

## ORGANS MISUSED AND USED: A COMMENT ON THE SOLE ORGAN PROBLEM

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### INTRODUCTION

Michael Van Alstine's article, *Taking Care of John Marshall's Political Ghost*, makes use of a classic historical convention to mount a devastating critique on a hoary legal myth.<sup>1</sup> The myth holds that the President, as the "sole organ" of foreign affairs, exercises something approaching all power over U.S. international relations unless the Constitution specifies otherwise, and sometimes even if it does.<sup>2</sup> The myth further holds that not only presidents have taken this position, but that it was pioneered by none other than John Marshall.<sup>3</sup> This myth made its appearance, as most legal myths do, in a Supreme Court opinion; here Justice Sutherland's justly criticized effort in *United States v. Curtiss-Wright Export Corp.*<sup>4</sup> As Van Alstine well documents, it had made certain appearances before, and has been more or less constantly on stage since.<sup>5</sup> Like most myths, the "sole organ" statement is not without some basis in fact. Yet like many myths, especially legal myths, it shrinks almost beyond recognition when subjected to genuine historical scrutiny.

Van Alstine conducts his analysis using a device that is immediately recognizable to anyone familiar with rigorous historical scholarship. This trope consists of first, taking a familiar historical incident or figure, and next, tracing how it has changed—sometimes radically—through time, usually because of contemporary reasons and context. Consider an example I recall from one of my first seminars in graduate school. There, fledgling historians

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1. Michael P. Van Alstine, *Taking Care of John Marshall's Political Ghost*, 53 ST. LOUIS U. L.J. 93 (2008).

2. *See id.* at 99–104 (citing 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall on Mar. 7, 1800)).

3. *See id.* at 93.

4. 299 U.S. 304, 319 (1936) (citing 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall on Mar. 7, 1800)).

5. Van Alstine, *supra* note 1, at 99–104, 99 n.104.

encountered the familiar story of Tituba, one of the first women accused during the Salem witch trials.<sup>6</sup> As one historian has noted, Tituba's race came to be seen as African, after having been half-African, Indian, and half-Indian.<sup>7</sup> These changes, moreover, had less to do with any attempt to discover her real origins than to fulfill the needs of changing racial stereotyping.<sup>8</sup> Professor Van Alstine gravitates to this technique for obvious reasons. The frequent repetition of the "sole organ" line by presidentialists, whether Democratic or Republican, whether in the Executive, Judicial, or even Legislative Branches,<sup>9</sup> suggests a myth that expanded to fit later needs rather than one that emerged full-blown. The challenge, therefore, is trying to recover what Marshall's "sole organ" statement meant in the first place.

Van Alstine meets this challenge elegantly. This warm assessment arises largely because his effort accords with a fair deal of historical work I have done regarding legal and historical scholarship,<sup>10</sup> including on U.S. foreign relations law.<sup>11</sup> Saying this, however, raises the danger of appearing solipsistic. To avoid that charge, I will focus not on my work, but rather on how Van Alstine's work confirms my work.

Toward that end I want to raise two further, and corollary, points for balance in this short critique. One is, and in fact this is where—I am sad to say—he echoes my work best: Van Alstine is very good on the "misuse" part of the "Use and Misuse of History in Foreign Relations Law." Here, my only criticism is he might have taken things a little further, but it is a relatively minor criticism. The other point, the more critical one—and this is a self-criticism as much as it is a criticism of Van Alstine's article—concerns the "use" part. How should we, especially we constitutional lawyers, use a proper account of the "sole organ" statement in light of its subsequent misuse? More generally, what do we do with this kind of episode in American history? These questions cut to the heart of these papers and this symposium.

## I. MISUSE

Consider first the misuse. At the outset, I note that Van Alstine's article engages in certain methodological approaches, all of which I think are

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6. See Chadwick Hansen, *The Metamorphosis of Tituba, or Why American Intellectuals Can't Tell an Indian Witch from a Negro*, 47 NEW ENG. Q. 3, 3 (1974).

7. See *id.*

8. See *id.* at 11–12.

9. See Van Alstine, *supra* note 1, at 99–104.

10. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

11. See Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169 (2004); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) [hereinafter *History Right?*].

exemplary. As such, they are the polar opposite of law office history or what some have called history “lite.”<sup>12</sup>

One method that lawyers often employ with phrases or legal texts is to try to figure out what they mean, starting from the specific and moving to the general.<sup>13</sup> What historians do, by contrast, is to start with general context and then try to figure out more specific issues and the meaning of those specific issues. Van Alstine does that very well in showing first the lawyerly approach and then secondly the historical approach. He first gives the conventional lawyerly interpretation of the “sole organ” phrase, giving a bare bones account of it and then explaining how it has been used.<sup>14</sup> In this he echoes the transformation of *Tituba*. But then the study takes a few steps back and builds the larger political context and legal context in which the speech was given.<sup>15</sup> This essential tack enables Van Alstine to recapture the original significance and meaning of Marshall’s actual speech.

A second methodological point Van Alstine follows is engagement with the secondary literature.<sup>16</sup> And here, especially when it comes to rebuilding the context, he looks at many of the relevant major works concerning the stakes involved with the election of 1800 and the politicization between the Federalists, the High Federalists, and the Jeffersonians.<sup>17</sup> From this he rightly discerns how great the incentives were for Marshall to soft-pedal presidential power and to keep it narrow in his defense of what Adams did in this highly charged episode.<sup>18</sup> All of that said, one thing I would have liked to have seen more of was direct engagement with other previous work on the topic, especially with that of Ruth Wedgwood, insofar as she has advanced an alternative view in a prominent article published in a prominent law journal.<sup>19</sup>

Finally, and it is ironic for someone who at least has some history training to say, but for me one of the *last* things to look at is primary sources. This ordering follows from the prior imperative to build context first. Begin by looking at what other historians have said, and then you are informed enough to make sense of what can otherwise be cryptic and misleading snippets of musty texts that can yield emphysema as readily as they yield meaning. Primary sources can be misleading unless you have built up larger historical legal understandings.<sup>20</sup>

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12. See Flaherty, *supra* note 10, at 549–56.

13. See *id.* at 553–54.

14. Van Alstine, *supra* note 1, at 95–104.

15. *Id.* at 104–19.

16. See Flaherty, *supra* note 10, at 553–55.

17. See Van Alstine, *supra* note 1, at 110–19.

18. *Id.* at 119.

19. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

20. See Flaherty, *supra* note 10, at 553–55.

Beyond these methodological guidelines, which apply to those engaging in originalist, quasi-originalist, historicist, or whatever the term may be for recapturing history for foreign relations and constitutional reasons, sometimes there will be a dominant narrative. Such a narrative may be about constitutional development in general or about certain episodes. If a school of historical thought emerges on a relevant matter, there is a presumption, rebuttable, but a presumption nonetheless, that the interpretation of specific historical episodes should in some way comport with the established narrative *unless* one has come up with enough evidence to rebut this presumption. Too often, lawyers make historical assertions with no connection to, or that are inconsistent with, a picture that scholars may have painstakingly created over the course of a generation. Sometimes they do so on purely instrumental grounds, in order to get to where they want to go. Sometimes they do so in utter good faith, but they simply lack the time, resources, or necessary historical background. Either way, too often lawyers and law professors come up with something that would be radically revisionist if it were presented before historians. They do this, moreover, without anywhere near the amount of evidence required to make sense of what would otherwise seem an anomaly in the larger story.<sup>21</sup>

How does all of this cut in favor of Van Alstine? What I have just recounted are rules for credible history by lawyers that I set forth about ten years ago in an article entitled *History "Lite" in Modern American Constitutionalism*.<sup>22</sup> Regarding method, yes, Professor Van Alstine is getting at the context properly, engaging in the secondary literature ably, and getting basic facts from the primary sources down. He hits the marks on every procedural point.

What of the merits of the story? Enough about his work; what about mine? Here it is a similar story. One central point that Van Alstine takes as a given is that treaties during this period were considered self-executing, or at the very least presumptively self-executing.<sup>23</sup> Nor is this surprising, given that this was the dominant understanding of treaties just over a decade before when the Constitution was ratified.<sup>24</sup>

Professor John Yoo tried to refute this view on historical grounds.<sup>25</sup> In my view that attempt was almost laughably wanting, precisely in terms of its use of historical sources to further a radically revisionist case.<sup>26</sup> Therefore, in

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21. *See id.* at 554–55.

22. *Id.* at 553–55.

23. Van Alstine, *supra* note 1, at 129–33.

24. *See History Right?*, *supra* note 11.

25. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

26. *See id.*; *see also History Right?*, *supra* note 11, at 2095–99.

another article I sought to adhere to my own historical precepts to refute the refutation.<sup>27</sup> That effort proved to be fairly straightforward since, in my view, it is painfully obvious that the Founding generation thought treaties should be self-executing.<sup>28</sup> Indeed, one does not need to go much beyond the text of the Supremacy Clause to see the point.<sup>29</sup> Ironically, the upshot of the Founding commitment to treaties as the supreme law of the land now appears lost on the Supreme Court.<sup>30</sup> Sound historical interpretation remains, however much judicial authority or academic eagerness would like to have the facts the other way.

That said, *John Marshall's Political Ghost* might have accorded John Yoo's otherwise outlandish assertion some consideration in one regard. The question does arise whether anyone involved in the Robbins controversy that Van Alstine describes made any arguments against treaties being self-executing. Robbins's Jeffersonian supporters certainly had the incentive to do so, however much self-execution may have seemed settled during the Constitution's ratification. This query arises given that Founding consensus on a provision or doctrine often gives way in light of subsequent politics, which can make positions that were off the wall suddenly appear on the table. It would not come as a shock if at least some individuals were making non-self-execution arguments. Only twenty years later, after all, Marshall himself would author the Court's opinion in *Foster v. Neilson*, holding that not all treaties were necessarily self-executing.<sup>31</sup>

More important and intriguing to me is not a speculative question, but an observation regarding what Van Alstine recovers concerning early conceptions of executive power and constitutional interpretation more generally. Striking, at least to me, is the text-bound approach that Congressman Marshall follows in his famous speech, an approach diametrically opposed to the expansive conception of presidential power that the "sole organ" language ostensibly supports. As I read it, his defense of Adams's actions, which itself is careful and modest, tracks two ideas and two constitutional clauses.

One is his duty as President to take care that the laws are faithfully executed.<sup>32</sup> And one of those laws is the Treaty at issue. What triggers the whole affair is that the British want to extradite Robbins to try and execute him pursuant to U.S. treaty obligations.<sup>33</sup> That said, Van Alstine perhaps overlooks

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27. *See History Right?*, *supra* note 11.

28. *See id.*

29. *Id.* at 2095, 2151.

30. *See Medellin v. Texas*, 552 U.S. \_\_\_, 128 S. Ct. 1346 (2008).

31. 27 U.S. (2 Pet.) 253, 314 (1829).

32. U.S. CONST. art. II, § 3.

33. Van Alstine, *supra* note 1, at 96–97 (citing Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. XXVII, Nov. 19, 1794, 8 Stat. 116).

what triggers this trigger. Another reason the British might have wanted to execute Robbins is, and this is just self-pleading, apparently he may have been Irish.<sup>34</sup>

The other clause at issue may be less obvious but not less compelling: the Receive Ambassadors Clause.<sup>35</sup> Now this may not be evident given the text of Marshall's speech. But a little bit of historical research reveals that it was common both in England and in the United States during the eighteenth century to view the power to receive ambassadors as containing an array of related powers to recognize countries—including communication with other foreign sovereigns.<sup>36</sup> This, I believe, is the ultimate source of Marshall's "sole organ" language, the modest claim that the President is the point person for communication with other nations.

In stark contrast, what it is not is the Executive Vesting Clause, or the notion that executive power is foreign affairs power. That is exactly the argument Marshall might be expected to make, but does not. His failure to do so fully comports with another article I have written, this time with Professor Curtis Bradley.<sup>37</sup> Our article, with mind-deadening detail, states that historical sources overwhelmingly demonstrate that the Founding generation saw no undifferentiated reservoir of power in the Executive.<sup>38</sup> To the contrary, from the beginning of the eighteenth century through the Pacificus-Helvidius Neutrality Controversy debate, only two people make this general Executive Vesting Clause argument.<sup>39</sup> One is well-known: Alexander Hamilton, writing as Pacificus, but he makes the argument only in passing.<sup>40</sup> The other is the renowned Egbert Benson, a Congressman from New York, presenting the argument during the famous debates on presidential removal of executive officers.<sup>41</sup> Everyone else argues almost every foreign relations dispute in terms of tethering it to specific clauses in the same way that Marshall does here.<sup>42</sup>

This clause-specific approach may actually cause us to double-back and confirm a larger background contextual point. Especially in foreign affairs, this was the dominant mode of interpretation.<sup>43</sup> One interesting further inquiry would therefore be: Was there evidence to the contrary? Was there some fire-

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34. *Id.* at 96.

35. U.S. CONST. art. II, § 3.

36. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 664–79 (2004).

37. See *id.* *passim*.

38. See *id.* at 592–688.

39. See *id.* at 653, 679.

40. *Id.* at 679–83.

41. Bradley & Flaherty, *supra* note 36, at 653.

42. *Id.* *passim*.

43. See *id.* at 686.

breathing Federalist or High Federalist, or some Hamiltonian or Hamilton himself perhaps who was making the broader argument during this controversy? The apparent negative answer confirms both the larger picture and Van Alstine's work.

## II. USE

As for uses, the issue essentially comes down to this: one great use for the account Van Alstine reconstructs is to put to rest an annoying sound byte—the sole organ myth—which to this day crops up in the Executive's briefs, speeches, and other utterances.<sup>44</sup> And at the very least one will be able to use this and interject that this particular sound byte, however oft-repeated, simply has no basis in fact.

More generally, one thing that neither I alone nor with Professor Bradley have been able to do, is provide more about the positive uses for the history we have found. With Van Alstine's findings in mind, let me very briefly suggest three steps forward.

First, if we are considering some version of the original understanding at the time of the Founding, the Van Alstine piece suggests that clause-centered interpretation is the way to start.<sup>45</sup> Yet with each of these steps comes a problem. In this instance, when is a given text "stretched" too far? For that, a theory of textual interpretation and historical interpretation *is needed*. Recognizing a country under the Receive Ambassadors Clause, for example, seems far too broad unless one has researched a bit of the background history. Yet there are many more instances where the text, plausibly interpreted, runs out, as does the relevant history. In fact, this happens most of the time. Think of the problems associated with fixing the meaning of the Commerce, Declare War, or Executive Vesting Clauses.

The second step, therefore, becomes turning to supplementary sources where text and history fail plausibly to fix constitutional meaning. Especially valuable in foreign relations, not least because there appears to have been some expectation, is reliance on evolving custom or tradition. This is the idea that constitutional meaning would be worked out incrementally, over time. One recent advocate of this approach, more or less, is Dean Larry Kramer.<sup>46</sup> Yet this approach too has its problems. Necessary in this instance is a theory to address at what point custom becomes binding. Or conversely, when is custom a divergence from what is proper and legitimate? At what point does it become what is proper and legitimate? This is the classic problem with any

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44. See Van Alstine, *supra* note 1, at 100–01.

45. See *id.* at 119–35.

46. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

sort of customary tradition-based theory of constitutional interpretation. This is a substantial normative problem.

Finally, Van Alstine's work suggests something of an intermediate step. While history is, for the most part, very bad at answering specific questions, sometimes, in fact, maybe somewhat often, history can be fairly good at providing very general abstract commitments from the Founding. This in fact may be a common implication of the contributions to this symposium. Text and history, for example, are not going to reveal much about the removal power. Custom may, but then when are the political branches violating what should be legitimate? When are they not? When are they merely filling in? Yet, I think one thing that can powerfully guide us is knowing that a primary purpose of separation of powers was to prevent tyranny, the accretion of too much power in any one branch.<sup>47</sup> In consequence, if it appears that we have a strong and still-growing Executive Branch thanks to the administrative state and the press of national security, then it makes sense to allow Congress to have restrictions on the removal power, the legislative veto, and a more robust role in approving the deployment of armed forces.<sup>48</sup>

#### CONCLUSION

These updated thoughts reflect on how history is misused, and provide a few preliminary musings about how it still might be used nonetheless. The question becomes: How do we begin thinking about how the Founding generation was looking at these issues? And can it be relevant to us later on? Michael Van Alstine has provided a wonderful reminder of the persistent reality of history's mistreatment, yet the ongoing possibilities of its rehabilitation.

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47. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1741 (1996).

48. See *id.* at 1828–39.