
PRESIDENTIAL ORIGINALISM?

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“The President does not have the authority to launch military action in Iran without first seeking Congressional authorization.”

– Senator Harry Reid (D.-NV), Senate Majority Leader, Remarks at the National Press Club (Jan. 19, 2007).¹

INTRODUCTION

Debates over the best way to interpret the Constitution tend to focus on the judiciary. The question usually asked, explicitly or implicitly, is whether *judges* should follow the Constitution’s original meaning or allow some sort of evolutionary change.² Constitutional interpretation is, of course, not limited to the judicial branch. The President, for example, must consider constitutional limitations when exercising presidential power, and Congress and the public must consider those limitations in assessing the President’s conduct. Often these interpretations of presidential power occur in areas where no judicial direction exists. That is especially true in foreign affairs law, where judicial

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¹ Edward Epstein, *Top Dems Rebuke Bush on War Plan*, S.F. CHRON., Jan. 20, 2007, at A1 (quoting Senator Harry Reid).

² Typical leading examples include RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-47 (Amy Gutmann ed., 1997); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). For an important counterpoint, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (discussing the possibility of reducing judicial review and returning constitutional decision making to the people through the political process).

interpretation occurs less often and lags further behind events than in other areas.³

This Essay suggests that we can gain some fresh perspective on well-worn interpretative debates by setting aside the judicial role and focusing instead upon the President. Consider, for example, the familiar debate over adherence to the Constitution's original meaning in constitutional interpretation. Must the President respect the limits that the Constitution's original meaning imposes on presidential powers? This apparently simple question proves, on further examination, to have no ready solution.

To set the scene, suppose the President wishes to take an action that the President believes is important to preserve national security. (To avoid complications relating to the President's emergency power, assume that no immediate and overwhelming cataclysm will result if the action is not taken – the President merely believes the nation will be more secure if it is.) Assume further that, as is often true in foreign affairs matters, there is no court decision closely on point⁴ and judicial review of the proposed action likely will not occur or will be delayed far beyond the relevant events, giving the President substantial scope to implement the proposed action.⁵ As a result, the

³ See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306-08 (1993) (noting that the “Court has the least interest of all in exercising rights of governance in the foreign affairs and war powers areas” and thus “has largely ceded the rights of governance in foreign affairs and war powers to the executive”); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1059-61 (2006) (observing that courts have resisted intervening in war powers disputes for political reasons and due to lack of institutional authoritativeness).

⁴ See *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (“[T]he decisions of the Court in this area [foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases.”).

⁵ By assuming no relevant judicial rulings, this Essay does not address the extent to which the President is bound by prior Supreme Court rulings, an issue on which there is a wide array of scholarship and opinion. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993). See generally John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33 (2006). Among other things, this Essay does not consider (a) the President's ability to disregard court decisions the President believes are incorrect (whether addressed to the actual action the President contemplates or a parallel one); (b) the President's ability to disregard court decisions which, although decided on distinct facts, involve indistinguishable reasoning; or (c) the President's responsibility to the Constitution's original meaning where a court decision appears to give authority to go beyond it. Rather, our inquiry arises where the Constitution's original meaning appears to

President's own sense of constitutional constraints, and the views of Congress and the general public, are likely to be especially significant.

This situation is by no means hypothetical. Consider, for example, the question whether the President may independently authorize the use of military force against foreign enemies in the interest of national security. President Truman confronted that issue in the Korean conflict in 1950, when he acted without express congressional approval.⁶ Similarly, President George W. Bush faced it with respect to Iraq in 2002: his advisors claimed he had independent power to act militarily,⁷ although he ultimately decided to seek prior congressional approval.⁸ Even more recently, as Senator Reid's remark quoted at the outset of this Essay indicates,⁹ the question has arisen again with respect to possible military action against Iran.

In such situations, the President might conclude that U.S. national security interests would be furthered by military action against a hostile regime, but that seeking prior congressional authorization of such action is impractical for various political or strategic reasons. The original meaning of the Constitution's Declare War Clause¹⁰ appears to give Congress power to initiate military conflicts with foreign nations and to deny that power to the President.¹¹ No Supreme Court case has addressed this question directly¹² and if the President orders an attack pursuant to independent presidential authority,

constrain the President's conduct, and the courts have not said anything directly on the subject.

⁶ Louis Fisher, *Truman in Korea*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 320 (David Gray Adler & Larry N. George eds., 1996). Truman did obtain some material, informal support from Congress. See Nzalibe, *supra* note 3, at 1050.

⁷ See Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote; Some See Such Support as Politically Helpful*, WASH. POST, Aug. 26, 2002, at A1.

⁸ See Dan Balz & Dana Milbank, *Iraq Policy Shift Follows Pattern; Bush's Move to Consult Congress Seen as Damage Control*, WASH. POST, Sept. 6, 2002, at A19.

⁹ See Epstein, *supra* note 1.

¹⁰ U.S. CONST. art 1, § 8, cl. 11.

¹¹ See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 218-59 (2007) (arguing that "declaring war" encompasses both formal declarations and attacks that initiate a state of war). *But see* JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 148-49 (2005) (contending that "the Framers thought of the power to begin hostilities as different from the power to declare war," and claiming that "[w]hen the Framers employed 'declare' in a constitutional context, they usually used it in a juridical manner, in the sense that courts 'declare' the state of the law or the legal status of a certain event or situation").

¹² The Supreme Court in *The Prizes Cases*, 67 U.S. (2 Black) 635, 668 (1863), said in dicta that as a general matter the President lacked power to initiate war, but the case did not present the issue and it is not clear how even that general proposition would apply in the specific case of Korea, Iraq, or Iran.

the Court, for various reasons, is unlikely to review that decision.¹³ Accordingly, the President must decide whether independent presidential action would be constitutional and then justify that decision to Congress and the American public.

The President might argue, as a matter of comparative institutional abilities, that the decision to respond militarily to developing foreign threats – especially in light of modern conditions and circumstances – is best placed in the executive branch, where actions can be taken quickly in reliance on sensitive information and without forewarning to the nation’s enemies.¹⁴ Of course, others may raise contrary arguments emphasizing the benefits of Congress’s deliberative and representative role in such momentous decisions. One could imagine these debates playing out in the political arena with little or no reference to the Constitution’s historical meaning and being decided largely by the relative political strength of the competing branches.¹⁵

There is, however, a powerful impulse in American discourse to appeal to constitutional imperatives rather than policy imperatives. That impulse lies at the heart of Senator Reid’s contention that the President would not merely act unwisely in attacking Iran without prior congressional approval, but would act *without constitutional authority*.¹⁶ Thus, *whether or not* the President thinks independent presidential action is a sound idea (and whether or not the President can convince us that it is), in Senator Reid’s view (as in the view of many others) the President is constrained from acting independently by a higher law than mere policy and expediency. This claim, especially in the war powers area, often centrally invokes the Constitution’s original meaning. The

¹³ See McGinnis, *supra* note 3, at 306-08 (“The Court, however, has largely given [control over foreign affairs and war powers] to the executive not so much through substantive decisions favoring the executive . . . , but through decisions invoking the political question doctrine or justiciability doctrine”); Nzelibe, *supra* note 3, at 1059-61 (“[C]ourts have resisted, and will likely continue to resist, intervening in war-powers disputes.”).

¹⁴ See Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (“From the standpoint of institutional design, it seems that the executive branch has critical advantages over a multi-member legislature in reaching foreign policy and national security decisions that are more accurate”; in particular, “the executive is structured for speed and decisiveness in its actions and is better able to maintain secrecy in its information gathering and deliberations”); see also ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15-16, 180 (2007) (“During an emergency, it is important that power be concentrated. Power should move up from the states to the federal government and, within the federal government, from the legislature and the judiciary to the executive.”).

¹⁵ See TUSHNET, *supra* note 2, at 108-09, 113-20. Similarly, Posner’s and Vermeule’s argument for presidential power in emergencies on the basis of institutional competency proceeds with little reference to the Constitution and especially not to the Constitution’s original meaning. See POSNER & VERMEULE, *supra* note 14, at 15-19.

¹⁶ See Epstein, *supra* note 1.

Constitution's framers, it is said, understood the Declare War Clause to mean that Congress must approve the decision to go to war – and that directive, it is further said, limits the President's action today.¹⁷

Thus, to focus the inquiry, let us posit a situation in which the President has decided that an attack on Iran's nuclear facilities serves the United States's national security interests. Assume also that the Constitution's original meaning denies the President independent power to make such an attack. Is Senator Reid justified in suggesting that an attack without prior congressional approval would be unconstitutional? That question, in turn, seems to have two parts: (1) under such circumstances, is the modern President bound by the Constitution's original meaning; and (2) if not, is there some other way to meaningfully say that independent military action against Iran would be unconstitutional? Part I of this Essay addresses these questions from the perspective of an observer who believes the Constitution's original meaning should be binding on judges and asks whether that position should apply similarly to modern presidential interpretations. Part II considers the perspective of someone who believes judges should be free, at least under some circumstances, to depart from the Constitution's original meaning.¹⁸

¹⁷ For leading academic arguments in this direction, see, for example, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-4 (1993); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1200-01 (2006) [hereinafter Fisher, *Lost Moorings*]; Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1644 (2000) [hereinafter Fisher, *Unchecked*].

¹⁸ One might be tempted to escape the dilemma by claiming that the Constitution's text, standing alone, resolves the matter in Congress's favor. "Declare war" on its face, however, seems to refer to a formal pronouncement of status which is largely antiquated today; perhaps it also might be confined to large-scale engagements ("wars") rather than lesser uses of military force. Although I have argued that these readings do not reflect the framers' understanding of the clause, it seems hard to reach any definite conclusions on the matter from the text alone. See Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450 (2006) (book review). Relatedly, the President's textual power as "Commander in Chief of the Army and Navy of the United States," U.S. CONST. art. II, § 2, seems on its face capable of encompassing independent authority to direct military attacks in peacetime. There is good evidence, however, that this was not the original understanding. See David Luban, *On the Commander-in-Chief Power*, 81 S. CAL. L. REV. (forthcoming 2008).

Another possible escape is to say that, whatever the Constitution's view, the War Powers Resolution precludes the President from taking military action against Iran. See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973). This escape attempt fails for at least two reasons. First, it is not clear that the Resolution even purports to prohibit such presidential action, at least for an initial 60 days. See *id.* § 5(b), 87 Stat. at 556. Second, even if the Resolution does purport to prohibit such presidential action, the President may claim constitutional authority to ignore it if the Resolution itself is unconstitutional. See David J. Barron & Martin S. Lederman, *The Commander-in-Chief Power at the Lowest Ebb*

I. ORIGINALISTS AND CONSTRAINTS ON THE PRESIDENT

One might suppose that most originalists – a term I shall use loosely to mean those who think modern constitutional interpretation should be governed primarily by the Constitution’s meaning at the time of its adoption¹⁹ – ought readily to agree with Senator Reid that the President must have prior congressional approval to attack Iran. The predominant position among scholars who have examined the issue closely is that the original meaning of the Declare War Clause and the intent and understanding of those who framed and ratified it requires this result.²⁰ Consequently, if the modern President ordered an attack on Iran without prior congressional approval, originalists should say (one would think) that the President acted unconstitutionally.

– *Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (discussing claims that congressional legislation is unconstitutional as an infringement of the President’s war powers). Thus, ultimately the issue becomes one of presidential war powers, whether directly or through the constitutionality of the Resolution.

¹⁹ See Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 619 (2006) (“Originalism is a theory of constitutional interpretation that assigns dispositive weight to the original understanding of the Constitution or the constitutional provision at issue.”); see also Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989). Here I gloss over substantial disagreements about how the “original meaning” should be determined and how it should be applied in modern interpretation. I use the term broadly to distinguish originalists (so defined) from those who, while perhaps according the original meaning some relevance in interpretation, would allow judges to depart from the Constitution’s original meaning in a substantial number of cases. See SCALIA, *supra* note 2, at 38 (“[T]he Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between *original* meaning . . . and *current* meaning.”). In using the term “original meaning,” I do not mean to take a position on the intra-originalist debate between those who would find meaning through authorial intent and those who would seek meaning in the common meaning of the text’s words and phrases at the time. Compare Larry Alexander & Saikrishna Prakash, “*Is that English You’re Speaking?*”: *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004) (defending authorial intent), with Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006) (defending text).

²⁰ See, e.g., RAMSEY, *supra* note 11, at 218-59; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699-702 (1972); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997). This view is shared by scholars who otherwise adopt relatively broad views of presidential powers in foreign affairs. See, e.g., Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 237-41 (2002); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 90 (2007). But see YOO, *supra* note 11, at 148-49; Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 123-25 (2007). In any event, I shall assume for purposes of discussion that the limited view of presidential war power is correct as a matter of the original meaning.

Similarly, originalists should criticize President Truman for initiating U.S. involvement in the Korean War without prior congressional approval. Indeed, a common recent criticism directed against legal and political conservatives is that, although they fault judges for exceeding the Constitution's original meaning, they often – especially with regard to the Bush administration – favor broad presidential foreign affairs powers without originalist foundations.²¹ Calls for judicial originalism, it might be said, should likewise entail a commitment to presidential originalism.

It is far from clear, however, that these conclusions follow. As a theoretical matter, originalists often frame their arguments in terms of courts' structural role and institutional capacity.²² This is not surprising, because one material impetus for modern originalism was a feeling that nonoriginalist judges had exceeded their authority in imposing extra-constitutional limits on the political branches²³ – a view that might be called “anti-Warren Court originalism.” This concern, underlying a view of originalism as a limit on judges, is distinct from the question of original limits on the President for two reasons. The presidency obviously differs institutionally from the judiciary in ways that may be relevant to the originalist argument. Judges, it is said, are not subject to political checks; if that is a central concern motivating originalism, then the President obviously stands differently. Further, anti-Warren Court originalism is principally concerned about not inventing *new* checks on the political branches; it falls somewhat short in explaining why *old* checks (those contained in the original Constitution) should be maintained. The question of presidential originalism falls squarely in the latter category, so it is less clear that originalists motivated by the need for judicial deference to political-branch decision making would have any necessary commitment to originalism in non-judicial interpretation.

It is at least plausible – and perhaps inevitable – that this strand of originalism has nothing to say about presidential interpretations of constitutional limitations on the President. If originalism is principally focused

²¹ See, e.g., Anthony Lewis, *The Imperial Presidency*, N.Y. TIMES, Nov. 4, 2007, § 7, at 26.

²² See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 39 (1999) (“Originalists have been particularly concerned about the discretion available to judges and therefore have been careful to clarify and emphasize the limits placed on them by the adoption of their interpretive method.”). Some strands even go so far as expressly saying that *only* judges need be originalist. See *id.* at 78 (“Originalism already implicitly assumes that the legislature operates with a different interpretive standard from the judiciary’s, a result of its different role in the constitutional system.”).

²³ See, e.g., John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83, 83-86 (2003) (stating that a rejection of judicial subjectivity, and in particular a rejection of subjectivity as practiced by the Warren and Burger Courts, was a driving force for many originalists); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986).

on limiting judges, and judicial review of the President's war power is unlikely, then the President, Congress, and the public would seem free to come to competing nonoriginalist views of the constitutionality of the President's war-initiating action. One could not say that the Constitution's original meaning resolves that debate (nor, as a result, that it could provide any meaningful limitation on the President).²⁴

Further, even for originalists with more comprehensive interpretive theories, the question of constitutional interpretation by the President may not be an easy one. These theories might be loosely grouped into two different categories: (1) those finding originalism to be a conceptually necessary consequence of the nature of interpretation or the nature of constitutional authority; and (2) those which believe that originalism as a general practice – not just by judges – would lead to superior social consequences. Neither theory clearly points to a presidential duty to follow originalism in the modern world.

As to “conceptual originalism,” as a practical matter a majority of Supreme Court Justices – despite some rhetoric to the contrary – do not think themselves bound by the Constitution's original meaning,²⁵ and this has been true for some time.²⁶ Nor can it be said, Supreme Court aside, that the nation's legal culture unambiguously embraces originalism. Of course, originalists believe the Court and the legal culture have erred in this approach, and urge a return to (in the originalists' view) the proper judicial role. But until the Court changes course, the implications for other constitutional actors remain obscure. Since *Marbury v. Madison*,²⁷ the Court has claimed authority to say what the Constitution is, and derivatively what it is not. Although the Justices have not outlined a single definitive approach to deciding what our constitutional law (for modern purposes) is,²⁸ they seemingly reject the proposition that it is only the document's original meaning. If the original meaning is not the law of the land, according to the supreme interpreter of that law, in what sense can the original meaning be said – even by an originalist – to bind the President? The

²⁴ At least as a practical matter, this conclusion may cast doubt upon the judges-only strand of originalism. Since, in this view, judges are bound by the Constitution's original meaning, the President would be ill-advised to depart from originalist interpretation in cases in which prompt judicial review is likely. However, the class of cases in which prompt judicial review is likely is, *ex ante*, necessarily uncertain. This strand of originalism would apparently require the President to assess the likelihood of judicial review before settling on a method of constitutional interpretation, a practice which seems both uncertain and theoretically problematic.

²⁵ See SUNSTEIN, *supra* note 2, at 7-9.

²⁶ See FALLON, *supra* note 2, at 3 (“[T]he originalist model departs radically from actual Supreme Court practice.”); Harrison, *supra* note 23, at 83-86.

²⁷ 5 U.S. (1 Cranch) 137 (1803).

²⁸ See SUNSTEIN, *supra* note 2, at 7-9 (“Not only has the Court as a whole refused to choose [a theory of constitutional interpretation] . . . , but many of the current justices have refused to do so in their individual capacities.”).

President must act in the real world, not in an ideal originalist world. At the least, it is not clear that conceptual originalists must believe that the modern President must live in their conceptual world rather than in the Supreme Court's.

Perhaps it would be argued that "the Constitution" the President takes an oath to "protect and defend"²⁹ is the Constitution as it was originally understood, and that the Court's lawlessness does not justify the President's lawlessness. But that argument appears circular. Perhaps "the Constitution" to which the oath refers is the Constitution as originally understood, but perhaps it is the Supreme Court's "Constitution," which apparently includes many things other than (or in addition to) the original meaning. That one believes "the Constitution" *should be* the document's original meaning provides no guidance on this point. The answer depends instead on whether, for modern purposes, we should regard the Supreme Court as having changed the conceptual nature of the Constitution. Originalism does not seem to compel any particular answer to that question – one could plausibly say that the Court has made a change and originalism only entails the belief that the Court should change it back. As a result, a President – even an originalist President – might reasonably say: I believe the Constitution should be interpreted according to its original meaning, but until our legal culture adopts that view, I shall embrace the now-prevailing view.

Similarly, "good results" originalism does not provide a clear directive for the modern President. On this view, society would be better off, on the whole, if constitutional actors embraced originalism.³⁰ But most variants of this view do not claim that society would be better off *in all situations* – only that society would be better off on average, in the run of cases.³¹ Supreme Court practice shows that originalism is *not* being followed in many situations. That being so, the President cannot say (on the basis of the good results theory alone) that in this particular situation (military action against Iran) originalism would lead to a better result, and the President also cannot say that following the original meaning with respect to action against Iran would be part of a larger national commitment to originalism that would actually lead to better results on average.

Of course, one might respond that the President has a moral obligation to set a good example in this regard. A less demanding argument, then, is that the President *should* follow originalism in constitutional interpretation (although the President is not bound to) because, regardless of what the Court does, that

²⁹ U.S. CONST. art. II, § 1, cl. 8.

³⁰ For a leading example, see generally John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) [hereinafter McGinnis & Rappaport, *Pragmatic Defense*]; John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002) [hereinafter McGinnis & Rappaport, *Supermajoritarian*].

³¹ See McGinnis & Rappaport, *Pragmatic Defense*, *supra* note 30, at 386.

is the right approach and the President must do what can be done to encourage it. But it may appear quixotic, in the real world, to insist on presidential originalism in the face of, say, a genuine national security threat. To be sure, originalists might see practical advantages in the President following original meaning and thereby taking a step toward reorienting the legal culture in that direction (which in turn would lead to good results, either directly or from the perspective of conceptual coherence). On the other hand, there may be great practical advantages to the President countering a national security threat at the expense of originalism, as Truman arguably did in Korea or a different President might do in Iran. It is not clear that these immediate benefits would be outweighed by the more-ephemeral supposed gains from long-term reorientation of the legal culture. In any event, it seems likely that the President's own assessment of the relative costs and benefits is likely to lean heavily in favor of immediate and concrete results, and it is not clear that originalists can, or even should, say that this is illegal or unconstitutional as opposed to a mere policy miscalculation in an area where costs and benefits are extraordinarily difficult to measure. Thus it is not clear that an originalist can meaningfully say Truman acted unconstitutionally in his Korean intervention, or that a modern President would act unconstitutionally in attacking Iran. Rather, an originalist can only say that these acts are contrary to the Constitution's original meaning and there are costs associated with departing from that meaning.

In sum, reorienting the question of constitutional interpretation away from the courts and toward the President should cause originalists to reexamine their theoretical foundations. If originalism is truly founded only, or even primarily, on the institutional limitations of judges, it can gain little traction in debates over purportedly unconstitutional presidential actions. Further, even with broad theoretical foundations, it is not clear that originalism can claim to restrain the modern President. The President acts in a world in which originalism is not the law of the land. Even if it should be, that does not necessarily mean the President must devote the presidency to making it so, at the expense of – for example – national security needs.

To be clear, I am not arguing that originalists have no basis for criticizing presidential actions contrary to the Constitution's original meaning – only that they should be cautious in doing so. At most, it seems they can argue that the President should lead by example in returning us to what is, in the originalists' view, the better approach to the Constitution, and that the President should do so by refraining from taking actions that exceed original constitutional limits, even where national security seems to demand such actions and modern interpretive approaches might allow them. On the other hand, contrary to some popular charges, it seems equally coherent to say that judges should adopt originalism in constitutional interpretation and yet acknowledge that, until they do so, the President is entitled to act in a nonoriginalist constitutional universe in pursuit of national security interests.

II. NONORIGINALISM AND PRESIDENTIAL CONSTRAINT

A. *Nonoriginalists and Presidential Originalism*

This part turns to nonoriginalist³² perspectives on the President's constitutional limitations. To begin, let us ask whether a judicial nonoriginalist can coherently criticize the President for transgressing limits on presidential power imposed by the Constitution's original meaning. The question is important because Presidents are frequently criticized for acting unconstitutionally by commentators or political actors who are not themselves committed to originalist judicial interpretation (Senator Reid presumably falls into this category). The question, then, is whether these critiques can invoke the Constitution's original meaning in support. For example, can a nonoriginalist say that the President must obtain Congress's approval before attacking Iran because that is what the Constitution's framers directed?

Although nonoriginalism comes in many forms, it may be usefully grouped into two basic categories.³³ Some nonoriginalists maintain that originalism is not a viable approach to constitutional interpretation because it is theoretically incoherent or practically unworkable. Others, while conceding that originalist interpretation is possible, argue that it should not be followed because it leads, on balance, to bad outcomes. These views, although frequently combined, have somewhat distinct implications for presidential originalism.

The most forceful objection to originalist interpretation is that originalism is conceptually incoherent or practically indeterminate. It may simply not be meaningful to speak of what the Constitution's framers and ratifiers "meant" by, for example, the Declare War Clause; across such a large number of people, presumably there were a range of understandings, as well as many individuals who never actually considered its meaning. Further, even if one thought that a collective intent or understanding might actually have existed, reconstructing that intent or understanding across more than 200 years of history is surely a daunting enterprise. Finally, even if an original meaning could be reconstructed with respect to questions faced by eighteenth-century Americans, modern circumstances are so different that it is impossible to know how the original meaning would apply today. For many nonoriginalists, these objections are sufficient to show that an original meaning – at least one having

³² By "nonoriginalist" I simply mean any approach to constitutional interpretation that is not "originalist" as I have defined it. *See supra* note 19 and accompanying text; *see also* Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1126 n.42 (2003) ("Non-originalism seems best defined, derivatively, in contradistinction to originalism.").

³³ I leave aside an intermediate claim that originalism, properly followed, directs us to look to modern meaning because that is the approach the founders intended. *See, e.g.*, RONALD DWORKIN, *JUSTICE IN ROBES* 29-30 (2006) (adopting this view at least with respect to individual rights provisions of many of the Constitution's amendments).

some definite content and capable of being applied to modern disputes – simply cannot be found.³⁴

If that is so, it is pointless to ask judges to apply the Constitution's original meaning. This objection also surely applies equally to non-judicial interpretations of the President's powers. There is no reason to think the Constitution's original meaning is any more accessible or conceptually coherent to Presidents (or Senators) than to judges. For this group of nonoriginalists, the Constitution's original meaning necessarily seems incapable of imposing a check on presidential action. The point here is, of course, modest and indeed tautological: if original meaning is indeterminate, one cannot argue on the basis of the Constitution's original meaning that President Truman acted unconstitutionally in beginning the Korean War, or that President Bush is constitutionally required to obtain Congress's assent before attacking Iran. This objection to originalism does not supply an affirmative theory of constitutional decision making of its own; standing alone it is simply a reason not to interpret the Constitution based on original meaning. Taken only this far, therefore, it leaves Senator Reid's claim essentially groundless. If we cannot find the Constitution's original meaning (at least with respect to disputed matters),³⁵ that seems to suggest that the Constitution does not impose limits and that matters must be worked out between the political branches as a matter of mutual cooperation and conflict. Senator Reid's comment might be construed as a claim that the President *should* seek congressional approval to enhance support for military action in

³⁴ For the view that it is incoherent to speak of a collective intent or understanding of the multiplicity of people who framed and ratified the document, see, for example, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). For the view that, although finding a common meaning might once have been possible, history is too complex, multifaceted, and indeterminate to allow us to do so over an extended period of time or to apply it to modern circumstances, see, for example, Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989). For some theoretical responses, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 648-54 (1999); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43, 50-52 (1987). I have argued that in foreign affairs law nonoriginalists too quickly conclude that the Constitution's original meaning is indeterminate or incapable of being applied to modern circumstances. See RAMSEY, *supra* note 11, at 1-9.

³⁵ Most variants of this position would likely concede that the plain meaning of the text does resolve some largely undisputed matters, but would deny it can give any further guidance. Perhaps some would argue that war-initiation power is one of those clear matters. But that position seems difficult to maintain, for reasons discussed above: the interaction of the Declare War Clause and the Commander in Chief Clause is capable of an array of interpretations. See *supra* note 18. Even if war-initiation power is clear, other claimed presidential powers likely are not; it seems implausible to suggest that the *only* place the Constitution provides comprehensive clarity is with respect to presidential power.

Iran or, more generally, that Presidents should seek congressional approval for war initiation as a matter of the best operation of government; it could not be seen to identify a legal obligation. But there are arguments in favor of independent presidential action as well – for example, those based on the need for secrecy and decisiveness in the face of external attack. It is not obvious that policy arguments for Congress should prevail. In any event, if originalism is impossible and there is no agreement on what is to replace it, it seems extraordinarily difficult to locate any *constitutional* checks on the President. Senator Reid’s statement, and others like it, become simply statements of policy preference.

Most nonoriginalist theories, however, do not rest solely on the claim that originalism is impossible, and indeed that claim is by no means essential to a nonoriginalist perspective. Rather, the most plausible affirmative alternatives to originalism may concede that originalist interpretation is possible, at least with respect to a number of important contested issues, but argue that original meaning should not be followed – or should not always be followed – because it may lead to bad results.³⁶ Further, most versions of this claim offer some adjudicative theory by which judges can improve on originalism and reach good (or at least better) social outcomes. (Otherwise, the implications would be the same as above – that we should simply eliminate constitutional adjudication and leave matters to the political branches.) Similarly, nonoriginalists who believe originalism is impossible commonly preserve a role for constitutional adjudication by developing an alternative approach to finding constitutional meaning.

For example, various pragmatic theories explicitly encourage judges to consider the practical results of decisions as informed by economic theory or by practical judicial intuition and evaluation.³⁷ Other theories appeal to moral reasoning, as informed by moral philosophy, to enable judges to reach just constitutional outcomes.³⁸ Although these theories are distinct and sometimes sharply conflict, they share the common idea that judges can improve upon originalism in terms of social outcomes. To be clear, these nonoriginalist

³⁶ See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 129 (2005) (“[O]riginalist doctrines may themselves produce seriously harmful consequences – outweighing whatever risks of subjectivity or uncertainty are inherent in other approaches.”); FALLON, *supra* note 2, at 3 (“Had the Court been rigidly originalist in the past, important steps toward social justice and fair political democracy likely would have been postponed, if not forgone.”).

³⁷ See BREYER, *supra* note 36, at 5-6 (emphasizing the importance of judges considering practical consequences when interpreting the Constitution); RICHARD A. POSNER, *OVERCOMING LAW* 29 (1995) (advocating for a “fusion” of liberalism, pragmatism, and economics); SUNSTEIN, *supra* note 2, at 5 (emphasizing an incremental approach); see also STEVEN D. SMITH, *LAW’S QUANDARY* 74-96 (2004) (discussing and critiquing various approaches).

³⁸ See DWORKIN, *supra* note 33, at 1-35; see also SMITH, *supra* note 37, at 82-85 (discussing this view).

approaches may not view judges as completely unconstrained by the Constitution's original meaning, and many emphasize that constitutional adjudication should proceed incrementally and cautiously, subject to various institutional constraints.³⁹ Nonetheless, it seems fair to say that these approaches share a central characteristic that judges may sometimes (perhaps often) depart from the Constitution's original meaning to find a constitutional rule they think makes more moral or policy sense under modern conditions.⁴⁰

Our question here, then, is how these versions of nonoriginalism fare when applied to the President's interpretation of constitutional limitations. Is there any reason to suppose they can only be invoked by judges, and not by executive interpreters? Put more sharply, can these nonoriginalists reasonably object on constitutional grounds if the President disregards a limitation upon presidential authority imposed by the Constitution's original meaning in order to reach a result that the President believes is more pragmatic, or more moral, or otherwise superior by whatever standards these theories apply?

Let us begin with a weak version of the nonoriginalist claim: that the original meaning is usually or presumptively the one that should be followed – or, at the very least, should be a strong starting point for analysis – but that judges should have discretion to depart from original meaning in situations where adherence would lead to extraordinarily bad results (morally or practically). Adherents to this view might further say that the President cannot be trusted to determine such extraordinary circumstances with respect to his own constitutional powers. As a result, one might defend an asymmetry between the President and the judiciary, with the latter entitled to depart from the original meaning, but not the former.

This conclusion does not seem entirely satisfactory, however. Presumably it starts from the proposition that respecting the original meaning has an inherent value of its own, so that departure can be justified only in extraordinary circumstances. (Otherwise, departure would be common, occurring even when social gains are slight.) Thus, the “extraordinary circumstances” allowing departure must indicate very bad results if originalism is followed. Because judicial review is rare in foreign affairs, if the President is not permitted to depart from the original meaning, ordinarily no departure will occur. As a result, very bad results will sometimes occur. That result seems especially problematic in areas in which national security is implicated. Since, by hypothesis, in some (unusual) cases the costs of originalism outweigh its benefits, this theory would require those costs to be borne in an area where threats are likely to be especially severe. Even if there is some additional cost

³⁹ See generally SUNSTEIN, *supra* note 2.

⁴⁰ To be sure, there may be nonoriginalist adjudicative theories that do not contain significant elements of subjective assessment of outcomes: an example might be one that regarded the originalist result as binding unless substantial historical practice pointed to the contrary. Such theories, however, are not dominant either in the courts or in legal scholarship.

to letting the President, in effect, judge presidential powers (that is, that the President will depart when departure is unwarranted), it is not clear we are better off constraining the President in national security matters contrary to the President's own judgment. In sum, a weak nonoriginalism that applies only to judges and excludes the President depends on highly uncertain assessments of costs and benefits.

Instead, the more plausible view seems to be that the same imperatives justifying judicial departure from original meaning also permit the President to depart. As with judges, this weak version of presidential nonoriginalism would not set the President entirely free from the framers' constraints; the President would have to acknowledge a departure from original meaning and justify it by pointing to the bad results the original rule would produce. Nonoriginalist critics could object that the President's reasons for departure were unpersuasive.⁴¹ But critics would not seem entitled to say the President was acting illegally or unconstitutionally on the basis of the Constitution's original limits – only that the President's policy assessment justifying departure differed from theirs.

Now consider stronger versions of nonoriginalism – ones holding that following original meaning usually leads to net social costs, or at least that judges should give the original meaning little if any presumption of correctness. Under this view, there seems no ready justification for treating judges and the President differently. Insisting on originalist limits on the President appears especially misguided if there is no reason to think those limits, taken as a whole, are usually good ones; rather, each limit should be considered for its individual policy merits. Under this analysis, the fact that originalism would limit the President's ability to initiate military action should not count materially against the President in assessing modern limits upon presidential authority to do so. One could still argue from a policy perspective that Congress *should* have war-initiation power, but this would not be based on a claim about what the Constitution's original meaning *requires*.

Again, this assessment seems especially potent in foreign affairs. Because judicial review in foreign affairs is rare, judicial updating will be rare. If the Constitution requires aggressive updating (justifying aggressive nonoriginalist judicial review), policy imperatives seem to favor aggressive presidential (and congressional) updating in foreign affairs. Otherwise, foreign affairs law will be frozen in an undesirable past. To be sure, the President may update in non-beneficial (including self-interested) ways, but under this view there is no firm reason to favor the original meaning baseline and therefore no firm reason to think the President's nonoriginalist interpretations will, on balance, make matters worse.

⁴¹ Perhaps – although the position would require further development – we could insist that the President's justifications must be even more persuasive than those required from judges due to concerns over the President's objectivity.

As a result, it seems problematic for judicial nonoriginalists to claim originalist limitations on the President's foreign affairs actions.⁴² Consequently, Senator Reid's claim with respect to military action in Iran appears incapable of deriving much support from the Constitution's original meaning, even assuming the Constitution's original meaning limits the President from independent war initiation. Although (as discussed above) a commitment to judicial originalism does not necessarily imply a commitment to presidential originalism, it appears that a commitment to judicial nonoriginalism implies a commitment to presidential nonoriginalism. That conclusion in turn points in an unwelcome direction: except in the rare case of a judicial decision directly on point, what legal – as opposed to political – limits on the President's foreign affairs actions are possible? Or, put practically, if Senator Reid was not relying on the Constitution's original meaning, what was he relying on?

B. *Presidential Nonoriginalism?*

Nonoriginalism's chief merit is its flexibility. There are reasons to doubt that the Constitution's drafters could envision modern circumstances and provide suitable rules for an immensely different society. Originalism, one might fear, will lock us into bad outcomes; nonoriginalism allows judges to adapt the old rules to new circumstances in a way that produces better outcomes.

Nonoriginalism's chief weakness is also its flexibility, or put more negatively, its inherent subjectivity.⁴³ Although nonoriginalism comes in many forms, there seems a necessary common thread of policy judgment. Nonoriginalist theories must have some reason to think they can supply better policy outcomes than majoritarianism or originalism – else there would seem little reason to adopt them. Most nonoriginalist theories depend, explicitly or implicitly, on the idea that judges are able to weigh consequences and reach substantively good conclusions. Sometimes this is made explicit, as in pragmatic theories or theories based on moral reasoning. Other times it is implicit, as in theories urging judges to use common-law reasoning or to apply the framers' values, taken at a very high level of abstraction, to solve modern problems.

Nonoriginalism resists the originalist critique that it is completely unconstrained,⁴⁴ and rightly so. A host of considerations may combine to

⁴² In a particular case, a nonoriginalist might say that the original meaning is the right one for policy reasons and thus that the President should follow it. But this argument derives all of its strength from the policy outcome, not from its alignment with the Constitution's original meaning.

⁴³ For Justice Scalia's colorful caricature, see SCALIA, *supra* note 2, at 44-45.

⁴⁴ See, e.g., SUNSTEIN, *supra* note 2, at 238 (“The debate over constitutional interpretation cannot sensibly be resolved by suggesting that anyone who disagrees [with originalism] is inviting judges to rule as they wish.”).

assure that judges find policy solutions within a fairly narrow range of politically acceptable outcomes (and that if they do not, their solutions will be modified or overturned). Crucially, though, it is difficult for a nonoriginalist to say, in an objective sense, that a nonoriginalist judge is acting unconstitutionally. More likely, the judge is simply acting under a different assessment of what the “best” constitutional rule should be. But for those with confidence in the judgment of judges, this subjective element may not appear too great a drawback.

When we consider presidential constitutionalism, this flexibility/subjectivity may seem more of a problem. A nonoriginalist President’s evaluation of constitutional constraints on the presidency will contain a substantial element of policy judgment as to how the presidency should be structured to meet modern challenges. It should not be surprising, then, that Presidents and nonoriginalist presidential sympathizers tend to find the Constitution quite flexible in its limits on presidential power. Other political actors may take different views of the needs of modern society, but neither side will be easily proven wrong and thus neither side can easily be said to have made an unconstitutional decision. There will be little dimension to the dispute aside from the policy elements.

In an important recent work, for example, Professors Eric Posner and Adrian Vermeule argue for broad presidential power to respond to emergencies, with little if any traditional constitutional analysis; they expressly do not rely on the Constitution’s original meaning, which they concede may point in a different direction.⁴⁵ If a President claimed constitutional powers in reliance on Posner’s and Vermeule’s arguments, an originalist might object that the Constitution’s original meaning does not convey the level of presidential power Posner and Vermeule advocate, and that Posner and Vermeule are in effect calling for a constitutional amendment. It is not clear, however, how a nonoriginalist would respond to Posner and Vermeule, or to a President relying on their arguments, other than by challenging the authors’ institutional (policy) analysis.

For a more specific illustration, again consider the example of the President’s war-initiation power. For a nonoriginalist President, the central question is not how the framers allocated war-initiation power in the eighteenth century, but how it should be allocated today to respond to modern circumstances and dangers. Perhaps some weight should be given to the original allocation; perhaps some also to historical practice and the more abstract values the framers sought to vindicate. It is likely, though, that these

⁴⁵ See POSNER & VERMEULE, *supra* note 14, at 15-57; *id.* at 56 (“Our original constitutional structure, with a relatively weak presidency, reflects the concerns of the eighteenth century and is not well adapted to current conditions.”). *But cf.* Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 293 (2007) (arguing that Posner’s and Vermeule’s institutional framework is generally consistent with the Constitution’s original meaning).

considerations can be marshaled in various directions. Historical practice, for example, might provide some guidance and constraint akin to prior judicial decisions in common-law-style adjudication.⁴⁶ But in the war powers area, historical practice (especially that of recent history) seems inconclusive at best. Modern Presidents of both political parties have used military force without congressional approval, or with only ambiguous or indirect approval.⁴⁷ Perhaps these uses were themselves a departure from a more settled prior rule requiring explicit congressional approval. It is not clear, though, whether they should be regarded as illegitimate departures or as new practices legitimately establishing a new rule in light of new circumstances.⁴⁸ Common law constitutionalism, in its modern judicial form, does not require rigid adherence to prior practices, but rather permits – indeed, encourages – evolutionary departures in order to liberate judges to adapt to new circumstances. Similarly, it would seem to liberate Presidents to adapt to new circumstances.

Important strands of nonoriginalist thought also emphasize adherence to the framers' constitutional values – albeit values stated at a fairly high level of generality, with considerable flexibility in applying those values to modern circumstances.⁴⁹ This approach also seems incapable of yielding a non-subjective answer to the question of presidential war powers. It is not clear which values one should choose to emphasize. As in many areas, the framers appear to have had competing values regarding executive power: they wanted to assure that the President did not act as an elected dictator, but also to assure that the presidency was sufficiently strong and unified to meet foreign threats.⁵⁰ Nor is it clear how these competing values should be applied in modern circumstances in which foreign threats differ so dramatically, on so many dimensions, from what eighteenth-century Americans faced. Both the selection and application of highly generalized “constitutional values” seem to contain a significant degree of subjectivity.

Modern needs and circumstances also seem capable of supporting various outcomes in the war powers debate. Surely a President could plausibly say that substantial foreign dangers, and the speed with which they can arise,

⁴⁶ See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

⁴⁷ See FISHER, *supra* note 13, at xi (stating that since World War II, “Presidents have routinely exercised war powers with little or no involvement by Congress”); Fisher, *Lost Moorings*, *supra* note 17, at 1200.

⁴⁸ See FISHER, *supra* note 13, at xi. Fisher regards these developments negatively but, from a nonoriginalist perspective, it is not clear why that should be true. Cf. POSNER & VERMEULE, *supra* note 14, at 56 (“One interpretation of history is that emergencies allow presidents to obtain powers that are necessary to cope with new problems.”).

⁴⁹ See, e.g., BREYER, *supra* note 36, at 17-20; SUNSTEIN, *supra* note 2, at 237-41 (imagining “judges who care a great deal about history but who explore history to identify, not particular understandings of particular problems, but overall goals and purposes”).

⁵⁰ RAMSEY, *supra* note 6, at 115-31.

demand a presidency able to act quickly and independently, and that the benefits of congressional participation are greatly overstated.⁵¹

Although all of these presidential claims could be disputed, for the most part they are not subject to proof or disproof other than by policy analysis that is principally subjective. Thus, if the President asserts independent authority to attack Iran, one may say it is wrong for policy reasons, but it seems hard for nonoriginalists to say that it is objectively “unconstitutional” (meaning anything other than “wrong for policy reasons”). Seen this way, Senator Reid’s claim is just one way of looking at the best constitutional rule given modern circumstances. A President who disagrees is simply expressing another view. There is no firm external standard against which either claim can be measured. By accepting presidential nonoriginalism, we have diminished our ability to make a fixed external critique of presidential war-initiating actions on constitutional grounds.

It is important to restate these conclusions cautiously. We need not conclude, as some of its harsher critics charge, that judicial nonoriginalism provides no constraints upon judicial outcomes. Rather, at the risk of oversimplifying many different strands, it seems better described as providing judges flexibility to reach conclusions within a range of plausible outcomes, using sound judgment to evaluate an array of considerations. Nor need we view that as a criticism of the approach. Typically, judicial nonoriginalism does not claim the ability to provide objective answers to hard cases; it requires judges to justify their answers using an array of authorities and considerations, but seems open to a range of potentially justifiable outcomes. Its principal claim is that this flexibility is superior to any greater certainty that could be provided by adherence to fixed historical directions.⁵² Further, we need not say that presidential nonoriginalism would leave the President without constitutional constraint in foreign affairs. Like nonoriginalist judges, the nonoriginalist President would need to justify constitutional decisions within a range of plausible outcomes, based on an array of considerations.

With these cautions, though, it remains true that a nonoriginalist President may be able to justify a much wider range of presidential actions than an originalist President, and that nonoriginalist critics have less definitive authority on which to base objections to presidential actions. In particular, a statement that the President “does not have the authority” to act militarily against Iran without prior congressional approval seems to be a subjective

⁵¹ See Nzelibe, *supra* note 3, at 909 (“[C]ongressional authorization is undesirable because it clogs up the President’s war-making prerogative and compromises the United States’ ability to confront unpredictable foreign military threats.”); Nzelibe & Yoo, *supra* note 14, at 2518 (finding “little or no empirical data to support” the conclusion that “congressional authorization produces deliberation, consensus, and good selection of wars”); see also POSNER & VERMEULE, *supra* note 14, at 3-181 (arguing that the modern President needs substantial freedom to act to meet modern threats).

⁵² See SUNSTEIN, *supra* note 2, at 239-41.

judgment within the range of plausible outcomes nonoriginalism may allow. Whether it is the best outcome depends on the relative weight one places on competing nonoriginalist values, something which is necessarily not capable of objective determination. Thus, in areas of competing considerations, the nonoriginalist President's constitutional power in foreign affairs is largely in the eye of the beholder.

CONCLUSION

This Essay has sought to make two points about constitutional constraints on presidential power in foreign affairs. First, given modern legal culture and judicial practice, it is difficult to criticize Presidents for departing from the original constitutional constraints upon their office. Second, in areas of competing historical and practical considerations, and in the absence of judicial determinations, it is difficult to identify any definitive sources of constitutional constraint upon the President to replace the original constraints. As a result, although it seems relatively clear that the Constitution's original meaning does not allow the President to initiate military conflict, it seems more difficult to say definitively that the modern President may not.

These conclusions in turn suggest two further points. First, we should be cautious in saying that the President is acting unconstitutionally or illegally in foreign affairs. For a nonoriginalist President and a nonoriginalist audience – or even, as I have argued, an originalist audience – the fact that the President is acting against the Constitution's original meaning is at most a minor consideration. Much of the President's case will depend on whether the President is acting in conformity with a constitutional rule that makes sense under modern conditions; that is, it will be mostly a policy debate. Some academic and political detractors of a powerful foreign affairs presidency have criticized modern Presidents in harsh terms that charge violations of constitutional authority. But unless these critics are prepared to embrace judicial originalism, which many are not, or to explain why the President has duties to the original Constitution that judges do not, their criticisms seem to rest more on subjective judgments and preferences than on firm constitutional commands. At the least, then, we should rethink some of the rhetoric that accompanies constitutional debates over presidential foreign affairs power.

Second, we can see a potential cost of abandoning originalist interpretation. Originalism can supply external checks on the President, at least if one thinks text and history are sufficiently determinate to do so. That does not mean that the checks are always good ones. (Perhaps, given modern exigencies, the rule requiring prior congressional approval of military action no longer makes sense.) It also does not mean the checks are strong ones. In an area of infrequent judicial review, Presidents may exceed even clear external limits and not be called to account, or at least be called to account only by political rather than constitutional considerations. But an originalist presidency is, in any event, limited to some extent by something (relatively) fixed and external: some debates about the scope of its powers will be legal and historical ones

about what is or is not (originally) constitutional, rather than constitutional debates subsumed into policy debates.

I emphasize that this is only a cost – perhaps not a great cost, and perhaps not enough to overcome other benefits. Like judges, Presidents face political constraints, and those constraints may be sufficient to ensure a system of some sufficiently balanced and separated power.⁵³ And one may say that originalism’s purported constraints are overstated: if historical meanings are sufficiently vague or unrecoverable, they too may be marshaled subjectively to support a range of positions. Nonetheless, to the extent one sees value in constitutional, as well as mere political, restraints on the President, originalism may have something to recommend it, and nonoriginalism may give some cause for concern.

⁵³ See TUSHNET, *supra* note 2, at 113-20.