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## The New Originalism and the Foreign Affairs Constitution

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# THE NEW ORIGINALISM AND THE FOREIGN AFFAIRS CONSTITUTION

Andrew Kent\*

## INTRODUCTION

The influence of originalism in the legal academy is large and growing. And the U.S. Supreme Court has relied heavily on originalism in certain domestic, individual rights cases like *District of Columbia v. Heller*.<sup>1</sup> But foreign affairs is different. In that area, originalism is, as Ingrid Wuerth has observed, “generally speaking, not the way courts or the Executive Branch and Congress actually interpret the Constitution.”<sup>2</sup>

In fact, there are dozens of important Supreme Court decisions on constitutional foreign affairs issues that pay little or no attention to the original meaning of specific textual provisions of the Constitution.<sup>3</sup> The most influential legal framework for modern foreign affairs decisionmaking is Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which begins with an attack on the utility and possibility of

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1. 554 U.S. 570 (2008); *see also* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (calling *Heller* “the most thoroughgoing originalist opinion in the Court’s history”). For other Supreme Court decisions in domestic cases relying substantially on originalist evidence, *see, for example*, *Crawford v. Washington*, 541 U.S. 36, 53–56 (2004) (interpreting the Confrontation Clause).

2. Ingrid Wuerth, *An Originalism for Foreign Affairs*, 53 ST. LOUIS U. L.J. 5, 9 n.19 (2008).

3. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012); *Medellín v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000); *Breard v. Greene*, 523 U.S. 371 (1998); *Regan v. Wald*, 468 U.S. 222 (1984); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Haig v. Agee*, 453 U.S. 280 (1981); *DeCanas v. Bica*, 424 U.S. 351 (1976); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Perez v. Brownwell*, 356 U.S. 44 (1958); *United States v. Caltex (Phil.), Inc.*, 344 U.S. 149 (1952); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *MacKenzie v. Hare*, 239 U.S. 299 (1915); *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *Neely v. Henkel*, 180 U.S. 109 (1901); *The Paquete Habana*, 175 U.S. 677 (1900); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *In re Ross*, 140 U.S. 453 (1891); *Jones v. United States*, 137 U.S. 202 (1890); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ker v. Illinois*, 119 U.S. 436 (1886); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850).

originalism<sup>4</sup> and proceeds to lay out a decisional schema based on functional considerations and realism about contemporary politics and institutional dynamics.<sup>5</sup> Even when the Court purports to spend some time on text and history in foreign affairs cases, as it did in *Boumediene v. Bush*<sup>6</sup> or *United States v. Curtiss-Wright Export Corp.*,<sup>7</sup> for example, it often skips any sustained textual analysis, references Founding-era history at a very high level of generality, and ends up finding that nonhistorical considerations such as precedent, functionalism, and abstract constitutional principles are decisive. Constitutional interpretation by the political branches is often nonoriginalist as well.

Notwithstanding the relatively modest impact that originalism has in the governmental practice of foreign affairs law today, its prominence in legal scholarship and in domestic, individual rights opinions by the Supreme Court more than justifies spending some time thinking about challenges that the “new originalism”—the latest version of the originalist method—faces in interpreting the foreign affairs aspects of the Constitution.

After sketching the basics of the new originalist method, I first suggest that new originalism struggles to decide how to handle background norms of the common law or the law of nations, which were understood by some members of the Founding generation to implicitly qualify or restrict parts of the constitutional text. These issues are omnipresent in foreign affairs law because courts, executive officials, and other interpreters must decide whether the boundaries of the Constitution’s broadly written protections for life, liberty, and property extend to domains such as wartime or extraterritorial activity by the U.S. government, or to persons beyond the paradigm case of U.S. citizens within the United States.

Second, I suggest that the exacting textualism practiced by many new originalists might only imperfectly understand certain aspects of the foreign affairs provisions of the Constitution. This is because some of it was drafted hastily and poorly, certain important topics were seemingly not addressed at all, and some Founding-era interpreters understood the foreign affairs portions of the Constitution in a holistic manner focused on purpose and structure, instead of parsing text in the manner of new originalism. This potentially large gap between results reached by new originalism and

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4. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring) (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.”).

5. See generally MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 53 (2007) (noting that Jackson’s opinion did not consider originalist evidence or arguments); Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown’s Shadow*, 53 ST. LOUIS U. L.J. 29, 30–35 (2008) (noting the same, and also suggesting that Jackson’s functionalism rather than originalism is the dominant mode of separation-of-powers analysis by the Supreme Court today).

6. 553 U.S. 723 (2008).

7. 299 U.S. 304 (1936).

the expectations and practices of the Founders raises questions about new originalism's claim to be based on the public meaning of the text to the adopting generation. And if many foreign affairs provisions of the Constitution have an underdeterminate original public meaning, originalism cannot answer many constitutional questions, and the ultimate usefulness of the method is called into question.

### I. THE NEW ORIGINALISM

Originalism is a famously diverse and evolving phenomenon that has proven hard for both its defenders and critics to pin down for any length of time. “[A] fairly basic definition of originalism” is that it “regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”<sup>8</sup> The “new originalism” is not a single theory but a family of related theories about how to discover and apply this meaning. I will not try to convey all the nuances of the debates between and among new originalists and their critics,<sup>9</sup> but instead make some general comments about how I understand the theory.

Because of the well-known theoretical and methodological problems with old originalism's focus on either the original intent of the Constitution's drafters or the original understanding of its ratifiers,<sup>10</sup> a number of prominent contemporary originalists have shifted to what is often called new originalism or original public meaning originalism.<sup>11</sup> This new originalism focuses on the objective linguistic meaning that the text of the Constitution would likely have had to an American audience at the time of adoption.

New originalists differ in how they define the person or group whose usage of words and phrases is the measure of original public meaning. For some, it is simply a “reasonable” or perhaps “reasonably well-informed” person in late eighteenth-century America.<sup>12</sup> Lawrence Solum, one of the most influential theorists of new originalism, suggests that new originalism should look to how meaning would be understood by an “ordinary

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8. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004).

9. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009).

10. See Colby, *supra* note 9, at 723–24 (discussing some of the criticisms); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 494 (2007) (same). The dated but classic article in the genre is Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

11. William Treanor and some others call it textualism. See Treanor, *supra* note 10, at 488 n.1.

12. BARNETT, *supra* note 9, at 92 (“a reasonable listener”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (“a hypothetical, objective, reasonably well-informed reader”).

American citizen fluent in English,” such as “farmers, seamstresses, shopkeepers, and even lawyers.”<sup>13</sup> As discussed below in Part II.B.7, other new originalists describe somewhat different groups of language users as the measure of meaning.

Excavating the public meaning of words and phrases to readers requires the new originalist to determine two things, says Solum: “(1) the conventional semantic meaning of the words and phrases that make up the text and (2) the rules of syntax and grammar that combine the words and phrases.”<sup>14</sup> The best way to make these determinations is, again according to Solum, a “large-scale empirical investigation of the ways that words and phrases were used in ordinary written and spoken English,”<sup>15</sup> employing dictionaries, grammar books, contemporary newspapers, records of how words were used and how terms were discussed in framing and ratification debates, and other sources bearing on usage.<sup>16</sup>

Most new originalists emphasize that their search is for the inherent “linguistic” or “semantic” meaning of the words of the Constitution, not the “expectations” that the Founding-era public held or would have held about how the linguistic meaning of the Constitution’s words would have applied in practice to concrete phenomena existing at the time of adoption.<sup>17</sup>

New originalists often posit a two-step process for answering constitutional questions. First, one must perform an empirical inquiry to ascertain “the semantic meaning of a particular use of language in context.”<sup>18</sup> This is “interpretation.”<sup>19</sup> The second step, “construction,” is “the activity of applying that meaning to particular factual circumstances.”<sup>20</sup> Oftentimes, the text is clear enough that the decision about how to apply it “follows directly” and “automatically from the linguistic meaning of the constitutional text,”<sup>21</sup> and “construction will look indistinguishable in practice from interpretation.”<sup>22</sup> But when the semantic meaning of the Constitution’s words is highly abstract or vague, construction becomes critical.

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13. Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 3 (Robert W. Bennett & Lawrence B. Solum eds., 2011). Historian Jack Rakove, with his tongue in cheek, calls this reader posited by some new originalists “Joe the Ploughman.” Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011).

14. Solum, *supra* note 13, at 1.

15. *Id.*

16. See, e.g., Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623, 626; Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 Nw. U. L. REV. 663, 669 (2009); Solum, *supra* note 13, at 10.

17. See, e.g., BALKIN, *supra* note 9, at 6–7; Solum, *supra* note 13, at 11; Whittington, *supra* note 8, at 611.

18. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (emphasis omitted).

19. *Id.* (emphasis omitted).

20. *Id.* (emphasis omitted).

21. Solum, *supra* note 13, at 23.

22. Barnett, *supra* note 18, at 67.

New originalists differ among themselves in many ways. For example, they have varying interpretations of the breadth of the “construction zone,” (to use Solum’s phrase<sup>23</sup>), of which modalities may be used when construction is needed (for instance, principles underlying the text, precedent, history, values, functional considerations, and the like<sup>24</sup>), of which institutions or actors are empowered to perform construction, and of how binding that construction is.<sup>25</sup>

Perhaps the biggest difference among new originalists is not theoretical, but comes when they apply their theories to actual constitutional text. My sense is that many new originalists—for instance, John McGinnis, Steven Calabresi, and Michael Rappaport—believe that the text of the Constitution is generally quite specific and determinate, so that interpretation does not usually need to be supplemented by construction and a nearly complete originalist Constitution can be discerned.<sup>26</sup> Other new originalists, most notably Jack Balkin, seem to find the text of the Constitution quite general and, therefore, pervasively open to nonoriginalist supplementation through construction.<sup>27</sup> Some new originalists may occupy a middle ground.<sup>28</sup> This difference in approach has enormous practical consequences for what the Constitution would look like if subject to originalist analysis and implementation.

## II. NEW ORIGINALISM AND THE PROBLEM OF UNWRITTEN LIMITS TO THE TEXT

A number of significant foreign relations issues turn on the relationship between unwritten rules of the common law and the law of nations, on the one hand, and the text of the Constitution on the other. Whether and when

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23. Solum, *supra* note 13, at 26.

24. *See, e.g.*, BALKIN, *supra* note 9, at 4 (defining “constitutional construction” as “implementing and applying the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent”); Barnett, *supra* note 18, at 70–71 (noting that new originalism cannot answer the normative question of what methods of construction should be employed). *See generally* Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358 (2007) (noting that originalists disagree “about what sorts of considerations may legitimately be considered at the ‘back end,’” that is, as part of what many new originalists call construction).

25. And some new originalists reject construction altogether, preferring to resolve ambiguity and vagueness by applying the interpretive methods and default rules that the adopting generation would have used. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

26. *See, e.g.*, Michael Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 878 (2009) (“[M]any constitutional provisions’ meanings become much less vague or unspecific if the interpreter properly attends to the meaning such words and phrases would have had, in context, to a reasonably informed speaker or reader of the language, at the time of the language’s enactment as part of the Constitution. That is to say, if one is a good practitioner of original-meaning textualism, the asserted vagueness frequently disappears.”).

27. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 646 (2013).

28. *See generally* Barnett, *supra* note 18.

to read the text according to its apparent plain meaning or to limit or qualify it by reference to unwritten nonconstitutional rules is an extraordinarily hard question that new originalism—with its focus on the objective public meaning of the written text for an ordinary, reasonable person of the late eighteenth century—has not satisfactorily answered.

#### A. *The Constitution's Domain*

A fundamental question of U.S. foreign affairs law concerns the domain or the territorial and personal scope of the Constitution: where, when, in what circumstances, and on whose behalf does the Constitution provide individual protections against the U.S. government. These domain questions are complex because most of the key individual rights-protecting provisions of both the Bill of Rights and the original 1787 Constitution are written in broad terms—apparently unrestricted as to person, place, status, or the nature of the government activity or interest asserted. The Due Process Clause, for example, provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>29</sup> Did the broad and unqualified term “person” have a broad and unqualified original public meaning? Or, did rules of the common law, law of nations, or other unwritten rules or principles implicitly limit it so that certain people in certain places—or certain categories of U.S. government activity—fell outside its protections?

Domain questions of this type are at the heart of many classic foreign relations and national security disputes in U.S. history. To be useful in the foreign affairs area, originalism must provide an account of what the relevant provisions of the Constitution, as understood by an ordinary, reasonable member of the adopting generation, say about the following controversies. Did aliens in the United States have constitutional rights that the 1798 Alien Acts threatened to infringe?<sup>30</sup> After secession and the start of the Civil War, did individual constitutional rights limit how the U.S. government conducted war against the wayward U.S. citizens of the Confederacy?<sup>31</sup> Did U.S. civilians in a loyal state during the Civil War have constitutional rights against military trial?<sup>32</sup> Did U.S. citizens tried by U.S. government consular courts in “uncivilized” foreign jurisdictions have constitutional rights?<sup>33</sup> Did admitted members of the German military who sneaked into the United States on a sabotage mission during World War II have the right to habeas corpus and individual constitutional rights against

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29. See U.S. CONST. amend. V; see also *id.* art. I, § 9 (“The privilege of the Writ of Habeas Corpus shall not be suspended . . .”); *id.* (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* amend. I (“Congress shall make no law . . .”); *id.* amend. II (“[T]he right of the people . . .”); *id.* amend. IV (“The right of the people . . .”); *id.* amend. VI (“In all criminal prosecutions . . .”).

30. See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 527–31 (2007).

31. See generally Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839 (2010).

32. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866).

33. *In re Ross*, 140 U.S. 453, 462–65 (1891).

military trial?<sup>34</sup> What about German military spies tried by a U.S. military tribunal in China in the aftermath of World War II and imprisoned in U.S.-occupied Germany?<sup>35</sup> Did noncitizens detained by the U.S. military on U.S.-controlled, but not sovereign, territory because they were allegedly combatants in terrorist groups against which Congress had authorized the use of military force have a right to habeas corpus or individual constitutional rights?<sup>36</sup>

Old originalism privileges the intentions and understandings of Framers and ratifiers, many of whom were learned, legally sophisticated (if not also practicing lawyers), and experienced in the art of governing,<sup>37</sup> and therefore reasonably likely to be aware of rules of the common law and the law of nations and how they would empower or restrict government and expand or contract otherwise broad individual rights. My prior writings, and important work by Philip Hamburger, suggest that many Framers and ratifiers of the Constitution and the Bill of Rights would have expected and understood that the rights-granting aspects of the Constitution would have a domain limited in various respects by citizenship, territorial location, and enemy status.<sup>38</sup> In particular, the common law and the law of nations<sup>39</sup> were understood to limit the substantive and procedural rights of enemy aliens (nationals of an enemy nation during wartime), nonresident aliens even if not enemies, and enemy fighters, no matter what their territorial location. The methodology of old originalism would thus tend to confirm that unwritten rules of common law or the law of nations could and did trump broad constitutional text in some instances. For instance, James Madison explained to the Virginia Ratifying Convention that the broad language about jurisdiction in Article III of the Constitution was qualified by the rule of the common law and the law of nations that alien enemies were barred from court during wartime.<sup>40</sup>

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34. See *Ex parte Quirin*, 317 U.S. 1, 18–19 (1942).

35. See *Johnson v. Eisentrager*, 339 U.S. 763, 765–66 (1950).

36. See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008); *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

37. For example, nearly two-thirds of the delegates to the Philadelphia Convention had legal training, and nearly three-quarters had served in the Continental Congress. See Sol Bloom, *Constitution of the United States: Questions & Answers*, U.S. NAT'L ARCHIVES & REC. ADMIN., [http://www.archives.gov/exhibits/charters/constitution\\_q\\_and\\_a.html](http://www.archives.gov/exhibits/charters/constitution_q_and_a.html) (last visited Oct. 21, 2013).

38. See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1834–47 (2009); Kent, *supra* note 30, at 505–24; Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 169–211 (2013).

39. In the eighteenth century, “[i]n its broadest usage, the law of nations comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states.” Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989). Thus, the law of nations differed from the common law, even though prominent British jurists taught that “the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*53.

40. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 484–86 (Jonathan Elliot ed., Washington, 2d ed. 1836) (statement of James Madison).



B. *New Originalism's Approaches to Unwritten Limits on the Constitution's Domain*

Because new originalism treats the understanding of the Constitution of “any contemporaneous speaker of the English language” as equally important to that of a Madison or Hamilton,<sup>41</sup> new originalism seems likely to produce quite different results than old originalism on some interpretive questions. Take the example of the Due Process Clause. Using the contemporary dictionaries, which many new originalists favor as a first-order aid to interpretation, we find “person” defined in a comprehensive and ordinary manner as, simply, a man or woman.<sup>42</sup> Using an intratextual method favored by some new originalists, we might note that the description of the rightholder in the Due Process Clause (“person”) is linguistically broader than other terms used in the document, for example “citizen” or “the People,” which is seemingly a reference to the American people who the Preamble tells us ordained and established the Constitution. Several of the state constitutions promulgated in 1776 and thereafter contained due process-type clauses that could be read as limiting the class of rightholders to citizens of the particular state or perhaps of the United States.<sup>43</sup> Read against the background of these documents, the term “person” in the Due Process Clause of the Fifth Amendment might have seemed, linguistically, to be a much broader and hence more encompassing term.

Putting all of this linguistic evidence together, and reading it in the context of the background premise that the new Constitution made the granting of power inextricably linked with limitations on power, it seems plausible that an ordinary member of the American public circa 1789 would have read the Due Process Clause to protect the rights of men and women—full stop. Thus, the Constitution’s domain—or at least the domain of its due process protections, since we would still need to examine the specific linguistic meaning of other parts of the text—might be universal.

But in fact, few, if any, of the men involved in framing and ratifying the Constitution would have understood “person” in the Due Process Clause this way. In giving us the linguistic or semantic meaning that a word or

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41. Balkin, *supra* note 27, at 653.

42. *See, e.g.*, GILES JACOB, A NEW LAW-DICTIONARY 705 (J. Morgan ed., London, W. Strahan, J. Rivington & Sons, 10th ed. 1782) (“Person”: “A man or woman . . . .”); WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 389 (London, W. Strahan, J. & F. Rivington, 1st Am. ed. 1788) (“Person”: “a man or woman . . . .”); THOMAS SHERIDAN ET AL., A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 713 (Phila., William Young, 6th ed. 1796) (“Person”: “Individual man or woman; one’s self.”).

43. *See, e.g.*, MASS. CONST. of 1780, art. XII (“[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.”); N.Y. CONST. of 1777, art. XIII (“[N]o member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers.”); PA. CONST. of 1776, art. VIII (“[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property . . . .”).

phrase should or would have had to the Founding-era public, new originalism might well produce an incomplete or misleading view of the meaning of this Clause, and how the Framers or ratifiers would have expected and understood this clause to fit within the U.S. Constitution and the broader legal framework.

New originalists might have a number of possible responses to the claim that their method could produce a reading of the domain of the Due Process Clause that relatively few people intimately involved in adopting the Constitution would have accepted. Each response has some merit, but none is entirely satisfying.

### 1. Terms of Art

Was “person” a term of art? Most, if not all, new originalists assert that terms of art must be given their specialized meaning.<sup>44</sup> But to prevent a word’s meaning from becoming untethered from the ordinary public meaning, many new originalists suggest that we ought to give terms of art their narrow technical meanings *only if it is somehow apparent that they are terms of art*.<sup>45</sup> Thus, new originalists can comfortably say that the ordinary, objective public meaning of Article I, Section 8’s vesting of power in Congress to “grant Letters of Marque and Reprisal” was its technical legal meaning.<sup>46</sup> But what about the very next power given to Congress: to “make Rules concerning Captures on Land and Water.”<sup>47</sup> Every one of those words seems like quintessentially ordinary, everyday, nontechnical English.<sup>48</sup> It is unclear on what basis new originalism could maintain that the objective meaning of those words for an ordinary member of the public would encompass a specialized understanding of the law of nations and military practice that the drafters of the language brought to the Constitution-writing project.<sup>49</sup>

The term “person” in the Due Process Clause also seems like quintessentially ordinary, nontechnical English. Law dictionaries of the Founding period did not tend to have any separate definition for “person,”

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44. See, e.g., Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 818; Solum, *supra* note 9, at 970.

45. See, e.g., Balkin, *supra* note 44, at 818; Solum, *supra* note 13, at 34–35.

46. U.S. CONST. art. I, § 8.

47. *Id.*

48. See generally Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 651–52 (2012) (“If a phrase in the Constitution looks like a technical term, ordinary citizens might assume that it is a legal term of art that they can leave to the experts to interpret. . . . By contrast, it is unlikely that citizens would make a similar assumption about plain language provisions of the Constitution, which include such ordinary sounding terms as ‘Equal Protection,’ ‘liberty,’ ‘property,’ and ‘Commerce . . . among the several States.’ In some cases, these seemingly ordinary terms could still have a technical meaning for legal experts. But it is unlikely that members of the general public—even ‘reasonable’ ones—would have understood them in that way.”).

49. See generally Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1683 (2009) (tracing the meaning of the language used in the Clause “through British and Colonial Admiralty documents, prominent works of international law, the Revolutionary War and Articles of Confederation, and the drafting and ratification of the Constitution”).

which might have suggested to an average member of the reading public that the word did not have a specialized legal meaning.<sup>50</sup> I am not convinced that it is properly considered a term of art within the new originalist framework.

## 2. Contextual Meaning

Some new originalists have a different way of accommodating non-obvious, specialized meanings that certain words would have had to the adopting generation. Solum, for example, says that the original public linguistic meaning of the text to an ordinary member of the public can be interpreted by “resort to those aspects of the framing and ratification of a given constitutional provision that would have been available to the general public.”<sup>51</sup> He elsewhere calls this “the publicly available context of constitutional utterance,” and notes that it includes knowledge about things like the government created by the Articles of Confederation and the basic facts of the British legal system.<sup>52</sup> The underlying premise is quite similar to the justification for giving terms of art a technical legal meaning: it would have been somehow obvious in the public culture of the Founding period that certain words have specialized meaning because of connection to important public facts and debates.

That strikes me as a reasonable methodological move when the alleged “context” is something that was widely discussed and understood by average members of the late eighteenth-century public. But it seems difficult to justify qualifying or trumping broad constitutional text by reference to unwritten rules of the common law and the law of nations unless, for example, a prominent legal or political event or widely distributed public statement by a leading figure can reasonably be supposed to have brought the issue to the fore.

## 3. The Choice of Broad Language Was a Delegation to the Future

New originalists might make another response to the problem I raised, contending that when the Constitution uses words that have a very broad semantic meaning, even if unwritten norms of common law or the law of nations might have been intended or understood to limit their domain during the Founding generation, fidelity to the document and the idea of limited government under a written constitution requires us to follow the broad semantic meaning. New originalists generally distinguish between

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50. See, e.g., 2 RICHARD BURN, A NEW LAW DICTIONARY 206 (John Burn ed., London, T. Cadell 1792) (containing no separate entry for “person”); JOHN COWELL, A LAW DICTIONARY 339 (Great Britain, J. Walthoe et al. 1727) (same); 2 TIMOTHY CUNNINGHAM, NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW 511 (London, J. Rivington et al., 3d ed. 1783) (same). *But see* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 19–32 (2013) (arguing that “person” in the Due Process Clause was a term of art and is best read to encompass unborn human embryos).

51. Solum, *supra* note 13, at 25.

52. *Id.* at 34 (emphasis omitted).

original public meanings and original expected applications, and assert that only the former are binding. If a meaning is extremely broad, so be it. As Jack Balkin and others emphasize, “we should pay careful attention to the reasons why constitutional designers choose particular kinds of language.”<sup>53</sup> If they chose narrow, precise language, it is “because they want to limit discretion” in the future; on the other hand, a choice of broad language is a choice to “delegate details to future generations,” to allow future generations to apply the concept within the outer boundaries set by the broad language used in the document.<sup>54</sup>

Since I assume this is not a backdoor way of smuggling in original intent, it cannot be a descriptive claim about the intent of particular constitution drafters or adopters. It would seem, therefore, to be a presumption requiring justification, such as a normative one. I think it quite likely that if Framers and ratifiers in 1787–88 thought that the Due Process Clause would be interpreted to provide protections to all persons no matter their citizenship, territorial location, or enemy status, many of them would probably have demanded that a more precise and restrictive term be used instead of “person.”<sup>55</sup> And if we strongly suspect that is true as a historical matter, then it would seem somewhat off the mark to rely on standard normative defenses of originalism to justify interpreting potentially broad or vague language as being intended to convey that kind of very capacious discretion to the future. It is somewhat difficult to understand how using originalism in this way constitutes “fidelity”<sup>56</sup> to word choices by the adopting generation and therefore supports popular government by tying the people’s agents to the choices made by the people.<sup>57</sup>

#### 4. Vagueness Allows Nonoriginalist Construction

A related potential response of new originalism is that the Due Process Clause’s term “person” is, like many important parts of the Constitution, very vague and underdeterminate. As a result, “interpretation” of the original public meaning will only produce a “thin,” “framework” kind of semantic meaning of the term, while a meaning “thick” enough to give some truly determinate content to the constitutional provision can only be produced by nonoriginalist “construction.”<sup>58</sup> In most cases, this form of argument is quite plausible. Indeed, it represents one of the major theoretical advances of new originalism over the old, though it does come, as Thomas Colby has noted, at the expense of originalism’s claims to

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53. BALKIN, *supra* note 9, at 6.

54. *Id.* at 6–7.

55. But maybe not. Sometimes broad or vague language in constitutions or statutes is used to paper over irreconcilable differences among the adopters.

56. See BALKIN, *supra* note 9, at pt. I (discussing “Fidelity”).

57. See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (“[T]he most common and most influential justification for originalism [is] popular sovereignty and the judicially enforced will of the people.”).

58. See Balkin, *supra* note 27, at 646–47.

provide a determinate method that reins in judicial subjectivity.<sup>59</sup> But when we turn to the example of “person” and potential limits from the common law and the law of nations, there is a hitch. It is a cardinal rule of new originalism that construction may not contradict interpretation—that is, construction may occur only within boundaries demarcated by interpretation. Above, I suggested that the semantic meaning of person might be “human being” (or perhaps “adult human being”). If so, a construction using background rules of general law to read “person” to mean, for example, “adult human being who is a U.S. citizen or, if not, is present in the United States and whose home country is not at war with the United States,” would seem to impermissibly undercut the broad, unrestricted semantic meaning, not merely flesh it out and specify it.

### 5. Continuity with the Preexisting Legal System

A fifth approach to the problem that text-focused new originalism might seem to produce a meaning that would have been rejected by many members of the adopting generation is presented in an interesting recent article by Stephen Sachs.<sup>60</sup> The claim is that the Constitution was adopted to be part of an ongoing legal system, and that it generally is unproblematic, because this is how our legal system worked, to think that provisions of the Constitution were defeasible—that is, could be defeated or limited by preexisting unwritten rules of the common law or the law of nations. This is an old idea. For instance, the debates in the Supreme Court’s first blockbuster case, *Chisholm v. Georgia*,<sup>61</sup> touch on it. Justice James Iredell assumed in dissent that the preexisting sovereign immunity of the states under the law of nations and common law survived under the new Constitution,<sup>62</sup> while the justices in the majority thought that the broad text of the new Constitution’s Article III trumped.<sup>63</sup>

Sachs’s basic presumption often appears, like Iredell’s, to be continuity: the Constitution was overlaid on a legal system that was already a going concern, and so would have been generally understood to fit comfortably within the rules of that preexisting legal system, including rules that defeated otherwise broad and unlimited constitutional language.<sup>64</sup> As a general matter, it is clearly true that the Constitution fit within an ongoing legal system. The Constitution did not purport to be a new code that would displace all prior law. But, at least in some instances, any presumption of continuity would be mistaken. As Martin Flaherty, Jack Rakove, and other historians have emphasized, the Constitution emerged from a time of revolutionary change, and represented such an extraordinarily new form of government that many details were not thought about, much less worked

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59. See Colby, *supra* note 9, at 714.

60. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

61. 2 U.S. (2 Dall.) 419 (1793).

62. *Id.* at 435, 449 (opinion of Iredell, J.).

63. See, e.g., *id.* at 466 (opinion of Wilson, J.).

64. See Sachs, *supra* note 60, at 1817.

out.<sup>65</sup> Even the meaning of the concept of a “constitution” was debated vigorously and changed significantly over the Revolutionary War and Framing periods.<sup>66</sup> The revolution went well beyond views about government. Gordon Wood, for example, after documenting the huge changes in views about the proper constitution of government that occurred over a short period of time,<sup>67</sup> then turned to writing about the “momentously radical” changes in views about the social order during the Revolutionary War period.<sup>68</sup> Instability and discord marked debates about interpretation of the Constitution. Caleb Nelson has documented how the radical newness of the Constitution generated unresolved disagreement over what kinds of preexisting interpretive presumptions should be used to construe it.<sup>69</sup> Saul Cornell’s contribution to this Symposium shows that elite versus populist debates about interpretive method raged during the Founding era, with the former groups advocating that the Constitution should be read as a technical legal document employing usual lawyerly presumptions and conventions, whereas the latter groups argued for a plain meaning interpretation according to the understandings of the uneducated common man.<sup>70</sup>

It is plausible to think that the limits and qualifications of the common law and the law of nations were understood by the public of the Founding era and later generations to have been silently incorporated into the Constitution, limiting its otherwise unqualified rights-bearing language. Indeed, I have previously made such an argument.<sup>71</sup> But it also strikes me as plausible to think that the new Constitution—especially given its new Bill of Rights with a new judiciary to enforce it, and its structure premised on the idea that enumeration presupposed limitation—could have been understood to be a new birth of freedom, overriding or at least modifying previous background norms that had limited the rights of aliens, military enemies, and nonresidents.

So if Sachs and others who make this argument are offering a descriptive claim about how the Constitution would have been understood, a presumption of continuity with the past will not do. Empirical investigation

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65. See, e.g., Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 *LAW & CONTEMP. PROBS.* 169, 171–72, 189 (2004); Rakove, *supra* note 13, at 588, 592.

66. Rakove, *supra* note 13, at 589–92.

67. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969).

68. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*, at ix (1991).

69. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. CHI. L. REV.* 519, 555–56, 560–78 (2003).

70. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 738–39 (2013); see also Nelson, *supra* note 69, at 570 (“During the debates over ratification . . . Federalists and Anti-Federalists divided over whether one should read the Constitution like a lawyer at all, or instead should understand the document as a layman would.”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 902–13 (1985) (describing battles between Federalists and Anti-Federalists over the proper interpretative methods for reading the Constitution).

71. See Kent, *supra* note 30, at 492; Kent, *supra* note 38, at 171–76; Kent, *supra* note 31, at 1852.

of what the public of the Founding era actually thought about how specific, unwritten rules of nonconstitutional law would interact with specific parts of the new Constitution is necessary, as Sachs's analysis of some specific issues makes clear. But this raises two problems of its own. First, it appears to be more of an original intent or original understanding argument than a new originalist argument about objective public meaning. The second difficulty is discussed in the next subsection.

#### 6. Original Methods Originalism

A sixth possible new originalist approach to our problem is suggested by the work of John McGinnis and Michael Rappaport, which they call original methods originalism—ascertaining the original public meaning by employing the background interpretive rules that the adopting generation would have thought applicable.<sup>72</sup> It is possible that there were one or more background rules that might have helped elucidate the relationship between the common law, the law of nations, and the Constitution.

McGinnis and Rappaport's theory is attractive in a number of respects. Compared to a new originalism that has the potential to allow semantic meaning to depart dramatically from the expectations of the adopting generation, original methods originalism better respects the choices of the adopting generation, avoiding what might be called a bait-and-switch problem. McGinnis and Rappaport also avoid a serious potential objection by not presuming that any given interpretive rule is applicable; the applicability of any rule is rather an empirical question about the understandings of the adopting generation.<sup>73</sup> But the theory has some difficulties answering the problem I am posing.

We are talking now about discovering unwritten rules about how unwritten sources of law, like the common law or the law of nations, would interact with the new Constitution. But, in practice, it is exceedingly difficult to pin down a majority, much less a consensus view, on a specific question when there is neither: (1) written text to serve as a focal point of debate and to clarify what exactly adopters were being asked to accept or reject; (2) actual or hypothetical cases to sharpen the debate and crystallize the issues; nor (3) a decision point that forces or at least allows many different people to go on record with their views. It seems to me that, in this situation, we are faced with the same type of methodological problems—how to know unexpressed intent and determine collective intent or understandings, and in any event, a lack of necessary written records to do so—that many think made original intent and original understanding originalism unworkable. Determining the intended, understood, expected, or commonly held meanings of the Constitution's textual provisions is difficult enough, even though both (1) and (3) existed to help us understand the adopting generation's views. It seems quite unlikely that today's interpreters will routinely be able to discover sufficient consensus in the

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72. See McGinnis & Rappaport, *supra* note 25.

73. *Id.* at 769, 783, 787.

adopting generation about the relationship between unwritten rules of general law and the Constitution's text.<sup>74</sup>

### 7. Defining the Audience of Speakers and Readers

A final possible response of new originalism might be to define the audience whose linguistic practices count as one which is both familiar with the common law and the law of nations *and* with how those preexisting bodies of law would fit in with the new Constitution. If made, this question-begging move would be an extreme example of why Larry Alexander and other critics of new originalism suggest that there is no “non-arbitrary way of choosing” what characteristics and views the chosen audience of speakers has.<sup>75</sup>

Old originalists presented different accounts of whose intent or understanding mattered: drafters, ratifiers, or the public at large.<sup>76</sup> Similarly, new originalists do not agree about who makes up the group that is the measure of objective public meaning. As noted above, for some new originalists, including Barnett, it is simply a “reasonable” or “reasonably well-informed” person in late eighteenth-century America.<sup>77</sup> For Solum, it is “ordinary American citizen[s] fluent in English,” such as “farmers, seamstresses, shopkeepers, and even lawyers.”<sup>78</sup> Other new originalists posit somewhat different groups whose linguistic practices are the measure of meaning. McGinnis and Rappaport’s reasonable person is apparently one who was aware of the background interpretive rules that would have been understood to apply to legal documents like the Constitution.<sup>79</sup> For Michael Ramsey, the relevant group is “educated and informed speakers of the time.”<sup>80</sup> For Gary Lawson, it is a hypothetical person who is “fully informed” and “know[s] all that there is to know about the Constitution and the surrounding world.”<sup>81</sup>

These differences can matter a great deal in the foreign affairs area. The public meaning for Lawson or McGinnis and Rappaport would likely incorporate relevant rules of the common law and the law of nations, while the less sophisticated audience of speakers that Barnett, Solum, and others

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74. See generally Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 784–85 (2010) (“Our whole constitutional history shows that in many instances several ‘public understandings’ existed. . . . Moreover, circa 1788, many Founders in fact believed that they had not yet established a fixed meaning for many parts of the Constitution.”).

75. Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* 87, 89 n.6 (Grant Huscroft & Bradley W. Miller eds., 2011).

76. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 250–52 (2009).

77. See BARNETT, *supra* note 9, at 92.

78. Solum, *supra* note 13, at 3.

79. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles As the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007).

80. Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 975 (2008).

81. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).



look to likely would not. As far as I can tell, new originalism has yet to provide a satisfactory account of how to choose its actual or hypothetical audience whose linguistic usages and practices are the measure of meaning.

### III. NEW ORIGINALISM AND THE IMPERFECTLY DRAFTED FOREIGN AFFAIRS CONSTITUTION

In recent years, originalism has become methodologically self-conscious and sophisticated; voluminous materials on the ratification of the Constitution have been made easily available to researchers, and a large number of academics have devoted themselves to originalist projects. Before all this, it was said by leading scholars of foreign affairs law that the Constitution's text appears to leave unanswered many foreign affairs questions.<sup>82</sup> But now, even after all the modern developments, many important foreign affairs law questions are still contested, difficult, and uncertain. The drafters and ratifiers did not fully work out their thinking and, hence, the Constitution's text is often poorly drafted or incomplete.<sup>83</sup> And some of the foreign affairs parts of the Constitution were written in a loose way that is a poor fit for new originalism's parsing of the precise meaning of specific words and clauses in the Constitution, based in large part on dictionaries, grammar books, and popular usage. Both of these factors make it difficult for new originalism to settle on a clear and uncontested original public meaning of many foreign affairs provisions.

#### A. *The Declare War Clause*

An example might help to start the discussion. Mark Tushnet recently observed, in criticizing any originalism that claims to isolate a single historical meaning of constitutional language, "give me an interesting term used in a constitution, and I will find a bunch of people at the time of its adoption who understood it to mean one thing, and a bunch of other people who understood it to mean something else."<sup>84</sup> My experience in reading the primary sources of the Founding era has confirmed the truth of this remark.

With one exception. Article I gives Congress the power to declare war,<sup>85</sup> grant letters of marque and reprisal,<sup>86</sup> and raise and maintain armies and navies,<sup>87</sup> while Article II makes the President the "Commander in Chief" of U.S. armed forces.<sup>88</sup> A vast array of members of the Founding generation

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82. See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 171 (4th rev. ed. 1957); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 14–15 (2d ed. 1996); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 68 (1990).

83. See generally JACK N. RAKOVE, *ORIGINAL MEANINGS* 159–60 (1996); Flaherty, *supra* note 65, at 171–72, 191; William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 986, 999, 1002 (2009).

84. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 611 (2008).

85. U.S. CONST. art. I, § 8, cl. 11.

86. *Id.*

87. *Id.* art. I, § 8, cl. 12–13.

88. *Id.* art. II, § 2.

opined without dissent that the Constitution had thereby empowered Congress alone to decide whether to initiate foreign wars.<sup>89</sup> Yet some significant modern academics believe that the original meaning of the Constitution is that the president has the authority to initiate foreign wars because the declare war power merely authorized Congress to proclaim that an international state of war existed, with all its attendant legal consequences.<sup>90</sup> Still other modern scholars believe that the original meaning of the Constitution was unclear on who possessed war initiation authority.<sup>91</sup> President Truman most famously, as well as a number of other modern presidents, acted on the basis of a modern pro-president understanding.<sup>92</sup>

What happened? In part, the felt necessity for expansive presidential war powers in the modern era may have subtly influenced the scholarship on this issue—"ought" created "is." But a large part of the reason for the divergence between the unanimous views of the Founders and the understandings of some modern academics is, I submit, that the drafters at Philadelphia did not do a great job making their unanimous intentions clear in the text. Both the Declare War Clause and Article II's provisions concerning executive powers were drafted quickly and debated relatively little.<sup>93</sup> Just looking at the Constitution's plain text from a semantic or

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89. Major figures whose views about this issue are essentially beyond dispute include George Washington, James Madison, Alexander Hamilton, John Marshall, James Wilson, Thomas Jefferson, John Adams, William Paterson, James Monroe, Pierce Butler, James Iredell, Samuel Chase, Henry Knox, and Charles Pinckney. On the other hand, I am not aware of a single instance in which a prominent member of the Founding generation expressed the view that the Constitution authorized the president to decide whether to initiate a foreign war.

90. The most important works in this vein are by John Yoo. *See, e.g.*, John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1643–44 (2002). Other academics share similar views. *See, e.g.*, Robert Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 698 (1990); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850–51 (1972); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1375–83 (1994) (book review); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 906–10 (1994) (book review).

91. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047, 2057–58 (2005); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 111 (1984).

92. *See* LOUIS FISHER, *PRESIDENTIAL WAR POWER* 99–100 (2d ed. 2004).

93. *See* Treanor, *supra* note 83, at 999 (“[T]he records of the Philadelphia Convention indicate that the language vesting in Congress the power to ‘declare war’ was more a product of delegates’ dissatisfaction with the original proposal that Congress should have the power to ‘make war,’ rather than a considered conception of what the power to ‘declare war’ meant. Their focus was on why ‘make war’ was a bad approach, rather than on why ‘declare war’ captured their intended meaning.”); Forrest McDonald, *Foreword* to CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789*, at xiv (Liberty Fund, Inc. 2007) (1923) (stating that by the time Article II powers were being drafted “the Convention was nearing an end, and the delegates were tired, irritable, and eager to go home. As a

linguistic standpoint, it is not obvious that the grant of a power to “declare war” conveys all war initiation powers to Congress.<sup>94</sup> The competing view—that it was authority to proclaim an international state of war—seems to me and many other observers a textually plausible one.

Excellent work by Michael Ramsey and Saikrishna Prakash has shown that a likely original meaning of “declaring war” was “initiating a state of war by a public act, and it was understood that this could be done either by a formal declaration or by commencing armed hostilities.”<sup>95</sup> But, in my view, that interpretation trumps the competing one primarily on the strength of the unanimous testimony of the founding generation and evidence of the purposes that animated the drafting<sup>96</sup>—in other words, evidence of original intent or original understanding, not the objective linguistic meaning of the text.

This raises an interesting question. Why, for years after the Constitution was adopted, do we not see any interpreters saying, “I know what the Framers intended to say regarding war powers, but the semantic meaning of the text that was adopted is consistent with some presidential power to initiate war, so that is what the Constitution means”? There are probably at least two reasons. First, and less interesting for present purposes, there was probably not much of a political constituency that desired presidential war initiation authority. Presidents Washington and Adams, for example, were both comfortable with Congress taking the lead. Second, as William Treanor has argued, it is not clear “that the original meaning of the text is determined by reading the document closely” in the manner of contemporary text-based originalists.<sup>97</sup> Treanor suggests that many early constitutional interpreters were not strict textualists in the modern style but rather focused on “the larger purposes underlying the text” and “[s]tructural concerns.”<sup>98</sup> William Eskridge has made similar arguments about early statutory interpretation.<sup>99</sup> The structural considerations and purposes in

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consequence, they became a bit careless in finishing their work. Article II, establishing the executive branch, was therefore put together in a slipshod fashion.”).

94. See generally Robert W. Bennett, *Originalism: Lessons from Things That Go Without Saying*, 45 SAN DIEGO L. REV. 645, 650–51 (2008) (arguing that important parts of the Constitution were sloppily drafted or incomplete, and that certain important issues were entirely unaddressed).

95. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1545 (2002) (emphasis omitted); see also RAMSEY, *supra* note 5, at 222–35; Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45 (2007); Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002).

96. See, e.g., William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695 (1997).

97. Treanor, *supra* note 10, at 488 (emphasis omitted).

98. *Id.* at 490, 501; see also Treanor, *supra* note 83, at 985 (stating that, for the Founding generation, “text was not central to meaning in the way that” modern textualist originalists assume).

99. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 998 (2001) (“The central lesson of the early period, best embodied in the work of John Marshall, is that statutory interpretation is all about words, but words are about much more than dictionaries

favor of sole congressional war initiation authority were so well known and widely accepted that it would likely have seemed outlandish to read the text any other way.

This is not to say that text was irrelevant. Anyone reading the ratification debates of 1787–88, or congressional debates, lawyers' arguments, and judicial decisions after the Constitution went into effect will find innumerable instances of careful reading of the Constitution's text coupled with the assumption that the textual meaning is binding. But the Founding era's textual analysis was, at least for some important interpreters and in some instances, slightly but significantly different than today's text-based new originalism.

### B. *Immigration and Unenumerated Powers*

The immigration power and debate about unenumerated, inherent legislative authority provides another example of ways the foreign affairs Constitution was incomplete and poorly drafted, and how its text was sometimes interpreted in a looser way than text-focused new originalism might assume.

It has long been noted that the Constitution lacks a clear textual basis for full congressional control over immigration. Some aspects of an immigration power may be implied from the Naturalization Clause, the war powers clauses, the Foreign Commerce Clause, or perhaps even the Migration and Importation Clause, but Congress regulates a vast array of immigration-related matters and not all can be easily implied from these other substantive powers. The Supreme Court has for well over a century resolved this problem by holding that Congress's authority to comprehensively regulate immigration comes either wholly or in part from extraconstitutional, inherent powers of sovereignty or international law instead of from any textually enumerated or implied power.<sup>100</sup>

A terrific book by Ramsey applying new originalist methods asserts that this understanding lacks any basis in the original public meaning of the Constitution.<sup>101</sup> (Interestingly, Justice Scalia accepts the inherent immigration powers argument<sup>102</sup>—perhaps an example of his faintheartedness.) According to Ramsey, the Vesting Clause of Article I and the Tenth Amendment rather clearly state that there are no inherent, extraconstitutional legislative powers of the national government, and that

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and ordinary usage; they also involve policies chosen by the legislature and enduring principles suggested by the common law, the law of nations, and the Constitution.”). See generally Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 NW. U. L. REV. 1905, 1916–17 (2007) (noting uncertainty and debate about the interpretive rules actually used by the Founding generation to read the Constitution). Treanor's and Eskridge's views are not universally accepted. See, e.g., McGinnis & Rappaport, *supra* note 25, at 793–96.

100. See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 603–05 (1889).

101. RAMSEY, *supra* note 5, at 4, 54–73.

102. *Arizona v. United States*, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part).

all powers not granted to the national government are reserved to the states.<sup>103</sup> Ramsey also notes that many prominent Federalists publicly defended the proposed Constitution by assuring the people that the national government only possessed those powers that the text enumerated or clearly implied, and that all others remained with the states.<sup>104</sup> As a result, any legislative power over immigration not granted to Congress by the text would be reserved to the states.<sup>105</sup>

Ramsey's reading of the text is highly plausible, and his reporting of the ratification debates entirely accurate. I think it is clear that he has captured *an* original public meaning of the text. But is it the only original public meaning?

Compared to other issues, the Framers did not spend as much time thinking about or drafting foreign affairs parts of the Constitution,<sup>106</sup> for at least two reasons. First, the foreign affairs provisions of the Articles of Confederation were considered to be the most successful, the least in need of repair or wholesale change, and so were largely copied over from the old document to the new and given to the national government.<sup>107</sup> Certainly, many Framers thought that new foreign affairs provisions were needed, but these were largely additions to the Articles, not subtractions—for example: making treaties and other federal law the supreme law of the land, creating new federal courts to enforce treaties and the law of nations, creating a separate executive branch, granting to Congress new legislative power over foreign commerce and the law of nations, as well as new direct powers of taxation to fund the national government. The new document split foreign affairs powers held by the Continental Congress between wholly new institutions: a Congress, its upper house, a president, and federal courts. Probably less attention was devoted to dividing powers between these institutions than the importance and complexity of the topic warranted. Second, the Framers shared more common goals and ideas about foreign

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103. RAMSEY, *supra* note 5, at 17, 199–201.

104. *Id.* at 17–18.

105. *Id.* at 202–04.

106. See, e.g., William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1339–40 (2006) (stating that the Declare War Clause “was not a first order issue” for the Philadelphia Convention and so the Framers “fashioned a text that neither fully captured their intentions nor resolved the types of issues that have become pressing to us”).

107. It was not until relatively late in the Philadelphia Convention that the enumeration of the legislative powers emerged. Before then, the convention was satisfied with the following principles: “That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation”—i.e., authority to control war and foreign affairs—“and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–32 (Max Farrand ed., rev. ed. 1966). Compared to the attention given to other issues at Philadelphia, not a lot of time was spent on debating the specific enumerations that replaced this formula and became Article I, Section 8. See Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 373–74 (2007).

affairs than many domestic issues.<sup>108</sup> As a result, foreign affairs issues generally received less time and attention and the Framers did not reach consensus in their conceptions or achieve specificity in the text for many separation of powers questions.<sup>109</sup> I am, of course, not saying that there was no controversy, debate, or attention to foreign affairs matters, for of course there was.<sup>110</sup>

As Treanor writes, “the way in which the Constitution was drafted—often at great speed and with many critical questions unresolved”—may “suggest[] the appropriateness of an open-ended interpretive process that considers many variables and does not limit the analysis to text.”<sup>111</sup> How might the rather hastily drafted foreign affairs portions of the Constitution have looked using a looser, more structure- and purpose-focused manner of reading text than some new originalists do today?

Although the principle of enumeration as limitation was central to the Federalists’ defense of the Constitution, many also believed that the Constitution that emerged from Philadelphia had given the national government enormous and nearly unlimited power in foreign affairs, and certainly enough power to accomplish all purposes for which the federal government existed. As Mark Graber has explained,

When Federalists spoke about federal authority, they consistently asserted that the federal government had the power to meet all national concerns. . . . Few Federalists thought seriously about the legal significance of enumerated powers because they still preferred constitutional politics to constitutional law as the best means for restraining national officials.<sup>112</sup>

Thus, prominent Framers declared that the Constitution they had written created a government that would, in Hamilton’s words, “contain in itself every power requisite to the full accomplishment of the objects committed to its care.”<sup>113</sup> John Jay described the Constitution as forming a “national government, competent to every national object.”<sup>114</sup> Hamilton explained:

As the duties of superintending the national defence and of securing the public peace against foreign or domestic violence, involve a provision for casualties and dangers, to which no possible limits can be assigned, the

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108. FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 143 (1973).

109. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725 (1996).

110. Whether to allow the national government to create a “standing army,” for example, was enormously controversial. For a helpful summary of debates about war and foreign affairs powers at Philadelphia and in the state ratifying conventions, see ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 25–59 (1976).

111. Treanor, *supra* note 83, at 985.

112. Graber, *supra* note 107, at 375.

113. *THE FEDERALIST* NO. 31, at 212 (Alexander Hamilton) (Cynthia Brantley Johnson ed., 2004).

114. Graber, *supra* note 107, at 375 (emphasis omitted).

power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.<sup>115</sup>

Madison agreed that the Convention had drafted “a Constitution fully adequate to the national defence and the preservation of the Union,” and that “[t]he means of security”—the powers granted to the federal government by the Constitution for national defense—“can only be regulated by the means and the danger of attack,” that is, must be essentially unlimited.<sup>116</sup> Because “[i]t is in vain to oppose constitutional barriers to the impulse of self-preservation,” the Philadelphia Convention had not attempted to do so.<sup>117</sup> As Graber describes it, “Proponents of ratification in 1787 and 1788 indiscriminately combined assertions that federal powers were limited with assertions that Congress was authorized to regulate all matters of national importance.”<sup>118</sup>

In other words, a case might be made that the Constitution was understood by some to have granted more foreign relations and national defense powers to the federal government than parsing the strict semantic or linguistic meaning of its words would seem to convey. I should emphasize that I am only sketching the outlines of this argument here, not claiming to have conclusively documented it.

There are some indications in the years after the Constitution was adopted that this looser way of reading the Constitution was in play. Soon after the Constitution was ratified and the new government was up and running, it became clear that a careful textual exegesis of the foreign affairs Constitution revealed some gaps. But some Federalists did not see this as problematic because of the widely shared assumption that the national government had been granted by the Constitution every power necessary to accomplish its ends, which included national defense and foreign relations. So early on, the power to punish sedition, to regulate immigration and deportation, and to acquire new territory were said by some to be derived from the general nature and powers of the powerful federal government created by the Constitution to manage foreign affairs and defend the nation.<sup>119</sup> This understanding was subtly but importantly different from the

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115. THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 113, at 212; *see also id.* NO. 23 (Alexander Hamilton), *supra* note 113, at 161 (“[I]t is both unwise and dangerous to deny the Fæderal Government an unconfined authority, as to all those objects which are intrusted to its management.”).

116. *Id.* NO. 41 (James Madison), *supra* note 113, at 289, 293.

117. *Id.* at 289.

118. Graber, *supra* note 107, at 374.

119. *See, e.g.*, REPORT OF A SELECT COMMITTEE MADE TO THE HOUSE OF REPRESENTATIVES ON FEB. 25, 1799, reprinted in 9 ANNALS OF CONG. 2986 (1799) (arguing that Congress had authority to pass the Alien Act because of “the common practice of nations,” “the power of war and peace, [which] according to the theory of the Constitution, belongs to the Government of the United States,” the Republican Government Clause, and the Necessary and Proper Clause); 8 ANNALS OF CONG. 2146 (1798) (statement of Rep. Harrison Gray Otis, Federalist, Mass.) (arguing that Congress has authority to enact the Sedition Act because “every independent Government has a right to preserve and defend itself against injuries and outrages which endanger its existence”); 8 ANNALS OF CONG. 1986 (1798) (statement of Rep. Harrison Gray Otis, Federalist, Mass.) (arguing that Congress has

claims heard later in the nineteenth century that the national government possessed some wholly unenumerated, extratextual foreign relations powers merely by virtue of sovereignty or international law.<sup>120</sup> The earlier idea was that the vesting of foreign affairs and national defense powers in the national government had been so complete and exhaustive that unmentioned powers of that nature that served the same purposes could be considered impliedly granted. This implication arose perhaps from the overall structure and purposes of the document, or perhaps from broad clauses like the Preamble's statement that the Constitution was formed to, among other things, "provide for the common defence," or the Article I, Section 8 grant of authority to Congress to tax and spend for the common defense.<sup>121</sup> This is similar—not identical, but similar—to what Chief Justice John Marshall later did in *McCulloch v. Maryland*. After noting that "[t]his government is acknowledged by all, to be one of enumerated powers,"<sup>122</sup> he nevertheless proceeded to read the enumerations in a broad

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authority to enact the Alien Act because "it was the design of the Federal Constitution to embrace all our exterior relations. The great objects of peace and war, negotiations with foreign countries, the general peace and welfare of the United States, must be provided for and maintained by the National Government. . . . If Congress has the right to defend the Union, it has certainly a right to prepare for defen[s]e"); 8 ANNALS OF CONG. 1983–84 (1798) (statement of Rep. William Gordon, Federalist, N.H.) (locating Congress's authority to enact the Alien Act in "the sovereign power of every nation . . . to protect itself," and "from the power of making war, and providing for the general welfare").

120. Perhaps not surprising, those ideas gained prominence during the existential crisis of the Civil War. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 3308 (1864) (remarks of Sen. John Hale, Republican, N.H.) ("It seems to have been considered by most of the gentlemen who have addressed the Senate that all the powers this nation has got it gets under the Constitution. No such thing, sir. If that were the case we should be in the condition of the Episcopal minister who was called upon to pray with a man who had been gored by a bull. He turned the prayer-book over and over from end to end and found no prayer for a man gored by a bull, and he told the man he could not pray for him, as there was nothing of that sort in the prayer-book. . . Just so it is here. We suppose that all the powers that this nation has got are prescribed in the Constitution. Have we no necessary powers as a nation, as a sovereignty, for our own preservation . . . ?"); CONG. GLOBE, 37th Cong., 2d Sess. 2964 (1862) (remarks of Sen. Charles Sumner, Republican, Mass.) ("I claim for Congress all that belongs to any Government in the exercise of the rights of war."); Woodbury Davis, *Political Problems and Conditions of Peace*, 12 ATLANTIC MONTHLY 252, 252 (1863) ("Over those interests which are committed to its care [the federal government] has all the powers incident to any other government in the world . . .").

The Supreme Court hinted at the concept of inherent sovereign powers of national defense to sustain Congress's wartime legal tender legislation. See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 529 (1870) (noting that it is "a power confessedly possessed by every independent sovereignty other than the United States"); *id.* at 555–56 (Bradley, J., concurring) (stating that the national government created by the Constitution was "[a]s a government invested with all the attributes of sovereignty," and has those powers which, at the time the Constitution was adopted, "were generally considered to belong to every government as such, and as being essential to the exercise of its functions"). For an argument that the idea of inherent, unenumerated foreign affairs powers derived principally from later nineteenth-century case law about regulating immigration and governing newly acquired territory and Indian tribes, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

121. U.S. CONST. art. I, § 8.

122. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).



and general way and held that in creating such a government of awesome powers, the People, through the Constitution, intended to grant Congress ample means to carry out the great objectives of the union.<sup>123</sup>

I am not arguing that the original public meaning of the Constitution's text was that Congress possessed inherent, unenumerated powers in foreign affairs and national defense. My point is more narrow: for some important Founding-era interpreters, a reading of the Constitution based strictly on the semantic meaning of the specific enacted clauses was insufficient, because it failed to account for what they understood to have been the vesting by the Constitution of all necessary foreign affairs and national defense powers in the federal government. How prominent this reading was is an empirical question. My sense—I have not exhaustively tried to research and document this—is that Ramsey's reading of the text was more common and influential than the alternate one I have sketched here. But a complete account of the original public meaning of the text should encompass all of the many contested views and indeterminacies. In my opinion, a strict textualism does not provide a fully satisfactory account.

#### CONCLUSION

This Article is the work of an interested observer rather than a partisan in the intense methodological disputes within the various originalist camps and between originalists and their critics. I do not think originalism is all "bunk."<sup>124</sup> In fact, I have several times attempted to uncover the original meaning of parts of the Constitution because I think that it is a crucially important aspect of constitutional interpretation.<sup>125</sup> But I am skeptical of originalism's claim to be the sole legitimate method of interpretation.

This skepticism is not so much philosophical as practical. Just as no previous prophet or church has ever succeeded in convincing all of humanity that he, she, or it represents the one true faith, I think it is inevitable that there will continue to be a very wide diversity of methodological approaches used by all the various kinds of people who interpret and apply the Constitution—private lawyers, judges, executive branch advisers, members of Congress and their staffs, state and local officials, public intellectuals, participants in social movements, and ordinary Americans.

Participating in a public discourse about the Constitution's meaning, therefore, requires speaking the languages of the many different methods of interpretation—including, of course, new originalism. This is particularly true in the foreign affairs area where, as noted in the Introduction to this Article, the Supreme Court and the political branches tend not to be very originalist.

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123. *Id.* at 407–08.

124. See Berman, *supra* note 9.

125. See Kent, *supra* note 30; J. Andrew Kent, *Congress's Under-Appreciated Power To Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

In addition, new originalism and its method of parsing the objective semantic meaning of the enacted text struggle to interpret certain foreign affairs aspects of the Constitution. Because of its focus on the meaning of the written text to an audience of ordinary Americans, the method has trouble explaining when and whether unwritten doctrines of the common law and the law of nations should be understood to limit otherwise broad language in the Constitution. And new originalism arguably commits the “aesthetic fallacy”<sup>126</sup> when it fails to grapple with the fact that many foreign affairs provisions of the Constitution were written hastily, sloppily, and incompletely, and were not interpreted by many members of the founding generation in a modern, strictly textualist manner.

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126. Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1617 (1997) (describing the “Aesthetic Fallacy” of constitutional interpretation as the assumption that “the Constitution is like a poem, a symphony, or a great work of political philosophy. Each word and every phrase must come together to form a harmonious and pleasing composition”); *see also* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *MICH. L. REV.* 545, 553–54 (2004) (invoking Eisgruber’s “aesthetic fallacy” and noting that a certain originalist “textual argument assumes a level of precision on the part of the Founders that may be unrealistic”).