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THE FIRST “ESTABLISHMENT” CLAUSE:  
ARTICLE VII AND THE  
POST-CONSTITUTIONAL CONFEDERATION

Gary Lawson\*

Guy Seidman†

It is a great pleasure for academics to realize that fellow scholars sometimes read their work and take it seriously. We are genuinely flattered that Vasana Kesavan has chosen to comment on our article, *When Did the Constitution Become Law?*,<sup>1</sup> and has done so with the intellectual rigor and generosity of spirit that characterizes his prodigious scholarship.<sup>2</sup> We are grateful to Mr. Kesavan for engaging us and grateful to the *Notre Dame Law Review* for accommodating the dialogue.

Mr. Kesavan’s article thoughtfully brings to the fore some oft-ignored but fascinating crevasses in American legal history, most notably the intriguing question whether there was any kind of interregnum, or gap in governmental authority, between the ratification and the full effectiveness of the federal Constitution. It raises some considerations that are important to that inquiry, such as the

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1 Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001).

2 See Vasana Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, 78 NOTRE DAME L. REV. 35 (2002). In addition to his contribution to this journal, Mr. Kesavan’s recent output (much of which has proved indispensable to us in other projects) is humbling. See Vasana Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2002); Vasana Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123 (2001); Vasana Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291 (2002); Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. (forthcoming 2003) [hereinafter Kesavan & Paulsen, *Interpretive Force*]; Vasana Kesavan, *The Three Tiers of Federal Law* (June 4, 2002) (unpublished manuscript, on file with author); Vasana Kesavan, *The Treaty-Making Power and American Federalism: An Originalist Proof for Missouri v. Holland* (Dec. 9, 2001) (unpublished manuscript, on file with author).

role and history of the Engagements Clause,<sup>3</sup> whose potential relevance we previously overlooked. It provides an unusually explicit and enlightening discussion of interpretative methodology. Most importantly, it is right in its principal claim that our article did not prove its assertion that the adoption of the Constitution by nine states on June 21, 1788, left intact at least some of the prior institutions of national governance.<sup>4</sup> To be sure, as Mr. Kesavan recognizes, this point was a brief aside in our article, but we did make the claim and therefore must accept the consequences that flow from it.

We do not view that responsibility as a burden. We have previously considered the problems of transition raised by the time lag between the ninth constitutional ratification and full constitutional effectiveness. Indeed, one of us wanted to address the issue in our original article, but the other wanted to postpone consideration until a later date. Thanks to Mr. Kesavan, that date has arrived somewhat sooner than expected.

Our response to Mr. Kesavan is on two fronts. First, we take his refreshingly lucid observations on methodology as an opportunity to explore some of the interpretative premises that drove our prior article. Although all three of us are, at some level, practitioners of what can loosely be called "originalism," there are some important differences between Mr. Kesavan's and our approaches that bear directly on the issue of transition. Second, we confront directly the question whether there was any gap in authority between the time of the ninth ratification and the Constitution's full effectiveness. We repeat our original conclusion that no such gap existed. This time, however, we try to prove it—and, more to the point, we try to show that the burden of proof is on the proponent of a gap.

## I. FRAMING THE PROBLEM

Pursuant to the terms of Article VII of the Constitution, which says that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same,"<sup>5</sup> the Constitution became law for nine

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3 U.S. CONST. art. VI, cl. 1 ("All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.").

4 See Lawson & Seidman, *supra* note 1, at 23–24 ("[The fact that the Constitution took effect in stages] means that the preexisting authorities, such as the institutions created by the Articles of Confederation, were not immediately displaced by ratification of the new Constitution. The machinery of the old regime could continue until the machinery of the new regime was in place.").

5 U.S. CONST. art. VII.

ratifying states on June 21, 1788. Our prior article endeavored to demonstrate that when the Constitution took effect, it did so in stages. Some provisions, such as the Contracts Clause<sup>6</sup> and the Treaty or Alliance Clause,<sup>7</sup> were effective for, and therefore restrained, the ratifying states immediately upon ratification. Other provisions, however, such as the provisions authorizing federal lawmaking,<sup>8</sup> could not take full effect until a Congress and a President were sworn in under the new Constitution. The question of interregnum, or gap in governmental rule, arises from the possibility that provisions of the new Constitution that were not fully operative upon ratification, such as the lawmaking and treaty-making provisions, would nonetheless immediately displace the institutions then operative pursuant to the Articles of Confederation, leaving no federal authority in place between the time of the ninth ratification of the Constitution and the full establishment of the machinery of the new government. As an interpretative matter, the relevant text is a single word in Article VII: did the "Establishment" of the Constitution for the ratifying states legally disable them from participating in the Confederation during the period between ratification and full effectiveness of the Constitution and thereby dissolve the Confederation?

Mr. Kesavan, as do we, begins the inquiry with the Constitution's text and structure<sup>9</sup> and general background understandings<sup>10</sup> (which he aptly calls "interpretive baseline[s]").<sup>11</sup> He finds these sources inconclusive with respect to the problem of transition and thus turns to "extra-textual evidence,"<sup>12</sup> consisting of public writings during the ratification debate, records from the Constitution's drafting history, and the journals of the Confederation Congress. Some of the most intriguing evidence presented by Mr. Kesavan comes from the Constitutional Convention. He relates how the Convention considered a resolution that would have specifically addressed the transition question by providing "for the continuance of [the Confederation] Congress and their authorities until a given day after the reform of the

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6 *Id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

7 *Id.* ("No State shall enter into any Treaty, Alliance, or Confederation . . .").

8 *See id.* art. I, § 7.

9 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 49-53.

10 *Id.* at 54-60.

11 *Id.* at 54.

12 *Id.* at 60-77.

articles of Union shall be adopted . . . .”<sup>13</sup> After brief reported comments by the formidable troika of Gouverneur Morris, James Madison, and James Wilson, the Convention rejected the proposed resolution, which Mr. Kesavan takes to point squarely toward the existence of an interregnum between the Confederation and constitutional authorities.<sup>14</sup> This conclusion is reasonable, though it is not inevitable. As Mr. Kesavan points out, the resolution, if passed, “would have *mostly* prevented an interregnum between the two regimes,”<sup>15</sup> but still would have permitted a gap in authority if the date for the final termination of the Confederation Congress was fixed at any time prior to the full effectiveness of the Constitution. The language of the proposed resolution—“until a given day after the reform of the articles of Union shall be adopted”<sup>16</sup>—permits this possibility. Perhaps one could therefore argue that the rejection of this resolution signaled that there will be *no* interregnum if the Constitution just stayed silent. But let us grant Mr. Kesavan that the Convention history at least vectors towards the possibility of a gap. What should one make of that knowledge?

Mr. Kesavan, in a refreshingly explicit discussion of methodology, tries to provide an answer:

[i]t is here that there is a good case for giving the secret drafting history of the Constitution some significant weight. The other evidence is threadbare on the specific issue of the transition between the two regimes. In the absence of other extra-textual evidence of constitutional meaning such as history or constitutional structure on the specific issue of the transition between the two regimes, the secret drafting history of the Constitution would seem to be an especially good source of constitutional meaning. Would not the Framers’ subjective understanding of the drafting of the Engagements Clause bear on the meaning of the text of the Constitution itself?<sup>17</sup>

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13 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 231 (Max Farrand ed., 1966) [hereinafter RECORDS OF THE CONVENTION].

14 See Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 66 (“Although the text is capable of supporting Lawson’s and Seidman’s theory of gapless transition between the two regimes as well as an alternative theory of an interregnum between the two regimes, the secret drafting history of the Constitution is only capable of supporting the latter.”).

15 *Id.* (emphasis added).

16 1 RECORDS OF THE CONVENTION, *supra* note 13, at 231.

17 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 67. Mr. Kesavan and Mike Paulsen elaborate this point at length in a forthcoming manuscript. See Kesavan & Paulsen, *Interpretive Force*, *supra* note 2.

Mr. Kesavan's final query is a good question that deserves a good answer. Although we do not back away from our prior statements that a minimally adequate answer to problems of interpretative methodology requires a lengthy book,<sup>18</sup> a thumbnail sketch of the premises that have been driving our work is overdue.

## II. GREAT TASTE AND LESS FILLING: LITE HISTORY, HEAVY LAW

Because Mr. Kesavan agrees with us on the basic principle that the Constitution's meaning is its original public meaning, we will not defend that principle at length. Nor is a lengthy defense really necessary, because that principle, at least in its broad outlines, follows from the nature of the Constitution as a communicative instrument. The Constitution addresses itself to a general (though not necessarily unlimited) audience. It does not present itself to the world as a personal memo written in shorthand or code that is only meant to be used by, and hence only meant to be understandable to, the author or a strictly limited audience. The best understanding (not necessarily the only understanding, but epistemologically the best understanding) of "the meaning" of that document accordingly must focus on the *public audience* to which the document presents itself. Moreover, the nature of the document points towards the *original* meaning of the document when it was first presented, in the unlikely event that there is ever a divergence between the original and current public meanings of the document.<sup>19</sup> This is in keeping with standard conventions concerning human communication; the use of original meaning is, as Sai Prakash has termed it, a "Default Rule"<sup>20</sup> that need not be expressly specified in the communicative instrument. If an instruction manual written in 1789 said, "Keep a screwdriver handy during assembly," whether the term "screwdriver" refers to a tool or an alcoholic beverage is determined by public understandings of 1789 rather than 2002.<sup>21</sup>

18 See, e.g., Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 197 n.22 (2001) ("Before one gets to the relative merits of originalism and other interpretative approaches, one must be able to define precisely what an originalist (or any other) inquiry entails. Even to identify the relevant questions for such a project would require a book . . .").

19 The actual incidence of changes in the semantic meaning of the words of the Constitution is probably fairly low. See John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y (forthcoming Jan. 2003).

20 Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541 (1998) (reviewing JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996)).

21 Any contemporary reader who thinks it frivolous to speculate whether the standard meaning of "screwdriver" in this context could change in two hundred years

This mode of discerning the Constitution's meaning is at all controversial only because many people import normative force to that meaning; no one would (we presume) ever think of interpreting the Confederate Constitution or the original corporate charter for Rhode Island according to contemporary public meanings, evolving social values, or any interpretative method other than original public meaning. We view the interpretation of the Constitution as an enterprise separate from an assessment of its normative force and accordingly take the methodology of original public meaning as a given. Reading a document and deciding whether to follow it are two distinct operations.<sup>22</sup> The nature of the document and the nature of communication tell you how to discern a document's meaning, though not what to do with that meaning once you have it.<sup>23</sup>

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either does not have children or has never attempted to assemble a computer table. For an even better example involving the changing meaning of the term "ratchet," see Harrison, *supra* note 19 (manuscript at \_\_, on file with authors).

22 See generally Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997) (noting that interpreting a text differs from applying the text).

23 More precisely, the nature of the document tells you *part* of what you need to know in order to interpret it. Michael Dorf, in a characteristically thoughtful response to some of Professor Lawson's prior work in this vein, has forcefully denied that interpretation can be divorced from normative concerns because "[w]hether we equate meaning with original public meaning, or with speaker's meaning, or with a dynamic conception of meaning, or with something else, depends on why we care about the meaning of whatever it is we are interpreting." Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1858 (1997). Professor Lawson has elsewhere agreed that the answers to at least some interpretative questions are "inescapably normative, depending heavily on the end one seeks to serve through interpretation." Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 860 (1992). It is crucial, however, to understand the particular respects in which interpretation, of a constitution or anything else, is and is not necessarily a normative enterprise.

Propositions about meaning are propositions. Anything that is true of propositions in general is also true of propositions about meaning. One important truth about propositions is that the *proof* of any proposition requires three elements: *principles of admissibility* that tell you which considerations count for or against a proposition's truth, *principles of significance* which tell you how much (relative) weight to give to different sets of admissible evidence, and *standards of proof* which tell you how much evidence is necessary in order to proclaim the truth value of a proposition.

Normative considerations enter at the last stage where one determines the *standard of proof* or *level of evidence* that is epistemologically required in order to make a declaration of truth. There is no way to separate that determination from the consequences of a truth declaration; the standard of proof appropriate to an ivory-tower scholar considering the meaning of the Engagements Clause is not necessarily the same as the standard of proof appropriate to the President of the United States deciding whether a certain state of affairs justifies the launch of thermonuclear missiles. But by the same token, the correct principles of admissibility and significance for

Up to this point, Mr. Kesavan would likely agree with our conclusions, if not necessarily with our path.<sup>24</sup> He too believes that the set of admissible evidence for constitutional meaning is limited to evidence that establishes original public meaning. The next question is the amount of weight or significance to which various sets of evidence are entitled. Mr. Kesavan thinks that evidence of subjective views from the Constitution's drafting (or ratification) is significant for determining constitutional meaning. We do not agree.

If Mr. Kesavan is right, there are at least two sets of professionals whose input would seem to be indispensable for constitutional interpretation: linguists, who can provide input into studies of usage, and historians, who can help set the contexts in which the usages are situated. Good interpretation, on this model, requires (a) comprehensive familiarity with actual word usages across a broad range of sources, (b) sensitivity to the factors that influence usage generally, and (c) sensitivity to the historical contexts that influenced, or may have influenced, the specific usages in question. Attempts to discern original public meaning without a high degree of professionalism across all of these fronts would constitute "History 'Lite,'" as one scholar has termed it<sup>25</sup>—not to mention "Linguistics Lite," and perhaps even "Law Lite." Indeed, if the goal is to ascertain and understand actual mental states of historical individuals, one would also need to avoid "Psychology Lite," "Sociology Lite," and the "Lite" form of any other discipline that bears on the reconstruction of historical mental states. History and linguistics are perhaps the most obvious disciplines that can lay claim to expertise in that inquiry, but the full list of disciplines is quite long.

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documents are objective facts. It is possible to monkey around with the rules of admissibility and significance for a document such as the Constitution, just as it is possible to monkey around with the rules of admissibility and significance for proving ordinary facts about events in the world. The law does it all of the time through rules of evidence. But to do so is deliberately to sacrifice the search for truth in favor of other values. There may, of course, be a good case for sacrificing the search for truth about constitutional meaning in favor of other values in many circumstances, but one ought to own up to the trade-off.

24 See Kesavan & Paulsen, *Interpretive Force*, *supra* note 2. And those who did not start out with originalist predilections will be unimpressed and unconvinced. We did not intend to impress or convince. Rather, we are setting up the subsidiary methodological point discussed in the next few paragraphs that explains the differences between our and Mr. Kesavan's approaches to the problem of transition.

25 Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (discussing the superficial, and often incorrect, use of history in constitutional theory).



Without at all intending to denigrate the important contributions that historians, linguists, and other professionals (and a lay sensitivity to the concerns of historians, linguists, and other professionals) can make to constitutional interpretation, we think that something is missing from this story. The Constitution's meaning is *not* the meaning that was actually held by some set of concrete actors (the ratifiers in most contemporary originalist accounts; the Framers in most earlier originalist accounts). Documents that address themselves to the public have objective meanings that are capable of being grasped or missed, even by their authors. Otherwise, it would not be possible (as ordinary people, uncorrupted by advanced degrees, know that it is possible) to "misinterpret" a document or statement or to be told, quite reasonably, that even if one intended *X*, the words used really meant *Y*. The proper object of constitutional inquiry is a *hypothetical* mental state, not an actual mental state. That is why

we do not regard the search for original meaning as a search for historically concrete understandings. Instead, we conceive of the inquiry in hypothetical terms: What would a fully-informed public audience, in possession of all relevant information about the Constitution and the world around it, have understood the Constitution to mean?<sup>26</sup>

Of course, one should not overstate the difference between actual and hypothetical understandings. At some point, they do indeed merge. When a particular understanding was so widely held by an actual historical audience that any reasonable interpreter in that audience would necessarily have held it, the understanding acquires an axiomatic status: it is part of the fundamental material in terms of which more disputed interpretative questions are answered. This is what we mean by "general background understandings" and what Mr. Kesavan calls "interpretive baselines." Those interpretive baselines (as we will henceforth call them) are linguistic and historical facts. But professional linguists and historians are not uniquely qualified to identify those facts, though consulting such experts may be a good idea. If an understanding really was pervasive enough to constitute an interpretative baseline, any reasonably sensitive interpreter should be able to recognize it.

Although there are some contexts in which actual and hypothetical understandings merge, there are also contexts in which they do not. For interpretative questions that do not have slam-dunk, baseline-level historical and linguistic answers, one must figure out the perspective from which "public meaning" must be determined. That

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26 Lawson & Seidman, *supra* note 1, at 25.

is not a determination that is distinctively within the realm of historians and linguists. It is a legal, and more deeply an epistemological, determination. There are many reasons not to locate constitutional meaning in historically concrete mental states (at least below the critical mass necessary to constitute an interpretative baseline), not the least of which is the relatively small and decidedly non-random sample of available sources in the specific case of the American Constitution. But the most important reason has to do with the nature of public expressions.

Imagine a complex text that a large number of actual readers (though less than the critical mass necessary to constitute an interpretative baseline) interprets to mean *X*. A smaller but non-zero number of actual readers interprets the same text to mean *Y*. No actual readers interpret the text to mean *Z*. Is it possible for *Y* or *Z* to be the correct original public meaning of the text? We think so, at least in the case of *Y*. Although one would have to articulate a theory of concepts in order to defend this (or any other) account of meaning, for present purposes one needs only to imagine a hypothetical dialogue between actual proponents of, let us say, *X* and *Y*. If meaning is truly a function of comparing (through whatever weighting formula is appropriate) actual mental states, then that dialogue cannot possibly consist of anything other than, "There are more/better interpreters on my side than on your side." "Yes, you win/no, you lose." That is not the way in which such dialogues are conducted, were conducted in the late eighteenth century, or ever will be conducted by ordinary people. People give *reasons* for their views of meaning, and those reasons do not inevitably reduce to some calculation involving actual mental states. Those reasons can involve pointing out some feature of the document that one's opponents have not yet seen, or have undervalued, or have refused to acknowledge for political or other reasons. In other words, they refer to mental states that *would* or *might* exist under counterfactual circumstances. Those reasons can also, of course, include reference to actual mental states; one can certainly invoke the numbers, the eminence, or both of the proponents of a particular viewpoint. But those mental states are *evidence* of meaning; they are not *constitutive* of meaning.<sup>27</sup> The meaning itself is a hypothetical construct that represents the hypothetical conclusion of a hypothetical dialogue in which all of the factors that bear on meaning are given their due weight. If a fully informed observer of this hypothetical dialogue, after considering all of the relevant arguments and after applying the appropriate interpretative baselines, would con-

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27 See Prakash, *supra* note 20, at 537.

clude that a dissenting voice on the meaning of a document had the better of the argument, that dissenting voice would reflect the document's objective public meaning.

If no actual person held a mental state corresponding to a particular meaning *Z*, it gets trickier to determine whether *Z* could ever be the correct meaning. Perhaps the absence of any actual linguistic support for *Z* would constitute an interpretative baseline that rules out *Z* as a candidate. But perhaps there is an argument about the document that went entirely unrecognized by actual contemporary audiences but is so powerful that it would convince any reasonable, objective observer that *Z* is the correct meaning. For now, it suffices to say that actual, concrete usages can establish the linguistic plausibility of an interpretation (and the more acknowledgements one finds, the more plausibly one can put forward the proposed interpretation as a candidate for the correct answer). But that is the start, rather than the conclusion, of the search for meaning.

Because actual mental states are evidence of meaning, they are certainly admissible into the inquiry; on that point, Mr. Kesavan is certainly right. The real question concerns the weight or significance that one ought to give such mental states. Mr. Kesavan is prepared to give them "significant weight"<sup>28</sup> and to treat them as "an especially good source of constitutional meaning"<sup>29</sup> if other sources are inconclusive. Here is where we part ways. Put aside for the moment the large problem of drawing a line between actual expressions and actual mental states, particularly when those expressions occur in the course of a debate.<sup>30</sup> Assume that the mental states are known. Those mental states are only good evidence of meaning if they were formed by someone (1) who considered all of the relevant arguments, (2) was capable of synthesizing all of the relevant arguments, and (3) was unlikely to be unduly influenced by various biases that would interfere with sound processing of the evidence. Mental states that meet that description are good authorities. Mental states that do not are not. As one of us has written elsewhere, "one must always be prepared to ask whether an expressed understanding would have been different had the utterer known or thought about *X*, *Y*, and *Z*."<sup>31</sup>

In the particular case of the transition from the regime of the Articles to the regime of the Constitution, there is simply no reason to

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28 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 67.

29 *Id.*

30 To put it as delicately as possible: people, especially political actors, do not always mean what they say or say what they mean.

31 Lawson, *supra* note 18, at 196 n.20.

think that the expressions of which we have a record meet these criteria. They do not count for nothing, but neither do they constitute "significant" evidence of constitutional meaning. They are sufficient to put the possibility of an interregnum onto the interpretative agenda, but they do not do much more than that.

So we regard such maneuverings at the Convention as weak evidence of constitutional meaning. But, as an economist might say, weak compared to what? Bad arguments are, by definition, better than even worse ones. If arguments based on the expressed mental states of the likes of Madison, Morris, and Wilson are weak arguments, then what would a strong argument look like in the present context? That is the question to which we now turn.

### III. FALL INTO THE GAP

The Constitution took effect for nine states on (or shortly after) June 21, 1788. What happened in the next year or so before the Constitution became fully effective?

An example, similar to one raised by Mr. Kesavan,<sup>32</sup> will illustrate the problem. Suppose that after ratification by nine states, but before the machinery of the new constitutional government was established, England declared war on the United States. Could the Confederation Congress respond with its own declaration of war?<sup>33</sup> Could it sign a treaty of peace to end the war (or enter into a treaty of alliance with France)?<sup>34</sup> Keep in mind that under the Articles of Confederation the Congress's war and treaty powers could not be exercised "unless nine States assent to the same."<sup>35</sup> Thus, if the States that ratified the new Constitution were, by virtue of that fact, no longer parties to the Articles of Confederation, then clearly the Confederation Congress had no such powers.

As Mr. Kesavan points out,<sup>36</sup> the Constitution seems to say very little about its relationship to the prior Confederation government. The Supremacy Clause makes clear that treaties entered into by the Confederation government remain valid under the new Constitu-

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32 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 48.

33 ARTICLES OF CONFEDERATION art. IX, cl. 1 (U.S. 1781).

34 *Id.*

35 *Id.* cl. 6.

36 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 52.

tion,<sup>37</sup> but that leaves open the question whether the Confederation government retained any authority to make treaties after June 21, 1788. Mr. Kesavan, in one of his many important contributions, also calls attention to the clause that immediately precedes the Supremacy Clause, but whose significance we frankly never considered: the Engagements Clause. That clause, drawing upon a similar (but differently worded) clause in the Articles of Confederation,<sup>38</sup> provides that “[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.”<sup>39</sup> It is not obvious what this clause means by “the Adoption of this Constitution.” Article VII describes ratification by nine states as sufficient “for the *Establishment* of this Constitution between the States so ratifying the Same.”<sup>40</sup> As an intratextual matter,<sup>41</sup> one might therefore conclude that the moment of “Adoption” must be different in some respect than the moment of “Establishment,” though what that moment might be is not obvious. It does not matter for present purposes exactly what the Engagements Clause means by “Adoption.” In any case, Article VI is agnostic on whether the Confederation was capable of generating debts and engagements for any period of time after adoption of the Constitution; it simply says that such debts and engagements, if any can exist, will not be assumed by the new government.<sup>42</sup>

In order to assess the plausibility of a gap in federal governmental authority, one must understand exactly what this gap could possibly involve. The move from the Articles of Confederation to the Constitution did not effect, strictly speaking, a transfer of sovereignty from the prior form of federal government to a new form. As Mr. Kesavan astutely notes, “many of the Founders thought that the federal government under that regime was hardly worthy of the moniker of government.”<sup>43</sup> There is much to be said for that position.<sup>44</sup> The

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37 See U.S. CONST. art. VI, cl. 2. The Clause distinguishes “Laws of the United States which shall be made in Pursuance” of the Constitution from “Treaties made, or which shall be made, under the Authority of the United States . . . .” *Id.*

38 ARTICLES OF CONFEDERATION art. XII (U.S. 1781).

39 U.S. CONST. art. VI, cl. 1.

40 *Id.* art. VII (emphasis added).

41 See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). (introducing an interpretive technique, intratextualism, in which words in a document are compared to similar words elsewhere in the text).

42 See U.S. CONST. art. VI, cl. 1.

43 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 46.

44 See Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529, 539 (1907) (“[The Articles of Confederation] as finally

Confederation government had no significant powers of law execution. Its only judicial powers concerned maritime matters<sup>45</sup> and boundary disputes.<sup>46</sup> Its domestic legislative powers were minimal.<sup>47</sup> The Articles of Confederation were concerned primarily with matters of interstate comity and defense. Because the Confederation organization (to employ as neutral a term as possible) never had very much power, that power was never in transition, in any meaningful sense, between the Confederation and the constitutional government. Accordingly, there could not possibly be an issue of a "gap" involving most governmental powers, because those powers were lodged in the States rather than in the Confederation organization.

The critical question, as Mr. Kesavan perceptively recognizes, concerns the treaty and war powers. The Confederation organization did have "the sole and exclusive right and power of determining on peace and war,"<sup>48</sup> except in specified emergencies,<sup>49</sup> and the sole power of "entering into treaties and alliances."<sup>50</sup> Furthermore, one of the immediately operative provisions of the Constitution was Article I, Section 10, which provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation."<sup>51</sup> If (as we maintain in our earlier article) this provision bound the ratifying States immediately upon completion of the ninth ratification *and* if the Articles of Confederation did not continue in force until the moment that a President and Senate were in place under the new Constitution, then there would have been a genuine gap in treaty-making authority, at least with respect to the ratifying States.<sup>52</sup> There would have been literally no authority capable of executing a treaty that included the ratifying States. That is the potential gap that we claim did not exist.

The statements from the Constitutional Convention that Mr. Kesavan has brought to our attention<sup>53</sup> do suggest, as he claims, that the Articles of Confederation might not continue in force unless something in the Constitution sustained them. Why else would some-

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adopted furnish us with an admirable measure of the depths or rather shallows of national feeling and of the . . . weakness of the contemporary desire for a state.").

45 See ARTICLES OF CONFEDERATION art. IX, cl. 1 (U.S. 1781).

46 *Id.* art. IX, cl. 2.

47 *Id.* cl. 4.

48 *Id.* cl. 1.

49 *Id.* art. VI, cl. 5.

50 *Id.* art. IX, cl. 1.

51 U.S. CONST. art. I, § 10, cl. 1.

52 Whether the non-ratifying States could have entered into their own treaties is a different question.

53 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 64-65.

one propose a resolution "that provision ought to be made for the continuance of [the Confederation] Congress and their authorities until a given day after the reform of the articles of Union shall be adopted."<sup>54</sup>

There is, however, a much more powerful statement on the status of the Articles of Confederation to which some significant weight is due even under our objectivist methodology. As we described in our earlier article, on September 17, 1787, when the Constitutional Convention asked the Confederation Congress to submit the Constitution to the States for ratification, the Convention also issued a resolution that said "that as soon as the Conventions of nine States shall have ratified this Constitution, *the United States in Congress assembled*"<sup>55</sup> shall fix dates for the election of the President and for the first meeting of Congress. Note the wording of the resolution: it is addressed, not to the States or to some future grouping of States, but to "the United States in Congress assembled"—that is, to the Confederation Congress. The requested action was to take place "as soon as the Conventions of nine States shall have ratified this Constitution." The Convention resolution clearly assumed that the Confederation Congress, and therefore the Confederation, would still be in existence as a legal entity after the establishment of the Constitution. This was not the statement of James Madison, James Wilson, or any other luminary. This was an official resolution of the Constitutional Convention as a whole, which comes as close to an interpretative baseline as one is going to get on these matters.

It is true, as Mr. Kesavan suggests,<sup>56</sup> that when the Confederation Congress complied with the Convention's resolution and fixed dates for presidential elections and for the first meeting of Congress,<sup>57</sup> it did not act pursuant to any authority under the Articles of Confederation. There is nothing in the Articles that could remotely have authorized the Confederation Congress to legislate on such matters. But that is not the point here. The Confederation Congress's specification of dates was obviously non-binding. If South Carolina had decided to cast its electoral votes on some day other than the one specified by the Confederation Congress, it would not have broken

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54 1 RECORDS OF THE CONVENTION, *supra* note 13, at 231.

55 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790, at 6 (Merrill Jensen & Robert A. Becker eds., 1976) [hereinafter FIRST FEDERAL ELECTIONS] (quoting RESOLUTIONS OF THE CONVENTION SUBMITTING THE CONSTITUTION TO THE CONFEDERATION CONGRESS (1787) (emphasis added)).

56 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 69-70.

57 See FIRST FEDERAL ELECTIONS, *supra* note 55, at 131.

any law (though it would preclude a valid presidential election until the States could all agree on a uniform date).<sup>58</sup> As we previously pointed out, the States could have agreed upon the relevant dates in any convenient forum; there was, from a legal standpoint, nothing special about the Confederation Congress. Our point is not one about the *powers* of the Confederation Congress, but about its *existence* as an entity. The Constitutional Convention knew, or at least thought, that it would be there to issue pronouncements, even if those pronouncements were non-binding.

It is, of course, conceivable that the Confederation Congress at that time *only* had the authority to issue non-binding pronouncements. That is, perhaps the Confederation Congress continued to exist after June 2, 1788, as more of a social club than a legal entity—able to issue non-binding pronouncements about electoral dates (or to declare National Potato Week) but unable to transact any business that had actual legal effect.

Perhaps, but that seems unlikely. The "United States . . . in Congress assembled"<sup>59</sup> mentioned in the Convention resolution of September 17, 1787, certainly seems to be the same "United States in Congress assembled"<sup>60</sup> described in the Articles of Confederation.

Nor, as Mr. Kesavan points out,<sup>61</sup> did the members of the Confederation Congress understand their authority to have been dissolved. As Mr. Kesavan explains, on July 2, 1788, just after the Congress learned of New Hampshire's decisive ninth ratification (with Virginia's ratification following shortly thereafter), all thirteen states were represented in the Confederation Congress for the first time in more than a decade. This was not a group unfamiliar with the Constitution; in early 1788, the Congress had great difficulty getting quorums because so many delegates were called away to ratifying conventions.<sup>62</sup> Mr. Kesavan is right that one cannot infer from this action that the Confederation Congress had any real legal authority, but that is not our point. The point, rather, is that if one is looking for an interpretive baseline, the fact that the Confederation Congress continued after ratification without a peep of protest, and indeed gathered steam, suggests a widespread understanding that the "Estab-

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58 See U.S. CONST. art. II, § 1, cl. 4 (stating that the day on which electors give their votes "shall be the same throughout the United States").

59 1 FIRST FEDERAL ELECTIONS, *supra* note 55, at 6.

60 ARTICLES OF CONFEDERATION pmbl. (U.S. 1781).

61 Kesavan, *When Did the Articles of Confederation Cease To Be Law?*, *supra* note 2, at 73.

62 See EDMUND CODY BURNETT, *THE CONTINENTAL CONGRESS* 705 (1941).



lishment" of the Constitution did not effect the "disestablishment" of the Confederation.

There is a further consideration that supports this conclusion. The move from the Confederation organization to the constitutional government was, from the standpoint of human history, strikingly peaceful. The process of establishing the Constitution did not entail killing the Czar and his ministers (while Anastasia screamed in vain). Instead, the principals in the Confederation organization were handing power over to the principals in the Confederation organization. A remarkable number of members of the last Confederation Congress went on to prominent positions in the new federal government.<sup>63</sup> The Constitution may well have been, as Bruce Ackerman and Neal Katyal have vigorously argued,<sup>64</sup> a revolution, but it was also, in the words of another scholar of revolutions, a case of "meet the new boss, same as the old boss."<sup>65</sup>

We submit that a reasonable observer/interpreter in 1788 would have been predisposed to see continuity between the old and new organizations. That is, faced with texts that could equally support an interregnum or a continued existence of a treaty power, a reasonable public audience would find in favor of the latter. From the standpoint of such an audience, there is substantial upside and no downside to a view that would retain war and treaty power in the Confederation Congress. The upside is obvious: it would be a good thing to have a national organization capable of conducting and ending war. The downside to recognizing the continued existence of the Confederation Congress is zero. Remember that the issue of transition can only arise once nine States have committed themselves to the new Constitution. Under a gapless transition model, those nine States are still members of the Confederation until the machinery of the new government is in place. Accordingly, those States, or even a fraction of them, could block any action by the Confederation that threatened to interfere with the smooth future functioning of the new government. If the ratifying states, for instance, did not want a certain treaty being considered by the Confederation Congress during the transition period to become an obligation of the new government, they could vote it down—or even prevent a quorum simply by staying home. There is

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63 The Patriot Resource, Continental Congress 1788–89 Members, at <http://www.patriotresource.com/history/congress/1788.html> (last visited Oct. 6, 2002).

64 See Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 477–78 (1995).

65 PETE TOWNSEND, *Won't Get Fooled Again, on WHO'S NEXT* (MCA Records 1971).

much to gain and nothing to lose for such an audience to choose continuity over gap.

This is risky ground for objectivist interpreters, so we want to be clear about our position. We are not saying, or at least are not saying in a direct sense, that policy arguments are relevant for constitutional interpretation. "X would lead to good results" is not, in general, a reason for reading something as X when other interpretative tools point to Y. Our claim here is much more limited. The only text to interpret on this question is the provision in Article VII that the ratification of nine states is sufficient for the "Establishment" of the Constitution. Does the "Establishment" of the Constitution for the ratifying States preclude their participation in another, pre-existing<sup>66</sup> intergovernmental organization until the new constitutional government is up and running? The chances of finding a linguistic consensus as to whether the word "Establishment" contained an answer to that question approaches zero. This is precisely the kind of circumstance where the referents of the concept "Establishment" are likely to be identified by a reasonable observer at least partially on the basis of consequences.

One final consideration, which ties in with Part I of this Essay, closes the deal. Consider the general problem of constitutional interpretation. Suppose that considerations of text, structure, and interpretive baselines do not yield a convincing answer. We have already said that evidence of expressed mental states is very weak evidence of original meaning except under highly stylized and unusual circumstances. But weak compared to what? If one is not going to look with much interest at evidence of original intentions, then what else is there to look at once text, structure, and interpretive baselines have run their course? Is not evidence of mental states, however weak in the abstract, better than nothing if nothing is truly the alternative?

A full answer would require a lengthy discussion of the problems of proving constitutional meaning, but a short answer may be enough here. The purpose of evidence is to prove propositions. Evidence about constitutional meaning is used to prove propositions about constitutional meaning. Evidence is only useful if it is capable of supporting such proof.

The Constitution comes with built-in presumptions. Because any claim of federal governmental power must be traceable to something in the Constitution, anyone who asserts a power on the part of the

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66 Under Article I, Section 10, those ratifying States could not "enter into" any treaties or alliances, but that clause does not forbid them from continuing to participate in an existing treaty or alliance with other States.

federal government to do *X* is asserting a positive existent and therefore must carry the burden of proof.<sup>67</sup> Similarly, anyone who asserts that the Constitution forbids a State from doing *X* is asserting a positive existent and therefore must carry the burden of proof. Someone who asserts that the Constitution forbids a ratifying State from participating in the Confederation during the period of transition is claiming a constitutional restriction on States and therefore bears the burden of proof. How much proof they need to muster depends on the appropriate standard of proof for propositions about constitutional meaning, which is a topic that we have no desire to engage here. The point for now is that, even if the only available evidence on the transition was the discussion of Resolution 15 at the Constitutional Convention, that evidence would not be opposed by nothing; it would be opposed by an interpretative presumption against limitations on the States. Weak evidence is not always better than no evidence. It is the same as no evidence when it is too weak to overcome the operative presumption for or against governmental power. In the case of the transition from the Confederation to the Constitution, the presumption is on the side of a gapless transition.

So in the final analysis, we do not need to prove that we are right about the post-ratification vitality of the Confederation Congress (though we think that we have done so). Someone else needs to prove us wrong. We are innocent until proven guilty.

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67 For a more extensive discussion of this point, see Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411 (1996).