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An Evaluation of Evidence for Constitutional Construction From"The Decision of 1789" Debate in the First Congress

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I. INTRODUCTION

The President of the United States is vested with "[t]he executive Power."[2] The meaning and scope of "executive Power" is widely viewed as being relatively difficult to ascertain. Justice Jackson famously claimed that the meaning of that power was "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[3] For this and other reasons, the Supreme Court has tread carefully[4] when defining executive power and the result is relatively little case law on the topic,[5] and what exists does not come

1. John W. Stoepler Professor of Law & Values, The University of Toledo College of Law. Thank you to Eric Simmons for his valuable research assistance and to the *Ohio Northern Law Review* for organizing and hosting this Symposium. This Essay represents my tentative thoughts on the subject of historical evidence regarding constitutional construction. It builds on a prior, similar investigation in Lee J. Strang, *An Evaluation of the Historical Evidence for Constitutional Construction From the First Congress' Debate Over the Constitutionality of the First Bank of the United States*, 14 U. ST. THOMAS L.J. 193 (2018), and I plan to more extensively survey historical evidence in future work.

2. U.S. CONST., art. II, §1.

3. Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Cases), 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

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

5. Compared to, for instance, the robust Commerce Clause case law, to pick just one facet of legislative power.

close to answering most important questions.[6] Similarly, scholars robustly debate executive power, and there is a wide spectrum of conclusions drawn by scholars. Some scholars argue that the Clause means that the President receives all of the Federal Government's executive power,[7] while others argue that the Clause authorizes the President only to execute the law;[8] and most recently, Professor Ilan Wurman articulated a middle path: a "thick" version of the law-execution conception that includes the powers to "appoint, remove, and direct executive officers, and to issue regulations, in furtherance of law-execution."[9]

This debate over the meaning and scope of executive power stretches back to the first days of the Republic. In fact, one of the most important and thoughtful debates over the Constitution's meaning occurred in the First Congress in 1789, when the House and Senate debated whether the President possessed the power to unilaterally remove executive officers.[10] Stepping back for a moment, there is no text that patently delegated such a power to the President. There are many texts that *might* bear on whether the President possesses this power, including his "executive Power,"[11] his power of appointment (conditioned by Senate consent),[12] and Congress' impeachment power,[13] among others.[14] Congressmen debated the President's removal power in the context of a statute that would create the office of Secretary of Foreign Affairs, and the question arose whether the President possessed the constitutional power to remove the future Secretary unilaterally.[15]

The long-standing debate over and contested meaning of executive power has potentially important implications for originalism. Originalism is the theory of interpretation that identifies the Constitution's text's public

6. Furthermore, some of the justices' claims are considered implausible by scholars. For instance, Justice Jackson maintained that the executive power is merely a reference to the powers enumerated in the remainder of Article II. The Steel Seizure Cases, 343 U.S. at 579, 641 (Jackson, J., concurring) ("I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.").

7. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (Princeton University Press forthcoming) (2020).

8. Julian Davis Mortenson, *The Executive Power Clause*, 167 U. PENN. L. REV. (forthcoming 2020); *see also* Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1171–73 (2019).

9. Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. __ (forthcoming 2020) (manuscript at 11), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472108 (last revised May 7, 2020).

10. This debate is recorded at 1 ANNALS OF CONG. 383-399, 473-614 (May 19-June 24, 1789) (Joseph Gales ed., 1834).

11. U.S. CONST., art. II, § 1, cl. 1.

12. *Id*. art. II, § 2, cl. 2.

13. *Id*. art. I, § 3, cl. 6; art. I, § 2, cl. 5.

14. Such as the tenure protections for federal judges. *Id*., art. III, §1.

15. 1 ANNALS 383-99, 473-614 (May 19-June 24, 1789).

meaning, at the time the text was ratified, as its authoritative meaning.[16] But, what if there was no public meaning at the time of ratification? Or, what if the public meaning was underdetermined: it answered some legal questions, but not all legal questions? Is "executive Power" an instance of such constitutional underdeterminacy?

Constitutional construction was a concept (re)introduced[17] by originalists to answer these questions.[18] Constitutional construction is typically described by originalists as the activity of crafting constitutional meaning when the Constitution's original meaning is underdetermined.[19] Within this "construction zone," interpreters have discretion on how to create constitutional meaning.[20]

Putting together originalism and its approach to constitutional underdeterminacy with the debates (both present and past) over the meaning of "executive Power," in this Essay I reviewed a selection of important evidence from the early Republic to evaluate whether, to what extent, and how Americans in these early debates utilized constitutional construction.[21] More precisely, I reviewed the debate in the First Congress, which spanned nearly 160 pages in the *Annals of Congress* and summarized the debate below.[22] Though this investigation focused on only a subset of the large quantity of potential historical evidence on the topic of executive power and possible instances of constitutional construction, it surveyed a key historical

16. LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 27 (2019).

17. Originalists who advocate for the existence of construction argue that construction has existed as a phenomenon as long as the Constitution has existed. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 20-71 (1999) (describing the Chase impeachment as an example of construction).

18. *See* STRANG, *supra* note 16, at 31-33 (providing a summary of the concept); WHITTINGTON, *supra* note 17 (providing a book-length treatment of the concept); *see also* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467-69 (2013) (describing construction).

19. *See* STRANG, *supra* note 16, at 31-33 (describing the concept); WHITTINGTON, *supra* note 17, at 9 ("The defining features of constitutional constructions are that they resolve textual indeterminacies and that they address constructional subject matter."). *Compare* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103 (2011) (arguing that construction also includes the determination of legal effect of determinate constitutional meaning).

20. STRANG, *supra* note 16, at 31-33; WHITTINGTON, *supra* note 17, at 6.

21. It is not surprising that the participants did not utilize the label "construction" to describe the phenomenon, but they did repeatedly employ the term "construct" to describe the activity in which they were engaged. *See infra* Part IV.B.

22. 1 ANNALS 383-399, 473-614 (May 19-June 24, 1789). To be clear, this Essay presents a summary of that debate because the debate itself was so long, intricate, and detailed, that a summary is all that is possible in the space of an essay.

episode in the early Republic, and this is evidence that any plausible interpretation of the period must fit.[23]

Before proceeding, let me emphasize that my claim is modest because of the limited evidence I reviewed and summarized.[24] At the same time, the debate over the constitutionality of the President's power to remove executive officers was one of the most important, contentious, and thoroughly debated constitutional issues in the early Republic, so it *is* weighty evidence.

In Part II, I briefly describe originalism, constitutional construction, and rules of interpretation. The heart of this Essay, Part IV, derives two conclusions from the debate on executive power: first, the debate participants perceived that the Constitution did not provide patent answers to the debated constitutional question—that the answer was initially unclear; and second, the participants believed that the application of interpretative rules through the course of the debate showed that the Constitution ultimately provided a determinate answer to the question.

II. AN INTRODUCTION TO ORIGINALISM, CONSTITUTIONAL CONSTRUCTION, AND RULES OF INTERPRETATION

Originalism is a family of constitutional theories whose core is the fixation thesis and the constraint principle.[25] The fixation thesis is the proposition that the Constitution's meaning was fixed when it was ratified.[26] The constraint principle is the proposition that the Constitution's original meaning constrains constitutional law.[27]

One identifies the Constitution's original meaning through three analytically distinct steps.[28] First, originalists identify the text's conventional meaning.[29] Second, originalists apply the rules of grammar and syntax to the text's conventional meaning to identify the text's semantic meaning.[30] Third,

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23. In other words, the debate over executive power to unilaterally remove executive officers was so early and so important an issue debated by such prominent statesmen at such a high level of sophistication, that any conception of constitutional construction must be able to take it into account.

24. This Essay does not purport to fully recount the First Congress' debate, though it does attempt to faithfully summarize the main arguments made by the participants. In this Essay, I summarize the key information provided by the debate as it relates to constitutional construction.

25. STRANG, *supra* note 16, at 10. Professor Lawrence Solum recently provided a thorough summary of the key distinguishing characteristics of originalism in Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U.L. REV. 1243 (2019).

26. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 15 (2015).

27. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice*, 2-3, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 (visited May 5, 2020).

28. STRANG, *supra* note 16, at 27-30.

29. *Id.* at 27.

30. *Id*. at 28.

originalists place that semantic meaning in its public context to ascertain the text's public meaning.[31]

However, the Constitution's public meaning at the time it was ratified may be underdeterminate. The original meaning is underdeterminate if it does not provide one right answer to a legal question.[32] Thinking back to the fixation thesis and constraint principle, underdeterminacy is the product of either a lack of a meaning fixed at ratification or the fixed meaning was insufficiently clear to constrain constitutional doctrine.[33]

Recently, I argued that this underdeterminacy of the Constitution's original meaning occurred primarily in the form of *epistemic* underdeterminacy.[34] This argument depends on a distinction between metaphysical and epistemic underdeterminacy.[35] Metaphysical underdeterminacy is when the law in fact is underdetermined; epistemic underdeterminacy is when our legal practice is unable to ascertain what the law is, so that it appears to participants in the practice as underdetermined.[36] My conclusion was that even if the Constitution's original meaning is regularly metaphysically determinate, it could still often be epistemically underdeterminate.[37]

This originalist underdeterminacy may be the product of a variety of causes including vagueness, ambiguity, gaps, and contradictions.[38] For example, the Republican Guarantee Clause's[39] original meaning may be underdetermined.[40] Some governments, like Ohio's, are clearly "Republican," and other governments, like the Soviet Union's, clearly were not. But, some governmental structures are not clearly republican or non-republican; perhaps states whose legislators were apportioned based on geography are an example.

According to originalists, constitutional construction is the activity that occurs in these situations of underdeterminacy.[41] Interpreters create constitutional law in those contexts of constitutional underdeterminacy.[42] As

31. *Id*.
32. *Id*. at 31; WHITTINGTON, *supra* note 17, at 9.
33. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice*, 8-9, 23, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 (visited May 5, 2020).
34. STRANG, *supra* note 16, at 73-83.
35. *Id*. at 74-77.
36. *Id*. at 74-75.
37. *Id*. at 73.
38. *Id.* at 65.
39. U.S. CONST., art. IV, §4.
40. Without use of rules of interpretation.
41. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118-30 (2004); STRANG, *supra* note 16, at 31-33; WHITTINGTON, *supra* note 17, at 1-19; Solum, *supra* note 26, at 24. A recent, important intervention is Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).
42. STRANG, *supra* note 16, at 31.

I explain below, the First Congress in the Decision of 1789 did *not* construct the meaning of "executive Power" to include the presidential power to unilaterally remove executive officers, because the rules of interpretation eliminated the prima facie epistemic underdeterminacy that the congressmen encountered when they initiated their debate.[43]

Originalists debate the existence and characteristics of construction. One aspect of this debate that is central to my Essay is whether the Constitution's determinate original meaning included the product of contemporary rules of interpretation or not. More particularly, the debate is over whether the text's publicly-available context included conventional legal rules of interpretation.

Most prominently, Professors McGinnis and Rappaport have argued that, properly understood, contemporary legal rules of interpretation were constitutive of the Constitution's original meaning.[44] They reached this conclusion through two main moves. First, they argued that, even if the Constitution's semantic meaning is underdetermined, application of the original methods eliminated most or all indeterminacy.[45] Second, they argued that, even if underdeterminacy remained after application of these original-methods-closure rules, an interpreter should choose the meaning supported by a preponderance of the evidence.[46] This Essay's focus is the first of these moves.

Among those originalists that argue for construction's existence, there are a variety of disagreements. For example, there is disagreement over which government officials have the authority to construct constitutional meaning. Many originalists argue that the judiciary possesses that authority, and many others argue that the elected branches have it.[47]

Despite the nuances of this intra-originalist debate, all agree that construction includes at least the non-determined creation of constitutional

43. *See infra* Part IV.

44. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 139-53 (2013).

45. *Id.*

46. *Id.*

47. *Compare* STRANG, *supra* note 16, at 83-90 (arguing that federal judges must defer to elected branch constructions); WHITTINGTON, *supra* note 17, at 7, 9, 11 (arguing that construction is a political and hence non-judicial enterprise), *with* BARNETT, *supra* note 41, at 122 ("I do not share Whittington's characterization of the process of construction as 'political.'"); *but see* Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 125-29 (2010) (modifying his previous position and concluding that, "[s]o long as judges are acting as faithful agents to provisionally maintain constitutional understandings widely shared by other political actors, then their role in articulating constitutional constructions may not be objectionable."); *see also* Lee J. Strang, *Originalism as Popular Constitutionalism: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 272-74 (2011) (describing where various originalists fall on this issue).

meaning.[48] Unlike interpretation, which provides determinate answers to constitutional questions, construction leaves the questions unanswered or, more typically, narrows the universe of possible answers. The relevant constructor of meaning[49] must craft constitutional meaning that is consistent with the known original meaning. "There appears, therefore, to be an originalist consensus on (at least) one major point—that construction occurs (at least) when the original meaning underdetermines a case—and this point of agreement fits the initial reasons originalists articulated the concept of construction."[50]

Taking this point of consensus as the focus of my investigation, below, I evaluated whether the participants in the debate over the President's constitutional power to unilaterally remove federal officers possessed and utilized the concept—not the label—of construction.[51] I did so by reviewing whether the debate participants perceived the Constitution's meaning as underdetermined and, if so, how they responded.[52]

My conclusion was that the debate participants did not believe that the Constitution prima facie resolved the constitutional question. They did believe, however, that upon application of rules of interpretation through the course of the debate, the Constitution's meaning determinatively resolved the constitutional question (though they disagreed on what that resolution was).

III. EXECUTIVE POWER AND THE PRESIDENT'S POWER TO UNILATERALLY REMOVE PRINCIPAL EXECUTIVE OFFICERS

The most important debate in the early Republic over the meaning of "executive Power" occurred during the first session of the First Congress.[53] The debate focused on whether the President's executive power included the power to unilaterally remove principal officers,[54] that is, officers whose positions require Senate confirmation.

House members considered legislation to create the first key executive departments under the newly-operating Constitution.[55] James Madison

48. This includes Professor Solum, who argued that constitutional construction is the giving of legal effect to constitutional meaning. Solum, *supra* note 18, at 468. Under Professor Solum's view, construction occurs both when the original meaning determines a case and when it underdetermines a case.

49. Congress, the President, the Supreme Court, or state officials, depending on one's conception of originalist construction.

50. Strang, *supra* note 1, at 197-98.

51. *See infra* Part IV.

52. *Id*.

53. 1 ANNALS 383-399, 473-614 (May 19-June 24, 1789).

54. One could reasonably claim that the debate also encompassed the President's power to remove inferior executive officers because many (though not all) of the arguments made by the majority for the proposition that the President has the executive power to unilaterally remove principal officers also apply to inferior officers.

55. 1 ANNALS 383-84 (May 19, 1789).

moved that the Secretary of Foreign Affairs "shall be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President."[56] The last clause was objected to because "it declared the President alone to have the power of removal."[57] Congressman William L. Smith claimed that the Secretary "could only be removed by an impeachment before the Senate."[58] The debate in the House was over whether the bill's text should state or imply that the President (alone) had the constitutional power to remove executive officers, or whether the President must cooperate with the Senate to remove a principal officer.[59]

Labeled by the Supreme Court and scholars the "Decision of 1789,"[60] the House engaged in a four-day long marathon debate over whether the President's executive power included the power to (unilaterally) remove officers appointed with the Senate's consent.[61]

The debate was conducted at an extraordinary level of sophistication. The congressmen who participated in the debate included men who had participated in the Second Continental Congress, the Philadelphia Convention, and state ratification conventions. The participants engaged one another with substantive and nuanced arguments, and the arguments' sophistication increased during the course of the debate as the congressmen responded to each others' arguments. By the end of the debate, there were arguments, counter-arguments, counter-counter-arguments, and more.[62]

The Decision of 1789 has played a large role as a precedent followed for over a century by Congress, the Court, and the President.[63] Chief Justice Taft's well-crafted opinion for the Court in *Myers v. United States*,[64] reviewed this debate and concluded that "executive Power" included the power to fire principal officers.[65] Though *Myers* and its reliance on the Decision of 1789 was blithely rejected by the Supreme Court less than a decade later,[66] the Decision of 1789 continues to exert gravitational power on and off the Court.[67]

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56. 1 ANNALS 385 (James Madison) (May 19, 1789).
57. 1 ANNALS 386 (William L. Smith) (May 19, 1789).
58. 1 ANNALS 387 (William L. Smith) (May 19, 1789).
59. Or, whether such officers were solely removable via impeachment.
60. Myers v. United States, 272 U.S. 52, passim (1926); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1022 (2006).
61. Otherwise known as Officers of the United States, or principal officers, or superior officers.
62. *See generally* 1 ANNALS 383-399, 473-614 (May 19-June 24, 1789).
63. Prakash, *supra* note 60, at 1023-24.
64. *Myers*, 272 U.S. 52 (1926).
65. *Id.* at 145, 150, 176.
66. Humphrey's Executor v. United States, 295 U.S. 602, 630-31 (1935).
67. Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010).

IV. REVIEW OF THE DEBATE IN THE FIRST CONGRESS OVER THE PRESIDENT'S POWER TO UNILATERALLY REMOVE PRINCIPAL EXECUTIVE OFFICERS

A. Introduction

In this Part, I summarize one of the most important debates over the Constitution's meaning in the early Republic. I selected this debate for three primary reasons.[68] First, it involved a robust *debate* over constitutional meaning. This debate was a contest between plausible alternative constitutional meanings; otherwise there would not have been a debate. When more than one plausible constitutional meaning exists, that phenomenon suggests the possibility of constitutional underdeterminacy.

Second, the debate participants' experience and expertise suggest that the debate included the best available arguments. The debate was led by some of the Country's leading statesmen, including James Madison, Roger Sherman, and Elias Boudinot.[69] They were well educated, many were attorneys, and they possessed intimate knowledge of the Constitution to present reasonable arguments. Many of the debate leaders, like James Madison, were skilled in the craft of legal and constitutional interpretation, so they were adept at identifying constitutional underdeterminacy, if it existed. The substance of the debate itself confirms the high level of sophistication in which the debate was conducted.

Third, this debate was over an important constitutional issue; indeed, one of the most pressing constitutional issues.[70] The participants saw themselves as setting a key precedent that would impact the Constitution's structure and functionality for the rest of the Republic's history.[71] This issue's importance incentivized advocates on both sides to present arguments that the Constitution supported their respective interpretations, and that clearly happened in this debate. One would also expect that the stakes of these issues would incentivize the debate participants to identify constitutional underdeterminacy, if it existed, to support their respective positions.

This debate provides evidence of two conclusions: first, the debate participants believed that, at first blush, the Constitution's meaning was not patent, it did not clearly answer the constitutional question; and second, most debate participants believed that the Constitution provided a determinate

68. These reasons are the same as those that justified investigating the congressional debate on the constitutionality of chartering the First Bank of the United States. Strang, *supra* note 1, at 198-99.

69. *See* 1 ANNALS 383-399, 473-614 (May 19-June 24, 1789).

70. Prakash, *supra* note 60, at 1022.

71. *Id.* at 1075.

answer following a series of arguments drawing-out the Constitution's meaning. Below, I describe the evidence supporting each proposition, in turn.

B. Participants Perceived Prima Facie Constitutional Underdeterminacy

The participants repeatedly acknowledged that the constitutional question was not open-and-shut; they did not appear to believe that arguments were unnecessary to establish the accuracy of their interpretation, nor did they appear to believe that their opponents' arguments were implausible. Instead, debate participants regularly concluded that the Constitution's meaning was prima facia underdetermined and that it was only after the application of often-sophisticated arguments that they identified determinate constitutional meaning.

Congressmen repeatedly and expressly stated that the Constitution's meaning was not clear. Connecticut's Benjamin Huntington, for example, "observed that the constitution was silent respecting the removal . . . ."[72] The debate participants did not argue that the Constitution's text patently determined the issue. Instead, they often acknowledged the opposite. James Madison, for instance, in the course of responding to another member's argument, stated: "The Constitution, at the first view, may seem to favor his opinion; but that must be the case only at the first view; for, if we examine it, we shall find his construction incompatible with the spirit and principles contained in that instrument."[73] Later in the debate, Madison described the Constitution's prima facie meaning on this point as "doubtful."[74]

Many members repeatedly and expressly concluded that, because the Constitution's meaning was unclear, it needed the aid of what they called "construction" or analogous terms.[75] Congressman John Vining identified the need for "a legislative construction of the constitution."[76] Congressman Egbert Benson from New York "thought this an important question, and one in which they were obliged to take the constitution by construction. For although it detailed the mode of appointing to office, it was not explicit as to the supersedure."[77]

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72. 1 ANNALS 477 (Benjamin Huntington) (June 16, 1789).

73. 1 ANNALS 394 (James Madison) (May 19, 1789).

74. 1 ANNALS 479 (James Madison) (June 16, 1789); *see also id*. (describing the Constitution as "undecided"); *id*. ("so far as [the Constitution] will serve as a guide to us . . . .").

75. Congressman used construction or other, similar expressions, to indicate the need for additional interpretative work to be done in order to identify the Constitution's determinate meaning.

76. 1 ANNALS 486 (John Vining) (June 16, 1789).

77. 1 ANNALS 388 (Egbert Benson) (May 19, 1789); *see also* 1 ANNALS 388 (John Vining) (May 19, 1789) ("He had no doubt but the constitution gave this power to the President; but, if doubts were entertained, he thought it prudent to make a legislative declaration[.]").

Benson tied the need for construction to the continued existence among his fellow congressmen of "doubts."[78] This reasonable disagreement by his fellow congressmen caused Representative Benson to turn to other tools of interpretation to clarify—"construct"—the Constitution's meaning.[79] Similarly, Representative Alexander White concluded that "it seems a difficult point to determine whether [the President] has or has not this power by the Constitution, because some gentlemen contend he has, others that he has not."[80] In other words, White saw the reasonable disagreement among his fellow congressmen as evidence that the Constitution's meaning was not patent on this point.

Additional evidence of this prima facie underdeterminacy is found in the fact that the debate participants explicitly disagreed over whether the President's executive power included the power to unilaterally remove principal officers. Representative William L. Smith from South Carolina argued that the President did not possess the power because the impeachment process was the only way to remove officers.[81] James Madison, by contrast, argued that the President possessed the power and provided a wide variety of arguments to support his conclusion.[82] Both sides in the debate proffered plausible reasons supporting their respective positions.

The debate participants treated the subject of debate as legitimately open to debate. "I look upon every question which touches the constitution as serious and important," Fisher Ames stated, "and therefore worthy of the fullest discussion, and the most solemn decision."[83] The congressmen heartily joined the debate. They did not argue that the debate was unnecessary or illegitimate. Congressman William L. Smith closely followed the debate to help him form his own judgment. "And as yet I have heard no argument advanced sufficiently cogent to prove to my mind that the constitution warrants such a disposition of the power of removal . . . ."[84]

House members expressly tied the need for reasoned interpretation to this prima facia opacity. James Madison argued that "if it relates to a doubtful part of the constitution, I suppose an exposition of the constitution may come with as much propriety from the Legislature, as any other department of the Government."[85]

The debate participants also identified reasons for the Constitution's lack of full clarity on the debated constitutional issue. Congressman Egbert

78. 1 ANNALS 388 (Egbert Benson) (May 19, 1789).
79. 1 ANNALS 387-88 (Egbert Benson) (May 19, 1789).
80. 1 ANNALS 536 (Alexander White) (June 18, 1789).
81. 1 ANNALS 387 (William L. Smith) (May 19, 1789).
82. *E.g.*, 1 ANNALS 387 (James Madison) (May 19, 1789).
83. 1 ANNALS 492 (Fisher Ames) (June 16, 1789).
84. 1 ANNALS 490 (William L. Smith) (June 16, 1789).
85. 1 ANNALS 479 (James Madison) (June 16, 1789).

Benson concluded that the House was "obliged to take the constitution by construction. For although it detailed the mode of appointing to office, it was not explicit as to the supersedure . . . ."[86] A congressional construction of the President's power to remove officers would clarify the Constitution's meaning.[87]

Lastly, some congressmen changed their minds over the course of the debate.[88] James Madison, the leading debater on this issue, was one of the representatives who made this journey.[89] Madison stated that "I have, since the subject was last before the House, examined the constitution with attention, and I acknowledge that it does not perfectly correspond with the ideas I entertained of it from the first glance."[90] New York Congressman Peter Sylvester acknowledged that he changed his views as the debate went on. "The constitution, at first view, may seem to favor his [Rep. Bland's] opinion; but that must be the case only at the first view; for, if we examine it, we shall find his construction incompatible with the spirit and principles maintained in that instrument."[91] Sylvester concluded that the Constitution's meaning was determinate only after a fulsome examination.[92] These changes of mind are difficult to explain if the Constitution's meaning was clearly determinate. These changes of position are much easier to explain if the Constitution's meaning was initially perceived to be underdetermined and, upon examination and consideration of the arguments, was in fact determinate.

The existence of these widespread views that the Constitution was initially unclear about the President's removal power and that it did, ultimately, provide an answer was frequently coupled with a related move. Congressmen frequently argued that in this situation, Congress should "make a legislative declaration of the sentiments . . . on this point."[93] James Madison argued that, since the question "relates to a doubtful part of the constitution" that Congress may provide "an exposition of the constitution . . . ."[94]

This widely-perceived prima facie underdeterminacy pushed the debate participants to turn to a variety of tools to help them uncover the Constitution's inchoate meaning. In the following subsection, I describe the common moves made by the participants.

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86. 1 ANNALS 388 (Egbert Benson) (May 19, 1789).
87. *Id*.
88. Prakash, *supra* note 60, at 1039-40. They migrated from the congressional-delegation view to the executive power view.
89. *Id.* at 1034 n.95.
90. 1 ANNALS 480 (James Madison) (June 16, 1789).
91. 1 ANNALS 394 (Peter Sylvester) (May 19, 1789).
92. 1 ANNALS 393 (Peter Sylvester) (May 19, 1789).
93. 1 ANNALS 388 (Egbert Benson) (May 19, 1789).
94. 1 ANNALS 479 (James Madison) (June 16, 1789).

C. The Debate Participants Utilized Standard Arguments to Identify the Constitution's Determinate Meaning

1. Introduction

The debate participants utilized many different arguments to identify the Constitution's meaning. Participants on both sides of the debate utilized similar arguments, and these arguments seemed to be stock—conventional—interpretative tools employed to tease out constitutional meaning. The participants did not criticize the others' use of these tools in principle; instead, they disagreed about the tools' import.

2. Arguments from a Text's Meaning

Especially initially, a common argument that participants employed was to argue that the meaning of a particular text did or did not include a power.[95] Representative John Vining from Delaware argued that "there was a strong presumption that [the President] was invested with" the power to remove because the Constitution "declared[] that all executive power should be vested in him . . . ."[96] Vining appeared to recognize that this argument from the meaning of executive power, by itself, was insufficient to carry the day, because he subsequently articulated a number of other arguments.[97] From the opposite perspective, Virginia Congressman Theodorick Bland argued that the power to appoint an officer carried with it the power to remove that officer.[98] Bland therefore concluded that the President could remove an officer only with the Senate's consent.[99] Fellow Virginian, Alexander White, took the same tack and argued that "in all cases, the party who appointed ought to judge of removal . . . ."[100] Congressman Smith supported this conclusion by arguing that, in many states, the executive power to appoint has not carried with it the power to remove.[101]

3. Inferences from Other Texts

Likely the most common form of textual argument that participants employed was to identify implications of other texts and apply that

95. *See, e.g.*, 1 ANNALS 397 (George Clymer) (May 19, 1789) ("[T]he power of removal was an executive power.").

96. 1 ANNALS 388 (John Vining) (May 19, 1789).

97. *Id.*

98. 1 ANNALS 389 (Theodorick Bland) (May 19, 1789); *see also* 1 ANNALS 393 (Peter Sylvester) (May 19, 1789).

99. 1 ANNALS 388 (Theodorick Bland) (May 19, 1789).

100. 1 ANNALS 391 (Alexander White) (May 19, 1789); *see also* 1 ANNALS 473 (Alexander White) (June 16, 1789) ("I conceive the power of appointing and dismissing to be united in their natures . . . ."); 1 ANNALS 391 (James Jackson) (May 19, 1789).

101. 1 ANNALS 392 (William L. Smith) (May 19, 1789).

implication to the meaning of executive power. There were a number of common uses of this move.

Perhaps the most common form of this was an argument made by South Carolina Representative William L. Smith. Smith argued that the express provisions for removal of federal officers via impeachment precluded a unilateral removal power in the President.[102] By contrast, Congressman Bland argued that the express grant of the impeachment power to Congress did not preclude the implication of another removal mechanism in the President.[103]

A second very common textual inference was that the express limit on the President's power to appoint and enter treaties showed that the President's power to remove was not so limited.[104] However, on the other side of the debate, participants used the same argument for the opposite implication. Representative Theodorick Bland claimed that, if the President could unilaterally remove officers, then the Senate's confirmation power would be "nugatory."[105]

A third common textual inference was made by New York's Egbert Benson, who argued that the constitutional grant of tenure during good behavior to federal judges implied that all other officers did not have such tenure and could therefore be removed at the President's pleasure.[106] This argument was echoed by many other debate participants, including Elias Boudinot who asked "if this is the tenure by which all offices are to be held, where is the necessity of this explicit declaration in favor of the Judges?"[107] Congressman John Laurence from New York elaborated on this argument by claiming that the tenure held by federal judges protected the judges from Congress specifying a different term of office, so other federal officers whose offices lacked tenure protection were presumptively subject to the President's removal.[108] An analogous move was made by Pennsylvania's George Clymer who argued that the Senate "held a qualified check over the executive power, but that was in consequence of an express declaration in the constitution; without such declaration, they could not have been called upon for advice and consent . . . ."[109]

James Madison raised a fourth such argument. He argued that, because Congress can identify the contours of the offices it creates, Congress has "the

102. 1 ANNALS 387 (William L. Smith) (May 19, 1789).
103. 1 ANNALS 388 (Theodorick Bland) (May 19, 1789).
104. 1 ANNALS 388 (John Vining) (May 19, 1789).
105. 1 ANNALS 388 (Theodorick Bland) (May 19, 1789).
106. 1 ANNALS 388 (Egbert Benson) (May 19, 1789).
107. 1 ANNALS 390 (Elias Boudinot) (May 19, 1789); *see also* 1 ANNALS 391 (George Thatcher) (May 19, 1789).
108. 1 ANNALS 392 (John Laurence) (May 19, 1789).
109. 1 ANNALS 397-98 (George Clymer) (May 19, 1789).

discretion . . . to say upon what terms the office shall be held, either during good behavior or during pleasure."[110] New York Representative John Laurence inferred from Congress' legislative power to create offices and to define their contours that federal officeholders lacked tenure protection from the President's removal unless the Constitution expressly provided it (as it did with federal judges).[111]

Representative James Jackson, from Georgia, combined prior arguments.[112] He argued that the power to appoint included with it the power to remove. He coupled this claim with a textual inference about Congress' power to enact laws: "the body who appointed ought to have the power of removal, as the body which enacts laws can repeal them . . . ."[113] Representative John Vining also argued that from the *lack* of a textual prohibition on unilateral presidential removal one could infer a reason to interpret executive power as including the power to remove.[114]

Some congressmen made implausible inferential arguments. For example, Representative Smith inferred that all federal officers hold their offices during good behavior because the Constitution explicitly identified the ends of the terms for the President and members of Congress.[115]

Debate participants made inferential arguments from other texts as well.[116]

4. A Text's Purpose

Congressmen often identified the purported purpose or function of a text as a way to identify its meaning and how that meaning impacted the meaning of executive power. For example, proponents of the presidential power of removal argued that the existence of an express impeachment mechanism did not show that the President did not have a unilateral removal power. This was because the impeachment process was designed for extraordinary situations; for instance, when the President refused to remove an officer who should have been removed.[117] Or, for officers holding office during good behavior.[118] Therefore, the impeachment process had a different purpose than presidential removal and its existence did not imply a lack of presidential removal power.[119]

110. 1 ANNALS 389 (James Madison) (May 19, 1789).
111. 1 ANNALS 392 (John Laurence) (May 19, 1789).
112. 1 ANNALS 389 (James Jackson) (May 19, 1789).
113. *Id.*
114. 1 ANNALS 388 (John Vining) (May 19, 1789).
115. 1 ANNALS 391 (William L. Smith) (May 19, 1789).
116. The text represents a summary of such inferential arguments.
117. 1 ANNALS 388 (John Vining) (May 19, 1789).
118. 1 ANNALS 391 (George Thatcher) (May 19, 1789).
119. 1 ANNALS 388 (Egbert Benson) (May 19, 1789).

5. Structural Principles

Debaters regularly turned to constitutional structural principles, especially the separation of powers, to help them interpret the Constitution.[120] James Madison examined the Constitution's "true principles" and "the great departments of the Government in their relation they have to each other" to support his conclusion that the President possessed the removal power.[121] Delaware's John Vining "begged the committee to consider the monstrous effect it would produce if the Legislature went on to mingle the legislative and executive powers."[122] On the other side of the debate, Congressman Samuel Livermore argued that the House should not decide the constitutional question because only the Senate and the President were implicated by the question and should answer it themselves.[123]

Representative Egbert Benson argued against the presidential power because "the Senate was an effectual check to a system of favoritism," a form of checks and balances.[124] Virginia's Theodorick Bland presented a structural argument based on the principle of limited and enumerated powers.[125] Bland contended that the Senate needed to serve as a check on the President, otherwise "he would become absolute."[126] Congressman William L. Smith likewise used the principle of limited and enumerated powers, and he applied it to Article II to argue that the President lacked an enumerated removal power and hence a power to remove.[127]

6. Avoiding the Absurd Result

Many congressmen employed an absurd-result argument to support their respective interpretations. For instance, James Madison argued that interpreting the impeachment provisions as the exclusive means to remove federal officers would show that "a fatal error [was] interwoven in the system, and one that would ultimately prove its destruction[]" because it would saddle the President with officers he could not remove.[128]

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120. *See* 1 ANNALS 395 (Elbridge Gerry) (May 19, 1789) (arguing that the separation of powers suggested that interpretations that lead to intermixing of branches should be avoided); 1 ANNALS 397 (George Clymer) (May 19, 1789) ("The Senate were not an executive body").

121. 1 ANNALS 481 (James Madison) (June 16, 1789).

122. 1 ANNALS 398 (John Vining) (May 19, 1789).

123. 1 ANNALS 396 (Samuel Livermore) (May 19, 1789); *see also* 1 ANNALS 395 (Elbridge Gerry) (May 19, 1789) (arguing that the House did not have the removal power because "that would be that mingling of executive and legislative powers gentlemen deprecate").

124. 1 ANNALS 397 (Egbert Benson) (May 19, 1789).

125. 1 ANNALS 394 (Theodorick Bland) (May 19, 1789).

126. 1 ANNALS 397 (Theodorick Bland) (May 19, 1789).

127. 1 ANNALS 475 (William L. Smith) (June 16, 1789).

128. 1 ANNALS 387 (James Madison) (May 19, 1789); *see also* 1 ANNALS 388 (Egbert Benson) (May 19, 1789) (making a similar argument).

John Vining from Delaware argued that opposition to the President's unilateral power to remove officers based on the congressional power to remove via impeachment led to the absurd result that an incapacitated officer—one the President could not remove, nor could Congress—would remain in office.[129] Likewise, Elias Boudinot asked, "[w]ould gentlemen narrow the operation of the constitution in this manner, and render it impossible to be executed?"[130]

7. Congressional Liquidation

Debate participants advocated for Congress to liquidate any prima facie underdeterminacy the Constitution may have possessed on the question of the President's power.[131] James Madison argued that "[i]f the power naturally belongs to the Government, and the constitution is undecided as to the body which is to exercise it, it is likely that it is submitted to the discretion of the Legislature . . . ."[132] Similarly, Elias Boudinot "agree[d] that it is a legislative construction of the constitution [that is] . . . necessary to be settled for the direction of your officers."[133]

D. Debate Participants Perceived the Constitution's Meaning to be Determinate After Use of These Arguments

James Madison acknowledged that he changed his views as the debate went on. "The constitution, at the first view, may seem to favor his [Rep. Bland's] opinion; but that must be the case only at the first view; for, if we examine it, we shall find his construction incompatible with the spirit and principles maintained in that instrument."[134] Madison concluded that the Constitution's meaning was determinate after a fulsome examination.[135] Congressman William L. Smith treated the debate as an opportunity to hear the best arguments from both sides and to form his own judgment. "[U]ntil I

129. 1 ANNALS 388 (John Vining) (May 19, 1789).

130. 1 ANNALS 390 (Elias Boudinot) (May 19, 1789); *see also* 1 ANNALS 483 (John Vining) (June 16, 1789).

131. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 15 (2019). This move did not make an appearance in the debate over the constitutionality of the First Bank of the United States, debated the following year. *Id.* at 21.

132. 1 ANNALS 479 (James Madison) (June 16, 1789); *see also id.* (stating that because the issue "relates to a doubtful part of the constitution, I suppose an exposition of the constitution may come with as much propriety from the Legislature, as any other department of the Government."); 1 ANNALS 481 (James Madison) (June 16, 1789) ("But it may be contended, that where the constitution is silent, it becomes the subject of legislative discretion . . . .").

133. 1 ANNALS 486 (Elias Boudinot) (June 16, 1789); *see also* 1 ANNALS 496 (Fisher Ames) (June 16, 1789) ("It therefore appears to me proper for the House to declare what is their sense of the constitution.").

134. 1 ANNALS 394 (James Madison) (May 19, 1789).

135. *Id.*

am convinced that it is both expedient and constitutional, I cannot agree . . . ."[136] Massachusetts' Fisher Ames "believe[d] . . . we may come to something near certainty, by attending to the leading principles of the constitution."[137]

Thomas Hartley from Pennsylvania argued that "we are reduced to a matter of construction; but it is of high importance to the United States that a construction should be rightly made."[138] Hartley went on to identify that "rightly made" meaning based on the Constitution's text and implications from the Constitution's structure.[139] Hartley believed he had identified the Constitution's answer to the question, not the "policy" answer.[140]

Maryland's Michael Stone summarized the debaters' experience: "When the question was brought forward, I felt unhappy, because my mind was in doubt; but since then I have deliberately reflected upon it, and have made up an opinion perfectly satisfactory to myself."[141]

Especially near the end of the debate, many representatives expressed their views that the Constitution's meaning on this point was determinate, though toward different results, and not without some lingering doubts in some of their minds. John Vining "was satisfied that the constitution vested the power in the President."[142] On the other side, Pennsylvania's Thomas Hartley expressed less confidence in his judgment, but still concluded that the President did not possess the power: "[h]e owned that he had some doubts . . . ."[143] Similarly, Thomas Tudor Tucker from South Carolina was sufficiently certain that the President did not possess this power, despite his lingering "doubt[s]": "It appears to me, that the power is not necessarily vested in the President by the Constitution . . . ."[144]

The result that the debate participants perceived the Constitution's meaning to be determinate after the application of the arguments in the debate is in tension with Professor Will Baude's suggestion that the Decision of 1789 is an example of liquidation.[145] Baude argued that liquidation may only occur if the Constitution's meaning is underdetermined.[146] The evidence I recounted above shows that, though the participants initially perceived that the Constitution's original meaning was opaque, after the debate, they believed that they had identified determinate constitutional meaning.

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136. 1 ANNALS 490 (William L. Smith) (June 16, 1789).
137. 1 ANNALS 492 (Fisher Ames) (June 16, 1789).
138. 1 ANNALS 499-500 (Thomas Hartley) (June 17, 1789).
139. 1 ANNALS 500 (Thomas Hartley) (June 17, 1789).
140. 1 ANNALS 498 (Thomas Hartley) (June 17, 1789).
141. 1 ANNALS 511 (Michael J. Stone) (June 17, 1789).
142. 1 ANNALS 608 (John Vining) (June 22, 1789).
143. 1 ANNALS 608 (Thomas Hartley) (June 22, 1789).
144. 1 ANNALS 607 (Thomas Tudor Tucker) (June 22, 1789).
145. *See* Baude, *supra* note 131, at 9, 53, 61 (using or referring to the Decision of 1789 three times as an example of or to show the implications of or to gain information about liquidation).
146. *Id.* at 13, 66-68.

This does not fit liquidation, at least as described by Baude.[147] The participants did not conclude that they had filled in a gap, clarified an ambiguity, or eliminated a vagary through the use of a discretionary policy choice. The participants did not see indeterminacy "all the way down"; instead, they saw prima facie indeterminacy that, on applications of rules of interpretation such as the separation of powers, was in fact determinate.

E. Debate Participants Explicitly Contrasted Constitutional with Policy Arguments

Congressmen explicitly and implicitly distinguished their arguments between what we today would call policy (or non-legal) arguments and constitutional (or legal) arguments, and they purported to employ only constitutional arguments to decide the question of the President's power.[148] This distinction is important because it shows that the participants perceived that properly-legal materials were performing the analytical work needed to identify the Constitution's meaning, and that normative arguments were a separate phenomenon, one not relevant to the task at hand.

For instance, James Madison, after describing his view that the Constitution gave the President the power to unilaterally remove executive officers, went on to state: "If you consult the expediency, it will be greatly against the doctrine advanced by the gentlemen on the other side of the question."[149] Elsewhere, Madison identified a negative consequence of the anti-removal power view, and then argued that "he did not believe the Constitution imposed any such duty upon them . . . ."[150] Similarly, after making a series of constitutional arguments about Congress' power to limit the terms of the offices it created, Congressman John Laurence concluded: "The question of right he conceived to be indisputable; it was merely a question of expediency."[151] Congressman White contrasted his role as interpreter with the role of constitutional drafter: "If we were framing a constitution, these arguments ["from . . . inconvenience"] would have their proper weight, and I might approve such an arrangement. But at present, I do

147. *Id*. at 13. To be clear, the Decision of 1789, by itself, would not have constituted liquidation under Baude's view because there was not (yet) settlement.

148. *See* 1 ANNALS 490 (William L. Smith) (June 16, 1789) ("But . . . the argument does not turn upon the expediency of the measure. The great question is with respect to its constitutionality."); 1 ANNALS 494-95 (Fisher Ames) (June 16, 1789) ("If this is to be considered a question undecided by the constitution, and submitted on the footing of expediency . . . ."); 1 ANNALS 498 (Thomas Hartley) (June 17, 1789) ("I apprehend . . . that this officer cannot be considered as appointed during good behavior, even in point of policy; but with respect to the constitutionality, I am pretty confident he cannot be viewed in that light.").

149. 1 ANNALS 394 (James Madison) (May 19, 1789).

150. 1 ANNALS 390 (James Madison) (May 19, 1789).

151. 1 ANNALS 393 (John Laurence) (May 19, 1789).

not consider we are at liberty to deliberate on that subject. The Constitution is already formed, and we can go no further in distributing the powers than the constitution warrants."[152]

This distinction between policy tools and legal interpretative tools occurred on both sides of the debate. Representative Elbridge Gerry opposed the proposed legislation, and yet he was careful to clarify that "[s]ome gentlemen consider this a question of policy; but to me it appears a question of constitutionality, and I presume it will be determined on that point alone."[153]

Congressmen also implicitly acknowledged the distinction between the Constitution's meaning and sound public policy. James Madison, after making a number of arguments about the Constitution's meaning, moved on to explain why "it [is] absolutely necessary that the President should have the power [to remove] . . . from office."[154] Congressman Bland concluded his argument claiming that he "was therefore against this part of the motion, both on principle and policy."[155]

F. Conclusion

The debate participants did not give up or stop working to extract meaning from the Constitution to answer the issue before them, despite (what they perceived as) the Constitution's prima facia lack of clarity. Additionally, none seemed to believe that the Constitution failed to answer the question. Nor did the participants argue that the proposed legislation's normative attractiveness, or lack thereof, was itself sufficient reason to conclude that the President possessed the power to remove, or lacked the power to do so. Instead, the participants worked hard to wring meaning from the Constitution until they found that it answered the question. To do so, the debate participants employed standard, noncontroversial rules of interpretation. They utilized these rules to make patent the Constitution's opaque meaning.

V. CONCLUSION

In this brief Essay, I made three moves. First, I briefly described constitutional construction. Second, I summarized the debate over the President's power to remove executive officers. Third, I summarized the evidence of the House debate on this issue. From this debate, I drew two

152. 1 ANNALS 485 (Alexander White) (June 16, 1789).

153. 1 ANNALS 490 (Elbridge Gerry) (June 16, 1789); *see also* 1 ANNALS 396 (Elbridge Gerry) (May 19, 1789) (stating that "I cannot think we ought to attempt to give him authority to remove from office, in cases where the constitution has placed it in other hands").

154. 1 ANNALS 387 (James Madison) (May 19, 1789).

155. 1 ANNALS 397 (Theodorick Bland) (May 19, 1789).

tentative conclusions: (1) the debate participants believed that, at first blush, the Constitution's meaning was not patent; and (2), the debate participants believed that the Constitution provided determinate answers following a series of arguments drawing-out the Constitution's meaning.