established by the written constitution is legitimate, the writing helps assure that the provisions will be respected over time. Page 116-117. Neither helps here. Third, however, Barnett also suggests that legitimacy itself requires a commitment to writtenness: "Deviations 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." 110, n.60. Given the underlying definition of legitimacy, it is still unclear (at least to this reader) why writtenness must preserve the original meaning of 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 pragmatic defense of originalism. *See infra.*

⁴⁹ As Posner and Vermeule say (in the context of emergencies) that "anyone who thinks originalism must be justified, if at all, by reference to its consequences will wonder why in a time of crisis the emergency powers of government should be determined, even in part, by what archival materials happen to say."

⁵⁰ BARNETT, RESTORING THE LOST CONSTITUTION at 49, 261.

⁵¹ *Id.* at 274 ("a 'proper' exercise of power is one that is within the jurisdiction of the branch or department in question and does not violate the rights retained by the people").

⁵² *Id.* at 128-130.

Congressional executive agreements would share the same fate (assuming they are inconsistent with the original public meaning of the Constitution⁵³). More so than the presidential initiation of war, these results are understandable from an individual liberties perspective, because insisting upon the law-making 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.

2. Whittington

Whittington, too, is primarily concerned with judicial review,⁵⁴ but his defense of originalism is ultimately based on popular sovereignty and consent, which Barnett rejects. Whittington argues that the Constitution is authoritative because it is a product of the sovereign will, which must be distinguished from the government itself.⁵⁵ The people in their “sovereign capacity” – i.e. in a constitutional convention -- do not always exist,⁵⁶ and when they do not, “the only available expression of the sovereign will is the constitutional text.”⁵⁷ 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.⁵⁸ Many disagree, of course, that the need for constraint requires originalism.⁵⁹ 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 the constitutional text as the expression of sovereign will.⁶⁰

⁵³ McGinnis & Rappaport, *Our Supermajoritarian Constitution* at 764 (“while 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”).

⁵⁴ In his writing on originalism, that is. Whittington has also written extensively on constitutional construction, however, which is not concerned with judicial review. See *Constitutional Construction*.

⁵⁵ Whittington, *Constitutional Interpretation*, 110-113, 124-127.

⁵⁶ *Id.* 135-138.

⁵⁷ *Id.* at 135.

⁵⁸ *Id.* at 56..

⁵⁹ Berman, *Originalism is Bunk*, at 61-63; see also Christopher L. Eisgruber, *Early Interpretations and Original Sins*, 95 MICH. L. REV. 2005, 2009-13 (1997).

⁶⁰ “...the judicial obligation to engage in constitutional interpretation is not unique to the courts, since each branch is bound by the sovereign will...” 153; “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.” 136 “although government officials are legally bound by the terms of the Constitution, they are only contingently constrained by the terms of constitutional construction.” 159. “The people can constrain their government agents only by fixing their will in an unchanging text.” Whittington, *Let’s Call the Whole Thing Off?* 380-381

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. First, they are “chosen by and responsible to the electorate” to ensure the “public good” and second, they are empowered by the “sovereign people” to “use the resources of the government to fulfill specified ends.”⁶¹ 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.”⁶²

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?⁶³ Whittington says that “the judiciary is functionally elevated above the other branches in terms of its specialized capacity to interpret [sovereign] will.”⁶⁴ Should courts accordingly refuse to defer to the executive branch’s interpretation of the Constitution?⁶⁵ What if the executive branch is in a functionally superior possession with respect to how the sovereign will should be understood in particular cases? Whittington, in other words, offers a popular sovereignty-based explanation for why judicial authority is limited to an originalist interpretation of a fixed constitutional text, but he seems to offer only a functional argument for judicial supremacy.⁶⁶ Indeed, despite the reasons he gives here to be skeptical of constitutional interpretation by the other branches, elsewhere Whittington defends extrajudicial constitutional interpretation (without discussing originalism) and suggests a complicated relationship between interpretation by the courts and that of the political branches.⁶⁷ Although this does not point to any inconsistency in Whittington’s theory of originalism, it makes the application of the theory to many foreign affairs issues uncertain.

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. 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

⁶¹ Whittington, *Constitutional Interpretation* 135.

⁶² *Id.* at 154; *see also* 46, 56-57, 152-159.

⁶³ *Cf.* Treanor, 81 *The War Powers Outside the Courts* at 1335

⁶⁴ *Id.* at 153

⁶⁵ Whittington emphasizes the functional superiority of courts as “neutral arbitrators” and describes government officials, by contrast, as “interested parties in disputes over constitutional meaning.” *Id.* at 53.

⁶⁶ “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.” 154.

⁶⁷ “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.” Keith Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. Rev. 773, 848 (2002).

limits of the authority he is given by the sovereign will of the people, how can the courts legitimately *fail* to act? As Whittington writes:

interpretative methods 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.⁶⁸

This, in turn, undermines “consensual government,” replacing it with “a selective rendering of constitutional values by government officials who claim an authority superior to the fundamental law under which they hold their office.”⁶⁹

Finally, the relationship between construction and interpretation is not entirely clear, either. 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 later 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.⁷⁰ 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. But 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 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.”⁷¹ Judges should adhere to original meaning (including the Framers’ own “interpretative rules”) in order to sustain and preserve these good consequences.⁷² 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 memorialized in the Constitution? They may believe that the Framers’ own interpretative rules foreclose a strong judicial role in foreign affairs – but what if

⁶⁸ Whittington, *Constitutional Interpretation* at 154. 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] controver[sy].” *Constitutional Construction* at 154.

⁶⁹ WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* at 154.

⁷⁰ *See supra* note ___;

⁷¹ John O. McGinnis & Michael Rappaport, *A Pragmatic Defense of Originalism*, 101 *NORTHWESTERN L. REV. COLLOQUY* 68, 69, 70 (2007).

⁷² *Id.* at 69, 74-76.

that is unclear or wrong? 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 *as a whole* of high-enough quality that is original meaning should be enforced.”⁷³ 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.”⁷⁴ 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 whole* on consequentialist grounds.⁷⁵

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 but 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). 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, need experimental, creative, forward-looking policy.⁷⁶

C. *Original Uncertainty & Changes Over Time*

History itself has always posed a variety of threats to originalism.⁷⁷ These threats may, depending on your view of history, be enhanced in the context of foreign affairs. This is, perhaps, an area in which the original meaning of constitutional text is especially hard to determine.⁷⁸ Some important textual

⁷³ *Id.* at 81.

⁷⁴ H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1991); see also William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L. J. 1333 (2006) (“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.”)

⁷⁵ 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 concepts of foreign affairs at the framing; one that continues to lead to good results today.

⁷⁶ Eric Posner and Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313, 314, 319-321 (2007); see also Sunstein, *Bukean Minimalisim*.

⁷⁷ See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204 (1980).

⁷⁸ Flaherty, *The Future and Past of U.S. Foreign Relations Law*, *supra* note __ at 171.

commitments of authority – like the power make “rules concerning captures on land and water” and to “issue letters of marque and reprisal” -- not only have as their referents things whose original meanings are extraordinarily difficult to understand at all in modern terms, they also went virtually unnoticed during the framing of the Constitution.⁷⁹ Other textual commitments of authority with perhaps far greater overall significance, like the Article II Vesting Clause, also generated little direct discussion during the federal convention, in the Federalist Papers, or in the state ratifying conventions.⁸⁰ This clause might be Constitution’s single most important with respect to foreign affairs, yet determining whether that is so turns out to be a difficult task, beset with questions about the background assumptions of the framing generation.⁸¹

Second, even if we are able to determine the original meaning of the text, that text still may not answer many foreign affairs questions.⁸² Examples include the power to terminate treaties,⁸³ the status of non-treaty international agreements, and whether or not the President has primary, exclusive power in the area of foreign affairs.⁸⁴ As Martin Flaherty observes, “[p]recisely because the Founding generation had resolved so little, rather than so much,” key constitutional questions have been “worked out over time by the three branches in light of likely consequences” and although this “result also frequently obtains in domestic constitutional issues, in foreign affairs it is close to systemic.”⁸⁵

Third, as the discussion in the foregoing section suggests, historical changes since the framing, including an increase in the power of the presidency⁸⁶ and of the United States,⁸⁷ as well as changes in international law⁸⁸ and the conduct of war, may all work to make originalism unattractive in the area of foreign affairs, especially to pragmatists. Perhaps the most significant of these is the increase in presidential power during the twentieth century.

⁷⁹ Casto; Wuerth; *see* Treanor, *The War Powers outside the Court*, *supra* note ___ at 1339-1340 (arguing that the Declare War Clause “was not a first order issue for [the framers]. As a result, they fashioned a text that neither fully captured their intentions nor resolved the types of issues that have become pressing to us.”)

⁸⁰ Curtis Bradley and Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 592-626 (2004).

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⁸² *See* EDWARD S. CORWIN, *THE PRESIDENT 1787-1984*, 201 (invitation to struggle language); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 14-15 (2d ed. 1996).

⁸³ *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).

⁸⁴ *See, e.g.*, H. Jefferson Powell, *The Founders and the President’s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1991)

⁸⁵ Flaherty, *The Future and Past of U.S. Foreign Relations Law*, at 171-72. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: 1787-1957*, at 171 (4th ed. 1957)

⁸⁶ *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. (1999); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* at 159-162.

⁸⁷ Bradley

⁸⁸ Bradley and Goldsmith

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.⁸⁹ 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 extra-textual analysis is only to elucidate the meaning of the actual constitutional text at issue.⁹⁰

Today's originalists like Barnett, Whittington, and Professor Balkin would not agree. All acknowledge that at some point original meaning 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 construction.”⁹¹ This has obvious importance for the first and second difficulties discussed in the preceding section: constitutional meaning may be indeterminable, or it may be determinable but still not answer many foreign affairs questions. It may also ease some of the tension between Barnett and Whittington's theories and foreign affairs; much of that tension is generated by executive power, about which neither say much of anything. Constitutional construction might help here by explaining the relationship between executive power and their theories of originalism. Moreover, a sufficiently plastic originalism⁹² might permit outcomes that pragmatists think are correct.

⁸⁹Barnett, 118-130

⁹⁰ Quoted in Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 547 n. 13 (2006). 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.

⁹¹Whittington, *Constitutional Construction*; Barnett 118 – 130.

⁹² 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

Consider the first example set out at the beginning of the paper, involving the President's power to use force in face of the Declare War Clause. Barnett's theory requires adherence to original meaning – and thus may require fundamental changes the current balance of power between Congress, the President and the Courts -- even when such adherence has nothing to do with individual liberty. 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 its limits.”⁹³

In other words, originalism works for foreign affairs because this area of constitutional law is so indeterminate that originalism itself does not require originalism! This leads to a vitally important question: what amount of indeterminacy (and of what sort) permits construction? This is an important question for understanding the requirements of originalism in foreign affairs, at least for theorists like Barnett, Whittington, and Balkin. 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 deliberately vague or where the “limits of historical inquiry”⁹⁴ are reached, construction can begin. Is the Executive Vesting Clause “deliberately 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.

Balkin's approach 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.”⁹⁵ For the first, we⁹⁶ are limited to the original meaning of the words. For the second, however, we can resort to underlying principles. 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 many foreign-affairs powers.

written to demand of government officials.” Whittington, *Let's Call the Whole Thing Off?* 380-381

⁹³ Barnett, 121.

⁹⁴ *Id.* at 121. When restating the conditions under which construction is appropriate, Barnett does not mention the “limits of historical inquiry.” *Id.* at 126.

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⁹⁶ Balkin explicitly expands the subjects of originalism beyond the courts, to the people.

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 of the example raised at the beginning of this paper. Whittington lists "executive agreements" as an example of constitutional construction at the outset of his book in this topic. Yet there is strong evidence that the original understanding of the Constitution would not permit such agreements, at least to the extent that they have domestic legal effect.⁹⁷ Why, then, is this an appropriate area for "constitutional construction?" 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 war-making power after World War II."⁹⁸ This is followed by an interesting discussion of how Congress and the president understood the Constitution during the debates around the War Powers Act. Here again the turn away from original history seems to come very quickly – especially, I suppose, to those of us who have read many long, densely-argued articles on this topic.

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."⁹⁹ It is also frequently described as functionalist, not formalist.¹⁰⁰ But as it turns out, it is hard to find contemporary originalists who are explicitly critical of it.¹⁰¹ 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 history" do not yield a "satisfactorily clear" "right" answer" or when the situation "involves overlapping spheres of authority." Again, and for the same reasons as discussed above, if a criterion like

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⁹⁸ Whittington, page 174

⁹⁹ Flaherty, *The Future and Past of U.S. Foreign Relations Law* at 172; RAMSEY, THE CONSTITUTION'S TEXT at 53 (Jackson did not "grapple[] with how the Constitution's text originally allocate foreign affairs power").

¹⁰⁰ Ernest Young, *The Constitution Outside the Constitution*, 117 Yale L. J. 498, 441-42 (2007); Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1522-31 & nn.55, 59 (1991).

¹⁰¹ Posner and Vermeuele refer to it as (in)famous, and they disagree with it, but they disavow originalism. John Yoo refers to "fans of *Youngstown*" – suggesting that he is not one – but does not make the disagreement explicit.

“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 relations 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 Vesting Clause, another is the presidential oath. The first has been comprehensively defended on originalist grounds¹⁰² while the second has not¹⁰³ -- 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.¹⁰⁴ Again, if this is the case, many 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.

III. Conclusion

The normative justifications that some have offered for originalism fit uncomfortably with foreign relations and frequently fail to answer the very questions that arise most often in this area. Barnett’s theory appears (depending on your view of text and history) to require sweeping 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 – with little analysis of what that “fixed meaning” might have been. Professors McGinnis and Rappaport support originalism because it commits us to super-majoritarian text, but this consequentialist justification must pre-suppose at least an acceptable allocation of foreign affairs power.

Ironically, some of the very things make originalism difficult also push 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. The relationship between executive

¹⁰² See Prakash & Ramsey, *supra* note __; *contra* Bradley & Flaherty, *supra* note __.

¹⁰³ Paulsen

¹⁰⁴ JOHN YOO, THE POWERS OF WAR AND PEACE; Gary Lawson reasons that the “best account of the Constitution’s original meaning is a “deferential judicial role in crises management.”

authority and war, the struggle and acquiescence of congress vis-a-vie the president; history is the coin of the interpretive realm, but originalism itself is an awkward fit. The relationship runs the other way as well; the content we glean from late 18th century history and the text it generated can make originalism a more (or less) comprehensive and compelling theory of interpretation in foreign affairs.