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Hamilton, 'Hamilton' and the original intent of the Framers

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Richard Primus has some pretty interesting speculations, in a piece in the Atlantic, on the effect that the astounding success of the musical "Hamilton" might have on law and constitutional interpretation. Specifically, he wonders whether it might change, rather fundamentally, the terms of the "originalist" debate in constitutional law.

I think he's on to something. Originalism has, up to now, been largely a "conservative" doctrine, an interpretive weapon wielded primarily by those on the "limited government/state sovereignty" side of the political fence; as Primus puts it, conservatives have for the past half-century or so "been more inclined than [wider government power/more centralized power] liberals to dive into the Founding, to embrace its characters and its sources, and in general to be confident that the Founders shared their own values on contested questions," while liberals largely "ceded the field" to the conservatives on these questions of original meanings.

The conservatives constructed a specific originalist narrative, one with the Virginians — Madison and Jefferson, in particular — at its center and Hamilton (and Adams) very much on the periphery and very much "out of step." It's very powerful and persuasive construction, and it represents a considerable intellectual achievement. I count myself among its admirers; I wrote a whole book trying to see the world through Jefferson's eyes because I thought (and still think) that his vision was the clearest of them all, his understanding of constitutional principles the most penetrating.

But there are other, alternative stories about what "the Framers" believed, and about what they thought the words in the Constitution meant. That's the thing about originalism — its Achilles' heel, in a way: There's no way to reconstruct "the Framers' view" of any contested constitutional matter, because the Framers themselves had very divergent views among themselves on those very questions.

Originalism is inherently neither right-leaning nor left-leaning.

For one thing, the Founders disagreed internally on most of the issues they discussed. Many individual Founders did not have consistent views of those issues and expressed different views at different times. Moreover, many of the issues the nation confronts today were not things that the Founders could have reasoned coherently about at all, just as no one today can reason coherently about many issues that Americans will confront in the year 2300.

Even if the Founders had agreed on a single theory of free speech, there would be no way of knowing whether they would have agreed on that same theory if they had been required to grapple with, say, the regulation of video games, or super PACs, or the intellectual-property status of human-genome research. The Founders' concerns sometimes overlap with those of modern Americans, such that one can read their writings and detect (or imagine) relevance. *But the source materials they left behind are fundamentally indeterminate on most of today's pressing questions—both because the Founders did not consider 21st-century questions and because they might not have agreed on answers even if they had.* [emphasis added]

It's a very fundamental indeterminacy, and it renders futile any attempt to make original intent the sole guide to constitutional interpretation, or to discern "the answer" that the Founders and their co-citizens would have given to contested constitutional questions.

A few years ago, I pointed out how Justice Clarence Thomas's dissenting opinion in the California violent video game case perfectly (though inadvertently) illustrated the futility of trying to find what "the founding generation believed" about contested constitutional issues. In a case challenging a California statute that prohibited the sale or rental of "violent video games" to minors, Thomas wrote:

When interpreting a constitutional provision, the goal is to discern the most likely public understanding of [that] provision at the time it was adopted…. As originally understood, the First Amendment's protection against laws "abridging the freedom of speech" did not extend to all speech. … In my view, the practices and beliefs *held by the Founders* reveal [a] category of excluded speech: speech to minor children bypassing their parents.

The historical evidence shows that *the founding generation believed* parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that *such a society*understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents. . . . The *founding generation would not have considered it an abridgment of "the freedom of speech"* to support parental authority by restricting speech that bypasses minors' parents. [emphasis added]

Originalism on steroids, I called it then, a rather poignant illustration of the weakness of the approach. I understand, and am sympathetic to, the notion that the meaning of a constitutional provision should be informed by the meaning given to it by those who drafted and ratified it. But even assuming that Thomas (or anyone else) can reconstruct the sociology of the 18th century so as to definitively support the notion that parents possessed "absolute authority" over their children and that "total parental control over children's lives" was the governing societal norm — what then? The question in the case was not "do parents have absolute authority over their children?" The question in the case is, rather, "how does what the state did here relate to (a) the authority of parents over their children, (b) the power of the state to protect the well-being of children, and (c) the constitutional protection for 'the freedom of speech'?"

That's a hard question in 2011, and it would have been a hard question in 1791, because it involves categorization: Is this, actually, a case about the authority of parents over their children? Or is it a case about the extent of the state's power to protect minors? The scope of the First Amendment rights of video-game manufacturers? Or the scope of the First Amendment rights of

minors? Nothing in Thomas's historical research tells me, or can possibly tell me, how people in the 18th century would have answered those questions.

So back to "Hamilton" the show, and Hamilton the person. Originalism always, necessarily, involves a game of "Pick Your Founder," and as a result, as our views of the Founders change over time, so too does the "original meaning" of the Constitution. Primus again:

What shapes constitutional law … is not the *actual* original meaning of the Constitution. It is the original meaning of the Constitution as imagined by judges and other officials at any given time. And how judges imagine the original meaning of the Constitution depends on their intuitions—half historical, half mythical—about the Founding narrative. If you can change the myth, you can change the Constitution…. [and] *Hamilton* is changing the myth.

[T]he lawyering class's intuitions about the Founding are poised to change. The blockbuster narrative of this election year retells the nation's origin story as the tale of a heroic immigrant with passionately progressive politics on issues of race and on issues of federal power. The audience is on its feet. So to all those Americans who expect original meanings in constitutional law to support mostly conservative outcomes, here is your Miranda warning [Nice!/DGP]: Within the foreseeable future, a jurisprudence of original meanings may fuel the most progressive constitutional decision making since the days of Chief Justice Earl Warren. Just you wait.

Needless to say, it's difficult to know in advance how deeply a Broadway musical or any work of art changes minds and intuitions about history. That it can do so is unarguable. "Hamilton" has tapped into something and given it voice, and I think it well within the realm of the possible that the next generation(s) of lawyers and judges and constitutional scholars will see a different vision of the Founding than the one we see today.

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