

# California Law Review

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VOL. 106

FEBRUARY 2018

NO. 1

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## Reclaiming the Constitutional Text from Originalism: The Case of Executive Power

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*There are consequences to theories in a world questioning the power of the President. For decades, some originalists, including Justice Scalia, maintained that the President enjoys “all” executive power. Of course, this is not the Constitution’s actual text (which refers to “the” executive power, not “all” executive power)—but a highly contestable, and potentially dangerous, addition of meaning to the text. As I demonstrate in this Article, adding to the actual text of the Constitution is common in the originalist literature on executive power, whether the precise question is the President’s removal power, the President’s power to refuse to enforce the law, or the President’s obligations under the Emoluments Clause. Using elementary principles from the philosophy of language—principles that apply to*

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DOI: <https://dx.doi.org/10.15779/Z38GQ6R246>

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\* Victoria Nourse, Jack N. Pritzker Visiting Professor of Law, Northwestern Law School; Professor of Law, Georgetown University Law Center. I want to thank my colleagues and friends (and they are my friends), Randy Barnett and Lawrence Solum, for inspiring a work that they may find overly contentious or deeply wrong. To John Mikhail, I owe an even greater debt for inspiring me to return to linguistic philosophy in aid of a clearer understanding of the constitutional text. Thanks, as well, to all those, including Greg Klass, Brian Galle, and others, who discussed this Article at a Georgetown University Law Center workshop. All errors are, of course, my own. I have obviously used a topic of current concern to highlight an issue of theoretical importance; none of these scholars, in my view, believes that the President can act contrary to law.

*all communication—I explain how originalist interpreters in this area “pragmatically enrich” the text, without articulating or justifying those additions and without seeking to test those meanings against the full text of the Constitution. Before one gets to history, the originalist has assumed a unit of textual analysis—a word, a clause, a paragraph—that may effectively enrich the meaning to reflect the interpreter’s preferred policy position. If this is correct, originalists must theorize the “interpretation zone,” a putatively neutral place from which historical inquiries are launched, and explain why interpreters may add meaning by pragmatic enrichment in this zone—particularly if those meanings are falsified by the rest of the Constitution. Perhaps more importantly, originalism’s opponents need to start talking about how to reclaim the actual text of the Constitution.*

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## INTRODUCTION

With the death of Justice Antonin Scalia, and Justice Neil Gorsuch confirmed, one very basic question remains as to whether the Supreme Court will now cleave more closely to Justice Scalia's theory of constitutional interpretation—originalism.<sup>1</sup> Even more important, given the current presidency, is the question whether the Court will accept Justice Scalia's textualist view of "executive power" as including "all" executive power. These issues of contemporary concern raise deeper theoretical questions about the relationship of originalism to textualism, including originalists' methodological commitments to an analysis that depends upon, but does not acknowledge, a kind of textual slicing and dicing that should be subject to greater scrutiny. Before one gets to history in originalist analysis, one starts with text and sometimes, as in "all" executive power, the purported text is not, in fact, the actual text of the Constitution.<sup>2</sup>

As Justice Elena Kagan has noted, we are all constitutional textualists and originalists now;<sup>3</sup> well not all,<sup>4</sup> but textualism has become an extremely

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1. As Randy Barnett has written, Justice Scalia was in fact a "faint-hearted" originalist, unwilling in many cases to overrule lengthy lines of precedent. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006); see, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (Scalia, J., concurring).

2. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) ("To repeat, Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States.' As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power."); see also *id.* at 726 ("*Humphrey's Executor* at least had the decency formally to observe the constitutional principle that the President had to be the repository of *all* executive power . . ."). Justice Scalia is not the only one who has urged that the President's powers are broad and plenary. See, e.g., Richard A. Epstein et al., *Federalism: Executive Power in Wartime*, 5 GEO. J.L. & PUB. POL'Y 309, 333 (2007) (quoting John Yoo as stating: "And then the Framers vested the executive power, all executive power, in the President, in contrast to Article I, which says the legislative Powers herein enumerated are vested in the Congress . . ."); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 217 (2005) (concluding that Congress "cannot regulate the President's constitutional powers"); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1038 (2011) (stating that the President has "all" executive power). Note that originalists differ on whether the President can act *contra legem*, which is to say, contrary to law. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 565 (1994) (noting claims of unenumerated, inherent presidential power to act *contra legem* and discussing the skepticism that greets such claims). At least one originalist takes the position that the term "executive power" is vague. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 470 (2013).

3. Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, at 8:29, HARV. L. TODAY (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/D682-ZKZL>]; *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (testimony of Elena Kagan).

4. Recently, Judge Posner has declared himself against textualism. See Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 176 (2016).

important conventional methodological position that deserves greater scrutiny.<sup>5</sup> In cases of first impression, constitutional text has been seen as important since the Founding.<sup>6</sup> On the other hand, the rather terse text of the Constitution cannot possibly account for constitutional doctrine's enormous reach. The vast, vast bulk of constitutional *law*—layers of scrutiny, expectations of privacy, undue burden tests—has little grounding in constitutional text. In our present world, textual originalism and common law constitutionalism exist simultaneously.

I leave to others exogenous normative critiques of originalism,<sup>7</sup> given its many, many meanings, some of them overtly politicized and others not.<sup>8</sup> History will play little role in this Article because I mean to question the interpretive step that occurs *before one consults ancient dictionaries*—the step that occurs in *selecting* and *interpreting* a constitutional text. I look seriously at the undertheorized textualist assumptions of “original public meaning”<sup>9</sup> focusing on originalist writing on executive power. *I will argue that originalist interpretations in this area do not, in fact, depend upon the literal text* but what linguistic philosophers call “pragmatic-enrichment”—a basic feature of linguistic communication—which *adds meaning to the text*. In these cases, it is not the text that decides but the interpretive meanings *added by interpreters before they have had recourse to history*. Just as Karl Llewellyn blasted canons

5. See, e.g., ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 16 (2011) (“A good *interpretation* aims at the fixed, original, linguistic meaning of the text.”).

6. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 407–08, 411–16 (1819) (considering the absence of “bank” or “incorporation” in the Constitution and interpreting the “necessary and proper” clause). I understand that the textual arguments in this case were embedded in a much richer context. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 749–58 (1999) (discussing various constitutional arguments employed in *McCulloch*, particularly intratextualism). Saying “text is important” is not to deny that other forms of argument were common and present in this case and others. In my view, the true “originalist” method was derived from Blackstone’s theory of statutory interpretation and is pluralistic. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59–62 (Univ. of Chi. Press 1979) (1765–1769) (discussing the various steps of statutory interpretation and how to resolve statutory ambiguity, including references to “subject matter” and “reason” of the statute).

7. See, e.g., David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015). David Strauss, among others, has argued that to accept originalism one would have to accept all sorts of unacceptable normative propositions. Originalist scholars have provided powerful rejoinders. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950–54 (1995) (arguing that an originalist interpretation of the Fourteenth Amendment would not permit school segregation). My critique is not about the normative consequences of particular decisions but undertheorized interpretive methodology and therefore should be of interest to originalists and non-originalists.

8. For a useful taxonomy of the varieties of originalism, including the term’s “thick” ability to combine both ideological and descriptive concepts, see Lawrence Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 6–9, 15–18 (Mar. 24, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2940215> [<https://perma.cc/XZ5A-8V7H>].

9. Original public meaning is described as “conventional semantic meaning” and is distinguished from original expected application meaning. BENNETT & SOLUM, *supra* note 5, at 11–16 (arguing that original public meaning is an argument about “the way that language works,” not an argument about normative ends).

from the inside, arguing that there is a counter-canon for every canon,<sup>10</sup> this Article argues, from what appears to be “inside” the interpretation zone, that originalists and non-originalists must have a much more precise, and theorized, approach toward the constitutional text.<sup>11</sup> In the cases that follow, the hard edges of constraint are too often edges added by interpreters.

Originalists complain that scholars refuse to be “bound by the actual words of the Constitution because those words are obstacles to noble objectives.”<sup>12</sup> If this is true, it is time for those who have resisted textualism to embrace what I call “analytic textualism.” I accept the notion that text, where clear, governs. Text can operate as the conscience<sup>13</sup> of a court whose own precedents have strayed far and wide. I also recognize that originalists differ in their theoretical approach and their view of executive power.<sup>14</sup> On the other hand, a good deal of originalist analysis of executive power lacks a consistent theory of the unit of textual analysis or awareness that originalist interpretations can, in fact, add meaning to the text of the Constitution, before resorting to historical materials. If I am correct about the choice and enrichment of text in this area, both textualists and originalists must consider whether this “added meaning” phenomenon is generalizable to other areas of constitutional law<sup>15</sup> and whether

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10. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

11. Lawrence Solum has done the most to theorize textual analysis in originalist theory, and my approach here would not exist but for his attention to textual detail and philosophical nuance. Indeed, Solum was the first to identify pragmatic enrichment and presupposition in textual analysis of the Constitution. See Solum, *supra* note 2, at 465 n.47.

12. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 2* (Princeton Univ. Press rev. ed. 2014) (2004).

13. As Thomas Jefferson asserted, “written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally [and] recall the people . . . .” Eric R. Nitz, Note, *Comparing Apples to Apples: A Federalism-Based Theory for the Use of Founding-Era State Constitutions to Interpret the Constitution*, 100 GEO. L.J. 295, 297 (2011) (quoting Letter from Thomas Jefferson to Doctor Joseph Priestley (June 19, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON 158, 159–60 (Paul Leicester Ford ed., 1897)). To accept this is not to concede the point that text always constrains; this is a claim that text can reflect an experience of life that, as a normative (as opposed to a linguistic) matter, deserves recognition. For example, a redemptive originalism would urge judges to reconsider why they have read the privileges and immunities clause out of the Constitution.

14. Libertarian originalists have every reason to reject broad executive power. Larry Solum has written that the term “executive power” is vague. Solum, *supra* note 2, at 470. This is contrary to the claims of Calabresi and Prakash, Calabresi & Prakash, *supra* note 2, at 557, and Calabresi and Rhodes, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); see also STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (examining presidential power under each presidential administration from George Washington through George W. Bush and arguing that all advanced the unitary executive theory); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996) (affirming the interpretation of the Vesting Clauses as a grant of power).

15. There are reasons to think that it is. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573, 2586–87 (2012) (Roberts, C.J., majority opinion) (writing that the Affordable Care Act violated the Commerce Clause, reading that clause as covering only “existing” commerce); *Marbury v.*

it is consistent with originalism's basic commitments to the text. Perhaps more importantly, this Article should be a provocation for those who disagree with originalism: the non-textualist and non-originalist cannot simply ignore text; they must learn to work out, and resist, textual claims that are not in fact found in the Constitution.

The roadmap: In Part I, I consider the state of originalism and its presumptions about text and history, arguing that, in the case of executive power, originalists have relied upon text as much as history. In Part II, I argue that originalists theorize an "interpretation zone" in which meaning is non-normative and self-evident but that this makes two crucial contestable assumptions. These are: (1) the originalist has chosen the proper and only relevant text and has not added to the text by pragmatic inference; and (2) the text chosen—one or two words in some cases—amounts to the proper unit of textual analysis. Using two basic principles from the philosophy of language—pragmatic inference and cancellation—this Part amplifies this methodological critique. In Part III, the concepts developed in Part II are applied to famous cases about executive power from *Steel Seizure* to *Morrison v. Olson*.<sup>16</sup> I argue that liberal and conservative judges are not, in fact, relying upon the text but adding to the text on executive power and that the whole text can falsify their inferred additions. In Part IV, I apply this critique to originalist arguments on topics of current importance relating to the President's powers, including the Emoluments Clause, the removal question, and the President's non-enforcement power. I demonstrate contestable textual enrichment in each area. Finally, in Part V, I consider objections to this claim, distinguish it from other theories on constitutional text (such as intratextualism and holism), and defend pluralism as a restraint on false textual meanings.

## I.

### ORIGINALISM'S TEXTUAL METHODOLOGY

Theories of originalism abound. So do critiques. Once upon a time, theorists argued about whether one should care about the Founders' original expectations; now they search for "original public meanings."<sup>17</sup> In the 1990s, originalism's critics seemed satisfied to say that history was vague, and the

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Madison, 5 U.S. (1 Cranch) 137, 173–75 (1803) (reading Article III original jurisdiction as exclusive); see also Victoria Nourse, *Picking and Choosing Text*, 70 FLA. L. REV. (forthcoming 2017) (applying this analysis to a variety of statutory cases).

16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Morrison v. Olson*, 487 U.S. 654 (1988).

17. BARNETT, *supra* note 12, at 95; Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 22–23 (Grant Huscroft & Bradley W. Miller eds., 2011).

Founders themselves were faint-hearted originalists.<sup>18</sup> By the end of the decade, many thought originalism dead.<sup>19</sup> Meanwhile, in real life, originalism has grown stronger. It has grown stronger on the Supreme Court, where it has had notable victories.<sup>20</sup> As Justice Kagan has said, we are all originalists now.<sup>21</sup> And it has grown stronger in the academy: those who once argued against originalism have rebranded themselves “living originalists,”<sup>22</sup> while an array of scholars invoke “original meanings” to support liberal or libertarian causes.<sup>23</sup> It seems worthwhile, at this moment in time, to pay attention to originalism—from a different perspective—from *inside its textual presumptions*.

The critique that follows differs from standard external complaints against originalism. Others have claimed that originalism yields unfortunate outcomes<sup>24</sup>—that it embraces racism or excludes women—critiques that over time have waned as originalists have written lengthy histories denying such claims.<sup>25</sup> Still others continue to claim that judges are incapable of historical analysis<sup>26</sup> or that the Founders themselves were not originalists.<sup>27</sup> Others seem more resigned, claiming to turn the tables, urging that originalism is really living constitutionalism in historical disguise.<sup>28</sup>

All of these things may be true but are irrelevant for my argument, which is pitched at a higher level of abstraction. I assume, for purposes of this argument, originalism’s most basic claim—that the text of the Constitution is the rule of law. For decades, this has been the *cri de coeurs* of originalists who argue that judges and their “academic enablers . . . think they can improve upon the original

18. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–13 (1999) (discussing a movement in the 1980s that criticized originalism as unworkable and inconsistent with the expectations of the framers).

19. *Id.* at 611 (“The received wisdom among law professors is that originalism is dead . . .”).

20. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (relying on originalist reasoning to hold that the Second Amendment protects an individual right to bear arms).

21. *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (testimony of Elena Kagan).

22. JACK M. BALKIN, *LIVING ORIGINALISM* (2014).

23. *See, e.g.*, LAURA K. DONOHUE, *THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE* (2016) (applying the original meaning of the Fourth Amendment in the context of modern intelligence programs).

24. *See* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Strauss, *supra* note 7.

25. *See, e.g.*, Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011); McConnell, *supra* note 7.

26. *See, e.g.*, Saul Cornell, “Don’t Know Much About History” *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657 (2002) (highlighting the flaws in judicial treatment of Second Amendment history); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524–26 (1995) (noting the tendency of judges to refer to problematic historical analysis).

27. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

28. *See* BALKIN, *supra* note 22.

Constitution . . . .”<sup>29</sup> As Randy Barnett writes, “[w]hy care about what the Constitution actually says, as opposed to what we might prefer it to say . . . ?”<sup>30</sup> It has also been the cry of many who have argued insistently over executive power. To give just one example (more will follow later), consider the grand arguments about the “unitary executive,” a concept that has been embraced by Justice Scalia in one of his most important dissents and which has produced book length treatments.<sup>31</sup> Unitary executives argue that the *constitutional text* demands that the President have hierarchical authority over the executive branch.

In 1994, Cass Sunstein and Larry Lessig wrote a lengthy article in the *Columbia Law Review* arguing that the originalist claim for a “unitary executive” was inconsistent with history; the earliest Congresses exercised discretion to shape the executive branch.<sup>32</sup> In reply, originalists Steven Calabresi and Saikrishna Prakash wrote a very lengthy piece in the *Yale Law Journal*, chastising Sunstein and Lessig for their *historical* method. The point of originalism, Calabresi and Prakash insisted, was not history *but text*. Calabresi and Prakash wrote: “[I]t seems clear that those who wish to *understand the meaning of a new constitutional text must start with the words of the text* and then see what their public meaning was at the time they were ratified into law.”<sup>33</sup> In their more recent book length treatment of the unitary executive, Calabresi and Christopher Yoo reiterate their argument that historical practice should yield to the “text and structure of the Constitution.”<sup>34</sup>

Since these claims were made, originalist theory has expanded and become more precise. Originalists have expended a good deal of effort distinguishing between *interpretation* and *construction* of constitutional text.<sup>35</sup> As one of the leading proponents of this theoretical distinction, Lawrence Solum writes:

The interpretation-construction distinction, which marks the difference between linguistic meaning and legal effect, is much discussed these days. I shall argue that the distinction is both real and fundamental—that it marks a deep difference in two different stages (or moments) in

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29. BARNETT, *supra* note 12, at 1.

30. *Id.* at 1–2.

31. *Morrison v. Olson*, 487 U.S. 654, 727, 732 (1988) (Scalia, J., dissenting); see CALABRESI & YOO, *supra* note 14.

32. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

33. Calabresi & Prakash, *supra* note 2, at 557 (emphasis added).

34. CALABRESI & YOO, *supra* note 14, at 8.

35. For an early treatment, see BARNETT, *supra* note 12. Solum defines the “construction zone” as the set of issues and cases for which the communicative content of the constitutional text does not provide a fully determinate answer—a zone of underdetermination. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010). By way of analogy, the “interpretation zone,” would be the set of issues and outcomes for which the communicative content of the text does not provide a determinate (or nearly determinate) outcome. See Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 464–66 (2016).



the way that legal and political actors process legal texts.<sup>36</sup>

Although some originalists have taken issue with the distinction,<sup>37</sup> many others embrace it. Keith Whittington, for example, has dubbed constitutional interpretation essentially “legalistic,” while constitutional construction is necessary to resolve linguistic “indeterminacies.”<sup>38</sup> Randy Barnett similarly supports the interpretation-construction distinction, writing that “[w]hat defines originalism as a method of constitutional interpretation is the belief that (a) the semantic meaning of the written Constitution was fixed at the time of its enactment and that (b) this meaning should be followed by constitutional actors until it is properly changed by a written amendment.”<sup>39</sup> Even those originalists who have sought to distance themselves from “original meaning” as the only

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36. Solum, *supra* note 35, at 95; *see also* Solum, *supra* note 2, at 492–95; Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 568–77 (2010); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 971–80 (2009); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 436–38 (2009); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law Research Paper No. 07-24, 2008), <https://ssrn.com/abstract=1120244> [<https://perma.cc/RC9Y-X84C>].

37. *See* Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1747 n.25 (2013) (referring to Solum’s approach as “an idiosyncratic and unnecessary wrinkle that other originalists have not fully appreciated and are unlikely to find congenial”); Roderick M. Hills, Jr., *The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) (arguing that no distinction exists where “the meaning of a constitutional provision is its implementation”); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 772–75 (2009) (objecting to the interpretation-construction distinction because original interpretive rules offer a plausible way to resolve ambiguity and because construction was not embraced by the founders); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 615–16, 616 n.34 (2008) (citing the interpretation-construction distinction as an example of a new originalist distinction that is “hardly intuitive, whose precise application may lead to missteps”); *see also* Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONST. COMMENT. 71, 76–80 (2010) (describing differing views about the interpretation-construction distinction and concluding that the distinction is “neither obvious nor identifiable through the application of an accepted and uniform set of rules”); B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the “Pragmatic Moment,”* 91 TEX. L. REV. 1815, 1831 (2013) (observing that the “context dependency of language . . . throws into question” the interpretation-construction distinction).

38. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 7 (1999); *see also* KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1–19 (1999).

39. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011); *see also* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013) (discussing “New Originalism” and a “gravitational force” that originalism exerts on legal doctrine regardless of whether originalism provides the basis for the decision); Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 616 (2009) (challenging the assumption that the original meaning of the Constitution is consistent with segregated schools or the inferiority of women); Barnett, *supra* note 18, at 660 (arguing that originalism survived the challenges it faced in the 1980s and has become the dominant approach to constitutional interpretation).

constraint on constitutional interpretation, acknowledge that there is some safe, neutral zone of textual meaning.<sup>40</sup>

Accepting that textual analysis is the first step in proper constitutional approach, I question the neutrality of that first step in what I might call, bowing to Lawrence Solum, the “interpretation zone.” Focusing on the field of executive power,<sup>41</sup> I contend that originalist interpreters of executive power regularly misread the Constitution’s text. *Not to put too fine a point on it, originalists specializing in this field of executive power too often make up their own preferred meaning of the text*, enriching the text’s meaning with strained inferences. This is not true of all originalists,<sup>42</sup> but it is certainly true of enough work on presidential power that it deserves greater scrutiny. To demonstrate that these are in fact additions to meaning, I deploy a “falsification” approach to read the Constitution. This approach is both more precise and more faithful to the full document. It requires that the interpreter (1) work out what interpreters add, by implication, to the text; and (2) work out whether that implication is cancelled (falsified) by the rest of the text. If there is more than one implication, the interpreter must engage in constitutional “construction,” based on traditional pluralist interpretive tools.<sup>43</sup>

Call this textual methodology “analytic textualism.” This approach rejects the tendency to pull single words or terms from the Constitution out of context and put them in an entirely new context to create new meanings. My approach is a post-originalist theory in the sense that Scott Soames has described post-originalism or as Lawrence Solum has elaborated it in his methodological writings;<sup>44</sup> it claims, like Richard Fallon, that originalists need a better theory of textual meaning.<sup>45</sup> Unlike Fallon, who contends that there are many possible theories of meaning, I argue that any theory of constitutional meaning must depend upon basic principles of communication. At a minimum, any asserted

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40. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

41. It is entirely possible, of course, that this thesis does not apply to other areas of originalist thought, such as the meaning of the “commerce power,” Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623 (2012), or the Second Amendment, Solum, *District of Columbia v. Heller and Originalism*, *supra* note 36. Of course, given that my theory rests on basic features of communication, it would be entirely appropriate in future work to test that hypothesis.

42. See, e.g., Solum, *supra* note 2, at 470 (executive power is vague).

43. For a discussion of pluralism, see PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982) (providing a classic elucidation of forms of pluralism); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (advocating for a “constructivist coherence” method of interpretation, which centers on the use of multiple constitutional arguments).

44. Soames calls his theory *deferentialism*. Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597 (2013); see also Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) (articulating an originalist methodology that draws on linguistic theories as well as legal theory and emphasizes the role of context in constitutional interpretation and construction).

45. Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1241–43 (2015).

inference from the text must not be inconsistent with the rest of the Constitution. By “inconsistency,” I mean that hypothesized meanings may not be “falsified” or “cancelled” by the rest of the Constitution. (In Part II, I explain what I mean by “falsify” or “cancel.”) Not only should non-originalists find this welcome but so too should originalists. In theory, there is nothing inconsistent with this approach to the text and the basic commitments of originalist theory, nor is it inconsistent with a more robust version of pluralism.<sup>46</sup> My claims are simply about the beginning of the analysis, not about what happens when there is no text or when the text is ambiguous—something I expect happens in almost every case that reaches the Supreme Court.

If one accepts this approach, one will find that there are no textual answers to the “executive power” questions raised here. Because there is no “hard textual answer” to these questions, courts must, in my view, turn to standard pluralist methods: history, structure, precedent, and consequences to resolve conflicting textual interpretations. Pluralism is ancient, reaching back to the Founding,<sup>47</sup> but it has been incorrectly theorized as a grab bag of approaches rather than as a constraint against false hypothesized readings. In fact, a restrained pluralism<sup>48</sup> resists false readings by testing the words against their effects: how the world has treated these questions in the past and what has happened because of these words in the world, to the Constitution and real life (what Madison called the “liquidat[ion]” of meaning).<sup>49</sup> This Article does not purport to provide a full theory of constitutional interpretation or a full defense of restrained pluralism; it takes the first step in that direction by suggesting a previously untheorized conception of pluralism as a constraint on false textual enrichment.

Some will find “analytic textualism’s” approach too narrow, insisting that all great theories of the Constitution must depend upon grand political morality. There is a problem with this “they go low, we go high” strategy: elitism. One reason that originalism has had a real political effect in the world is that its core idea—the importance of the constitutional text—speaks to citizens. The idea that the Constitution can be read, and presumably understood, by everyone is an important element in our constitutional and political culture. To argue that constitutional theory must emphasize the Supreme Court’s complex judicial

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46. Originalists, at a minimum, believe in the fixation of text and that text constrains. *See* BENNETT & SOLUM, *supra* note 5, at 2. Those two commitments are entirely consistent with “analytic textualism” based on reading the “whole” text. To the extent I endorse pluralism, which would include review of interpretive consequences, my view is unlikely to be viewed as originalism.

47. *See* 1 BLACKSTONE, *supra* note 6.

48. I recognize that, for some, this will represent a radical restructuring of the conventional ideas of pluralism but, alas, the focus of this Article on executive power does not permit a greater defense than provided in Part IV.

49. THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob Ernest Cooke ed., 1961). Liquidation of meaning over time is different from early uses of particular texts of the Constitution as a kind of lexicon. Liquidation in the sense I am using it here involves the notion that practice over time yields real world experiences solidifying a position on an otherwise vague text. An originalist is likely to consider the former lexicon use but may not necessarily consider the latter.

doctrine,<sup>50</sup> or judges who like to make the Constitution “live,”<sup>51</sup> or moral theorists who want to dictate “right answers,”<sup>52</sup> is to imply, even if unintentionally, that the Constitution is above the people. The originalist insistence on the text of the Constitution is something no citizen is likely to deny. Whatever elite courts may do, the power of the Constitution’s text means something in everyday American politics.

The battle that follows will be pitched, in the first parts, at the level of words, which will cause some discomfort to those preferring grander theory. Academics tend to value high levels of abstraction. They also tend to value theories that have little real world potential: throwing the Constitution to the winds or holding a new constitutional convention.<sup>53</sup> From these perspectives, my approach may seem petty, picayune, or insufficiently theoretical. But if the real world is fighting at a different pitch, at a level where words constitute bullets, to refuse to resist those bullets because it is beneath one’s station is to resign oneself to the possibility of grave injury, all the while claiming one is above the battle. Given the current state of the Supreme Court, it is unlikely that originalism’s jurisprudential gestalt will disappear. Justice Gorsuch will only strengthen that tendency in a world that will raise important questions about the exercise of presidential power. It is time, then, to test the textual (as opposed to the historical) theories upon which originalist theories of executive power are based.

## II.

### SPARSE TEXT, ADDED MEANING

The most obvious and basic feature of our Constitution is that its text is sparse. Economy of expression distinguishes a constitution from a legal code. No linguist denies that, faced with skimpy texts, interpreters are likely to interpolate or add to the meaning of raw text when seeking to apply the text to a particular context. Linguists call these “pragmatic enrichments” or “pragmatic inferences.”<sup>54</sup> Put more colloquially, interpreters tend to fill in the blanks in any communication. It is equally basic that these enrichments are hypothesized

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50. See Strauss, *supra* note 7.

51. STRAUSS, *supra* note 24. I reject the term “living constitutionalism” as verging on the oxymoronic. “Living” suggests instability and constitutionalism denotes stability. This is a very poor term to describe what I believe to be the most stable theory of constitutional methodology, pluralism.

52. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 185–86, 279–90 (1977) (challenging the idea that no “right answer” exists for difficult questions of law and morality).

53. See, e.g., SANFORD LEVINSON, FRAMED (2012) (arguing that the U.S. Constitution, like many state constitutions, warrants updating); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012) (arguing against the view that the Constitution is binding and in favor of disobedience). I too value these theories as a legal academic seeking to understand the Constitution’s role in a larger polity, but my experience in courts and in politics makes me wonder about their value to constitutional law, which has increasingly pitched itself in an entirely different register.

54. See generally STEPHEN C. LEVINSON, PRAGMATICS (1983); DEIRDRE WILSON & DAN SPERBER, MEANING AND RELEVANCE 3–10 (2012); PERSPECTIVES ON PRAGMATICS AND PHILOSOPHY 89–90 (Alessandra Capone et al. eds., 2013).

meanings—they are not the “actual” meaning of the text but attempts to apply the raw text to a particular context, by the addition of meanings. These hypothesized, enriched meanings can, in turn, be falsified by consulting new, conflicting information.

A. *Meaning, Pragmatic Inference, and Originalism*

Like all forms of communication, the Constitution is economical, using relatively few words to convey meaning. All speech is economical in some sense—it typically says less than it means.<sup>55</sup> I may say to you, “I’ll go get that.” The listener will have to rely upon the context of “that” to determine the meaning of my communication.

In linguistics, context adds meaning and is typically considered to add meaning by “pragmatic inference.”<sup>56</sup> So, for example, if I say “fifth” and the interpreter assumes that I am referring to the “Fifth Amendment to the U.S. Constitution,” she has “enriched” the meaning by adding a legal context. Literally, the term “fifth” could mean any number of things, from the fifth linebacker to a fifth of gin, depending upon whether I was at a football game or in a liquor store. Specifying some features of context does not eliminate the potential for pragmatic enrichment. If we all know that I am saying “fifth” in a legal context, without further clarification, I could still mean anything from the fifth paragraph in a contract to the Fifth Amendment to the Constitution or the fifth Article of the U.S. Code.

For purposes of this Article, I will use the term “pragmatic inference” or “pragmatic enrichment” to mean the kind of addition to meaning that philosophers of language describe when they talk about interpretation. The linguistic philosopher Scott Soames offers the following example to show how even the most basic of terms may need additional information to precisify meaning: “Matriculated students are allowed to take five courses.”<sup>57</sup> At the semantic level, this statement does not tell us whether the term “*five*” means *exactly five*, *at least five*, *at most five*, or other contextually determined qualifiers of “five.”<sup>58</sup> If the interpreter adds “exactly” or “at least,” they are adding meaning separate and apart from the term “five.” Linguists, such as Kent Bach, call this form of interpretation by the name “implicature,” on the theory that the interpreter adds meaning already implicit in the expression. Other linguists

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55. See, e.g., WILSON & SPERBER, *supra* note 54, at 10–12 (explaining how implicatures and explicatures communicate meaning beyond what the speaker has said).

56. See STEPHEN C. LEVINSON, PRESUMPTIVE MEANINGS: THE THEORY OF GENERALIZED CONVERSATIONAL IMPLICATURE 20–22 (2000) (arguing that interpreters add meanings to semantic content based on generalized assumptions); see also PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989) (establishing the basis for Grice’s theory of language, including his theory of pragmatic implicature).

57. Scott Soames, *Drawing the Line Between Meaning and Implicature—and Relating Both to Assertion*, 42 NOÛS 440, 451 (2008).

58. *Id.* at 451–53.

purporting to follow or reject the work of Paul Grice might use the names “implicature” or “explicature.”<sup>59</sup> For my purposes, internecine debates within linguistics about these terms matter less than the notion that contextual enrichment occurs by inference due to the economy of expression. Pragmatic inference is not a linguistically controversial practice. Contending camps within linguistics, semanticists and pragmatists, have embraced this idea.<sup>60</sup>

Lest this seem orthogonal to originalism, some theorists of originalism have embraced the notion that pragmatic enrichment is part of interpretation, a part that precedes any “construction” of vague terms.<sup>61</sup> In short, they have posited that there is some space where meaning is clear and can be precisified by historical example or definitions,<sup>62</sup> even if there exists a large, and capacious, role for courts to play in constitutional construction—in cases where the Constitution’s words are cavernous and aspirational (i.e. “due process of law,” “equal protection of the law”). Originalists debate the scope of constitutional construction and even the distinction between interpretation and construction,<sup>63</sup> but, as a general rule, they theorize that there is a space where interpretation yields meanings that determine or nearly determine legal content. Call this the “interpretation zone.” Even those theorists, like Will Baude and Stephen Sachs, who question whether public meaning can do all “originalist” work and seek constraint in canons of construction, posit a realm of easy cases where meaning

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59. See Kent Bach, *The Top 10 Misconceptions About Implicature*, in DRAWING THE BOUNDARIES OF MEANING: NEO-GRICEAN STUDIES IN PRAGMATICS AND SEMANTICS IN HONOR OF LAURENCE R. HORN 21 (Betty J. Birner & Gregory Ward eds., 2006). “Implicature” comes from Grice, although now it is a term of art accepted, if contested, by a variety of linguists. See, e.g., Laurence R. Horn, *Implicature*, in THE HANDBOOK OF PRAGMATICS 3 (Laurence R. Horn & Gregory Ward eds., 2004); YAN HUANG, PRAGMATICS 25–83 (2d ed. 2014) (discussing various theories of implicature, including Gricean and neo-Gricean pragmatic theories). “Explicature” is associated with Wilson and Sperber’s relevance theory. See WILSON & SPERBER, *supra* note 54, at 160. None of these theorists deny that contextual enrichment occurs by inference due to economy of expression.

60. See, e.g., JAMES R. HURFORD, BRENDAN HEASLEY & MICHAEL B. SMITH, SEMANTICS: A COURSEBOOK 260–326 (2d ed. 2007); NICK RIEMER, INTRODUCING SEMANTICS 118–20 (2010); JOHN I. SAEED, SEMANTICS 210–19 (4th ed. 2016); see also WILLIAM G. LYCAN, PHILOSOPHY OF LANGUAGE: A CONTEMPORARY INTRODUCTION 165 (2d ed. 2000) (discussing the importance of context and noting that pragmatics is “about the functioning of language in context”); CONCISE ENCYCLOPEDIA OF PHILOSOPHY OF LANGUAGE AND LINGUISTICS 308–21 (Alex Barber & Robert J. Stainton eds., 2010) (discussing the prevailing approaches to implicature); KEY IDEAS IN LINGUISTICS AND THE PHILOSOPHY OF LANGUAGE 86–92 (Siobhan Chapman & Christopher Routledge eds., 2009) (discussing implicature generally).

61. See e.g., Solum, *supra* note 44, at 278, 286–92; Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1125–28 (2015).

62. Solum, *supra* note 44, at 278 (“[I]nterpretation is a factual inquiry that yields communicative content, whereas construction is a norm-guided activity that yields constitutional doctrines, decisions in constitutional cases, and constitutionally salient actions by officials.”); see also John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015) (employing Gricean principles to understand what powers the Constitution vests in the federal government); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011) (arguing that the Ninth Amendment should be read as a precise and limited rule of construction).

63. McGinnis & Rappaport, *supra* note 37.

can be determined by dictionaries, history, or through the application of canons.<sup>64</sup>

My claim here is not that such a place does not exist, but that, if there is a neutral “interpretation zone,” it does not resolve many important constitutional questions on executive power. No one doubts, for example, that each state elects two Senators, but that question is easy and not likely to be contested in the future. Precisely because the Constitution is so sparse in its terms, it requires enriched hypothesized meanings to answer real life problems, and because it requires such hypothesized, additional meanings, one must fear that the scope of a neutral, interpretation zone is quite small. If the examples I offer below are correct, they show that in a large range of cases involving executive power—from the removal power, to the Emoluments Clause, to the President’s power to refuse to enforce law—originalist interpreters have not applied the actual text. They have added hypothesized text that can be, and often is, falsified by the rest of the Constitution.

Some originalists will no doubt object that I am confusing interpretation and construction zones. Lawrence Solum, for example, has written that the very meaning of “executive power” is vague and thus its application to borderline cases requires some method of constitutional “construction.”<sup>65</sup> But originalists specializing in executive power have taken precisely the opposite line, declaring the text to be clear or clearly capable of interpretation.<sup>66</sup> As noted above, they openly and fervently *reject historical evidence in favor of text*. I do not disagree with Solum that what is involved here is “construction”; I do disagree with the vast amount of work that has been written assuming that questions about executive power—from non-enforcement to removal to emoluments—sits in a neutral, norm-free, “interpretation zone.”

### B. Pragmatic Inference, Linguistics, and Cancellation

History, if nothing else, shows that the Supreme Court makes important, and perhaps crucial, inferences embellishing the actual, constitutional text. One of the most revered Supreme Court opinions—*McCulloch v. Maryland*<sup>67</sup>—explains the process of pragmatic inference. The question there was the meaning of the “Necessary and Proper” clause.<sup>68</sup> Chief Justice John Marshall wrote that the term “necessary” has no “fixed” character, but “admits of all degrees of

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64. Baude & Sachs, *supra* note 40, at 1143 (“[T]he easy cases . . . seem easy because a particular theory has become second nature . . . It’s an easy case . . . that a new criminal statute takes the laws of duress or accessory liability as it finds them.”).

65. Solum, *supra* note 2, at 470. Solum argues that “construction” occurs when one moves from semantic content to legal effect.

66. CALABRESI & YOO, *supra* note 14; Calabresi & Prakash, *supra* note 2, at 557; Calabresi & Rhodes, *supra* note 14; Lawson & Moore, *supra* note 14.

67. 17 U.S. 316 (1819).

68. U.S. CONST. art. 1, § 8, cl. 18.

comparison.”<sup>69</sup> Those comparisons are provided by “*other words*” that “increase or diminish” the urgency of the matter: a thing may be “necessary, very necessary, absolutely or indispensably necessary.”<sup>70</sup>

Without saying so, Chief Justice Marshall has explained the principle of pragmatic inference, noting that the term “necessary” is only precisified by adding modifiers, modifiers that clarify meaning. In other words, Chief Justice Marshall is identifying a range of potential pragmatic enrichments. Chief Justice Marshall highlights that the state of Maryland is making an inference when it argues that the term “necessary” means “absolutely” necessary. Chief Justice Marshall rejects that addition of meaning, referring to another clause in the Constitution which does, in fact, use the term “absolutely necessary” to limit the power of states to impose taxes on imports.<sup>71</sup>

In this opinion, then, Chief Justice Marshall shows us what philosophers of language call pragmatic inference—additions made to precisify text—but he gestures as well to the notion that the whole text may add information relevant to the purported pragmatic addition.<sup>72</sup> In philosophical linguistics, this idea is captured more precisely by the idea of “cancelling” a pragmatic inference, a phenomenon that the linguistic philosopher Paul Grice first identified.<sup>73</sup> Cancellation means that new information may “cancel” the original purported pragmatic enrichment. One common example is that of the “professor, writing a letter of recommendation for a job candidate,” who writes only that her student’s “command of English is excellent, and his attendance in class has been regular.”<sup>74</sup> The implication—technically, an implicature—is that the candidate is not terribly qualified, even if the letter does not literally say that. That added implication can be “cancelled” if the letter writer continues and says, “and she received the best score on her exam.” The original pragmatic inference (she is not a very good student) is cancelled by the addition of information (she scored high on the exam). Another common example involves “a stranded motorist seeking help.” The motorist says, “I’m out of gas,” and the response is: “There is a gas station around the corner.” This implicates a presupposition that the gas station is “open for business.” That implicated presupposition, however, can be negated or cancelled by additional information—“but the gas station is closed.” If this is correct, it is possible that purported inferences obtained from sparse or

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69. *McCulloch*, 17 U.S. at 414.

70. *Id.* (emphasis added).

71. *Id.*

72. For a commanding analysis of all of Chief Justice Marshall’s intertextual moves, see Amar, *supra* note 6, at 749–58. As I explain in Part IV, intratextual analyses can fall prey to purported enrichments as well.

73. LEVINSON, *supra* note, 54, at 114 (“[Grice] isolates five characteristic properties of which the first, and perhaps the most important, is that they are cancellable, or more exactly defeasible.”). For its application in constitutional analysis, see Mikhail, *supra* note 62, at 1073–75.

74. Soames, *supra* note 57, at 442.



partial texts can, in fact, be falsified by adding to the information economy (i.e. consulting more text).<sup>75</sup>

Critics might argue that relying upon Grice's work raises problems: Controversy surrounds Grice's theory of conversational maxims. Nothing in my argument depends, however, upon the validity or multiple reinterpretations of Gricean maxims. Even linguists who reject those maxims, or reconceive them entirely, accept the concepts of "pragmatic inference" and "cancellation."<sup>76</sup> As one linguist I spoke to said, "no one denies the idea of pragmatic enrichment."<sup>77</sup> Similarly, there is a consensus about "cancellation,"<sup>78</sup> which is to say, the basic concept that what we add by pragmatic enrichment may be negated by further information in "full" communication. These ideas are well accepted by a wide variety of linguists.<sup>79</sup> In this Article, I generalize from these more technical concepts to consider how interpreters "enrich" meaning, how those "enrichments" may be contested or inconsistent with competing enrichments, and in some cases, how the full text explicitly cancels or negates these enrichments.

Some may object that we should not view the Constitution as a conversation because it is a formal document, a document meant to cohere in ways different from daily conversation. That idea resonates with originalists and textualists who regard the Constitution as a contract.<sup>80</sup> That idea is wrong, in my view,<sup>81</sup> but irrelevant to the claims made here. Even if one conceives of the Constitution as a contract, it is not a secret contract, hidden from the people. As long as we think that the Constitution communicates, we should accept the idea that it is likely to be read in ways similar to other communications. One of the signature qualities of our Constitution is brevity; there is no reason, then, to reject the notion that interpreters will add meaning by pragmatic inference<sup>82</sup> to the constitutional text.

Even if one believes that the Constitution is somehow immune from principles governing language more generally, enrichment, contested enrichment, and cancellation remain relevant to any *internal* critique of originalist theories. Richard Fallon has argued that there are various legal "meanings" of "meaning" used by lawyers that may not track semantic or linguistic meaning. For Fallon, since "meaning" is itself a matter of contention,

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75. *Id.* at 443.

76. See Mikhail, *supra* note 62, at 1073–75; *supra* note 53 and accompanying text.

77. Nick Allott, University of Oslo.

78. See Mikhail, *supra* note 62, 1073–75 (discussing a common example of the distinction between implication and entailment, including a discussion of cancellation).

79. See, e.g., LEVINSON, *supra* note 54, at 114; WILSON & SPERBER, *supra* note 54, at 309–12 (discussing the concepts implied from the context and their cancellation).

80. See Baude & Sachs, *supra* note 40.

81. And in the view of other scholars. See, e.g., Barnett, *The Misconceived Assumption About Constitutional Assumptions*, *supra* note 39, at 616 (criticizing "a mistaken conflation of constitutions and contracts").

82. Some originalists, like Larry Solum, agree with the idea that interpretation includes pragmatic inferences. See Solum, *supra* note 35.

originalist claims cannot safely find constraint in *original* meanings.<sup>83</sup> I agree with Fallon’s claims that language is not enough to resolve great constitutional cases, but the problem lies deeper than ambiguities about “meaning.” Even if one assumes a unified definition of meaning, given the linguistic economy of the Constitution, interpreters will be forced to add meaning by “pragmatic enrichment” to resolve particular controversies. This move can occur under any theory of meaning—intended meaning, reasonable meaning, or dictionary meaning. As we will see, *the very choice of a relevant text is itself capable of yielding pragmatic enrichment*. That choice and the potential for enrichment, both in theory and in practice, occurs *before* the application of history or canons of constitutional construction. To use *McCulloch* as an example, if one enriches the term “necessary” with the idea of “absolute” necessity, and then looks to original public meaning or canons of construction to confirm that meaning, one is simply confirming the *interpreters’ added meaning*, not the actual, underdetermined, meaning of the constitutional text.

### III.

#### ENRICHING EXECUTIVE AND LEGISLATIVE POWER

Now that I have introduced the concepts of enrichment, contested enrichment, and cancellation, let me generalize and apply these ideas to some of the Supreme Court’s most famous cases on executive power. I begin with an opinion written by a liberal textualist, Justice Hugo Black, and then turn to one written by a conservative textualist, Justice Scalia. In both cases, the opinions depend upon purported pragmatic enrichments—additions to the text, not the actual text—that are contested and may be cancelled by the full text. In Part IV, I turn to contemporary constitutional controversies to show how this interpretive tendency affects scholarly treatments of the removal power, the Emoluments Clause, and the President’s power to refuse to enforce the law.

##### A. A Liberal Textualist Argument and Its Pragmatic Enrichment

In a number of cases, the Justices have been asked to consider the extent of the President’s executive authority. In the most famous of these cases, *Youngstown Sheet and Tube Co. v. Sawyer*, Justice Black, a liberal textualist, urged that President Harry Truman could not seize domestic steel mills because he was exercising “legislative” rather than “executive” power.<sup>84</sup> As Justice Black wrote: “The Constitution limits his functions in the lawmaking process to the recommending of laws [the President] thinks wise and the vetoing of the laws he thinks bad.”<sup>85</sup> As many critics of the Black opinion have noted, executive agencies engage in “lawmaking” every day—they issue regulations—and the

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83. See Fallon, *supra* note 45.

84. 343 U.S. 579, 587–88 (1952).

85. *Id.* at 587.

President issues executive orders. If the President makes law in these ways, the critic asks: Why cannot the President exercise “legislative power” with respect to the steel mills?<sup>86</sup>

Justice Black’s argument depends on a pragmatic enrichment of the text, not the actual text. Justice Black quotes the Vesting Clause of Article I, “All legislative Powers herein granted . . . ,” and the Necessary and Proper Clause’s reference to “all Laws.”<sup>87</sup> He explains those texts, however, by writing that Congress has “*exclusive* constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution.”<sup>88</sup> Note that the Constitution does not say that Congress has exclusive legislative authority. *Exclusivity* is Justice Black’s pragmatic enrichment. That pragmatic enrichment occurs because the interpreter has focused on a very small part of the text—“all”—wrenching it from its immediate context. Even if we open the textual frame just a few more words, we can see that the text of Article I, Section 1 itself denies that the Congress has “all” legislative power since it limits “legislative” power to those powers “herein granted.”<sup>89</sup> Congress has enumerated legislative powers, not every power that could possibly be deemed “legislative.”

Notice, as well, that Justice Black picked particular texts to support his argument, to the exclusion of other constitutional texts. This very choice, the isolation of a word or clause, puts a thumb on the scale on one side of the interpretive question, privileging and ignoring other text. Not surprisingly, the President’s lawyers chose a different text, relying upon “the executive power” in Article II, to support precisely the opposite conclusion that the President can, in fact, use his executive power to seize the steel mills.<sup>90</sup> Thus we see that the choice of text here has crucial consequences for the decision: if you pick the “legislative power,” like Justice Black, the interpreter rejects the President’s decision as unconstitutional; if you pick the “executive power,” like the dissenters, the interpreter affirms the President’s decision as constitutional. Whether one calls this “interpretation” or “construction,” it seems rather clear that the very “choice” of text matters to the ultimate decision of the case. If that is correct,

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86. See Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 64 (1953) (criticizing the doctrine as stated in Justice Black’s opinion as “a purely arbitrary construct”); Paul G. Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141, 180–81 (1952) (criticizing Justice Black’s opinion because “it is doubtful whether such a clear and sharp distinction between legislative and executive functions can always be drawn”); see also William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 23–24 (1998) (discussing the differing formalist and functionalist views among the Justices in *Steel Seizure*); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1925–26 (2012) (noting Justice Black’s opinion but discussing lawmaking as a function of administrative agencies).

87. U.S. CONST. art. I, § 1; U.S. CONST. art. I, § 8, cl. 18.

88. *Steel Seizure*, 343 U.S. at 588–89 (emphasis added).

89. U.S. CONST. art. I, § 1.

90. *Steel Seizure*, 343 U.S. at 587.

then originalists and textualists must have a theory of the choice of text if they are to establish a neutral interpretive zone.

*B. Contesting Justice Black's Pragmatic Enrichments of "Legislative" Power*

Opening the window to other texts allows us to test whether Justice Black's purported "pragmatic enrichment" is a contested enrichment, including whether looking at the whole text negates or cancels<sup>91</sup> Justice Black's enrichment. That Article I limits itself to enumerated powers "herein granted" challenges the notion of exclusivity, where exclusivity means that "every imaginable legislative-type power" is given to Congress.<sup>92</sup> Article I also challenges the notion suggested by exclusivity that *only* Congress holds legislative power. Article I gives the President power to veto legislation.<sup>93</sup> In other words, the President and the Congress share this most important "legislative power"—they must agree on all legislation. Lest one still insist on "exclusivity" as a proper pragmatic enrichment, any student of the full Constitution knows that the President and the Senate "share" power in many important matters, including appointments to the executive, appointments to the judiciary, and the treaty power.<sup>94</sup>

The full text of the Constitution thus negates Justice Black's enriched meaning—that the Congress has *exclusive* legislative power. This may well explain why Justice Black's interpretation has not held up well over time, and Justice Robert Jackson's concurrence offers a powerful rejoinder. Justice Jackson's famous tripartite test depends upon the idea of "shared power" as a baseline. When the President and Congress agree, says Justice Jackson, the President has the greatest power; when they disagree, each must rely upon its own powers.<sup>95</sup> The model here is Article I, Section 7, the Bicameralism Clause, which provides for Congressional passage and Presidential veto.<sup>96</sup> When the

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91. One might argue that to fully "cancel" a pragmatic inference, there must be precise semantic content directly contrary to the inference. If the inference is "she is a bad student," cancellation requires the precise semantic content that "she is a good student." The question of cancellation may then hang upon how one expresses the pragmatic inference. In Justice Black's case, the inference is exclusivity; cancellation would, under this approach, require that the Constitution expressly state, "legislative power is not exclusive." My own view is that this is too narrow a view of cancellation. For example, the Constitution does not say "legislative power is not exclusive," but it does grant legislative power (the veto) to the President. Put in other words, the Constitution *does* what the enrichment denies. This explains my use of the term "negation."

92. The powers assigned to Congress do not *only* exist in Article I: In Article III, for example, the Congress is given power to create lower courts and to define the Supreme Court's appellate jurisdiction, U.S. CONST. art. III; similarly, Article IV allows Congress the power to regulate territories, U.S. CONST. art. IV.

93. U.S. CONST. art. I, § 7, cl. 2–3.

94. U.S. CONST. art. II, § 2, cl. 2 (appointments and treaty power shared with the Senate).

95. *Steel Seizure*, 343 U.S. at 635–37 (Jackson, J., concurring).

96. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United

branches agree, there is law; when not, there is only a bill or a presidential statement. Justice Jackson’s “shared power” view and the texts that support “shared power” (the Appointments Clause and the Bicameralism Clause<sup>97</sup>) negate one version of Justice Black’s interpretation—that Article I legislative powers are “exclusive.” Despite Justice Jackson’s overt anti-textualism,<sup>98</sup> his opinion depends upon a fuller and more accurate view of the constitutional text, even if the choice of executive-legislative agreement as a safe harbor is itself a contestable proposition.

Notice that the dissenting Justices, like Chief Justice Fred Vinson, also rely upon pragmatic enrichment. Chief Justice Vinson writes that the President has “*the whole of the*” executive power.<sup>99</sup> Again, we see pragmatic enrichment: the text of the Constitution says “the” executive power, not “the whole of the” executive power. In his concurrence, Justice Jackson rejected this argument rather quickly, explaining that the dissenters had *added to the text* of the Constitution.<sup>100</sup> He went on to conclude that Article II negated Chief Justice Vinson’s (and the government’s) interpretation since there would be no need to enumerate any particular executive powers—such as the commander-in-chief power—if, in fact, the Vesting Clause granted “all” or “the whole” executive power to the President.<sup>101</sup>

To sum up, we have seen how major *Steel Seizure* opinions depend upon pragmatic inference. Justice Black reads Article I as vesting “all” legislative power in the Congress, but the Constitution does not say that.<sup>102</sup> The dissenting Chief Justice Vinson and Justices Reed and Minton read Article II as vesting “the whole” executive power in the President, but the Constitution does not say that, either. Justice Jackson offers a more complex interpretation, acknowledging what appears a logical contradiction but textual truth: that the Constitution both requires, in some cases, that the President and Congress act together and at the

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States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . .”).

97. *Id.*; U.S. CONST. art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate . . . [to] appoint . . . all other Officers of the United States . . .”).

98. *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”).

99. *Id.* at 681 (Vinson, C.J., dissenting) (emphasis added).

100. *Id.* at 640 (Jackson, J., concurring).

101. As Professor Steven Calabresi once argued, the notion that Article I powers are limited to those “herein granted” can be seen by negative implication (its absence from Article II) as suggesting a more capacious field for executive power. Calabresi & Rhodes, *supra* note 14, at 1175–76. Here, however, I am simply describing Supreme Court cases and their interpretive focus, rather than considering all forms of linguistic argument in the case of executive power. For an analysis of the more complex textual arguments made by unitary executives, see *infra* Part IV.

102. The Constitution provides for “[a]ll legislative Powers herein granted . . .” U.S. CONST. art. I, § 1.

same time provides, in other cases, independent power to each department. This is by far the safer and more precise interpretation.<sup>103</sup>

C. *Justice Scalia's Pragmatic Enrichment in Morrison v. Olson*

Justice Black, a liberal, is hardly the only constitutional textualist who has enriched the meaning of central phrases in the Constitution. Consider Justice Scalia's dissent in *Morrison v. Olson*, the independent counsel case, a dissent whose conclusion I applaud<sup>104</sup> but whose pronouncements on the meaning of the text are just as easily seen to be additions to the text, again negated by the full text.

The independent counsel law permitted Congress to submit a request to the Attorney General to name a "special counsel" to investigate misconduct in the executive department. In the post-Watergate era, proponents insisted that the executive branch should not have the power to investigate itself; there should be an "independent" investigator. More specifically, Theodore Olson's case involved allegations of false testimony before Congress by a high-ranking Department of Justice official. The specific question was the constitutionality of the independent counsel law, a very complex statute making it rather easy for the Congress to investigate executive department personnel based on claims of false testimony before Congress.

The majority opinion, written by Chief Justice William Rehnquist, upheld the law on the basis that the independent counsel had not "unduly trammel[ed] . . . executive authority" because her job was not "so central to the functioning of the Executive Branch."<sup>105</sup> The idea, presumably, was that the independent counsel was one prosecutor among many in the Justice Department, and her prosecution of a government employee would not bring the executive

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103. Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON 346, 347 (Barbara B. Oberg ed., 2014) ("When an instrument admits two constructions the one safe, the other dangerous, the one precise the other indefinite, I prefer that which is safe & precise."). The implicit argument here, which awaits greater explication, is that an explanation that includes more text is by definition better than an explication that includes less text.

104. Justice Scalia's opinion deserves recognition not because of its formalism but because of its implicit understanding that the statute allowed members of Congress too much power to send their political enemies to jail. Under the law, Congress could initiate an investigation, which the Attorney General had no real power to resist. A Congress upset with an official could simply threaten to ask the Attorney General for an investigation, and given the difficulty of denying that investigation (the Attorney General had to find that there was "no" reason to investigate), Congress could be fairly sure that it had the power to call any of its political enemies to court under threat of criminal indictment. Somehow, this was never very clear to liberals until Republicans used this tactic against President Clinton: Independent Counsel Ken Starr found Clinton lied about an affair under oath, leading to a failed impeachment. Put in other words, Justice Scalia was prescient about the statute's incentives and operation, its consequentialist, as opposed to formalist, dangers. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 772-76 (1999); see also Julie R. O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 471-74 (1996) (discussing the role of politics in application of the statute); Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2195 (1998).

105. *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

branch to a halt. In linguistic terms, the Rehnquist approach enriches the text suggesting that “the executive power” means “not unduly trammled” executive power. Justice Scalia’s response to this enrichment quite properly noted that “unduly trammled” appears nowhere in the text of the Constitution.

Because of textual economy, both sides of the case ended up enriching the actual constitutional text. For Justice Scalia, “all” executive power must reside in the hands of the President. Here are his precise words: “To repeat, Article II, § 1, cl. 1, of the Constitution provides: ‘The executive Power shall be vested in a President of the United States.’ As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power.”<sup>106</sup> Again, note the pragmatic enrichment: *all of* the executive power.<sup>107</sup> As Justice Scalia noted, no one doubted that the independent counsel was exercising executive power as a prosecutor. It follows then, for him, that the counsel was violating the Constitution because the President must have “all” executive power; at the very least, the President must have the power to remove those exercising executive power.<sup>108</sup>

#### D. Contesting Justice Scalia’s Pragmatic Enrichment

Like Justice Black’s enrichment, Justice Scalia’s is negated by the constitutional text as a whole. As others have written, Justice Scalia’s view of the Vesting Clause’s “grant of executive power” is “a grant of exclusive control.”<sup>109</sup> As Justice Jackson explained in *Steel Seizure*, the Constitution does not say “all” executive power; it says “the” executive power.<sup>110</sup> Second, if “all” means “exclusive,” the President’s veto power exists in Article I, which would seem to make of it, what Justice Black called it—a “legislative” power,<sup>111</sup> even if held in the hands of the executive. Moreover, the President does not have “all” power to appoint his subordinates; he shares that power with the Senate, under the Appointments Clause.<sup>112</sup> Whether we like it or not, the constitutional text does not create simple, hermetically sealed categories of power.

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106. *Id.* at 705 (Scalia, J., dissenting).

107. As Larry Lessig and Cass Sunstein as well as other scholars have noted, this is supposed to be a textual argument: a “strongly unitary executive is grounded in the Vesting Clause of Article II: ‘The executive Power shall be vested in a President.’” Lessig & Sunstein, *supra* note 32, at 9–10. Lessig and Sunstein are speaking here of the “unitary executive” as a theory that puts the President on top of a hierarchical executive branch. In theory, that is a different claim than that the President has “all” executive power.

108. This is not a particularly tendentious view of the case. *See, e.g.*, David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 76 (2009) (“Justice Scalia’s dissent relied on the proposition that the President possesses ‘all’ executive power under the Constitution. This idea, Scalia argues, stems from the Vesting Clause, Article II, Section 1, Clause 1 . . .”).

109. *Id.* (internal quotation marks omitted).

110. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640–41 (Jackson, J. concurring).

111. U.S. CONST. art. I, § 7.

112. U.S. CONST. art. II, § 2, cl. 2.

Of course, the claim here is more complex. Justice Scalia may say “all” executive power, but very few scholars are willing to accept that this means the President can do anything he wants as long as he calls it “executive power.”<sup>113</sup> In *Morrison*, Scalia is using pragmatic enrichment to argue about a specific statute and a specific constitutional problem. He believes that the President has “all” power in the sense of hierarchical authority over the executive branch; therefore, Congress cannot create “independent” entities within the executive branch. Put in its narrowest compass, Justice Scalia’s reading of the text is that “all power” means the power to remove “all” executive officers. Of course, as any student of the “removal power” knows, the Constitution says nothing at all about the removal power. And, as a result, the removal question has bedeviled Presidents and the Supreme Court since the Founding, leading to some of the more memorable constitutional clashes, including impeachment controversies, in American history.<sup>114</sup>

To sum up, there is no textual answer to the removal question facing the Court in *Morrison v. Olson*.<sup>115</sup> There are only textual arguments that put the thumb on the scale in one direction or another by pragmatic enrichment. The real issues here lurk behind this veil of linguistic legerdemain. Chief Justice Rehnquist upheld the independent counsel law because he feared any other ruling would mean that all independent agencies—from the Federal Reserve Board to the Securities and Exchange Commission—would become unconstitutional (a fear that was highly overstated, since the independent counsel could have been easily distinguished based on the power it gave to Congress). Justice Scalia, fearful that Congress was using the independent counsel law to punish political opponents, was correct about the result but much too confident that what he was applying was in fact the text of the Constitution (“all” executive power) rather than his personal addition to the text of the Constitution.

*E. False Pragmatic Enrichment, the Creation of Hard-Edged Rules, and Consequences*

Once one actually pays attention to what seem like small interpretive additions to the Constitution’s text, one can see why these interpretations are attractive. Pragmatic inferences are often terms that appear to have quantitative references—all, exclusive, only, exactly, whole. Such added terms are likely to be particularly attractive because they appear objective and hard-edged. They create bright line rules. Notice, however, that it is pragmatic enrichment that is

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113. See, e.g., Calabresi & Rhodes, *supra* note 14, at 1177 n.119 (noting that unitary executives do not believe that Article II confers inherent power to act without a statute); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 729–30 (2005) (arguing that belief in the unitariness of the executive does not require belief in an inherent authority to act *contra legem*).

114. CALABRESI & YOO, *supra* note 14, at 174–89 (discussing the impeachment of Andrew Johnson).

115. *Morrison v. Olson*, 487 U.S. 654 (1988).



adding the hardness, the lines, and not the constitutional text. There is a linguistic pattern here, and it should not go without notice. We will see it again in the next Part, which turns to the unitary executive, the non-enforcement power, and the Emoluments Clause.

One of the risks of this kind of small, almost unnoticed addition, is that it raises the possibility that the interpreter has added a hard-edged pragmatic inference—not because this is the best interpretation of the text, or even the historically proper one (the interpreter has not at this stage even referred to history)—but because of the interpreter’s policy preferences. Judicial decision-making, like any other decision-making, can be motivated decision-making, which is to say it has a tendency toward confirmation bias.<sup>116</sup> Let us say, for example, one believes in a powerful Presidency and is skeptical of government bureaucracy, then one might easily find oneself adding a very small word, “all” in front of “executive power,” convinced that one is applying the constitutional text even if this is not in fact the text of the Constitution. Reverse the political presumption: assume one is fearful that the President will take on too much power. It is not too hard to imagine the interpreter almost unconsciously adding the word “all” to legislative power as Justice Black did to support his claim that the President was legislating. In neither case is the interpreter using the *actual text* of the Constitution. Instead, in apparently small—but absolutely crucial—ways, the interpreter is injecting the interpreter’s preferences into the text of the Constitution, justifying it all the while by the hard edges the interpreter has herself added to the text.

As we will see in Part IV, there is more at stake here than a few small words. On these words hangs much. I hope no Justice or constitutionalist really believes that the President has “all” power. But large consequences can depend upon the misuse of language in judicial opinions. We all know the history of the Bush administration’s use of these theories in the War on Terror, when the Office of Legal Counsel wrote opinions that appeared to assume that the President did in fact have “all” executive power.<sup>117</sup> When in doubt, lawyers will look at these phrases and wonder just how far they can push the meaning of “executive power.” This is not a matter of mere theory; liberals and conservatives have cited the phrase “all” executive power in dissents and majority opinions in the Supreme Court both before and after *Morrison*.<sup>118</sup> The good news is that it is not

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116. See VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 103–34 (2016) (detailing the cognitive risks of interpretation).

117. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

118. *Clinton v. City of New York*, 524 U.S. 417, 471 (1998) (noting that “provisions that . . . vest all ‘executive’ power in the President” have been “interpreted . . . generously” by the Court); *Touby v. United States*, 500 U.S. 160, 168 (1991) (noting that “[t]he Constitution vests all executive power in the President”); *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) (noting that “Article II, § 1, cl. 1, of the Constitution provides: ‘The executive Power shall be vested in a President of the United States’” and that “this does not mean *some* of the executive power, but *all* of the executive power”); *Youngstown*

actually the text of the Constitution; the bad news is that too few seem to have noticed.

#### IV.

##### EMOLUMENTS, REMOVAL, AND THE NON-ENFORCEMENT POWER

Pragmatic enrichment is not limited to judicial opinions. Textualist and originalist scholars who write about executive power engage in similar processes of textual insemination, injecting their preferred inferences and purposes into the constitutional text. In this Part, I consider various controversies about executive power—from the President’s power to refuse to enforce the law to the Emoluments Clause—to show how originalist claims about executive power depend upon pragmatic enrichment of the text (in short, deviations from the actual text). Most importantly, I focus on the choice of text, which particular word or words are chosen for interpretation. Choice is important here because it precedes any pragmatic enrichment. Textualism, as currently practiced, requires that one pick a relevant applicable clause, or clauses, or paragraphs. That unit of analysis, as we will see, can yield apparent pragmatic enrichments that may be false—or at least falsifiable—by opening up the textual economy, by giving full faith to the full text. Moreover, as we will see, this isolationist method tends to yield falsely precise results by adding hard-edged terms or suggesting all-or-nothing results. By limiting the information economy to a few words or isolating a particular word, textualists and originalists have assumed a methodology that forces them to add and subtract information to make sense of any text.

##### A. *The Foreign Emoluments Clause*

Consider the now-important battle over the otherwise ignored Foreign Emoluments Clause. The Constitution states: “no person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”<sup>119</sup> Long before this issue arose as a public question with regard to the current President, scholars had staked out positions on this matter.<sup>120</sup> At least one constitutional textualist/originalist

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Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 681 (1952) (Vinson, C.J., dissenting) (noting that “[t]he whole of the ‘executive Power’ is vested in the President”).

119. U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

120. See, e.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 182 (2005) (“[T]he more general language of Article I, section 9 barred all federal officers, from the president on down, from accepting any ‘present’ or ‘Emolument’ of ‘any kind whatever’ from a foreign government without special congressional consent.”); John Manning, Response, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 146 (1995) (“The Presidency is surely an ‘Office under the United States.’”); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1772 (2009) (implying that the President

argued that the clause *did not even apply to the President* because the clause says “Office,” and based on a survey of the use of the term “office” throughout the Constitution, the term “office” typically applies to *unelected* members of the executive branch, not the President.<sup>121</sup> He claimed that many other scholars, originalists and others, agreed with the position that “office” means the same thing throughout the Constitution.<sup>122</sup> More recently, the President’s lawyers, claiming allegiance to original meaning,<sup>123</sup> have asserted that, even if the clause does apply to the President, it only covers emoluments from “offices.”<sup>124</sup>

First, let us take the argument that the clause does not apply to the President. This is a classic form of textual gerrymandering—an argument that takes text out of context to create a new meaning.<sup>125</sup> Let us assume that, in some parts of the Constitution, the term “office” means a lower ranking, unelected, member of the executive branch. The problem comes in moving that definition from one part of the Constitution (call this the home clause) to another part (the receiving clause). Once isolated from the home clause, the term “office” is recontextualized within the receiving clause. If the home clause only covers unelected officials, then the

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falls within the scope of the Foreign Emoluments Clause); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 366 (2009) (“Foreign corruption of the Executive was a concern as well, as we saw in the Foreign Gifts Clause.”). *But see* Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 411–12 (2012) (arguing that the Foreign Emoluments Clause does not apply to the President or the Vice President).

121. Tillman, *supra* note 120, at 411–17. For more recent and far more comprehensive claims about the Foreign and Domestic Emoluments Clauses, see Andy S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2902391> [<https://perma.cc/MXL5-T93J>]; (offering a broad discussion of how both the foreign and domestic emoluments clauses treat the President as well as perspective on the implications for President Trump’s business dealings); Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2911871> [<https://perma.cc/L4RT-NWQY>]. The Justice Department has adopted an argument similar to the claims made by Grewal and Natelson, one which John Mikhail concludes is “inaccurate, unrepresentative, and misleading.” John Mikhail, *The Definition of “Emolument” in English Language and Legal Dictionaries, 1523–1806*, at 1 (June 30, 2017) (unpublished draft), <https://ssrn.com/abstract=2995693> [<https://perma.cc/TH3R-Y85Q>] [hereinafter Mikhail, Definition].

122. According to Tillman, other scholars, including Professors Steven Calabresi, Josh Chafetz, John Manning, Michael Paulsen, and Saikrishna Prakash, embrace the position that “all office-related language means the same thing,” Tillman, *supra* note 120, at 420 n.55 (emphasis removed). I have not attempted to verify that statement as it could apply to many claims about “office” in the Constitution. Originalist Will Baude has lauded Tillman’s project to find that “office” must mean the same thing throughout the Constitution. William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), <http://conlaw.jotwell.com/constitutional-officers-a-very-close-reading> [<https://perma.cc/B7Q8-XZLP>]. To be fair, Tillman also relies upon various historical claims, but this simply illustrates the problems with using a pragmatically enhanced text as a baseline for historical research. Tillman, *supra* note 120, at 411–17.

123. “The scope of any constitutional provision is determined by the original public meaning of the Constitution’s text.” MORGAN, LEWIS & BOCKIUS LLP, *CONFLICTS OF INTEREST AND THE PRESIDENT 4* (2017), <https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf> [<https://perma.cc/V77Y-2XXU>] [hereinafter MORGAN LEWIS WHITE PAPER].

124. *Id.*

125. For the equivalent of this in statutory interpretation, see Nourse, *supra* note 15.

receiving clause is now deemed to cover unelected officials. Such inferences, however, can rewrite the Constitution. The transferred home context effectively amends the new receiving context—the Foreign Emoluments Clause—by inserting the term “unelected.” Of course, that is not the actual text of the Constitution. The term “unelected” does not exist in the Foreign Emoluments Clause; it has been added by the interpreter.

Under “analytic textualism,” one asks whether a pragmatic addition such as “unelected” is falsified by any other text in the Constitution. And, yes, there is powerful evidence that the President can be covered by the term “Office.” No one doubts that the President can be impeached. And so, no one should doubt that the term “Office” in the Foreign Emoluments Clause can easily be interpreted to cover an elected official like the President. Article II, Section 4 provides that the President “shall be removed from Office by Impeachment” for “high crimes and [m]isdemeanors.”<sup>126</sup> Article I, Section 3, Clause 7 provides that the “Judgement in cases of Impeachment shall not extend further than to removal from Office.”<sup>127</sup> This falsification procedure allows us to see that the claimed textual enrichment is not the “only possible” interpretation; in fact, it is not a terribly plausible enrichment at all: even President Trump’s lawyers now admit that the Foreign Emoluments Clause does in fact cover the President.<sup>128</sup>

Second, let us turn to the President’s emoluments-from-office interpretation, applying the same method.<sup>129</sup> The argument is that the Foreign Emoluments Clause does not apply to President Trump because the only emoluments covered are benefits coming from a foreign office.<sup>130</sup> Notice the

126. U.S. CONST. art. II, § 4 (“The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for . . . high Crimes and Misdemeanors.”).

127. U.S. CONST. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”).

128. MORGAN LEWIS WHITE PAPER, *supra* note 123, at 4. It is worth noting that by invoking this comparison, I am not repeating “borrowing” errors. My claim is not that the impeachment clauses use the term “Office,” therefore the term “Office” in the Foreign Emoluments Clause must include the President. I am using that clause to negate a hypothesized interpretation, not to demand a particular textual reading.

129. Professor Natelson argues that the “original meaning” of the emoluments clause requires “compensation with financial value, received by reason of public employment.” Natelson, *supra* note 121 at 1. Professor Grewal appears to concur with Natelson’s view, although he is not focused on historical evidence. In both cases, their textual methodology depends upon comparing the Foreign Emoluments Clause with other instances of “emolument” in the Constitution. I believe that this methodology fails because its choice of text—the single word emolument—is faulty (reducing the information economy too narrowly) and assumes that which it is trying to prove (that emolument in the domestic sphere must mean the same thing in the foreign sphere). There is no reason to assume, *ex ante*, that the clauses in which the term “emolument” appears use the term in precisely the same way. As originalists themselves avow, text takes its meaning from context, and the contexts of the compared clauses are quite different. *See infra* discussion at notes 138–140 (comparing the overall purposes of the domestic and foreign emoluments clauses).

130. Nothing in this Article presumes to be a comprehensive review of the emoluments literature, which since the initial draft of this Article has grown exponentially. My point is that the President’s

pragmatic addition to the text: “*only-emoluments-from-office*.” Just as we have seen in earlier additions, there are new terms added—“*from office*”—and they are made exclusive and hard-edged—emoluments “*only . . . from office*.” As we have also seen, this interpretation gains its power from isolating the term “Emolument” from the rest of the clause.

If we open up the interpretive window just a bit, the proposed pragmatic enrichments falter as plausible readings. First, the enriched “emolument from office” interpretation makes the clause implausibly redundant (“emolument from office, office”). Second, since the President cannot accept a foreign “Office” in any event, that prohibition presumptively includes foreign office benefits, effectively eliminating the term “emolument” in such cases. Third, and most importantly, the addition of exclusivity (“*only emoluments from office*”) renders other terms surplusage. “[P]resents . . . of any kind whatever”<sup>131</sup> surely includes uncompensated foreign benefits<sup>132</sup> given to the President that are not given to others.<sup>133</sup>

Just as we saw in the earlier “the-President-is-not-covered” argument, the “emolument-from-office” argument depends upon strained inferences drawn from other constitutional texts.<sup>134</sup> The term “Emolument” has been taken out of two home clauses and redefined as “*only-emolument-from-office*” in the receiving Foreign Emoluments Clause. The home clauses are: (1) the Domestic Incompatibility Clause, which bars members of Congress from assuming “any civil Office created, or . . . the Emoluments whereof shall have been

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arguments on emoluments, like other arguments we see in this Article, do not depend upon the text of the Constitution but upon meaning added to the Constitution, here “emoluments *from office*.”

131. U.S. CONST. art. I, § 9, cl. 8. This Article assumes, for sake of argument, that benefits to the President’s businesses are in fact benefits attributable to the President. The clause may suggest to the contrary since it applies to “persons.”

132. Samuel Johnson’s eighteenth century dictionary defines “present” as “a gift; a donative something ceremonially given; a letter or mandate exhibited.” *Present*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 1755). In turn it defines “gift” as “[a] thing given or bestowed; the act of giving; oblation; offering; the right or power of bestowing; power; faculty.” *Gift*, *id.* That dictionary also defines Emolument as “[p]rofit; advantage.” *Emolument*, *id.*; see Grewal, *supra* note 121, at 4 n.10 (noting that the “office-related definition” became the principal definition by the end of the nineteenth century, but that the more general definition of “benefit” is found in the 1755 classic). This suggests, of course, that the “office” meaning is not in fact the “original” meaning. For a more comprehensive analysis, see Mikhail, Definition, *supra* note 121.

133. For example, governments that provide tax, trademark, or other benefits to the President alone would presumably be giving “presents” to the President, requiring congressional approval. Lest someone claim that these would not be covered because they are intangible presents, the term “emolument” has traditionally been used to cover intangible as well as tangible benefits. See, e.g., Natelson, *supra* note 121 at 13–14 (defining emoluments to include a soldier’s right to forage or a seaman’s right to obtain booty from ship captures as long as these benefits could be “convertible to money”).

134. Natelson, who looks at historical definitions, does not confine his study to foreign emoluments but uses references to domestic emoluments to support his claim that the historical meaning of the term is best read as emolument-from-office. See *id.* at 13–16.

[i]ncreased”;<sup>135</sup> and (2) the Compensation Clause, which guarantees the President’s compensation during his term of office and prohibits him from “receiv[ing] within that Period any other Emolument from the United States, or any of them.”<sup>136</sup> From these clauses, the President’s lawyers infer that foreign emoluments must come from an “office.” Since the home clauses address offices, it is assumed that the receiving clauses address offices,<sup>137</sup> even when the clauses address entirely different subject-matter.

To put it bluntly: the home clauses have nothing to do with foreign affairs. The Incompatibility Clause focuses on the entirely domestic relationship of the President and Congress.<sup>138</sup> House Minority Leader Nancy Pelosi or Senate Majority Leader Mitch McConnell may not simultaneously sit in the Congress and as Cabinet members. Nor may they create new offices in the executive branch, raise the pay of those offices, and then benefit from that pay raise. Equally focused on domestic affairs, the Presidential Compensation Clause bars legislative bribery. As Benjamin Franklin once explained, one of the defects of the Pennsylvania state constitution was that every time the Governor approved a bill, he would exact a payment from the legislature.<sup>139</sup> Legislation was “purchased” with the increase of the Governor’s salary. The Framers viewed<sup>140</sup> these clauses as *central to the separation of powers*;<sup>141</sup> *they do nothing to address foreign influence over the President.*

135. U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been [i]ncreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

136. U.S. CONST. art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be [i]ncreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”). The idea here is that the President will be receiving other compensation from his service in the “office” of the presidency.

137. It seems to me to make perfect sense to read the presidential Compensation Clause, U.S. CONST. art. II, § 1, cl. 7, as applying to *benefits from office* because it says “he shall not receive within that Period any other Emolument from the United States, or any of them.” In short, the clause “Emolument from the United States,” implies that the emolument comes from an “office,” at a minimum, although it also includes other government payments. By contrast, the Foreign Emoluments Clause provides that no person may accept “any present, Emolument, Office, or Title, of any kind whatever” from a foreign government. U.S. CONST. art. I, § 9, cl. 8. In the first case, the term “Emolument” is explicitly modified by a term suggesting “office”—from the United States—in the latter case it appears in a list separated from the term “Office.”

138. See U.S. CONST. art. I, § 6, cl. 2.

139. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 99 (Max Farrand ed., 1937) (statement of Benjamin Franklin of Pennsylvania, June 4, 1787).

140. See Victoria Nourse, *Toward A “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 459–61 (1996) (discussing pervasive concern during the founding era about the corruption of government leaders and the debate at the Constitutional Convention about the President’s independence).

141. *Id.* at 450–52 (describing the “‘due foundation’ for the separation of powers [as] a foundation built upon the independence of persons”); see also Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045,

Lest this all seem too abstract, consider the strange results these borrowing maneuvers create. Under the President’s interpretation, the only cases that the term “Emolument” would cover would be something like this situation: the British government gives the President the fringe benefits of an office like the Earldom of Ipswich (*e.g.* the use of the castle and golf course).<sup>142</sup> Of course, it is important that the President not be given the title “Earl of Ipswich” because that is already barred by the clause. Even then, however, it is not clear why these benefits would not be barred as a “present:” a gift “of any kind” bestowed on the President by a foreign government. The only way one eliminates “present” from the Foreign Emoluments Clause is by isolating and focusing so hard on the term “Emolument” that one forgets the rest of the clause.

The proper interpretive approach refuses to add meaning to the text. The term “emolument” is ambiguous: at the Founding, emolument meant both “benefit” in a general sense and “benefit from an office.”<sup>143</sup> Once we stop focusing on that particular term and turn to the clause as a whole, three things seem clear. First, as we have seen, the clause is redundant. If the President is named the Earl of Ipswich and accepts the benefits of that office, that action is covered four times—as a present, office, emolument, and title. Second, the clause errs on the side of over-, rather than under-, inclusion. It applies to “*any* present, Emolument . . . Title, of *any* kind whatever.”<sup>144</sup> Third, Congress is assigned the ultimate power to determine its effect. Even if a court were to err in finding that something constituted an “Emolument,” the clause would give Congress power to allow the President to accept it.<sup>145</sup> Altogether, these textual features counsel against a narrow interpretation. At the very least, courts should reject any purported “originalist” argument that gerrymanders meaning, both adding and subtracting from the Constitution’s text.

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1050–52, 1062–65 (1994) (arguing that “separation of personnel” is necessary for separation of powers and that these clauses resulted in “reinforc[ing] . . . the separation of powers”).

142. See, *e.g.*, Natelson, *supra* note 121, at 13 (describing “Definition No. 1” as “fringe benefits”); *id.* at 13 (“Perhaps the most frequent meaning [of ‘fringe benefits’] in political discourse was also the narrowest.”). *But see Emolument*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 1755) (defining “emolument” as “[p]rofit; advantage”).

143. See *e.g.*, Address to the People of Great Britain (Oct. 21, 1774), in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774, at 84 (Worthington Chauncey Ford ed., 1904–1937) (“You [the British people] restrained our [American] trade in every way that could conduce to your emolument.”); see Natelson, *supra* note 121, at 12–20 (describing four meanings including “all benefits” and writing that “All four [definitions] were very common”).

144. U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

145. This was a significant change from the Clause as it appears in the Articles of Confederation where it did not allow for congressional approval. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1. George Mason famously declared that he could not sign a constitution in which Congress could in fact allow a President to serve in a foreign office. George Mason, Speech at the Convention of Virginia (June 15, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 483 (Jonathan Elliot ed., 1827), [https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=495&itemLink=D%3Fhlaw%3A1%3A.%2Ftemp%2F~ammem\\_UEDc%3A%3A%230030496&linkText=1](https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=495&itemLink=D%3Fhlaw%3A1%3A.%2Ftemp%2F~ammem_UEDc%3A%3A%230030496&linkText=1) [<https://perma.cc/T38N-8LMC>].

### B. Removal and Pragmatic Enrichment

Can the President remove his subordinates based on whim, political preference, or hair color? Unitary executives say “yes,” on the theory that Congress may not limit the President by requiring that he show “good cause” to terminate executive branch officers. The removal power often seems technical to many students of the Constitution, but originalist work urges that the President’s power to remove officers implies something very important about the administrative state. Supporters of the unitary executive believe that making the President the hierarchical head of the executive will mean that so-called “independent” agencies are unconstitutional.<sup>146</sup> There are real-world consequences to this problem. If the unitary executives are right, the President can fire the head of the Office of Government Ethics or the head of the Consumer Financial Protection Bureau, despite the fact that Congress permits dismissal only after a term of years or for good reasons.<sup>147</sup>

As noted earlier, the classic originalist treatment decries opponents of the unitary executive for failing to pay sufficient attention to the text of the Constitution. Originalists argue that their opponents are wrong in asserting a fourth “administrative” power, when the Constitution only provides for three departments.<sup>148</sup> Put in other words, they argue that their opponents are enriching the Constitution’s text with added meaning. And, indeed, if the argument really was that there was some “fourth” power, that would be an inappropriate enrichment. (As we have seen in the case of Justice Black’s opinion in *Steel Seizure*, liberal textualists are not immune from criticism that they too add to the text). One rather obvious problem with this argument, however, is the assumption that “administrative” means something other than “executive.” To execute is to administer.<sup>149</sup> Let us imagine that the Vesting Clause read, “the

146. CALABRESI & YOO, *supra* note 14, at 4 (arguing that, under the unitary executive theory, “congressional efforts to insulate executive branch subordinates from presidential control by creating independent agencies and counsels are in essence unconstitutional”).

147. 5 U.S.C. App. 4 § 401 (2012) (the head of the Office of Government Ethics to serve a five-year term). The Director of the Consumer Financial Protection Bureau serves for a term of five years and may only be removed for cause. 12 U.S.C. § 5491(c) (2012) (The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office). Other statutes that include a “good faith” cause requirement include the head of the Federal Trade Commission. *See* 15 U.S.C. § 41 (2012).

148. Calabresi & Prakash, *supra* note 2, at 547 (responding to Lessig & Sunstein); *cf.* Lessig & Sunstein, *supra* note 32, at 118 (arguing that the Framers “did not believe that the President must have plenary power over all we now think of as administration”).

149. *Administer*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/administer> [<https://perma.cc/XH4J-K6NS>] (defining administer as “to manage or supervise the execution, use, or conduct of?”); *Administer*, MERRIAM-WEBSTER THESAURUS, <https://www.merriam-webster.com/thesaurus/administer> [<https://perma.cc/AM3T-L4JN>] (listing “execute” as a synonym for “administer”); *Execute*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriamwebster.com/dictionary/execute> [<https://perma.cc/6YR4-AZWS>] (listing “administer” as a synonym for “execute”); *Administer*, DICTIONARY.COM, <http://www.dictionary.com/browse/administer> [<https://perma.cc/6Y5E-NQJL>] (listing “execute” as a synonym for “administer”); *Execute*, DICTIONARY.COM, <http://www.dictionary.com/browse/execute> [<https://perma.cc/U8Y4-5SW2>] (listing “administer” as a synonym for “execute”).



President shall have executive-but-not-administrative power.” This sentence is self-contradicting.<sup>150</sup>

Even if there were a difference between execution and administration, the unitary executive claim would remain one of pragmatic enrichment. Defenders of the unitary executive explain that the Constitution provides three departments and therefore there are only three kinds of power.<sup>151</sup> Of course the number three can in theory be “at least” three or “at most” three or “perhaps more than” three.<sup>152</sup> It is no surprise that this kind of enrichment—adding an “exclusivity” term—has surfaced once again. We have seen this with Justice Black’s pragmatic inference in *Steel Seizure* (“all” legislative power). We have seen this with Justice Scalia’s dissent in *Morrison v. Olson* (“all” executive power).<sup>153</sup> We have seen this in the President’s interpretation of the Foreign Emoluments Clause (“only” from office). In each case, the hard-edged nature of the rule has been created by the interpreter, not by the text itself.

Since the Constitution’s text does not address removal,<sup>154</sup> the textual argument for removal is a hypothesized interpretation (“all executive power” includes removal). Since this is a hypothesis, it must be tested against the rest of the Constitution. Measured in such a fashion, the hypothetical interpretation fails. The Necessary and Proper Clause provides Congress with at least some power to structure the administration in ways that do not preclude “proper” limitations. If Congress has some power to limit the President’s removal power, then the hypothetical interpretation—“all power”—should fail as an interpretation that considers the entire text.

In an important set of articles, John Mikhail has argued, for example, that the “necessary and proper clauses” “cancel” the exclusivity inference that many have drawn from a listing of legislative enumerated powers under Article I, Section 8. As Mikhail explains, there are three “necessary and proper clauses,” the first referring to Congress’s own powers enumerated in Section 8,<sup>155</sup> the second providing Congress with the power to implement “all other [p]owers” granted to the federal government under the Constitution,<sup>156</sup> and the third

150. Interestingly Professor Prakash in an earlier student comment called the unitary executive theory the “Chief Administrator Theory.” See Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 991–92 (1992).

151. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”); U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court . . . .”).

152. See Soames, *supra* note 57, at 451–53.

153. See *supra* Part III.

154. Unitary executives sometimes concede this point. See, e.g., Prakash, *supra* note 2, at 224 (describing the removal power as an “unspecified” power deriving from the Vesting Clause).

155. U.S. CONST. art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .”).

156. *Id.* (“[A]nd all other Powers vested by this Constitution in the Government of the United States . . . .”).

granting Congress the power to implement “all other powers” vested by the Constitution in any “Department or officer” of the United States.<sup>157</sup> The President’s power to execute the law falls within “other powers” granted to the federal government and/or an “officer” of the United States under the Constitution. That, in turn, gives Congress the power to assist the President in his enumerated power to faithfully execute the law. At the very least, it cancels the pragmatic enrichment that Congress has no power whatsoever to shape the executive branch.<sup>158</sup>

If this is correct, whatever hypothetical inference unitary executives draw from Article II’s Vesting Clause may be canceled or at least negated by the “third” “necessary and proper clause.” The pragmatic inference, remember, is that the President has “all” executive power where “all” means “all executive power to nullify, remove, or otherwise control” executive officers (including those Congress seeks to protect from purely political dismissal).<sup>159</sup> Under the third necessary and proper clause, Congress has the power to create entities that assist the executive. The executive is a “Department or officer” vested with power under the Constitution to execute the law and thus Congress has the power to assist in implementation by providing institutions and offices to aid the executive. Since the Founding, Congress has acted to create such institutions, as for example, when Congress created the Department of the Treasury and the Department of State.<sup>160</sup> Originalists insist that this aid must be limited to an enumerated executive power,<sup>161</sup> but in fact there is an enumerated executive power—the power to faithfully execute the laws.<sup>162</sup> After all, if Congress did not create such entities, would we really expect the President himself to be collecting customs duties or litigating cases? The President needs institutions, and officers, to help him or her execute the law.

The only real textual limit on Congress’s power to assist the President in execution is that the law must be “proper.”<sup>163</sup> It seems fairly easy, however, to argue that it is proper to restrain Presidents from removing the heads of departments for purely arbitrary or partisan reasons. If Congress, for example, wants to maintain market or legal stability across administrations and to ensure this by preventing dismissal of officers for political or arbitrary reasons, that presumably is a “proper” reason because it aids in the execution of the *law* (as

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157. *Id.* (“[O]r in any Department or Officer thereof.”); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045, 1046–47 (2014).

158. *See* Mikhail, *supra* note 157, at 1056 (arguing that the “all other Powers” language was “presumably intended to give Congress whatever instrumental power it needed to organize and regulate the other branches and agencies of the government”).

159. Calabresi & Prakash, *supra* note 2, at 599 (arguing that “the President must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion ‘assigned’ to them himself”).

160. *See* Lessig & Sunstein, *supra* note 32, at 25.

161. Calabresi & Prakash, *supra* note 2, at 589.

162. U.S. CONST. art. II, § 3.

163. *See* Prakash, *supra* note 150, at 1009–11.

opposed to arbitrary decision-making).<sup>164</sup> This does not mean that there might not be other limits on Congress's structuring of agencies. As I have argued elsewhere, Congress cannot, for example, require that the Senate "approve" of the President's decision to remove an officer. If that were true, the Senate would have enormous power over the executive branch, forcing the President to retain officers at the whim of a filibustering Senate minority. That much is very clear from history; Madison warned that such a practice would cause the executive branch to slide into the Congress.<sup>165</sup> Limiting the President's removal to "good faith" reasons for dismissing the head of a Commission or Board, however, is a far cry from an attempt by Congress to insinuate its members into positions within the executive branch or holding up the President's removal by requiring Senate approval.<sup>166</sup>

To sum up, the unitary executive argument hinges on a reading of Article II that depends upon an inference that adds text to the Constitution—that there are *only* three departments. Analytic textualism asks whether this hypothesis is negated by other texts in the Constitution. The answer is that the necessary and proper clauses provide Congress the power to shape the executive branch in ways that assist the President in enforcing the law.<sup>167</sup> At the very least, these clauses negate the claim that the text of the Constitution demands the unitary executive theory, and expose it as a creation of the interpreter, not the text.

### C. Non-Enforcement Power

During the Obama administration, originalists claimed that the administration was acting unconstitutionally by failing to enforce immigration law, specifically, that executive actions regarding Dreamers and their parents<sup>168</sup>

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164. Unitary executives concede that the Necessary and Proper Clause "enables Congress to assist the President in the fulfillment of his constitutional duties," Prakash, *supra* note 150, at 1011, but argue that it does not permit the creation of an "independent agency," because that would be improper, *id.* Part of the problem here is that the argument fails to explain what is precisely meant by an "independent agency," which is to say an agency whose head can only be removed by the President for misconduct in office, barring what are purely political or arbitrary dismissals, or one whose head has a fixed term. Critics claim that the Congress cannot restrict the President's discretion. That claim simply assumes what it is trying to prove—that the President has unlimited constitutional power of removal. See also Prakash, *supra* note 2, at 233 (citing for a similar proposition, Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 333–34 (1993)). In any event, my argument here is only that the assumption of "all" executive power to remove is an invention of a nonexistent textual power.

165. See *Myers v. United States*, 272 U.S. 52, 113–16 (1926). President Andrew Johnson was impeached because he failed to abide by the Tenure of Office Act which required that Congress approve of the President's decision to remove a Cabinet official.

166. See, e.g., Nourse, *supra* note 140, at 517–18 (arguing that Madison did not believe the Senate should have a role in removal but approved Congress's limitation on the tenure of offices, such as the office of the Comptroller General).

167. U.S. CONST. art. I, § 8, cl. 18.

168. The Obama administration issued an internal Department of Homeland Security (DHS) memorandum allowing the Director of U.S. Citizenship and Immigration Services (USCIS) to not enforce the removal provisions of the Immigration and Nationality Act (INA) against individuals known

were unconstitutional. At the time, originalists Robert Delahunty and John Yoo argued that the text of the Constitution required the President to act and non-enforcement of the immigration laws was therefore unconstitutional.<sup>169</sup> In short, if Delahunty and Yoo are correct, the originalist position would suggest that President Trump may not decline to enforce domestic law. This is likely to cause liberals to find originalism on non-enforcement suddenly more appealing than it was during the Obama years. Nevertheless, this position, like the ones we have seen before on emoluments and removal *depends upon pragmatic enrichment of the text*.

Delahunty and Yoo's textual argument begins with the "Take Care Clause." Article II, Section 3 of the Constitution states that the President "shall take Care that the Laws be faithfully executed." They emphasize that the clause takes the "imperative" form, using the term "shall." Invoking Dr. Samuel Johnson's *Dictionary of the English Language*, Delahunty and Yoo argue "Johnson defines the meanings of the adverb 'faithfully' to include both '[w]ith strict adherence to duty and allegiance' and '[w]ithout failure of performance; honestly; exactly.'" They conclude: The Take Care Clause is thus naturally read as an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, "without failure" and "exactly."<sup>170</sup>

The pragmatic enrichment here is obvious: the authors have added the term "exactly" (a hard-edged additive) to the Take Care Clause. Under "analytic textualism," one looks to see whether any other clause falsifies that inference. One immediate textual answer against such an enrichment comes from the term "faithfully." "Faithfully" assumes, in my view, that exactitude is not in fact required; honest good faith efforts may fail. Even fiduciaries may make mistakes, as long as they honestly seek to further their client's interest.<sup>171</sup> Samuel

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as "Dreamers." That term refers to undocumented students who would have benefited from the Development, Relief, and Education for Alien Minors (DREAM) Act. USCIS was authorized to do so through "deferred action," an exercise of prosecutorial discretion. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 786–89 (2013). The Obama administration subsequently expanded the deferred action criteria to apply to the parents of citizens and legal permanent residents of the United States. Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 92 (2016).

169. Delahunty & Yoo, *supra* note 168, at 784.

170. Interestingly enough, Delahunty and Yoo actually deploy a kind of canceling logic when considering this claim and the meaning of the Vesting Clause. They believe the Vesting Clause confers "the entirety" of executive power on the President. One might then ask why one would need the Take Care Clause. They posit that the Vesting Clause includes a power to suspend or refuse to enforce law that the Take Care Clause "dispels." *Id.* at 799–800.

171. See *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982) (discussing the fiduciary obligations of corporate directors and officers and noting that "a corporate officer who makes a mistake in judgment . . . will rarely, if ever, be found liable"); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1770 (2016); Joseph K. Leahy, *A Decade After Disney: A Primer on Good and Bad Faith*, 83 U. CIN. L. REV. 859, 889–90 (2015) (noting that courts will not assume bad faith when a corporation's board of directors makes a mistake but will instead presume good faith absent evidence to the contrary).

Johnson's ancient dictionary, invoked for its pragmatic enrichment, is not definitive on this matter.<sup>172</sup> Supporting this argument—against enriching the text with the term “exactly”—is the Presidential Oath Clause, which seems to cancel any notion that President has a duty of precise enforcement, since it requires only that the President faithfully execute the laws “to the best of” his ability.<sup>173</sup>

The term “faithfully,” however, has not satisfied a variety of scholars who argue that the text is complex. Those who support the notion of “exact” enforcement argue that the veto power suggests that the President has only one shot at negating a law through Article I, Section 7,<sup>174</sup> rather than two shots—one at signing and then another at the time of enforcement. That argument, however, does not account for discretionary non-enforcement falling short of an effective veto. Here again, the textual arguments of those who insist on “exact” enforcement run into the problem that the terms “executive” power and “faithfully” execute suggest that there is room for Presidential judgment.<sup>175</sup> These terms tend to cancel or at least undermine the claim that interpreters should effectively add the term “exactly” to the Take Care Clause.

Without creative additions, the text is unlikely to solve the Presidential non-enforcement problem. On the one hand, few believe the President can ignore the law. As the Supreme Court held in *Kendall v. United States* in 1838: “To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and is entirely inadmissible.”<sup>176</sup> The Founders had no interest in granting a President the monarchical equivalent of an ability to “dispense” with Congress's laws. As the *Kendall* court explained:

It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results to all cases falling within it, would be clothing the President with a power to control the

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172. *Faithfully*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 1755) (defining “faithfully” as “[s]incerely; with strong promises” and “[h]onestly; without fraud, trick, or ambiguity”).

173. U.S. CONST., art. II, § 1, cl. 8 (“[H]e shall take the following Oath or Affirmation: ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”).

174. See, e.g., Bellia, *supra* note 171, at 1773 (“[A]n executive decision to disregard a law . . . would grant the President a second veto that the Constitution does not contemplate.”); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 690 (2014) (“Allowing the President to disregard duly enacted laws . . . would [give] the President a form of second veto over laws . . .”).

175. See Bellia, *supra* note 171, at 1756 (noting that “one can view the clause as discretion-granting: in conferring or recognizing the President’s power to ‘execute[]’ the law, the clause seemingly embeds some flexibility to decide when and how to exercise that power”); see also DAVID K. NICHOLS, *THE MYTH OF THE MODERN PRESIDENCY* 52 (1994) (noting that “to the extent that the execution of the law requires discretion, the exercise of that discretion is under the control of the President”).

176. 37 U.S. 524, 525 (1838).

legislation of congress, and paralyze the administration of justice.<sup>177</sup>

These statements, however, do not settle the textual question. To arrive at “exact” enforcement, the interpreter must add meaning to the text of the Take Care Clause, yielding an inference that is negated by other text. In the absence of a clear text, the most we can say of the non-enforcement power is that the devil is likely to end up in the details: one must ask precisely what the President is “not” enforcing. If the President refuses to enforce a “mandatory” duty, there are good arguments that the President, in domestic affairs, must comply with Congress’s mandatory statute.<sup>178</sup> When the statute provides the President with discretion, however, then the answer may well be different. The President surely has power to direct his Cabinet to exercise discretion when in fact Congress has provided discretion. In any future case, it will be up to courts to determine whether the action amounts to “faithful” execution or “blithe” ignorance.

## V.

### ANALYTIC TEXTUALISM DEFENDED AND THEORIZED

So far, I have highlighted how originalist interpreters, whether judges or scholars, add meaning to the text by pragmatic enrichments that suggest “hard-edged,” rule-like qualities that do not exist in the text of the Constitution or may be falsified by other parts of the Constitution. More generally, I have argued that interpreters are forced to add and subtract meaning because they artificially limit the information economy by focusing narrowly on single words ripped from their context. If one starts by limiting oneself to a word or two, one will be unable to find meaning without adding or enriching meaning.

In this Part, I defend this approach against objections. First, I defend the assumption that constitutional interpretation must be consistent with basic rules governing communication. Second, I explain why “analytic textualism” and falsifying technique is an improvement over intratextualism, and is consistent with theories of structural inference or constitutional holism. Third, I explain why originalists who hope for historical precisification must recognize that their starting place—the choice of text—may raise significant risks of confirmation bias and error. If one starts from a false textual inference, then historical evidence confirming that interpretation does not honor the text; it violates it. Indeed, this may be one reason why the vast majority of judges have never been constitutional monists (following text alone) but have embraced pluralistic modes of reasoning (such as text, structure, history, and consequences) as a

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177. *Id.*

178. See Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1231 (2014) (discussing the legislative power of Congress as a limitation on executive power); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 45–46 (2014) (discussing the relationship between the grant of executive power in Article II and the Necessary and Proper Clause); see also Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1566 (2015) (noting the existence of mandatory executive duties).

defense against false textual inferences imposed by an artificial reduction of the interpretive information economy.

A. *The Constitution as Communication*

Critics will claim that the Constitution cannot be analyzed as if it were a casual conversation; it is a far more formal document.<sup>179</sup> Formal communications are still communications—whether issued by a general or by a president. Indeed, formality suggests we should pay more, rather than less, attention to the text since it reflects deliberation.<sup>180</sup> It would be a sad thing, as Justice Scalia used to say, if the people could not read their government’s own constitution,<sup>181</sup> and reading, of course, requires communication.

Others will suggest that conversations are liable to wide-ranging contradictions and digressions not likely to be found in formal documents. “Analytic textualism” does not assume either logical contradiction or inadvertent inconsistencies; it assumes the possibility of clarifying hypothesized readings by asking whether they can be falsified by means of other text. It assumes that a formal document is likely to express compromises that may not be reflected in small pieces of text, but require a wider view. It opens the information economy to test a hypothesized meaning. To make an analogy to a conversation: the theory assumes that one cannot take a single statement from the conversation but must look at how the conversation itself clarifies meaning.

Just as conversations proceed by iterative process, drafting of formal documents proceeds by give-and-take over time. Our Constitution began with competing drafts. Seriatim discussion of particular parts of the proposed drafts led to changes. Those changes in turn raised further amendments. Refinements were issued by committees and referred back to the whole. This is really not so different from a conversation. Party A proposes a plan to go to lunch. Party B asks: “Where do you want to go to lunch?” Party A says he wants to go to lunch at the Restaurant Bis near the Capitol. Party B amends that by saying he would prefer to go to Alexandria, and so on. Conversation, like drafting, can involve a good deal of iterative give-and-take to settle on a final plan.

Some have urged that, in constitutional and other contexts, we should adopt interpretive norms from contract law.<sup>182</sup> As Randy Barnett has argued, the Constitution is not a contract.<sup>183</sup> Contracts have the consent of all the parties; there never has been unanimous consent to our Constitution. But even if the

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179. A more sophisticated form of this argument is that Gricean maxims of cooperation should not prevail in cases of complex formal documents. See Williams, *supra* note 62, at 542. As noted earlier, I make no claim that those who debated the Constitution always agreed; they agreed enough to produce a final text. I also make no claim that Gricean maxims apply. The maxims are not necessary to my argument.

180. Barnett, *supra* note 18, at 631.

181. ANTONIN SCALIA, A MATTER OF INTERPRETATION 46–47 (1997).

182. Baude & Sachs, *supra* note 40.

183. Barnett, *supra* note 39, at 616.

Constitution were a contract, sophisticated interpreters of contracts know that the words of a document are not enough to give it meaning—inference is necessary. As contract theorists have argued, “communication” is only possible because of a “sophisticated process of pragmatic inference.”<sup>184</sup> Like all communications, contract terms can be ambiguous, vague, or otherwise require enrichment by reference to context or other information. In this sense, my approach is no different than how an interpreter might interpret a contract.

*B. Intratextualism, Structural Inference, and Constitutional Holism*

All of this brings me to defend the falsification method I have suggested when addressing proposed pragmatic inferences. Some might question whether this approach amounts to “intratextualism,” a term coined by the constitutionalist Akhil Amar.<sup>185</sup> There is a surface similarity in the sense that both theories seek to understand the text by focusing on the text, rather than on recourse outside of the text. There is a deeper difference, however: Intratextualism imagines that similar words or strings of words should be read similarly or that variation in language is meaningful. This requires judgments about the similarity or dissimilarity of terms.<sup>186</sup> “Analytic textualism” makes no such assumption, indeed it seeks to interrogate such assumptions, by attempting to falsify claimed similarity relationships. In this sense, intratextualism and analytic textualism are opposites: Intratextualism assumes a coherent document,<sup>187</sup> verified, non-reductive textualism does not.<sup>188</sup>

Intratextualist arguments are fully capable of adding pragmatic meaning *without acknowledging this important fact*. As we saw in the discussion of the Foreign Emoluments Clause, intratextual arguments may be full of pragmatic enrichments that come from excising particular words from one “home” clause and moving that enrichment to a different “receiving” clause, where the term takes on a new meaning. That new meaning may or may not be true, depending upon underlying judgments of similarity or dissimilarity. So, for example, the assumption that “office” must mean the same thing throughout the Constitution leads to the verging-on-silly argument that the Foreign Emoluments Clause does

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184. “[B]y harnessing, and then processing, more information than merely the text, more meaning can be extracted at the other end of the interpretative process. The other information is the ‘context’ . . .” Adam Kramer, *Common Sense Principles of Contract Interpretation (And How We’ve Been Using Them All Along)*, 23 OXFORD J. LEGAL STUD. 173, 177, 184–88 (2003).

185. Amar, *supra* note 6.

186. *Id.* at 762 (emphasizing the difference in phraseology as significant to a question involving interpretation of Article III).

187. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 730–31 (2000).

188. One might argue that I have adopted an equally false assumption that the Constitution is not coherent, simply shifting the burden. Falsifying procedure does not reject real textual coherence, where it exists. Instead, it aims to test hypothesized meanings that are *enrichments of meaning*, additions to the text.



not apply to the President. Intratextualism depends upon contestable assumptions of coherence and similarity that need to be defended, not assumed.<sup>189</sup>

“Analytic textualism” is consistent with, and in fact reinforces, arguments based on structural relationships created by the constitutional text. Charles Black famously argued that we should interpret the Constitution to enforce its structure and relationships.<sup>190</sup> Black’s emphasis on constitutional relationships remains exceedingly important and often misunderstood. “Analytic textualism” recognizes the importance of those relationships. When one pulls a word or a couple of words out of the clauses of the Constitution, there is a risk that one will sever any embedded relationships that might exist elsewhere in the document across clauses or articles. For example, severing the Vesting Clauses from the rest of the provisions in Articles I and II gives us a false picture of the President’s powers as exclusive when we know that, in many important instances, such as the making of legislation, the President and the Congress share power.

Similarly, “analytic textualism” supports a holistic approach toward the constitutional text defined as one that recognizes intertemporal relationships.<sup>191</sup> Vicki Jackson, among others, has argued that we should read amendments to the Constitution as amending the whole Constitution, including prior amendments and provisions in the original framework constitution.<sup>192</sup> So, for example, the Fourteenth Amendment, or at least its values, should be read as modifying the meaning of the Commerce Clause in cases where commerce and discrimination intersect.<sup>193</sup> Holism, as suggested by Jackson, refuses to pull one amendment out without looking at later amendments. Nothing in “analytic textualism” rejects that approach; in fact, to the extent that it is non-reductive, it is fully consistent with the idea that pragmatic enrichments must be tested against later textual modifications to the Constitution.

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189. See, e.g., Amar, *supra* note 6, at 773 (discussing glossing in connection with *McCulloch v. Maryland*). But see *id.* at 764 (explaining that Marshall’s textual argument in *Marbury v. Madison* assumes that the Original Jurisdiction Clause is exclusive but not explaining this as a pragmatic enrichment and seeking to confirm this reading by other textual evidence rather than trying to determine whether it is falsified).

190. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

191. There are many ways in which one can interpret interpretive “holism.” Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1962 (2013). Here, I define it to mean that amendment means amendment of all prior provisions in the original constitution.

192. Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 270 (2003); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 952 (2002) (arguing for a synthetic reading of the Fourteenth and Nineteenth Amendments).

193. Jackson, *supra* note 192, at 266–67.

## VI.

## RECONCEIVING PLURALISM AS CONSTRAINT?

For all of the particularity on which I have defended “analytic textualism,” no one should think that, in matters of constitutional structure, I believe that this is the end of any sound constitutional analysis. If anything, I have shown that the text on key matters involving executive power is vague. I sincerely doubt that, if in the near future courts are faced with questions of executive power, they will resort only to text, rather than the standard multi-modal argument in which they look at text, history, structure, and consequences to interpret a text.

My own theory of the separation of powers requires that courts consider deeply the consequences of their actions to the people<sup>194</sup> (for all shifts in governance privilege some constituencies over others) and to the future of governmental structure. The Founders were not linguists; they were practical men creating a political structure, a government, and they reasoned about constitutional structure in terms of how the government would work in practice, not based on “parchment barriers.”<sup>195</sup> They knew that “parchment barriers” had failed in securing a separation of powers under state constitutions; that is why there is no express separation of powers clause in the Constitution, or the Bill of Rights.<sup>196</sup>

Textualism, alone, in my opinion, will never answer the hard questions about executive power. There is simply too little text for all of the complex situations courts are likely to face. This, of course, leaves us with the question about where the interpreter goes once text leaves no answers. Originalists will argue that one should look for the meaning of particular terms in history. If I am correct about interpretive enrichment, however, if one begins with a hypothesized textual interpretation that is not in fact true, and one looks for that interpretation in the historical record, one may simply be confirming a meaning that the text itself denies. For example, in the Foreign Emoluments Clause case, there is no doubt that the historical record is likely to refer to cases where emoluments were attached to offices, since terms like “salary and emoluments” or “fees and emoluments” were common usage.<sup>197</sup> Looking for such usage, however, may only confirm a meaning—that the Foreign Emoluments Clause only covers emoluments related to a foreign or domestic office—that is not in the text of the Constitution.

Traditionally, at least according to Blackstone,<sup>198</sup> one applies a plurality of modalities. Critics of pluralism worry that this grab-bag of considerations is

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194. Nourse, *supra* note 104, at 799–802.

195. THE FEDERALIST NO. 48 (James Madison) (Jacob Ernest Cooke ed., 1961).

196. Nourse, *supra* note 140, at 468–70.

197. See *Emolument*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., 1828); *Fee, id.*; *Salary, id.*; see Mikhail, Definition, *supra* note 121.

198. 1 BLACKSTONE, *supra* note 6, at 60 (remarking that the law is to be gathered from “the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law”);

insufficiently rule-like, that it includes no key to the code. If I am right about pragmatic enrichment, however, there may be a different way of defending pluralism's longstanding history—as a constraint on false textual enrichments. One of the great problems in judicial decision-making is “motivated reasoning,” which is to say that a judge comes to a decision about who wins, based on her political views; she then seeks to confirm that view in the existing materials. Cognitive science calls this a recipe for “confirmation bias.” Judges are using materials to confirm their political priors, not to falsify their views. If this is right, critics are correct to wonder whether pluralistic approaches are constraining. Of course, the same reasoning applies to textualism: judges with political priors find their preferred meaning in the text, add pragmatic enrichments to the text, and look to historical materials on meaning to confirm their original bias. As we have seen, judges who like rule-like terms are fully capable of adding rule-like edges to a constitution that does not in fact include them.

Why, then, would pluralism ever be more constraining than monistic attachment to text? Two reasons: first, pluralism opens up the information economy. As we have seen earlier, one of the reasons that judges interpolate is that the constitutional text is sparse. If there are competing interpretations, pluralism allows the interpreter to “falsify” their preferred meaning against the meanings offered by history, structure, and consequences. So, for example, if one really wanted to know whether the Framers believed in a textual interpretation of “all executive power,” one could test this against whether, in fact, Framers regularly used this phrase (which they did not).<sup>199</sup> Recourse to the history of practical problems<sup>200</sup> (like removal) for its potential effects upon constitutional structure, in turn, offers a check against meanings that will yield structural harm. Blackstone insisted on this element of the interpretive calculus in part because it rests upon the perfectly rational assumption that writers generally do not pen suicide notes. Assuming one believed that “all executive

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1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §181, at 135 (Boston, Hilliard, Gray & Co. 1833) (“Mr. Justice Blackstone has remarked, that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law.”). See generally John P. Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century*, 80 MISS. L.J. 587 (2010) (discussing the interpretive rules advanced by nineteenth-century treatise authors).

199. There are occasional references to this enrichment. Madison famously uses it in the removal debate, but it is not a widely used phrase based on searches of databases on the ratification and the Constitutional Convention. See John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 1, 6 (2010); Search: *A Century of Lawmaking for a New Nation*, LIBRARY OF CONGRESS, <http://memory.loc.gov/ammem/hlawquery.html> (search title “Farrand’s Records (full text),” string “all executive power”); *Notes on the Debates in the Federal Convention*, AVALON PROJECT (2008), [http://avalon.law.yale.edu/subject\\_menus/debcont.asp](http://avalon.law.yale.edu/subject_menus/debcont.asp) [<https://perma.cc/86VH-UFG9>].

200. Political writers write in particular political contexts to address particular political problems, not to define the meaning of words. There is a difference in looking to the past as a dictionary (which depends upon what words one isolates) and looking to the past to determine how particular political problems have been resolved over time. See QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978).

power” in the domestic sphere was the proper pragmatic reading, one need only read *Steel Seizure*,<sup>201</sup> or look at recent controversies about the use of torture,<sup>202</sup> or even President Barack Obama’s refusal to enforce the immigration law,<sup>203</sup> to see how all Presidents will seek, when they believe it to be necessary, to expand their powers.

#### CONCLUSION

In important cases involving issues of executive power, originalists are not finding meaning in the Constitution, but adding to that meaning. If this is correct, theorists of originalism must have a more robust theory of the “interpretation zone,” one that defends the choice of text and pragmatic enrichments that could well be standing in for the interpreter’s preferences. As for non-originalists, it is time to insist upon the text of the Constitution, and to refuse to allow textual arguments that do not in fact reflect the actual Constitutional text.

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201. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

202. Janet Cooper Alexander, *John Yoo’s War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331 (2012).

203. *See supra* note 179 and accompanying text.