

***Non-Textualism and the Duck Season-Rabbit Season*[†] Dramaturgical Dyad: A Response to Professor Cass Sunstein (and others)^{††}**

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ABSTRACT

Debate regarding legal interpretation is intense. A standard critique of so-called originalism and textualism is that such methodologies are not neutral or objective; rather, they must implicitly rely on unstated norms or on contestable historical claims. This critique is usually put forth by non-textualists. But their critique, that is, the critique put forward by non-textualists, equally applies to their preferred modes of interpretation, as it must apply to all methods of interpretation.

I amend one word from Professor Sunstein’s conclusion.

It is tempting to think that in the kinds of cases [and texts] that are of concern here, *non-textualism* is a kind of lie. It might be. But it might also be an honest mistake, a matter of sincerely thinking that you are “seeing that” [which all others see or that which is there to be objectively seen] when you are actually “seeing as” [which is seeing only one meaning among several potential meanings which others see]. Still, it is a serious problem if a judge [or academic] does not know that she is seeing as. If she is, in fact, seeing as, she should explain why that is the right way to see, and if she thinks that she is seeing that, she might see no need to offer an explanation.¹

To illustrate my point, I refer to how *non-textualists* have developed Hamilton’s *Federalist No. 77*² in relation to the doctrinal debate on the unitary theory of the executive and the scope of the President’s removal power. My purpose in doing so is not to settle that substantive debate—a matter about which I have no substantial published or settled views. Rather my purpose is methodological: it is

[†] *Rabbit season, duck season*, YOUTUBE, <https://www.youtube.com/watch?v=9-k5J4RxQdE> (last accessed Jan. 6, 2021).

^{††} *I’m Fired, Aren’t I? (The Simpsons)*, YOUTUBE, https://www.youtube.com/watch?v=Xlf2G00_VY0 (last accessed Jan. 6, 2021) (at 00:15).

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1. Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CALIF. L. REV. ONLINE 463, 477 (2020) (changing “textualism” to “*non-textualism*”), <https://tinyurl.com/yxo2hc49>.

2. *Federalist No. 77* has an interesting publication history. The essay first appeared in *The Independent Journal* on April 2, 1788, and then in *The New-York Packet* on April 4, 1788. What is now *Federalist No. 77* appeared originally as number 76 in the series, and it did not take its present place as number 77 until the first collected edition (the M’Lean edition) in 1788. See 4 THE PAPERS OF ALEXANDER HAMILTON 638 (Harold C. Syrett ed., 1962) (editor’s note).

to illustrate how *non*-textualist commentators and their readers “see” and how they choose to support their understanding of what they “see” with historical and other legal materials.

1994’s *DUCK SEASON*

In 1994, a *non*-textualist wrote:

Some thought that [the power of] removal of necessity followed appointment, and that since the President and Senate were involved in appointment, only the President and the Senate could remove. On this view, a shared role in removal was a matter of constitutional necessity. (This indeed was the apparent position of the executive’s strongest booster, Alexander Hamilton, writing in *The Federalist Papers*.) From this point, some concluded that by assigning removal to the President alone, the [the First Congress’ statutory] proposal deprived the Senate of its constitutional role.³

This *non*-textualist’s position is supported by two footnotes, which state:

See *The Federalist No. 77*, at 459–62 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The consent of [the Senate] would be necessary to displace as well as to appoint.”).⁴

Recall that Hamilton, certainly the strongest proponent of a strong executive, see, e.g., Lynton K. Caldwell, *The Administrative Theories of Hamilton & Jefferson* 100 (1964), apparently presumed that the Senate would share in the removal power. See *The Federalist No. 77*, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961).⁵

The author speaks to Hamilton’s “apparent position” and to his “presumed” position in support of a constitutionally mandated role for the Senate in removals. I approve of this author’s caution. Interestingly, the two footnotes, both citing *Federalist No. 77*, are not saying precisely the same thing. The second footnote merely indicates that Hamilton presumed the Senate would have a role in removals. But the first footnote is used to buttress the view that Hamilton thought that the power to appoint and the power to remove were intertwined—that is, the Senate’s presumed role in the removal power flowed from the Senate’s holding a share in the appointment power. As Professor Driesen explained:

It is not entirely clear whether Hamilton’s insistence that the President lacks the power to remove federal officials unilaterally relies on the exclusivity of the Constitution’s Removal Clause [controlling removal in the context of a

3. I will return to this point shortly; bear with me.

4. *Id.*

5. *Id.*

Senate impeachment conviction] or the principle that the power of removal goes with the power of appointment (which the Senate shares).⁶

I would go further than Professor Driesen: *we simply have no idea why Hamilton thought the Senate had a role in removals.*⁷ Hamilton only tells us his conclusion—that is, the Senate has a role in removals—but he does not explain why it has that role. In short, this *non*-textualist author, writing in 1994, believed he was “seeing that” which is or which all see, but, in reality, he was merely “seeing as” he chose to see.

Furthermore, in order to buttress his claim that Hamilton supported the view that the Senate had a constitutionally mandated role in removals, this author quotes a mere single sentence from *Federalist No. 77*. Moreover, the author fails to develop the well-known, and standard, counter-narrative which explains that Hamilton, a short time after publishing *Federalist No. 77*, may have changed his mind when the First Congress engaged in debate on the removal power.⁸ Surely the author was aware of this counter-narrative. I do not suggest this author was engaged “in a kind of lie.”⁹ Rather, I will just say that I do not know why the counter-narrative information was left out of the author’s analysis, although other materials were developed. It is a genuine puzzle.

6. David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 20 (2020), <https://tinyurl.com/y8me9kmd>.

7. See also, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 565 n.40 (2005) (“[I]t should be noted that in *Federalist No. 77*, Hamilton/Publius had suggested *in passing* that the Senate would play a symmetric advice-and-consent role in both appointments and removals.” (second emphasis added)); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 440 n.21 (2008) (denominating Hamilton’s position in *Federalist No. 77* as a “*passing comment*” (emphasis added)); cf. JAMES MACGREGOR BURNS & SUSAN DUNN, *GEORGE WASHINGTON* 68 (2004) (denominating Hamilton’s position as “odd[.]”); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 106 (1993) (denominating Hamilton’s position in *Federalist No. 77* as “careless[.]”). But see Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 621–22 (2009) (denominating *Federalist No. 77* as “detailed” and “significant”).

8. See Letter from William Loughton Smith to Edward Rutledge (June 21, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 831, 832–33 (Charlene Bangs Bickford et al. eds., 2004); Letter from William Loughton Smith to Edward Rutledge (June 21, 1789), in *The Letters of William Loughton Smith to Edward Rutledge, June 6, 1789 to April 28, 1794*, 69 S.C. HIST. MAG. 1, 6, 8 (George C. Rogers, Jr., ed., 1968); Debate on the Department of Foreign Affairs, in 1 ANNALS OF CONG. 473, 474–75 (Joseph Gales ed., Washington, Gales and Seaton 1834) (June 16, 1789) (Congressman Smith (S.C.) quoting Publius’ *Federalist No. 77*), <https://tinyurl.com/3tk8eb42>; see also *Myers v. United States*, 272 U.S. 52, 136–37 (1926) (Taft, C.J.) (pointing to discussion of Hamilton’s *Federalist No. 77* on the House floor in 1789 as supporting the view that the Senate’s consent is necessary to effectuate removals, but also arguing that Hamilton purportedly changed his mind during his service in Washington’s cabinet); *The Claim of Surgeon Du Barry for Back Pay*, 4 Op. Att’y Gen. 603, 609 (1847) (Clifford, Att’y Gen.) (“It is conceded that [civil officers] are removable at pleasure [of the President] in all cases under the [C]onstitution where the term of office is not specially declared. It seems, however, that one of the authors of the ‘Federalist,’ before the adoption of the [C]onstitution, and while it was pending before the people for ratification, had intimated a different opinion, insisting that ‘the consent of the Senate would be necessary to displace as well as to appoint.’”).

9. Sunstein, *supra* note 1, at 477.

Finally, in *Federalist No. 77*, Hamilton did not actually use the word “removal” or any variant on that word; rather, he used the word “displace.”¹⁰ Indeed, Justice Joseph Story understood Hamilton’s use of “displace” in *Federalist No. 77* as addressing *replacing* officers, as opposed to *removing* officers.¹¹ All this suggests that the 1994 author’s discussion of removal powers was “seeing as” as opposed to “seeing that.”

10. Compare *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting) (“In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide; and this clause was construed by Alexander Hamilton in *The Federalist, No. 77*, as requiring like consent to *removals*.” (emphases added)), and RAY RAPHAEL, CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT 118–19, 277 nn.34 & 36, 278 n.38 (2013) (affirming that Hamilton’s “displace”-language addressed removals, and characterizing the contrary view as “purely legalistic” and inconsistent with “historical standards”), <https://tinyurl.com/2p8jhwkc>, and Jeremy D. Bailey, *The Traditional View of Hamilton’s Federalist No. 77 and an Unexpected Challenge*, 33 HARV. J.L. & PUB. POL’Y 169 (2010) (arguing that *Federalist No. 77*’s “displace”-language was akin to “remove”), <https://ssrn.com/abstract=1473276>, with Reply Brief for the Respondent [Consumer Financial Protection Bureau (“CFPB”)] at 10, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7), 2020 WL 774433 (“In *The Federalist No. 77*, Hamilton said only that the Senate’s consent ‘would be necessary to displace’ principal officers . . . not to ‘remove’ them. Replacing an officer would of course require Senate confirmation of the replacement—which is all Hamilton may have meant.”), <https://tinyurl.com/y4fbdh2x> (brief filed on Feb. 14, 2020 by Solicitor General Noel Francisco), and 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1532–1533, at 390 (Boston, Hilliard, Gray, & Co. 1833), <https://tinyurl.com/a5hsn8zr>, and *infra* note 11 (quoting Story’s *Commentaries*), and Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149 (2010) (arguing that *Federalist No. 77*’s “displace”-language was akin to “replace,” and was not addressing “removal” per se), <https://ssrn.com/abstract=1331664>, and Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 CATO SUP. CT. REV. 157, 197 (2019) (“Hamilton’s entire paragraph [in *Federalist No. 77*] is about ‘the business of appointments.’ Thus, he speaks of ‘displacing’ an officer after a new president is elected. This seems most logically to be a reference to the advice and consent of the Senate to a new appointment.”), <https://tinyurl.com/2p9xzn8s>, and Letter from Professor Forrest McDonald to Seth Barrett Tillman (Feb. 14, 2009), <https://tinyurl.com/2ueurpx4> (“Your argument [that is, the view regarding the meaning of Hamilton’s “displace”-language] is, in my opinion, irrefutable.”).

11. See STORY, *supra* note 10, §§ 1532–1533, at 390 (emphasis added):

§ 1532. [I]n an early stage of the government, [the power of removal] underwent a most elaborate discussion [in Congress]. The language of the constitution is, that the president ‘shall nominate, and, by and with the advice and consent of the senate, appoint.’ &c. The power to nominate does not naturally, or necessarily include the power to remove; and if the power to appoint does include it, then the latter belongs conjointly to the executive and the senate. *In short, under such circumstances, the removal takes place in virtue of the new appointment, by mere operation of law.* It results, and is not separable, from the [subsequent] appointment itself.

§ 1533. This was the doctrine maintained with great earnestness by the Federalist [No. 77] . . .

See also *United States ex rel. Bigler v. Avery*, 24 F. Cas. 902, 905 (C.C.N.D. Cal. 1867) (No. 14,481) (Deady, D.J.) (quoting Story’s *Commentaries, supra*); CONG. GLOBE, 39th Cong., 1st Sess. 2307 (May 1, 1866) (Senator John Brooks Henderson quoting Story’s *Commentaries, supra*); *Judge Story’s Commentaries*, 14 AM. Q. REV. 327, 364–65 (Philadelphia, Pa., Carey & Lea 1833) (quoting Story’s *Commentaries*, §§ 1532–1533, *supra*), <https://tinyurl.com/2p8bdxwb>; *cf., e.g., Bowerbank v. Morris*, 3 F. Cas. 1062, 1064 (C.C.D. Pa. 1801) (No. 1726) (Tilghman, C.J.) (“A removal from office may be either express, that is, by a notification by order of the president of the United States that an officer is removed; or implied, by the appointment of another person to the same office. But in either case, the removal is not completely effected till notice actually [is] received by the person removed.”).

2017'S *RABBIT SEASON*

In a 2017 casebook, a *non*-textualist wrote:

Removal. . . . The power to hire and fire generally go together, so officers are fired the same way they are hired, by the president with the advice and consent of the Senate (unless, perhaps, Congress has placed the appointment in the president alone, the courts of law, or the head of department). See *The Federalist No. 77* (Alexander Hamilton) (“The consent of [the Senate] would be necessary to displace as well as to appoint.”).¹²

Again, some of my critique of the 1994 *non*-textualist author equally applies to this *non*-textualist. The author is reasonably cautious; his use of “generally” makes good sense. On the other hand, it is difficult to see how the citation to Hamilton directly supports the qualified position put forward by this *non*-textualist.

Hamilton’s statement involves something like a clear rule—a rule involving purported “necess[ity].” Let us make the simplifying assumption that the focus of *Federalist No. 77* was on principal officers, as opposed to inferior officers appointed absent Senate consent. If Hamilton was correct, if his rule is a “necessary” one applying to *all* principal officers, then this *non*-textualist author’s use of “generally” is underinclusive. In other words, Hamilton’s position is not direct authority for the *non*-textualist author’s position; rather, it is counter-authority. Hamilton’s *Federalist No. 77* should get a *but see* (or, better, a *but cf.*), and not a *see*.

Again, in *Federalist No. 77*, Hamilton did not actually use the words “remove” or “removal” or the phrase “power to fire.” Instead, he used a somewhat unusual word choice: “displace.” Here too, one may fairly conclude that this *non*-textualist was “seeing as” and not “seeing that.”

2020'S *DUCK SEASON*

In a 2020 journal article, this *non*-textualist, stated:

It might seem plain that because Article II creates a unitary executive, independent agencies are necessarily unconstitutional. But that is not so plain. An English speaker could say: ‘I agree that the executive power is vested in a president of the United States. But I do not agree that Congress lacks the authority to immunize Cabinet officials from plenary presidential removal authority.’ Alexander Hamilton spoke English, and that is exactly what he thought.¹³

This *non*-textualist’s position is supported by a single footnote—listing only a single source, absent any explanatory parenthetical. The footnote merely states:

See THE FEDERALIST NO. 77 (Alexander Hamilton).¹⁴

12. I will return to this point shortly; bear with me.

13. I will return to this point shortly; bear with me.

14. *Id.*

This *non*-textualist is not playing games. He asserts that Hamilton supported a particular position. But he does not actually quote anything Hamilton wrote. There is no indication that he recognizes that Hamilton’s language used “displace” as opposed to “remove.” Nor does he make any allowances for ambiguity in regard to what *Federalist No. 77* might mean. Instead, this *non*-textualist claims to *know* “exactly” what Hamilton thought. That is (almost) enough to make a textualist or, even, an unreconstructed originalist blush.

But this *non*-textualist has another, substantially more serious problem. In *Federalist No. 77*, Hamilton stated: “The *consent* of [the Senate] would be *necessary* to displace as well as to appoint.”¹⁵ Let us assume Hamilton meant: “The consent of [the Senate] would be necessary to *remove* [the President’s Executive Branch principal officers] as well as to appoint [them].” If so, it would appear—based on Hamilton’s use of “necessary”—that Hamilton meant that cabinet or principal officers are *constitutionally* immunized against “plenary presidential removal,” and that removal *must* be effectuated by joint President-Senate action. The tenure in office to which Hamilton is purportedly describing is not something granted by Congress; instead, it is granted by the Constitution. Not only is it not granted by Congress, but it would appear that Congress cannot take it away or modify it. After all, Hamilton’s posited position is a rule of “necess[ity].”

To put it another way, Hamilton’s use of “necessary” in *Federalist No. 77* would seem to establish a mandatory constitutional rule, not a simple default which could be modified by statute. But if Hamilton meant that Congress cannot grant this tenure (because it is fixed by the Constitution) and that Congress cannot take it away, then why would this *non*-textualist suggest that Congress has the “authority to immunize Cabinet officials from plenary presidential removal authority”? And how is that view supported by Hamilton’s *Federalist No. 77*? So when this *non*-textualist explained “exactly” what Hamilton meant, surely then, this author was merely “seeing as,” and not “seeing that,” right?

Finally, it is possible that the *non*-textualist author of this 2020 publication was not “seeing” anything at all; rather, the author was simply mistaken. Perhaps, this author confused Hamilton’s *Federalist No. 77* with Madison’s *Federalist No. 39*?¹⁶

15. THE FEDERALIST NO. 77 (Alexander Hamilton) (emphases added).

16. See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part):

In *Federalist No. 77*, Hamilton presumed that under the new Constitution “[t]he consent of [the Senate] would be necessary to displace as well as to appoint” officers of the United States. He thought that scheme would promote “steady administration”: “Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained” from substituting “a person more agreeable to him.” By contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. He explained in *Federalist No. 39*: “The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions.”

Id. at 2230 (citations omitted) (emphases added); see also *CFPB v. All American Check Cashing, Inc.*, 952 F.3d 591, 597–98 (5th Cir.) (Higginbotham, J., concurring), *reh’g en banc granted, judgment vacated*, 953 F.3d 381 (2020) (“And the Framers held disparate views on where the power of removal

In *Federalist No. 39*, Madison wrote: “The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.”¹⁷ It is Madison’s position which closely supports this author, not Hamilton’s.

2021’S *RABBIT SEASON*

Lastly, in an article published in 2021—in an exclusive peer reviewed law journal—a *non*-textualist wrote:

Hamilton himself, a strong believer in a unitary executive, . . . concluded that the removal power followed from the Appointments Clause. In [Hamilton’s] view, that meant that officials who were subject to advice and consent for their appointment, could be made removable only with the consent of the Senate. In his words, “the consent of [the Senate] would be necessary to displace as well as to appoint.”¹⁸

Hamilton had no problem with the Take Care Clause, but he also believed that Congress could condition removal of cabinet officials on the advice and consent of the Senate.¹⁹

These two statements do not cohere. The first statement’s use of “only” suggests that Hamilton took the position that the Constitution conditioned the removal of principal executive officers on Senate consent. But the second statement suggests that Hamilton took the position that Congress “could condition removal of cabinet officials” in such a manner, but it need not do so. Both views are ascribed to Hamilton. Ascribing both views to Hamilton, particularly if both views were based on *Federalist No. 77*, seems strained.

ought reside. Alexander Hamilton argued that the ‘consent of [the Senate] would be necessary to displace as well as to appoint’ officers.” (citing *Federalist No. 77*); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 186–87 (2021) (distinguishing Hamilton’s position in *Federalist No. 77* and Madison’s position in *Federalist No. 39*), <https://tinyurl.com/ys2dn96f>.

17. THE FEDERALIST NO. 39 (James Madison). See generally, e.g., James Madison, Speech on the Removal Power of the President, June 16, 1789, in THE CONGRESSIONAL REGISTER; OR, HISTORY OF THE PROCEEDINGS AND DEBATES OF THE FIRST HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA 457 (New York, Harrisson & Purdy 1789), <https://tinyurl.com/rtvtccx>:

[James Madison, in the House of Representatives’ Committee of the Whole:] Where the people are disposed to give so great an elevation to one of their fellow citizens, I own that I am not afraid to place my confidence in him; especially when I know he is impeachable for any crime or misdemeanor, before the senate, at all times; and that at all events he is impeachable before the community at large every four years, and liable to be *displaced* if his conduct shall have given umbrage during the time he has been in office.

Id. at 458 (emphasis added).

18. I will return to this point shortly; bear with me.

19. *Id.*

Again, *Federalist No. 77* indicates that Hamilton presumed the Senate will have a role in appointments and removals.²⁰ But this *non-textualist* author is ascribing more than that to Hamilton. This author is stating that Hamilton “concluded that the removal power followed from the Appointments Clause.” As Professor Driesen explained, Hamilton’s language in *Federalist No. 77* does not actually say that.²¹ Apparently, this author was merely “seeing as,” and not “seeing that.”

The author or co-author of all these passages—from 1994, 2017, 2020, and 2021—was: Professor Cass Sunstein. The 1994 publication was Sunstein’s (co-authored) *The President and the Administration*.²² The 2017 publication was Sunstein’s (co-authored) casebook: *Administrative Law and Regulatory Policy: Problems, Texts, and Cases*.²³ Of course, the 2020 publication was Sunstein’s *Textualism and the Duck-Rabbit Illusion*.²⁴ Finally, the article published in 2021 is Sunstein’s (co-authored) *The Unitary Executive: Past, Present, Future*.²⁵

One might ask: Hamilton’s *Federalist No. 77*—is it a duck or a rabbit?²⁶

It is tempting to think that in the kinds of cases [and texts] that are of concern here, *non-textualism* is a kind of lie. It might be. But it might also be an honest mistake, a matter of sincerely thinking that you are “*seeing that*” [which all

20. I am using “removal” here in a broad sense to cover both simple removals and also removals effectuated by replacing an incumbent officer with a successor. *See supra* notes 8, 10 & 11 (collecting authority).

21. *See* Driesen, *supra* note 6, and accompanying text.

22. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 25, 25 n.114, 26 n.119 (1994), <https://tinyurl.com/ptdexw9n>; *supra* notes 3–5.

23. *See* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL E. HERZ, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES* 121 (8th ed., Wolters Kluwer 2017), <https://tinyurl.com/yf4227w>; *supra* note 12.

24. *See* Sunstein, *supra* note 1, at 471 (footnote omitted) (citing, absent any quotation, *Federalist No. 77*); *supra* notes 13–14.

25. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 92 & 93 (footnote omitted) (citing and quoting a paragraph from *Federalist No. 77*) (published in 2021), <https://www.journals.uchicago.edu/doi/10.1086/714860>; *supra* notes 18–19.

26. For a discussion how historians, academic lawyers, and other commentators overread meanings into texts and historical incidents reported in threadbare primary materials, see, e.g., Seth Barrett Tillman, *What Oath (if any) did Jacob Henry take in 1809?: Deconstructing the Historical Myths*, 61 AM. J. LEGAL HIST. 349 (2021), <https://ssrn.com/abstract=3790115>; Seth Barrett Tillman, *A Religious Test in America?: The 1809 Motion to Vacate Jacob Henry’s North Carolina State Legislative Seat—A Re-Evaluation of the Primary Sources*, 98 N.C. HIST. REV. 1 (2021), <https://ssrn.com/abstract=3498217>. *See also*, e.g., Declaration of Seth Barrett Tillman, Lecturer (Exhibit D), in *Amicus Curiae* Scholar Seth Barrett Tillman’s and Proposed *Amicus Curiae* Judicial Education Project’s Response to *Amici Curiae* by Certain Legal Historians, *Citizens for Responsibility and Ethics in Washington v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Civ. A. No. 1:17-cv-00458-GBD) (Daniels, J.), ECF No. 85-5, 2017 WL 7795997, <https://ssrn.com/abstract=3037107> (brief filed on Sept. 19, 2017 by Professor Josh Blackman et al.).

others see or that which is there to be objectively seen] when you are actually “seeing as” [which is seeing only one meaning among several potential meanings which others see]. Still, it is a serious problem if a judge [or academic] does not know that she is *seeing as*.²⁷

Notwithstanding Professor Sunstein’s article’s title, *Textualism and the Duck-Rabbit Illusion*, the methodological difficulty raised by Sunstein—i.e., judges’, academics’, and other interpreters’ of legal texts mistakenly failing to distinguish what they see from what others see (or from there actually is)—would seem to infect some (and, perhaps, many) others—i.e., interpreters other than textualists and originalists—including, e.g., Professor Sunstein. To put it another way, a thoughtful person might ask: Is the duck-rabbit illusion a particular problem for textualism and textualists, or for originalism and originalists—or, is it something of a more universal problem for all engaged in the interpretation of all (or nearly all) texts?²⁸

One might also ask: Had Professor Sunstein written an article titled *Non-Textualism and the Duck-Rabbit Illusion*, and framed the issue as presented in the block quotation above, would any United States-based law journal have cared to publish it?

27. Sunstein, *supra* note 1, at 477 (changing “textualism” to “non-textualism”) (emphases added).

28. Cf. Seth Barrett Tillman, *The Two Discourses: How Non-Originalists Popularize Originalism and What that Means*, NEW REFORM CLUB (Mar. 28, 2016, 9:22 AM), <https://reformclub.blogspot.com/2016/03/the-two-discourses-how-non-originalists.html>.