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Publication Information & Recommended Citation

Primus, Richard A. "Lin-Manuel Miranda and the Future of Originalism." In *Hamilton and the Law: Reading Today's Most Contentious Legal Issues through the Hit Musical*, edited by Lisa A. Tucker, 3-11. Ithaca, NY: Cornell University Press, 2020.

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HAMILTON AND THE LAW

*Reading Today's Most Contentious
Legal Issues through the Hit Musical*

EDITED BY LISA A. TUCKER

CORNELL UNIVERSITY PRESS
ITHACA AND LONDON

LIN-MANUEL MIRANDA AND THE FUTURE OF ORIGINALISM

Richard Primus

The summer of 2015, when *Hamilton: An American Musical* opened on Broadway, was also the summer when Donald Trump announced his candidacy for the Republican presidential nomination. The shared timing was more than coincidental; there was a reason why each of these projects came on the scene during the last phase of America's first nonwhite presidency. The birther-in-chief's campaign for high office and Lin-Manuel Miranda's rap opera about the man behind the *Federalist Papers* spoke to the same deep issues about American identity at a time when the nation's demography was increasingly coming to resemble that of the larger world. They just approached the subject from different perspectives. One sought to protect an America that was still mostly white and Christian against Mexicans, Muslims, and other outsiders deemed dangerous. The other was so confident in the multiracial future that it rewrote the American past in its image. Trumpism and *Hamilton* are, in short, the same national transition but from opposite sides of the looking glass. And the passions that each has inspired are rooted partly in the desire to reject a vision of America that the other represents.

The astounding success of each project has implications for the future of constitutional law. The effects of Trump's election are obvious: The Supreme Court is likely to have a Republican-appointed majority into the indefinite future, continuing an unbroken run that began in 1970. While Republican appointees control the Court, Miranda's project is unlikely to have significant effects on legal doctrine. But among the Court's liberal opposition—on and off the bench—*Hamilton* will contribute to a significant change. After several decades during which constitutional originalism has been mostly a right-wing art form, liberals will increasingly turn to a jurisprudence of original meanings—and not merely as a way of trying to appeal to the originalists on the bench. Instead, liberals will turn to originalism because they will increasingly believe, authentically, that originalist methods support liberal positions in constitutional law. Eventually, we'll see this development's ascendancy: when the day finally comes that the Supreme Court has a liberal-leaning majority, that majority will deploy originalism for liberal ends. *Hamilton* is part of the reason why.

Judges commonly understand the Constitution in light of their assumptions about the Founding generation. The writing of the Constitution is part of America's origin story. And if the history of constitutional law shows anything, it shows that the "original meaning" of the Constitution changes over time. Not the *actual* original meaning, of course. To the extent that the Constitution has an actual original meaning, that meaning is fixed by historical facts. But what shapes constitutional law is not the actual original meaning of the Constitution. It is the *operative* original meaning of the Constitution, meaning the original meaning as understood by judges and other officials at any given time. The operative original meaning of the Constitution is not entirely divorced from actual constitutional history, but it is also not a strict function of careful historical inquiry. Instead, how judges imagine the original meaning of the Constitution depends on their intuitions—half-historical, half-mythical—about the Founding narrative. If you can change the myth, you can change the Constitution.

Hamilton is changing the myth. Originalism in constitutional law has recently had a generally conservative valence not because the Founders were an eighteenth-century version of the Federalist Society, or the Cato Institute, or the Family Research Council, but because readings of Founding-era sources that favored right-leaning causes were generally

predominant in the community of constitutional lawyers. Since 2015, however, the millions of Americans who have listened obsessively to *Hamilton*'s cast album or packed theaters to see the show in person have been absorbing a new vision of the Founding. The blockbuster musical narrative of our times has retold America's origin story as the tale of a heroic immigrant with passionately progressive politics on issues of race and issues of federal power. And so the balance shifts:¹ inspired in part by this retelling, a new orientation toward the Founding will come into view.

Hamilton offers this alternative vision at the dawn of a period when liberals will find themselves attracted to rediscovering the Founders as political and jurisprudential allies. The Court is likely to be distinctly conservative, or libertarian, or some mixture of the two. One of originalism's leading uses is as a tool of resistance to judicial authority. Within our legal culture, an appeal to the Founders is an appeal over the judges' heads. The Founders lack the power to reverse the Supreme Court, so in the here and now that appeal to higher authority is a bid for hearts and minds rather than damages and injunctions. But in a democratic society, hearts and minds are worth winning. Moreover, many liberals will be opposed to things the Court does, and they will want ways to articulate their opposition. Many liberals will accordingly do what many conservatives were motivated to do by the Court of the 1960s: tell stories about the Founding that vindicate their values against current judicial depredations. *Hamilton* will help that process along. So for everyone who has learned to expect originalist arguments to lead mostly to conservative results, here is your Miranda warning: within a generation, American liberals may have developed a jurisprudence of original meanings that, if deployed one day by a liberal Court, could underwrite progressive constitutional decision-making like nothing seen since the days of Chief Justice Earl Warren.

Twenty years ago, in an opinion curtailing the federal government's power to regulate gun sales, Justice Antonin Scalia described *Hamilton* as the most nationalistic of the Founders. It was not a compliment. It was a reason to discount an argument based on one of Alexander Hamilton's arguments in the *Federalist Papers*, an argument that would have upheld broad federal power to regulate in the case at hand. The true Founding view, Scalia wrote, was better captured in a different essay by James

Madison, who was (in Scalia's presentation) more skeptical of central authority.² Hamilton was out of step.

Scalia was not wrong to think of Hamilton as a fervent supporter of national government. But Hamilton's views were not as marginal as Scalia's treatment suggested. Any number of leading Founders were aggressive centralizers in 1787—Madison included. Writing for a majority of the Supreme Court, however, Scalia's confidence in the Founders as local-power, small-government types enabled him to imagine Hamilton as an outlier who could be dismissed. The same set of assumptions also framed Scalia's reading of Madison's essay—an essay that would easily bear a more nationalistic interpretation than Scalia gave it. I assume that Scalia and the rest of the Court's majority made these interpretive moves in good faith. Quite authentically, they thought of Hamilton as *nonrepresentative* and Madison as *skeptical of central authority*. Those attitudes supported an interpretation of the sources that blocked an exercise of federal lawmaking.

Hamilton, which opened in the last year of Scalia's life, will make it harder for the next generation of American lawyers to think of Hamilton as marginal. A large and ecstatic audience now knows a narrative of the Founding in which Hamilton is protagonist and hero. If that perspective prevails, then future readers of originalist source material will hear Hamilton's voice more loudly. Moreover, if Hamilton's ardent support for centralized power is taken as the view of a leading figure, it will be easier to read the writings of other Founders as leaning further toward national authority. The sources will bear more nationalist readings than the Court has given them in recent decades. The question is whether the judges and commentators who do the reading will continue to expect Founding texts to lean against federal power, as they have in the past generation, or whether a substantial portion of the next generation of readers will develop the intuition that the nationalism Hamilton represents was an authentic Founding view.

The question is not whether *Hamilton* will change the way dedicated conservatives view federal power. It is whether *Hamilton* will help people who might be open to robust conceptions of federal power to see the Founders as on their side and to deploy the cultural power of originalism accordingly. The answer to that question is probably yes. One cannot know in advance how any given influence will change people's intuitions

about history, but in this case it is hard to overstate the preliminary indications. *Hamilton* is a Pulitzer Prize-winning production whose cast album went platinum faster than any album in the history of Broadway. The audience has not just been listening; it has been rapt. In cooperation with the Rockefeller Foundation, *Hamilton*'s production company has staged special performances for tens if not hundreds of thousands of students in New York City's public schools. My personal experience suggests that a significant proportion of teenage Michiganders can recite the lyrics. If art can change ideas—and it can—then it looks like a new vision of the Founding is ready to rise up.³

As a weapon of social change, *Hamilton* is trained directly on the intuitions that previously made the Founding the differential property of conservatives. In part, this is a matter of the substantive political values that Miranda's protagonist represents, both on the issue of federal power and on currently salient social issues like immigration. But *Hamilton*'s larger enterprise is exploding the politics of racial memory that have, in recent decades, made liberals queasy about embracing the Founding too closely. On that score, *Hamilton* attempts nothing less than regime change. Not in the sense of replacing the president with a different president, but by altering the way that Americans—of all races—think about the identity of the republic.

The show takes barely thirty seconds to establish its perspective on this issue. In the opening sequence, half a dozen rappers—all of them nonwhite in the original production—take turns contributing verses to an introduction of the title character. The third rapper in the series, describing Hamilton's adolescence in the West Indies, speaks these words:

And every day while slaves were being slaughtered and carted
away across the waves, he struggled and kept his guard up
Inside, he was longing for something to be a part of
the brother was ready to beg, steal, borrow, or barter.⁴

Americans have told countless stories about the framers that marginalize or omit slavery. Americans have also told many stories about the Founding that seek to take slavery seriously. *Hamilton* did something new. The same African American actor (in the original production at least) who announces, in the play's first minute, that this story will neither hide

slavery nor deny its brutality also refers immediately to the white title character as a “brother.”⁵ Hamilton, announces the nonwhite cast communicating in a paradigmatically nonwhite genre, was *one of us*. Not because of some bizarre claim that the first Treasury secretary was actually not a white man. But because we—the cast members—see him as ours. (The next rapper calls Hamilton “our man.”⁶) In full knowledge that Hamilton’s race differentiated him from the slaves being slaughtered and carted away,⁷ the cast uses racially laden terms of identification to describe its connection to the story’s protagonist. *Our* race matters, the company implicitly declares. It shapes how we tell this story. But there is no hint that the historical Hamilton’s race matters, one way or the other.

Scrambling prevailing intuitions about race and the Founding in the way that *Hamilton* does is not a method of helping audiences think accurately about the lives of nonwhite Americans in the eighteenth century. If you think that theater has a responsibility to help the public get those kind of historical understandings right, you might conclude that *Hamilton*’s casting and its use of paradigmatically black musical genres are gimmicks that whitewash historical injustice. But if you think that theater can legitimately play a myth-making role, the required analysis is different. The question is then not whether *Hamilton* does justice to the past by depicting it accurately but whether *Hamilton* builds justice in the present by reallocating the ownership of the republic. Broad public absorption of *Hamilton*’s vision would not replace a false picture of the past with a true picture. It would replace one false picture with a different false picture. In scholarship, that substitution would not be an appropriate aspiration. But in the politics of national identity, the practical alternative to the reigning myth is never a careful historical understanding. It is always some other myth.

The leading Founders are figures of myth. That’s precisely what makes them potent in the rhetoric of law and politics. How people imagine mythical historical figures is at least as much a function of their own mental maps as it is a function of dispassionate history. As long as the mental maps of Americans feature deep social cleavages based on race, the historical fact that the Founders were white will figure in citizens’ images of George Washington and Thomas Jefferson. But in a future America, one that was thoroughly multiracial and egalitarian, a nonwhite image of Washington might be no more jarring than dark-skinned images of Jesus

have been among nonwhite Christian populations around the world. At that future juncture, the argument that *Hamilton* misrepresents the eighteenth century would be a bit like the argument that originalism is a bad way to make most constitutional decisions. As a matter of intellectual analysis, it's a good point. But it's a complex and inconvenient point, and it is unlikely to withstand the power of a good story. *Hamilton* tells a good story, with thumping good music to help it along. By the time you leave the theater, maybe even Washington is a little bit brown.

The success of *Hamilton*'s project would mark an inflection point in the politics of American memory. If nonwhite Americans can own the story of the Founding without selling out their racial identities, then the door is open for large numbers of Americans with liberal politics to claim the Founders as their own. In part, that is simply because the median nonwhite voter is to the left of the political center. But just as important is the effect on white liberals, whose ability to embrace the Founders enthusiastically has been tempered in recent decades by the fear that one cannot celebrate those dead white men without risking complicity in the continued marginalization of nonwhites. For the generations that revered Thurgood Marshall, a responsible perspective on the Founding had to show critical distance. But if Miranda's frame replaces Marshall's, or even just competes with it, then white liberals can be less ambivalent. Surely white liberals can lay as much claim to the Founders as their nonwhite allies do.

What's more, *Hamilton*'s demonstration that the story of the Founding can be told from a liberal perspective is not limited to the subject of race. The particular Founding Father whom Miranda's musical elevates was not just an opponent of slavery but a city dweller and a passionate supporter of strong central authority in the national government. The musical emphasizes all of these aspects of Hamilton's character. To be sure, *Hamilton* takes some politically motivated liberties with the historical record. The historical Hamilton's antislavery attitudes were real, but they are accentuated in the musical. Similarly, the musical's relentless characterization of Hamilton as an immigrant in an important sense anachronistic: it seems natural only because the audience thinks of the thirteen British colonies that became the United States as a distinct entity in the international order. (Hamilton's journey from Nevis to New York occurred entirely within colonies of the British Empire.) The musical also repeatedly uses the label "immigrant" to describe the Marquis de Lafayette, who was

in no sense an immigrant. He was just a foreigner, a well-born Frenchman who fought the British without ever intending to settle in America. In short, *Hamilton* is a piece of musical theater, not an article in the *Journal of American History*. But as musical theater goes, *Hamilton* is well steeped in its historical sources. And a good musical can shape views of its subject matter, even when audiences ought to know that they are watching an exercise in myth-making. *Hamilton*'s version of the Founding story will accordingly creep into the consciousness of a large group of Americans.

That should have two mutually reinforcing effects. First, *Hamilton* will prime people in the audience who interpret the Constitution for a living—law professors, judges, and others—to think, consciously or otherwise, that the historical sources will bear politically progressive readings. Second, it will change who is inclined to tell the story,⁸ rather than leaving that story for someone else. If liberals of all races become confident storytellers about the Founding, they will put their own spin on the sacred sources, consciously or subconsciously, and across a broad range of issues. That sense of connection and ownership will be more significant than *Hamilton*'s raising the profile of any Founder or reorienting public intuitions about how the Founders saw any particular issue. It is not that liberal views of constitutional law will on all issues come to track the views that the historical Hamilton held in the eighteenth century—many of which play no role in the musical, and some of which modern liberals might dislike. It is that by offering a version of the Founding that resonates with liberals today, *Hamilton* will encourage them to embrace the Founding rather than run away from it. And when liberals appropriate the Founding, they will (consciously or unconsciously) emphasize those sources that can be made to do work for liberal causes in modern constitutional law. Some of those causes will coincide with the politics of Hamilton, or those of *Hamilton*, or both. Others may not. But we can be confident that the meanings that liberals give to the Founding, once they are inclined to play the game of originalism, will be liberal-leaning meanings, just as the meanings that conservatives have given the Founding have mostly leaned conservative. What matters is who tells the story.⁹

Hamilton's reframing may not be powerful enough to convince people with conservative political principles that the framers of the Constitution were liberals. But it can persuade people with liberal politics that the framers have their backs, thus prompting them to tell the tale accordingly.

Hamilton is beyond compelling as art: people who hear the music once want to hear it again and to hum it walking down the street. And American liberals are not going to expend too much effort fighting the revised myth they are being offered. They are going to need resources of resistance to a conservative judiciary, and no resource has more capital in our legal culture than the Founders. In addition, in a noninstrumental way, deep down most liberals want to claim the mantle of the Founders just as much as most conservatives do. It is nice to have Washington on your side.¹⁰

The liberal originalism of the future will not rest on one rap opera alone. Cultural change has many inputs. *Hamilton* plays a role, and so do the other things in the environment that made the musical possible. The sheer fact of the Obama presidency helped nurture the intuition that nonwhite Americans are full owners of the republic, thus opening a door for Miranda to walk through—and provoking a white countermovement desperate to slam it shut. If the American republic eventually repudiates President Trump, the racial bigotry that brought him to power might be further discredited. Farther downstream, *Hamilton* will mix with other influences, some of which it will have directly nurtured and some of which might have arisen independently. The combined effect will be transformative. Nothing the Trump administration can do will prevent an American future that is demographically different from the one in which today's justices formed their worldviews. *Hamilton* is helping that future bring its origin story along with it. And in the field of constitutional law, originalism will keep the present connected to the Republic's Founding by making sure that the Founding adapts. Just you wait.¹¹

printed 778,313 copies of the book over seven printings. Jimmy Franco, senior director of publicity, Grand Central Publishing, email message to author, May 23, 2018.

8. Miranda, “Right-Hand Man,” *Hamilton*.
9. Miranda, “The Schuyler Sisters,” *Hamilton*.
10. Miranda, “Non-Stop,” *Hamilton*.
11. Miranda, “Satisfied,” *Hamilton*.

1. Lin-Manuel Miranda and the Future of Originalism

A longer version of this chapter was originally published as Richard Primus, “Will Lin-Manuel Miranda Transform the Supreme Court?,” *The Atlantic*, June 4, 2016, <https://www.theatlantic.com/politics/archive/2016/06/lin-manuel-miranda-and-the-future-of-originalism/485651/>. Reprinted with permission.

1. Lin-Manuel Miranda, “Guns and Ships” *Hamilton: An American Musical* (Atlantic Records 2015).
2. *Printz v. United States*, 521 U.S. 898, 915 at n 8, 117 S. Ct. 2365, 2375, 138 L. Ed. 2d 914 (1997).
3. Miranda, “My Shot,” *Hamilton*.
4. Miranda, “Alexander Hamilton,” *Hamilton*.
5. *Ibid.*
6. *Ibid.*
7. *Ibid.*
8. Miranda, “Who Tells Your Story?” *Hamilton*.
9. *Ibid.*
10. Miranda, “Washington on Your Side,” *Hamilton*.
11. Miranda, “Alexander Hamilton,” *Hamilton*.

2. Some Alexander Hamilton, but Not so Much *Hamilton*, in the New Supreme Court

I thank Max D. Bartell, Rachel N. Harris, and Danielle M. Stefanucci for excellent research assistance.

1. U.S. Constitution, Art. 3, Sec. 1.
2. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803).
3. Lin-Manuel Miranda, “Non-Stop,” *Hamilton: An American Musical* (Atlantic Records 2015).
4. *Ibid.*
5. See Buckner F. Melton, Jr., “The Supreme Court and *The Federalist*: A Citation List and Analysis, 1789–1996,” *Kentucky Law Journal* 85 (1996–97): 243; Buckner F. Melton, Jr. and Jennifer J. Miller, “The Supreme Court and *The Federalist*: A Supplement, 1996–2001,” *Kentucky Law Journal* 90 (2001–2): 415; Buckner F. Melton, Jr. and Carol Willcox Melton, “The Supreme Court and *The Federalist*: A Supplement, 2001–2006,” *Kentucky Law Journal* 95 (2006–7): 749.
6. A few examples from a prominent cases: Brief for Respondents at 2, *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392 (2018) (No. 16-1540) (quoting *Federalist* No. 47 [by Madison], explaining the principle that legislative, executive, and judicial powers should not be held by a single person or branch of government); Brief for Petitioners at 51–52, *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (No. 13-354) (quoting from *Federalist* No. 78 [Hamilton]: the “independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from . . . serious oppressions of the minor party in the community”); Brief of Amicus Curiae Judicial Watch, Inc. in Support of Respondents at 3–4, *Sebelius*