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Interpretive Modesty

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Interpretive Modesty
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Introduction
During the 2013 U.S. Supreme Court oral arguments in the closely watched case of Perry v. Hollingsworth, Justice Scalia asked plaintiffs’ attorney Ted Olson – whose clients challenged California’s exclusion of gay couples from marriage -- to pinpoint “the date at which it became unconstitutional to exclude homosexual couples from marriage.” Justice Scalia implored, “how am I supposed to know how to decide a case . . . if you can’t give me a date when the Constitution changes?” The question appeared meant as a “gotcha” of sorts, designed to spotlight the absurdity of the notion that the same constitutional text might apply differently at different points in time. It implicitly channeled a longstanding caricature of constitutional arguments that do not purport to follow automatically from text and history. Such arguments, goes the caricature, are explicable solely by result-orientation, bearing little if any relationship to the Constitution’s text or original meaning. The flip-side of that depiction is the view that originalism provides the only principled, value-neutral criteria to find and effectuate constitutional meaning. As Justice Scalia and his co-author Bryant Garner put it in a recent book, “Originalism is not perfect. But it is more certain than any other criterion. And this is not even a close question.”

The well-known claim that originalism is a uniquely principled interpretive method comprises two smaller premises. The first, which I call the “reliability premise,” is that originalism enables one to determine the meaning of constitutional provisions in an accurate and unbiased manner by drawing upon objective semantic and historical information. The second, which I call the “determinacy premise,” is that originalism suffices, on its own, to resolve most constitutional questions. It thus leaves little room for interpreters to inject their own values and preferences into the decision-making process.

While critics have always challenged the reliability premise, the determinacy premise long was taken as a given by originalism’s friends and foes alike. Such acceptance generally was warranted, as originalism traditionally has exhibited a bias toward determinacy. To understand how this bias works, consider again Justice Scalia’s oral argument query. It was grounded partly in the notion that the equal protection clause’s meaning has remained static since its framing in 1868 – that is, its original meaning is its current meaning. More significant is the query’s other underlying assumption, one about the meaning of “meaning.” Justice Scalia’s query assumes that the original meaning of the equal protection clause tells us not only how to define its words, but how to apply them to specific cases. Hence, if “the equal protection of the

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1 Hollingsworth v. Perry, official transcript, March 26, 2013, at 38-40.


removal power. Writing as An American Citizen in “the first substantive essay published anywhere in favor of the Constitution,” Tench Coxe explained that the President could not “take away offices during good behaviour.” In The Federalist, Alexander Hamilton expressed the view that senatorial consent would be needed to “displace as well as to appoint [officers].”

The lack of a founding consensus on removal also was reflected in the First Congress’s 1789 debate over presidential removal power. Elsewhere, I discuss that debate and its implications in some detail. For our purposes, it suffices to note that a number of participants expressed a belief similar to that expressed by Hamilton in the Federalist -- the Senate had to consent to removals of executive officers. While others evinced the view that the President alone had constitutional discretion to effectuate such removals, others expressed confusion and uncertainty on the matter. It also is important to remember that even those on the removal power side argued not for a categorically unfettered removal power, but for the power as applied specifically to the Secretary of Foreign Affairs. Additionally, their position was framed in response not to a moderate restriction on the removal power, such as a good-cause requirement, but rather to the fairly extreme proposals that removal could be effectuated only with Senate consent or through impeachment. The Debate of 1789 thus corroborates the lack of founding consensus on the scope of the President’s removal power even with respect to the proposals at issue in that debate. And it certainly stands for no broader consensus on the topic of removal writ large.

History also cuts against the notion that the original meaning of the vesting clause clearly vests an unfettered power in the President to control all discretionary executive activity beyond the power to remove. For example, in the period between the Revolution and the founding, state constitutions regularly mixed formalistic references to separated powers with breaches of executive unity and independence. “[S]tate constitutions not only permitted, but actually mandated legislative involvement in both personnel and superintendence. Nothing in the records

159 Rakove, Original Meanings, supra note 84, at 274 (referring to Tench Coxe, An American Citizen, An Examination of the Constitution of the United States, Essay I, September 26, 1787).
160 Coxe, supra note 159.
161 Hamilton, Federalist 77. A recent article challenges the longstanding view that Hamilton’s statement referred to the removal power. The article suggests that by “displace,” Hamilton might have meant “replace,” and thus might have been referring only to the Senate’s role in confirming new appointees to replace those removed by the President. See Seth Barrett Tillman, The Puzzle of Hamilton’s Federalist No. 77, 33 Harv. J. L. & Pub. Pol’y 149 (2010). While this is a provocative thesis, I believe that it is an unlikely one, largely for reasons captured in a response essay by Professor Jeremy D. Bailey. Jeremy D. Bailey, The Traditional View of Hamilton’s Federalist No. 77 and An Unexpected Challenge: A Response to Seth Barrett Tillman, 33 Harv. J. L. & Pub. Pol’y 169 (2010). Even if Tillman’s thesis were accurate, the record is clear that at least some founders understood Hamilton to have been referring to the removal power, and that others including Tench Coxe publicly expressed the view that the President’s removal power was not unlimited. See Tillman, supra this note at 161-63; see also infra nn. 159-160 and accompanying text.
163 Id.
164 This was famously observed by Madison in Federalist 47, who cited the examples of the states to demonstrate that it was neither possible nor desirable to completely separate the three major powers. Federalist 47 (Kindle edition at 134-35). See also, e.g., GORDON S. WOOD, THE CREATION OF AN AMERICAN REPUBLIC 153-6; M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 131-33, 146-49, 154-74; Flaherty, supra note 157, at 1765-71, 1776-77; Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 WM. & MARY L. REV. 211, 217-19 (1989); Edward S. Corwin, The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 AM. HISTORICAL REV. 511, 514, 516 (1925).