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ARTICLE

TOWARD A DUTY-BASED THEORY OF EXECUTIVE POWER

David M. Driesen *

This article develops a duty-based theory of executive power. This theory maintains that the Constitution seeks to instill a duty in all executive branch officers to faithfully execute the law. Conversely, the Constitution's Framers and Ratifiers did not intend to empower the President to distinctively shape the law to suit his policy preferences or those of his party. Rather, they envisioned a model of "disinterested leadership" serving rule-of-law values. Because of the Ratifiers' and Framers' interest in preventing abuse of executive power, the Constitution obligates executive branch officials to disobey illegal presidential directives and creates a major congressional role in preventing illegal executive action, primarily by assigning the Senate a major role in appointments and removal.

The duty-based theory fits original intent better than the unitary executive theory popular these days among originalists. Both the constitutional text and the pre-enactment history show a preoccupation with establishing duties, preventing real abuse, and securing stable administration, rather than an effort to establish presidential control over executive branch discretion. The duty-based theory also serves rule-of-law values better than the unitary executive theory. This article closes with a discussion of the theory's implications for key separation of powers issues involving the execution of law.

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INTRODUCTION

This Article develops a duty-based theory of executive power.[1] This theory conceives of the U.S. Constitution as an effort to establish a rule of law, rather than a reign of presidential personality.[2] As part of this effort, the Constitution imposes a duty upon the President and all other executive branch officials to obey the law,[3] relying upon a variety of approaches to encourage compliance. It seeks to instill allegiance to the law in all executive branch officials, provides for significant congressional and judicial control over the executive branch, and envisions principled but vigorous presidential leadership.

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1. *See generally* David M. Driesen, *Firing U.S. Attorneys*, 60 ADMIN. L. REV. 707 (2008) (providing a brief preliminary sketch of the theory developed and fleshed out more fully here).

2. *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (linking the "proud boast of our democracy that we have 'a government of laws and not of men'" to the principle of separation of powers (quoting MASS. CONST. pt. I, art. XXX)); GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 124–25 (1993) (describing the founding generation's commitment to the rule of law as including the concept that the law "bound lawmakers and citizens equally"); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 318–19 (Max Farrand ed., rev. ed. 1966) (recounting an argument against the New Jersey plan as failing to remedy the law's "impotence" under the Articles of Confederation); 2 *id.* at 64–65 (arguing that the President should be impeachable because no man should be "above Justice"). *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

3. *See* PHELPS, *supra* note 2, at 125 (describing this commitment to law governing the government as distinguishing a Republic from monarchy).

An emphasis on presidential duty fits the relatively modest conception of the "Chief Magistrate['s]"[4] political role prevailing at the founding, for the Framers expected the President generally to cede policy-making authority to Congress and to dutifully execute, rather than distinctively shape, the law.[5] The modern notion of a President and his faction using his political "preferences"[6] to mold the law was utterly foreign to the Framers, even though they did understand that legal administration requires some discretionary judgment.[7] While historians have recognized Republican ideology's concept of "disinterested leadership" as a consensus view at the founding,[8] contemporary legal scholars have not explored this concept's implications for executive power theories.

This Article offers a fresh bottom-up perspective on the very old debate over executive power. Its explanation of how the Constitution creates duties in lower executive branch officials as a check on presidential abuse of power constitutes one of this Article's most distinctive contributions to that debate.[9] While other commentators have recognized that lower executive branch officials usefully check presidential decision making,[10] they have not hitherto recognized that this check forms part of the Framers' design.

The duty-based theory provides an alternative to the unitary executive theory of presidential power. Unitarians (proponents of the unitary executive theory) claim that the Constitution gives the President complete control over all executive branch decisions. The duty-based theory, by contrast, insists that the Constitution denies the President complete control over the executive branch of government in order to assure fidelity to law.

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4. *Id.* at 141.

5. *See, e.g., id.* at 150–54 (discussing George Washington's practice of not vetoing domestic measures he disagreed with).

6. *Id.* at 141.

7. *See, e.g., id.* at 81 (explaining that the idea of competing notions of the public interest appeared nonsensical to Washington, since he believed in a single public interest that all virtuous men would endorse); William J. Kelleher, The Original Intentions of the Framers for US Presidential Elections (Dec. 18, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1317837 (discussing the Framers' abhorrence of faction and how they structured presidential elections to avoid it).

8. *See, e.g.*, GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 165 (2002) (discussing the Framers' "vision of disinterested leadership").

9. *Cf.* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 651 (2001) (describing the fragmentation of power within branches of government as "our assurance against threatening concentrations of government power").

10. *See* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1560–62 (2007) (describing the U.S. Congress and the courts as "[t]he most obvious checks on the President" but identifying "legal advisors within the executive branch" as an "underappreciated" source of constraint); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316–17 (2006) (presenting use of bureaucracies' ability to check executive branch abuse as a functional proposal to compensate for the demise of the equilibrium between the executive and legislative branches that the Framers sought to achieve).

The unitary executive theory can, at times, undermine the rule of law in favor of a rule of presidential personality.[11] Thus, belief in a version of the unitary executive theory encouraged the President, the Vice President, and several executive branch lawyers to support illegal torture, wiretapping, and procedures for prosecuting "enemy combatants."[12] The duty-based theory, by contrast, aims to resurrect a robust rule of law.[13]

The Constitution's text, I will argue, supports the duty-based theory presented here. This textualism is important, because the unitary executive theory's allure stems largely from its claim of fidelity to constitutional text.[14] By focusing heavily on text, I hope to more directly engage the core of the argument for the unitary executive position. Proponents and opponents of the unitary executive theory often speak past each other, because proponents of the theory tend to emphasize text and original intent

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11. *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 85 (2007) (discussing the Cheney-Addington view of the unitary executive theory as prohibiting congressional interference with presidential decisions during wartime); Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 344 (2008) (characterizing a new unitary executive theory as a basis for "a view of the scope of the executive power that is unprecedented in its breadth"). Of course, the "cult of personality" has its roots in the tradition of electing Presidents. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 657–60 (2000) (associating the cult of personality with presidential elections). But the unitary executive theory, by strengthening the Presidency, enhances the influence of this cult of personality.

12. *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY, 49–50, 124–27, 130–39, 146–50, 153–56, 177–81, 240, 271–73 (2008) (describing how the Bush-Cheney team's "new and improved Unitary Executive Theory" led these actors to believe that the Commander-in-Chief could properly carry out these illegal actions); Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 383–84 (2008) (describing the link between the Department of Justice (DOJ) memorandum justifying illegal wiretapping and the "Vesting Clause thesis"); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 613, 625 (2006) (holding that the military commission's procedures violated the Uniform Code of Military Justice and the Geneva Conventions); Hamdi v. Rumsfeld, 542 U.S. 507, 533–38 (2004) (holding that a U.S. citizen accused of being an enemy combatant was unconstitutionally denied a fair hearing and notice of the factual basis for allegations against him); ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 775 (E.D. Mich. 2006), *rev'd and vacated on other grounds*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008) (holding that the warrantless wiretapping program violated the Foreign Intelligence Surveillance Act and the Fourth Amendment). In order to make this Article manageable, this Article will not examine the relationship between the unitary executive theory and inherent presidential power to address terrorism. *Cf.* SAVAGE, *supra* note *12*, at 124–27 (discussing the relationship in broad outline).

13. *See* United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342) (reading the Take Care Clause as establishing a duty to obey the law and therefore declining to allow the President's approval of military action to justify a private violation of the Neutrality Act). *But see* Lawson, *supra* note 12, at 376 (identifying the view of the Article II Vesting Clause as a power grant as crucial to justifying wiretapping without the warrants required by the Foreign Intelligence Surveillance Act).

14. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (claiming that the text of Article II, Section 1, Clause 1 requires that the President must have "*all of* the executive power"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 550–56 (1994) (claiming that constitutional text supports the unitary executive theory and arguing for text's "primacy").

while most of the theory's critics emphasize functional considerations and the actual practice of government.[15] This Article builds on and adds to previous scholars' textualist critiques, but its textual analysis supports a competing vision of executive power, not just a critique of the unitary executive theory.[16] Although this duty-based theory relies primarily upon the Constitution's text, this presentation of the theory will also examine non-textual evidence of original intent, case law, and functional factors.[17] The historical analysis presented here emphasizes pre-enactment history,

15. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1170 (1992) (claiming that non-unitarians offer functionalist theories instead of the "formal power grant construction" that unitarians rely upon). *But see* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1137–38 (2000) (describing the "unitary executive" debate as "dominated by constitutional-text parsing and dueling accounts of the original understanding"). *Compare* Calabresi & Prakash, *supra* note 14, at 551–56 (arguing for text's "primacy"), *with* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 275 (1993) (focusing on the role of political actors in defining the unitariness of executive branch legal interpretations), Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 17–32 (1994) (relying heavily upon lessons drawn from practice in the early Republic), Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter Strauss, *Overseer*] (focusing heavily on constitutional practice, including contemporary practice), *and* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581 (1984) [hereinafter Strauss, *Agencies*] (assuming that "any useful legal analysis . . . must" largely "accept" existing "reality").

16. *See, e.g.*, Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967–69 (2001) (providing a brief textualist argument for limited presidential power); Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 799–801 (1987) (same). Professors Cass Sunstein and Lawrence Lessig offer an important theory, but it does not so much compete with the unitary executive theory as narrow and reshape it. *See* Lessig & Sunstein, *supra* note 15, at 4 (rejecting the conclusion that the unitary executive theory properly reaches "all administration of the laws"). They characterize the original understanding of the scope of executive power as narrower than today's understanding. *Id.* at 12–78 (developing a distinction between executive and administrative functions). And they also argue that the broad modern theory might be right, but based on functional rather than historical considerations. *See id.* at 2–3 (rejecting the claim that the Framers intended to require presidential control over all government officials implementing law, but finding that modern circumstances provide a "compelling nonhistorical argument" for the unitary executive (citation omitted)). Nevertheless, Lessig and Sunstein offer a very significant argument. *Accord* Calabresi & Prakash, *supra* note 14, at 545 (characterizing Lessig and Sunstein's work as "seminal").

17. I choose to focus primarily on original intent in order to more squarely meet the contentions of proponents of the unitary executive theory but do not take a position here on the validity of original intent approaches, which has generated a vast literature. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1990) (insisting on original intent's primacy); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers did not intend that their intent would govern future construction of the Constitution).

which has heretofore played a very limited role in the contemporary debate on these issues.[18]

This Article begins with a discussion of the unitary executive theory. It then develops and justifies the duty-based alternative. Finally, it examines some of the duty-based theory's implications for existing law.

I. THE UNITARY EXECUTIVE THEORY

Justice Antonin Scalia's dissent in *Morrison v. Olson*[19] provides the leading judicial articulation of the unitary executive theory. The *Morrison* majority upheld provisions of the Ethics in Government Act (Act)[20] creating an independent counsel to investigate and prosecute high-ranking officials' crimes.[21] In order to prevent presidential interference with independent counsel investigation and prosecution, Congress lodged the authority to appoint an independent counsel in the judiciary and only authorized the Attorney General to remove him for "'good cause.'"[22] While the U.S. Supreme Court upheld the Act's removal and appointment provisions,[23] Justice Scalia dissented on the grounds that these provisions interfered with presidential control over the executive branch of government.[24]

Justice Scalia's dissent relied on the proposition that the President possesses "*all*" executive power under the Constitution.[25] This idea, Scalia argues, stems from the Vesting Clause, Article II, Section 1, Clause 1, which provides, "'The executive Power shall be vested in a President of the United States.'"[26] Since the statute "deprive[s] the President . . . of exclusive control over the exercise" of a "purely executive power" (namely prosecution), argued Scalia, it conflicts with the Framers' decision to give the President "*all*" executive power.[27] This statement treats the Vesting Clause's grant of "executive power" as a grant of "exclusive control," thereby implying that the President does not share control of the executive branch with Congress or other federal officials.

Justice Scalia equates control with the power to appoint and remove executive branch officials.[28] For Scalia, the President's ability, through the

18. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 35 (2008) (devoting half of a sentence to the pre-enactment history of removal).

19. 487 U.S. at 697–734 (Scalia, J., dissenting).

20. Pub. L. No. 97-409, 96 Stat. 2039 (1982) (codified at 28 U.S.C. §§ 591–99 (Supp. V 1982)). This provision has since expired.

21. *Morrison*, 487 U.S. at 659–60.

22. *Id.* at 660–65 (quoting 28 U.S.C. § 596(a)) (describing these provisions in detail).

23. *Id.* at 670–97.

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

25. *Id.* (describing Article II, Section 1, Clause 1 as lodging "*all of* the executive power" in the President).

26. *Id.* (citing U.S. CONST. art. II, § 1, cl. 1).

27. *Id.*

28. With respect to removal, Justice Antonin Scalia states that the "principle that the President had to be the repository of *all* executive power . . . necessarily means that he must

Attorney General, to remove the Prosecutor for cause does not suffice; the President must have the ability to remove without cause.[29] He strongly suggests that presidential control implies rejection of "'an attitude of independence against the [President's] will'" among officers of the executive branch of government in favor of a system where all hold their office only if their conduct pleases the President.[30] In other words, he equates control over the executive branch of government with the power to fire all of those carrying out executive duties for any reason or no reason whatsoever. Likewise, Justice Scalia finds the inability of the President, through the Attorney General, to exercise control over the appointment of the independent counsel inconsistent with presidential control over the executive branch.[31]

I shall refer to the idea that presidential control over the executive branch implies presidential control over appointment and removal as the "patronage state theory."[32] While this term highlights the possibility that presidential control can be used to advance a faction's interest, a chief concern of the Framers, I do not mean to deny that Presidents can use their power to serve rule-of-law values instead. This Article will later contrast the patronage state theory with the duty-based theory's narrower conception

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be able to discharge those who do not perform executive functions according to his liking." *Id.* at 726 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 627–28 (1935)). With respect to appointment, see *infra* note 31.

29. *Morrison*, 487 U.S. at 706–07 (Scalia, J., dissenting) (explaining why good cause removal does not amount to complete control).

30. *Id.* (quoting *Humphrey's Ex'r*, 295 U.S. at 629). Justice Scalia implies this through his argument that "good cause" removal provisions limit the removal power. *See id.* at 706–07. He points out that a person who can only be removed for good cause does not serve at the President's pleasure. *Id.* at 707. Indeed, the purpose of a good cause removal provision is to allow the person protected by it to "'maintain an attitude of independence against the latter's will.'" *Id.* (quoting *Humphrey's Ex'r*, 295 U.S. at 629). By rejecting good cause removal, Scalia implicitly rejects executive branch independence from presidential will.

31. *See id.* at 701–03, 707 (criticizing the appointment provisions because they "severely confine[]" the Attorney General's ability to refuse appointment of an independent counsel). Justice Scalia also emphasizes the separation of powers principle that each department must have "'defense . . . commensurate to the danger of attack.'" *Id.* at 704 (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)). Justice Scalia applies this principle to the executive branch, which he sees as under attack in *Morrison v. Olson*. *See id.* at 703 (criticizing the statute for commencing investigations without the assent of the "President or his authorized subordinates"). He identifies the constitutional need to defend the executive branch as giving "comprehensible content to the Appointments Clause." *Id.* at 704. And this content leads him to reject the majority's decision to uphold judicial appointment of the independent counsel. *See id.* at 713.

32. *See* Myers v. United States, 272 U.S. 52, 151 (1926) (explaining that congressional opposition to a custom or presidential removal arose in response to the "use of patronage for political purposes"); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 408–09 (2006) (describing President Andrew Jackson's introduction of the policy of wholesale removal of holdover appointees as an innovation justified as serving democracy that soon "degenerated into a spoils system of patronage and cronyism"); *cf.* John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 425–26 (2008) (citing Thomas Jefferson's introduction of the spoils system—the practice of rewarding supporters with offices in the government—as an effort to assert personal presidential control over "all law enforcement").

of the proper scope of presidential influence over the officials executing the law. The patronage state theory constitutes a central element of the larger theory of the unitary executive.[33]

Justice Scalia justifies this control, in part, by endorsing a presidential prerogative to make political decisions about prosecution. He describes prosecutorial discretion as involving a balance of "legal, practical, and *political* considerations."[34] Prosecutors must balance these factors, writes Scalia, in deciding whether to prosecute "technical violation[s]" at all.[35] He then claims that the Constitution lodges control over prosecutorial discretion, including decisions about when not to prosecute violations, in the President.[36] Moreover, Justice Scalia envisions an executive branch "attuned to the interests and the policies of the Presidency."[37]

I will refer to this idea that the President must have exclusive control over the politics of executive branch decision making as the unitary executive theory's "political dimension." Notice that this political dimension empowers the President to exercise more power than is strictly necessary to assure faithful execution of the law.[38] In a situation in which an executive branch official must choose between two actions, both of which comply with the law, the "political dimension" insists that the sitting President's political preference becomes the determining factor in making the decision.[39]

This political dimension of the unitary executive theory lies at the heart of the unitary executive theory's tendency to undermine the rule of law. This problem arises because the President and loyal subordinates may support policies in considerable tension with the law they should administer. The political dimension, the idea that the President's policy preferences must govern administration, can lead to opportunistic

33. *See* CALABRESI & YOO, *supra* note 18, at 4 (characterizing presidential claims of removal power as decisive evidence that Presidents "have believed in the theory of the unitary executive").

34. *Morrison*, 487 U.S. at 708 (Scalia, J., dissenting) (emphasis added) (describing the balancing of these factors as "the very essence of prosecutorial discretion").

35. *Id.*

36. *Id.* at 708–09 (stating that taking control of this balancing from the President "remove[s] the core of the prosecutorial function" from "[p]residential control"); *accord* Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 209–10 (2000) (Scalia, J., dissenting) (suggesting that the President's duty to faithfully execute the law requires him to be able to decide to refrain from prosecuting violators of environmental statutes); *cf.* Johnsen, *supra* note 10, at 1594–95 (explaining that nonenforcement of statutes can undermine the rule of law).

37. *Morrison*, 487 U.S. at 712 (Scalia, J., dissenting).

38. *See* 1 Op. Att'y Gen. 624, 624 (1823) (recognizing that an officer honestly exercising discretion within statutory bounds faithfully executes law); *cf.* U.S. CONST. art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed").

39. *See* Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 992 (1993) (opining that whenever a statute grants an executive branch official discretion, the Constitution authorizes the President to "control that discretion").

construction of the law, which can distort it.[40] While neither Justice Scalia nor the leading academic proponents of the unitary executive theory endorse perversion of statutes, the political dimension of the unitary executive theory can significantly undermine the rule of law.

The Court has rejected the unitary executive theory on numerous occasions.[41] Yet, the rejected theory has profoundly influenced executive branch conduct, much of it either unreviewable judicially or reviewable only in a very deferential sense.[42] And recent appointments to the Court may make it more receptive to the theory in the future.[43] In the meantime, Justice Scalia's dissent rekindled academic debate about the theory.[44]

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40. *Accord* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, 80–81 (N.Y. Univ. Press 1957) (1940) (opining that allowing the President to substitute his own judgment for that of any agency would convert all law enforcement questions into discretionary questions controlled by "an independent and legally uncontrollable branch of the government"); *see, e.g.*, SAVAGE, *supra* note 12 (detailing numerous instances where the Bush administration distorted law in order to enhance the President's power and carry out a militant policy to counter terrorism).

41. *See Morrison*, 487 U.S. at 690 n.29 (rejecting the dissent's view that blanket executive removal authority can be inferred from the Article II Vesting Clause); Bowsher v. Synar, 478 U.S. 714, 738–39 & nn.1–3 (1986) (Stevens, J., concurring) (approving of the majority's decision not to endorse the theory that all executive officers must be subject to presidential removal at will); Wiener v. United States, 357 U.S. 349, 355–56 (1958) (upholding a congressional decision to insulate a War Claims Commission from presidential control); Humphrey's Ex'r v. United States, 295 U.S. 602, 628–29 (1935) (rejecting an illimitable power of the President to remove officers carrying out quasi-legislative or quasi-judicial functions); United States v. Perkins, 116 U.S. 483, 484–85 (1886) (expressing "no doubt" that Congress may prohibit the President from removing inferior officers); Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838) (holding that when the Congress imposes a duty upon an executive officer, the law, rather than the President, controls the exercise of that duty).

42. *See* SAVAGE, *supra* note 12 (offering an exhaustive account of the role of the unitary executive theory in executive branch decision making); Devins, *supra* note 15, at 273 (stating that "perceptions about unitariness define White House control of the administrative state").

43. *See* SAVAGE, *supra* note 12, at 254, 271 (noting Justices John Roberts and Samuel Alito's support for expanding executive power prior to their elevation to the bench).

44. *See, e.g.*, Calabresi & Prakash, *supra* note 14, at 593–99 (describing the unitary executive theory as demanding complete presidential control over all executive branch officials and discussing required control mechanisms); Calabresi & Rhodes, *supra* note 15, at 1186–208 (claiming that many arguments made about Article III support the unitary executive theory of Article II); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1022 (2007) (stating that the President can supervise and control principal officers and veto any inferior officer's decision); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1348 (1994) (stating that "unitarians" believe that the Constitution requires that the President have the power to countermand and fire all executive branch officials); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 73 (1990) (stating that the U.S. Supreme Court has recognized presidential removal authority in order to "preserve a unitary executive"); Lessig & Sunstein, *supra* note 15, at 4 (characterizing the unitary executive theory as a "myth"); Percival, *supra* note 16 (arguing against application of the unitary executive theory to officials that have received delegated authority from Congress).

Scholars supporting Justice Scalia's view have emphasized intertextual considerations,[45] which the duty-based theory emphasizes as well. The most important of these intertextual arguments for purposes of understanding the duty-based alternative concerns the relationship between the Vesting Clause and the Take Care Clause, which requires that the President "take Care that the Laws be faithfully executed."[46] These scholars argue that in order to "take Care that the Laws be faithfully executed,"[47] the President must control all officials administering law.[48]

Generally, unitary executive proponents support originalism, the idea that the Constitution's Framers' intentions should govern the resolution of contemporary constitutional questions.[49] Accordingly, Justice Scalia and his academic supporters rely on the Framers' intent to help justify the unitary executive theory. This history shows that the Framers specifically rejected the notion of a committee heading the executive branch of government in favor of a single executive, hence the phrase "unitary executive."[50] These originalists have also attempted to bolster the case for the unitary executive theory by looking at post-enactment practice.[51] Because both the early presidents and many of the members of the first Congress were among those involved in ratifying the Constitution, their actions may provide clues to the Framers' intentions. While unitarians argue that the available evidence of Framers' intent both prior to and subsequent to enactment of the Constitution supports their case, they argue strenuously that text governs and that the Framers' intentions are only relevant in helping resolve textual ambiguities.[52] The duty-based theory relies heavily on text and only secondarily upon history, in keeping with this approach.

II. THE DUTY-BASED THEORY OF EXECUTIVE POWER

This section begins with an elaboration of the duty-based theory's central claims. It then discusses the relevant evidence for evaluating the theory's soundness, beginning with constitutional text, and, with minor exceptions,

45. *See, e.g.*, Calabresi & Prakash, *supra* note 14, at 570–99 (discussing various intertextual arguments).

46. U.S. CONST. art. II, § 3.

47. *Id.*

48. *See* Calabresi & Prakash, *supra* note 14, at 582–83.

49. *See id.* at 546 n.11 (pointing out that originalists have tended to support the unitary executive theory in recent years).

50. *See* Morrison v. Olson, 487 U.S. 654, 698–99 (1988) (Scalia, J., dissenting) (describing the decision to vest the executive power in a single President as reflecting deliberate rejection of proposals for multiple executives or a council of advisers); *infra* notes 162–65 and accompanying text.

51. *See, e.g.*, Calabresi & Prakash, *supra* note 14, at 635–62; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1075 (2006) (arguing that the congressional debates over the Decision of 1789 evinced majority support for a presidential removal power).

52. *See* Calabresi & Prakash, *supra* note 14, at 550 (arguing that originalists only resort to historical argument when an ambiguity exists).

introducing history only later. Because of this Article's desire to focus primarily upon original intent, most of the case law presentation occurs in Part III as part of the discussion of the duty-based theory's implications for existing law.

A. *Duty's Primacy*

The Constitution, as unitarians recognize, seeks to establish a rule of law through a scheme of separated powers.[53] A rule of law implies that all officials in the executive branch of government must obey the laws that Congress enacts under the Constitution. Congress passes many laws with the President's concurrence. But it passes some, as it were, over his dead body, i.e., by overriding a veto.[54] Whether the President likes the law or not, the Founders wanted the President and all other executive branch officials to obey it.[55]

A central problem the Framers faced in designing the new government's executive branch was how to configure government to encourage this obedience to law. The Founders wished to check the natural tendency of Presidents and other executive branch officials to act according to their own personal or political preferences, but many of them feared making the executive branch completely subject to congressional caprice as much as others feared monarchy. The Founders were familiar with the idea of allegiance to a person; English law had long required an oath swearing allegiance to the King.[56] But they sought to establish something different, allegiance to the law.[57]

The Constitution addresses this need by explicitly creating duties applicable to both the President and all other executive branch officials to obey the law. These duties, as we shall see, require lower executive branch officials to disobey illegal presidential orders in order to allow them to check presidential abuse.[58]

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53. *See Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) (identifying the rule of law with separation of powers).

54. *See* U.S. CONST. art. I, § 7, cl. 2 (authorizing two-thirds of the Congress to override a presidential veto).

55. *See generally* WALTER E. DELLINGER ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), *reprinted in* Johnsen, *supra* note 10, at app. 2, at 1604 (discussing the President's "constitutional obligation to ensure the legality of executive action"); Ackerman, *supra* note 11, at 712 (suggesting that the President's role in lawmaking conflicts with his duty to take care that the law be faithfully executed).

56. *See generally* Enid Campbell, *Oaths and Affirmations of Public Office Under English Law: An Historical Retrospect*, J. LEGAL HIST., Dec. 2000, at 1 (detailing the history of oath taking in England).

57. *Cf.* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984) (explaining that the Oath Clause aimed to establish allegiance to the Constitution in much the same way that religious oaths sought to establish allegiance to a church).

58. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 171 (1803) (stating that the President may not lawfully forbid an executive officer from carrying out acts required by law).

The Constitution reinforces the duty to obey law by dividing control over the executive branch of government between the President and Congress. Rather than create the patronage state, the Framers rejected the idea of unilateral presidential control over appointment and removal, instead adopting provisions providing for senatorial removal and substantial congressional involvement in the appointment of officers. Indeed, a leading proponent of executive power, Alexander Hamilton, specifically praised the Constitution's decision to deny the President a removal power as a force for stability in administration during the ratification debates.[59]

The Constitution envisions presidential leadership and a dialogue between somewhat independent officials and the President about appropriate exercises of discretion within a rule-of-law framework. It does not provide presidential power to completely control officials.

The Framers contemplated a much more modest role for presidential power than exists today. The Founders did not view the President as a major domestic policy maker, leaving that job to Congress. The utter lack of originalist support for the political dimension of the unitary executive theory fatally undermines the theory as a whole.[60] Since the President never could execute all law himself or even personally direct each action that other executive branch officials take, the unitary executive theory's insistence on presidential control of the executive branch must be understood as a metaphor.[61] Implicitly recognizing this, unitarians extend the control metaphor by insisting on the President putting in place subordinates, in Justice Scalia's words, "attuned to the interests and the policies of the Presidency."[62] The Framers, however, did not expect the President to act as a policy maker in executing the law and specifically sought to check his ability to advance his own interests by denying him the ability to select his subordinates without substantial legislative control. They viewed Congress as the chief policy maker and viewed the President as the "Chief Magistrate," i.e., as the principal officer who must obey and properly carry out the law.[63]

We shall see that the text and contemporaneous history powerfully support the duty-based theory. The provisions most directly speaking to the relationship between the executive branch and lower government officials embrace duty and reject unilateral presidential control over the executive

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59. *See infra* notes 175–78 and accompanying text.

60. *See* Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive, *by Steven G. Calabresi and Christopher Yoo*, 11 U. PA. J. CONST. L. (book review) (forthcoming 2009) (manuscript at 3, on file with the Fordham Law Review) (describing the unitary executive theory as the "belief . . . that the Vesting Clause of Article II confers on the President plenary power over *policy making* by all Executive Branch . . . officials" (emphasis added)).

61. *See* Devins, *supra* note 15, at 275 (characterizing the administration as "too immense for the White House . . . to comprehensively coordinate policy making").

62. Morrison v. Olson, 487 U.S. 654, 712 (1988) (Scalia, J., dissenting); *cf.* Devins, *supra* note 15, at 276 (explaining that a President can appoint "like-minded individuals" in order to "place his imprimatur on governmental operations").

63. *See, e.g.*, Phelps, *supra* note 2, at 140–41 (showing Washington adopted this view).

branch, a reading confirmed unequivocally by the pre-ratification history. Early post-enactment history reflects a consensus favoring the duty-based theory and division on questions of presidential control. The text and contemporaneous history together establish that the Ratifiers' intent favors the duty-based theory and that contemporary unitary executive theory is a non-originalist attempt to smuggle modern notions of expansive presidential power into the Constitution.

B. *Constitutional Text*

A proper reading of the constitutional text requires consideration of the whole text. Taken together, the text strongly supports the duty-based theory.

1. Clauses Establishing Duties

The Constitution addresses the need to create a duty to obey the law in a very straightforward manner—by imposing duties on the President and other executive branch officials directed at securing fidelity to the law. The text includes both a Take Care Clause and two Oath Clauses creating these duties.

a. *The Take Care Clause*

The Take Care Clause establishes the first relevant presidential duty. It requires the President to "take Care that the Laws be faithfully executed."[64] This clause does not require the President to execute the law himself, for the simple reason that even in George Washington's time this was impossible.[65] Accordingly, the Framers employed the passive voice, implying that unnamed people other than the President would execute the law.[66] Nor does the clause require the President to "assure" that these other

64. U.S. CONST. art. II, § 3.

65. *See* Myers v. United States, 272 U.S. 52, 117 (1926) (recognizing that the President "alone and unaided" cannot execute the laws); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 53–54 (affirming that the Executive "can do nothing of consequence" without the "great" ministers of war, foreign affairs, etc.); *see also, e.g.*, Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1667 (2007) (pointing out that because President Jefferson "could not micromanage" enforcement of the embargo Congress imposed, the U.S. Treasury Department provided much of the enforcement policy's content); Letter from George Washington, U.S. President, to Eleanor Francois Elie, Conte de Mousier (May 25, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON, JUNE 1788–JAN. 1790, at 333–34 (John C. Fitzpatrick ed., 1939) (acknowledging the "impossibility" of "one man" performing "all the great business of the State" as the rationale for creating Departments and their officers).

66. *See* BRUFF, *supra* note 32, at 455 (stating that the "passive mood" of the Take Care Clause signals that the President superintends others' activities); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465–66 (1987) (claiming that the Take Care Clause envisions others executing the law); Prakash,

people faithfully implement the law. Instead, it more mildly admonishes him to "take Care" that others execute the law properly. The choice of the Take Care Clause's mild admonishment over the language of control suggests that the President must employ his best effort to encourage faithful law execution, but acknowledges that he lacks the power to assure faithful execution of the law himself.[67]

b. *The Oath Clause*

The Constitution supplements this effort to make the President into a force for executive branch fidelity to law with a requirement of a presidential oath. It requires him upon assuming office to promise to "faithfully execute the Office of President of the United States, and . . . to the best of [his] Ability, preserve, protect and defend the Constitution of the United States."[68] This Presidential Oath Clause suggests an effort to employ the President's sense of honor and duty as an instrument in securing fidelity to law.[69] This clause's existence suggests that the Framers believed that a President who publicly promises to defend the Constitution is more likely to do so.[70]

Since the Constitution recognizes that executive branch officials other than the President must implement the law, it seeks to secure their fidelity to law as well. Importantly, in a break with the monarchial tradition of fealty to an individual head of government, it does not try to secure their personal loyalty to the President. Instead of requiring executive branch officials to swear an oath pledging fealty to the President, the Constitution requires "all executive . . . Officers . . . [to] be bound by Oath or Affirmation, to support this Constitution."[71] This General Oath Clause even more strongly suggests an effort to employ individual honor and duty, this time in officials other than the President, as forces encouraging fidelity

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supra note 39, at 993 (acknowledging that "[t]he Framers recognized that the President could not enforce federal law alone").

67. *See* 1 Op. Att'y Gen. 624, 624 (1823) (interpreting the Take Care Clause as precluding the President from overturning a Treasury Department decision); *cf.* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1120–26 (9th Cir. 1988) (explaining that the duty to faithfully execute the law does not include a power to decline to enforce valid statutes); BRUFF, *supra* note 32, at 456 (approving an Attorney General Opinion saying that the President could order a federal prosecutor to dismiss a case with foreign affairs implications, because the President "makes our foreign policy"); Strauss, *Agencies*, *supra* note 15, at 648–50 (finding the clause consistent with vesting decision-making authority in administrative agencies).

68. U.S. CONST. art. II, § 1, cl. 8.

69. *See* Grey, *supra* note 57, at 18 (describing the oath clause as a "ritual of allegiance" substituting for a religious oath); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1837, at 702 (1833) (finding that the oath imposed "solemn obligation[s] . . . especially upon those . . . who fe[lt] a deep sense of accountability to" God).

70. *See, e.g.*, THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 31, at 177 (stating that the "sanctity" of the oath will bind all officers to obey federal law).

71. U.S. CONST. art. VI, cl. 3. This Oath Clause applies not only to "all executive . . . Officers . . . of the United States," but also to all state and federal officials. *Id.*

to the law.[72] It explicitly views the required promise of allegiance to the Constitution as binding the official making the oath or affirmation.

It remains to spell out the implications of these duties to the Constitution. The presidential duty to "preserve, protect and defend the Constitution"[73] has a lot in common with the other officials' duty to "support" the Constitution.[74] The notion of protecting and supporting a Constitution both imply an obligation to obey it. The Constitution needs support and protection in the sense of obedience, so that it can establish a rule of law. Thus, these oaths create duties for all executive branch officials to obey the Constitution.

Obviously, this obedience duty prevents executive branch officials from trampling upon rights established in the Constitution. Thus, for example, an officer who swears such an oath should feel duty bound not to take property of citizens without just compensation and due process, for the Fifth Amendment of the Constitution prohibits such actions.[75] But this obedience duty is broader than just the duty to avoid trampling on constitutional rights. For the Constitution also establishes the process for making and implementing the law. The obligation to uphold these parts of the Constitution imply an obligation to comply with laws enacted under the Constitution.[76]

Accordingly, the General Oath Clause *requires federal officials to disobey the President* when he orders them to violate the law.[77] To that

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72. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 551 (recounting Gouverneur Morris's statement supporting allowing the Senate to impeach a President for a misdemeanor because "there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes").

73. U.S. CONST. art. II, § 1, cl. 8.

74. *Accord* DAVID WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 910 (1910) (quoting Thomas Jefferson as stating that the presidential oath substantively replicated the general oath).

75. U.S. CONST. amend. V.

76. *See* Printz v. United States, 521 U.S. 898, 924–25, 943 (1997) (majority and dissenting opinions) (recognizing that the General Oath Clause requires officials to implement constitutional federal statutes); *accord* Dawn E. Johnsen, *What's a President To Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 412–14 (2008) (explaining why the President's duty to "'preserve, protect and defend'" the Constitution requires him to enforce statutes properly, unless they blatantly violate the Constitution under Supreme Court precedent (quoting U.S. CONST. art. II, § 1, cl. 8)). Professor Saikrishna Prakash points out that the General Oath Clause, unlike the Supremacy Clause, U.S. CONST. art. VI, cl. 2, does not explicitly mention federal law. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1992–93 (1993). Yet, the Framers and the Anti-Federalists clearly understood the oath as binding state officials to enforce federal statutes. *See* THE FEDERALIST No. 27 (Alexander Hamilton), *supra* note 31, at 177 (explaining that the oath, by binding all state and federal officials helps make federal law supreme); Letter of Agrippa V, MASS. GAZETTE, Dec. 11, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 78 (Herbert J. Storing ed., 1981). The General Oath Clause applies to both state and federal officials, so if it requires state officials to enforce federal law, it must bind federal officials in that way as well.

77. *See* 1 Op. Att'y Gen. 624, 625 (1823) (opining that when a statute delegates power to a department head, the President's duty to faithfully execute the law precludes his interference with that officer's decision).

extent, at least, the Constitution rejects presidential control over the executive branch of government, setting up individuals within the executive branch of government as checks on presidential abuse.[78] This is a necessary implication of a clause that requires fidelity to the law, rather than fidelity to the President.[79]

This implication of the Oath Clause has enormous contemporary relevance. For example, a key Justice Department official, relying on his Oath of Office, opposed administration efforts to authorize torture, in contravention of treaties, which constitute binding laws in the United States under the Constitution.[80] Lawyers who believed that their primary loyalty belonged with the law, rather than with the President or Vice President, have moderated some recent abuses. Fidelity to the law triggered a threat of mass resignations, leading President Bush to narrow his illegal wiretapping program, and oath-based opposition, at least briefly, checked broad authorization of torture.[81] The General Oath Clause aims to encourage these sorts of checks upon presidential abuse of power.

The Presidential Oath Clause affirms the President's lack of control over executive officers, while simultaneously emphasizing the President's broader responsibilities to the Constitution. While other officeholders need merely pledge their "support" for the Constitution, the President must promise to "preserve, protect and defend" it.[82] This locution includes a duty to obey the Constitution, but it implies a broader duty to try to prevent others from undermining it through maladministration of the law. Thus, the Presidential Oath Clause reinforces the Take Care Clause, in effect requiring the President to take a public oath that he will carry out the duty established in the Take Care Clause.[83]

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78. *See* GOLDSMITH, *supra* note 11, at 41–42 (explaining that by claiming that the Geneva Convention protects Iraqi terrorists even though David Addington insisted that the President's contrary decision not be questioned, the Office of Legal Counsel acted as a "frontline policymaker in the war on terrorism").

79. *See id.* at 79–80 (recounting FBI Director Bob Mueller's explanation of "why he felt obliged to follow an OLC legal opinion even if the President disagreed").

80. *See, e.g.*, *id.* at 11 (explaining that the author decided to "fix" defective memoranda authorizing counterterrorism operations, because doing so "was more consistent with my oath of office" than resigning).

81. *See id.* (suggesting that concerns about violating his oath led to his efforts to narrow torture memos); SAVAGE, *supra* note 12, at 184–88 (explaining how President George W. Bush authorized a narrowing of the warrantless wiretapping program, apparently to avoid resignations of officials who doubted its legality); *see also* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 2000–02 (2008) (describing JAGs as "stubborn rule of law defenders" against torture memos predicated on the unitary executive theory); Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40, 42 (explaining that the employee blowing the whistle on warrantless wiretapping did so because he "'had taken an oath to uphold the Constitution'" (quoting Thomas Tamm)).

82. *Compare* U.S. CONST. art. VI, cl. 3, *with id.* art. II, § 1, cl. 8.

83. A proposal from the Committee on Detail shows how closely related these two clauses were in the eyes of their drafters: "(He shall take Care to the best of his Ability, that the Laws) <It shall be his duty to provide for the due & faithful exec—of the Laws> of the United States (be faithfully executed) <to the best of his ability>." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 171.

The Presidential Oath Clause, however, only requires the President to "preserve, protect and defend the Constitution" "to the best of [his] Ability."[84] In addition to exhorting the President to make his best efforts, this ability limitation acknowledges that the President cannot prevent all abuses, because he cannot control all law execution himself. This ability phrase contrasts with the part of the oath wherein the President promises to "faithfully execute the Office of President."[85] The ability limitation does not apply to this part of the oath. This contrast signals an understanding that the President can wholly control his own exercise of authority, but not that of others. Thus, the Take Care Clause creates a broad presidential duty while recognizing limits to presidential control over executive branch officials.

2. Clauses Rejecting the Patronage State and Embracing Shared Power over the Executive Branch

While the Constitution seeks to instill a duty to uphold the Constitution among officeholders directly, through announcement of duties and the swearing of oaths, it reflects a recognition that this might not suffice. Accordingly, the Constitution established significant elements of congressional control over the executive branch of government. This is in keeping with general philosophy of separation of powers, that "[a]mbition must be made to [check] ambition."[86] Congressional ambitions for law enforcement would check potential presidential abuse and help secure executive branch fidelity to the law.

The Constitution does not establish the patronage state favored by unitarians. The text denies the President complete control over appointment and removal of executive branch officials. The Framers understood that the power to appoint carries with it the ability to create a sense of obligation among officeholders, which would serve as a source of presidential control.[87] Similarly, the ability to remove an officer would serve the aim of presidential control over executive branch officials. Yet, the Constitution only gives the President limited control over appointments and contains not a single word authorizing the President to remove executive branch officials from their offices under any circumstances.[88]

a. *The Appointments Clause*

The Appointments Clause authorizes the Senate to reject presidential nominations of high executive branch officials. It empowers the President

84. U.S. CONST. art. II, § 1, cl. 8.

85. *Id.*

86. *See* THE FEDERALIST No. 51 (James Madison), *supra* note 31, at 322.

87. *See infra* notes 173–74 and accompanying text (showing an understanding that unilateral presidential control of appointments would lead to appointment of quislings).

88. *See* CALABRESI & YOO, *supra* note 18, at 4 (characterizing the removal power as an "implied" power).

to nominate "Officers of the United States," but only to appoint them "with the Advice and Consent of the Senate."[89] The Senate can use this power to reject presidential favorites not likely to faithfully carry out the laws the Senate helps enact.[90] This means that the highest ranking officials, while surely feeling some loyalty to the President who nominates them, also owe their appointment to U.S. Senators. The Appointments Clause also allows the Congress to take the appointment of "inferior Officers" away from the President entirely by expressly authorizing Congress to vest the appointments power in Article III judges,[91] who have life tenure and may have been appointed by a political opponent of a sitting President. This congressional authority to vest judges with an appointment power figured prominently in *Morrison*, which adjudicated, among other things, the constitutionality of an Ethics in Government Act provision that lodged the power to appoint an independent counsel in a panel of Article III judges.[92] The Court upheld this provision, relying on the language authorizing Congress to delegate appointment authority to judges.[93] The Appointments Clause also authorizes the vesting of the authority to appoint inferior officers in the President or heads of departments, but it leaves Congress with the choice of whether to allow for direct presidential control (presidential appointment), the possibility of presidential influence (heads of departments), or no presidential control at all (the judiciary).[94] The provision authorizing Congress to control who gets to appoint inferior officers allows Congress to lodge the appointment power in the person most likely to hire inferior officers who will faithfully execute the law.[95] This clause shows that the Constitution does not give the President complete control over the executive branch of government, thereby undermining the unitary executive theory.[96]

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89. U.S. CONST. art. II, § 2, cl. 2.

90. *See generally* Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) (describing the Senate as "a participant in the appointive process by virtue of its authority to refuse to confirm" the President's nominees).

91. U.S. CONST. art. II, § 2, cl. 2.

92. *See* Morrison v. Olson, 487 U.S. 654, 671–77 (1988) (explaining why 28 U.S.C. § 594(a) does not violate the Appointments Clause when it provides for judicial appointment of an independent counsel (citing 28 U.S.C. § 594(a) (Supp. V 1982)).

93. *See id.* at 673–77 (rejecting an argument against interbranch appointments, primarily because the Appointments Clause expressly authorizes Congress to vest the appointment of "inferior officers" in the courts).

94. U.S. CONST. art. II, § 2, cl. 2; *see also Morrison*, 487 U.S. at 673 (stating that the Appointments Clause gives Congress "significant discretion" in choosing where it wants to vest the authority to appoint inferior officers).

95. *Cf. Ex parte* Siebold, 100 U.S. 371, 398 (1879) (affirming Congress's discretionary authority to choose the locus of the appointment power, but suggesting that Congress should favor the department of government in which the official is to be located).

96. *Accord* Froomkin, *supra* note 16, at 799; *see Morrison*, 487 U.S. at 674–75 (noting that the Framers rejected attempts to transfer the authority to appoint inferior officers to the President); Calabresi & Rhodes, *supra* note 15, at 1181 (recognizing that the Inferior Officers Clause both curtails the President's appointment power and recognizes "Heads of Departments" as having a place in the constitutional design).

b. *The Removal Clause*

The Constitution's text provides for congressional control over the removal of officers and contains not a word authorizing presidential removal for any reason. More specifically, it provides for removal from office of "civil Officers of the United States . . . on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[97] Thus, it authorizes removal for the kind of corruption that the Framers viewed as the greatest threat to the rule of law.[98] The Constitution assigns the Senate the duty to try impeachments and requires a two-thirds vote in order to convict an impeached officer.[99] The Framers' debates about Article II focus heavily upon concerns about abuse of power.[100] They decided that somebody must control executive officers in cases of abuse. They chose not the President, but the Senate, to perform this function of controlling executive branch officials.

The Removal Clause sets out a "finely wrought" procedure[101] for these trials, requiring Senators "sitting" for the purpose of impeachment to "be on Oath or Affirmation" and requiring the Chief Justice of the United States to preside in the case of a presidential impeachment.[102] Furthermore, the Constitution specifies impeachment's consequences, namely, removal from office and a bar on assuming any other office in the federal government.[103] It goes on to deny that impeachment has any other consequences, but affirms that an impeached officeholder can be tried criminally in a regular court for his offense.[104]

Since the Constitution contains only a single "finely wrought" procedure for removing executive branch officials from office, one might well infer that this procedure is exclusive. Under this reading, the President may never remove an officeholder prior to expiration of his term in office; only the Senate can do that, through impeachment. And this is precisely the way some of those who participated in framing the Constitution read it when this subject arose during the First Congress, as Professors Steven Calabresi and Saikrishna Prakash, both leading unitarians, admit.[105]

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97. U.S. CONST. art. II, § 4.

98. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 65–66 (recounting James Madison's support for making the President impeachable, because he might "pervert his administration into a scheme of peculation or oppression[,] . . . betray his trust to foreign powers," or "lose his capacity").

99. U.S. CONST. art. I, § 3, cl. 6.

100. *See* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 17 (2000) (describing avoiding abuse of power as the primary goal of the Appointments Clause debate).

101. *Cf.* INS v. Chadha, 462 U.S. 919, 951 (1983) (treating the "finely wrought" procedure of bicameralism and presentment explicitly set out in the Constitution as the exclusive means of passing legislation).

102. U.S. CONST. art. I, § 3, cl. 6.

103. *Id.*

104. *Id.* art. I, § 3, cl. 7.

105. *See* 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1834) (statement of William Smith) (contending that the Constitution's impeachment provision implies that impeachment is the

The modern Court, of course, has never prohibited Congress from adding removal procedures not specified in the Constitution. And Congress has done so for a very long time.

Intertextual considerations do not support this tradition of allowing Congress to supplement the Constitution's sole removal procedure. Article III provides lifetime tenure for federal judges, absent impeachment.[106] The failure of Article II to specify that executive branch officials likewise enjoy lifetime tenure (absent impeachment) seems, at first glance, to make the inference that Congress can provide for their removal by means other than impeachment reasonable.[107] On the other hand, an assumption that Congress has authority to limit executive branch officials' terms of office but not to provide for removal prior to the expiration of a term except via impeachment makes the Impeachment Clause's exclusivity consistent with Article III.[108] Thus, the contrast with Article III provides no intertextual support for the notion that Congress may supplement the Constitution's sole explicit removal procedure.

Supplementing the Constitution with new removal provisions, however, can make it possible to remove officeholders for failures not amounting to high crimes and misdemeanors. For example, Congress could make consistent failure to implement a statute grounds for removal (and has often done so). Removal procedures that allow this would serve rule-of-law values at the heart of the duty-based theory, but enjoy no explicit textualist support.

The Constitution's failure to explicitly provide for removal except in cases of criminal misconduct shows, at a minimum, that the Framers did not consider the authority to fire noncriminal officials sufficiently important to the rule of law to explicitly authorize it in the Constitution. The Constitution's language implies that a sense of honor and duty to the law and gratitude to the many officials entitled to participate in appointments would act as forces impelling officials to properly execute the law. In addition, the possibility of judicial review, presidential cajoling, and congressional oversight create additional pressures to secure faithful execution of the law. Removal for noncriminal malfeasance, while potentially useful in advancing the rule of law, may not be constitutionally required, or even permissible under the constitutional text.

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only "mode" of removal from office); Calabresi & Prakash, *supra* note 14, at 642–43 (noting that some in the First Congress supported the idea that impeachment was the sole constitutionally permissible method of removing an officer); Gerhard Casper, *An Essay in Separation of Powers*, 30 WM. & MARY L. REV. 211, 234 (1989) (describing the position that "[r]emoval was possible only by means of impeachment" as one of the major positions taken in the 1789 debate over creation of departments in the executive branch of government).

106. *See* U.S. CONST. art. III, § 1 (stating that "Judges . . . shall hold their Offices during good Behaviour").

107. *See* Prakash, *supra* note 51, at 1035 (asking why the Framers would have specified life tenure for judges if all officers could serve for life).

108. *See id.* at 1035 n.101 (suggesting a similar position).

The Constitution's failure to explicitly provide for removal for disobedience to the President also suggests that the Constitution does not require the creation of a patronage state. If the Framers considered presidential control over executive branch officials important, they did not consider the ability to fire disobedient officials sufficiently essential to maintaining this control to justify express inclusion of such a power in the Constitution. Instead, the Constitution uses shared power and duty to secure fidelity to law. Certainly, the Constitution's appointment and removal provisions do not create the patronage state.

c. *Vesting of Power in Departments*

Both proponents and opponents of the unitary executive theory agree that the Necessary and Proper Clause empowers Congress to create executive branch departments and offices and to assign them duties.[109] This clause authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[110] This language states that the Constitution vests powers in departments and officers, not just the President.[111] This reading of the Article I Vesting Clause precludes reading the Article II Vesting Clause as an exclusive grant of power.[112]

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109. *See* Calabresi & Prakash, *supra* note 14, at 592 (agreeing that the Necessary and Proper Clause creates congressional authority to create executive offices and to assign duties to carry out statutorily specified tasks); Lessig & Sunstein, *supra* note 15, at 69 (interpreting the Necessary and Proper Clause to allow Congress to "specify the means by which laws were to be executed"); Strauss, *Agencies*, *supra* note 15, at 598–99 (inferring from the paucity of the Constitution's description of the President's powers an intention to leave the "job of creating" the federal government's shape to Congress under the Necessary and Proper Clause); *see also* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 345 (showing that Madison and Charles Pinckney proposed to specifically provide that Congress can "establish all offices," but that many members considered this as unnecessary, as the power was clearly implied by the Necessary and Proper Clause); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102, 107, 118 (arguing that the Necessary and Proper clause suggests limits on implied presidential power).

110. U.S. CONST. art. I, § 8, cl. 18.

111. *Accord* Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838) (affirming Congress's power to "impose upon any executive officer any duty they may think proper"); Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 356 (C.C.D.S.C. 1808) (No. 5420) (Congress may vest final decision-making authority in an inferior officer).

112. *See* Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843) (declaring that the President's duty to superintend administration "cannot require of him to become the administrative officer of every department" lest he "absorb" the various departments' duties); *see also, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (affirming the constitutionality of congressional creation of an independent national bank under the Necessary and Proper Clause). Professors Steven Calabresi and Kevin Rhodes argue that the Necessary and Proper Clause authorizes the creation of executive branch offices, but does not authorize congressional delegation of executive power to such offices. Calabresi & Rhodes, *supra* note 15, at 1184 n.158. But this Vesting Clause states that the Constitution, not the President, vests departments with powers. Since this Vesting Clause appears in

The Opinions Clause confirms that department heads have responsibility to execute the law. It empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[113] Notice that this clause confirms that department heads have duties. The Clause undermines the idea that the Vesting Clause empowers the President to fully control executive officers. If it did, there would be no need for a clause giving the President power to get a written opinion from a cabinet member.[114] The felt need for an explicit power grant to simply get a written opinion suggests an expectation that department heads would sometimes have substantial scope for independent operation.

Thus, the Constitution's removal provision (the Impeachment Clause), the Appointments Clause, the Oath Clauses, the Necessary and Proper Clause, and the Opinions Clause give non-presidential actors a role in controlling the execution of government power.[115] Unitarians seek to overcome the specifics in the directly relevant clauses, those that explicitly address elements of control over the executive branch, by arguing that complete presidential control must be implied from a more general clause, namely the Vesting Clause. This approach contradicts the principle that ordinarily provisions in a document directly bearing on a subject qualify more general provisions.[116] In any case, we now turn to the Vesting Clause, the textual linchpin of the unitary executive theory.

3. The Article II Vesting Clause

The proper interpretation of Article II's Vesting Clause accepts presidential influence on behalf of the rule of law, but rejects the theory of the patronage state. While it is plausible to read the Vesting Clause in isolation as creating complete control, it is not plausible to read it that way in light of all of the textual evidence that others also have a role in controlling executive branch decisions.[117]

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conjunction with language in Article I authorizing Congress to create departments, this Clause is best read as authorizing Congress to give the officers it creates specific powers.

113. U.S. CONST. art. 2, § 2, cl. 1.

114. *See* THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 31, at 447 (characterizing the clause as "mere redundancy"); Lessig & Sunstein, *supra* note 15, at 32–36, 38 (providing elaboration of this basic point); Froomkin, *supra* note 16, at 800–01.

115. Indeed, a series of early Attorneys General opinions stated that when Congress vested responsibility in a federal officer to perform a duty, the President may not make relevant decisions in her stead. 13 Op. Att'y Gen. 28 (1869); 6 Op. Att'y Gen. 226 (1853); 4 Op. Att'y Gen. 515, 516 (1846); 2 Op. Att'y Gen. 507 (1832); 1 Op. Att'y Gen. 624, 625 (1823). *Contra Gilchrest*, 10 F. Cas. at 357–59 (courts may not order an officer to disobey a presidential order (citing Letter from Caesar A. Rodney, U.S. Att'y Gen., to Thomas Jefferson, U.S. President (July 15, 1808))); 7 Op. Att'y Gen. 453, 469–70 (1855).

116. *See* Townsend v. Little, 109 U.S. 504, 512 (1883) (describing the rule that specific provisions qualify general provisions as a "well settled rule").

117. *See* Froomkin, *supra* note 16, at 793 n.31 (claiming that the Vesting Clause derives its meaning from the Constitution's "full text").

Unitarians read the language vesting "the Executive power" with the President as vesting "all" executive power with the President. Yet, the word "all" comes from Justice Scalia's *Morrison* dissent, not from the Constitution itself. The omission of the word "all" from Article II appears deliberate. Article I vests in the Congress "*All* legislative Powers herein granted."[118] By contrast, Article II vests in the President "the executive Power."[119] The omission reflects recognition of the President's inability to exercise all of the executive power himself, so that others must execute the law. The Vesting Clause gives the President very significant power, but does not deny others an important role in executing the law. The Constitution denies the President complete control over the executive branch, precisely in order to assure that competing forces coalesce to foster a rule of law, rather than allowing a single faction to capture the actual implementation of law.

The President exercises executive power through legitimate requests that lower ranking officials will generally honor.[120] Their oath requires them to support the Constitution. The Constitution provides for the election of the President and gives him executive power.[121] They must, therefore, carefully consider his requests in light of his political stature and his executive power.[122] These provisions assure that executive branch officials will generally honor legitimate requests involving the exercise of purely executive power, even if no power to remove them existed.[123] But these officials are also bound to support the Constitution themselves. Therefore, they must refuse improper requests.

During most periods, this is precisely how government operates.[124] No good organization relies heavily on threats of dismissal as a means of assuring fidelity to its mission.[125] Instead, sound governance instills a

118. U.S. CONST. art. I, § 1 (emphasis added).

119. *Id.* art. II, § 1, cl. 1.

120. The duty-based vision of presidential execution through influence, rather than complete control, closely tracks Peter Strauss's distinction between presidential execution through oversight and performance. *See generally* Strauss, *Overseer*, *supra* note 15 (setting out this conception and defending it at length).

121. *See* U.S. CONST. art. II, § 1, cl. 1.

122. *See* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 522 (2005) (arguing that agencies should generally defer to presidential direction unless the directives take them outside of their statutory authority); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 315 (2006) (arguing that agencies should only reject presidential requests for "very good reasons").

123. *See* GOLDSMITH, *supra* note 11, at 36–39 (arguing that the Office of Legal Counsel properly tilts toward the President's views in close cases and tries to serves its ends, while affirming a duty to check illegal executive branch initiatives); Ackerman, *supra* note 11, at 660 (arguing that the President's election means that "[n]o cabinet secretary ever imagines himself operating on the same plane of legitimacy as his boss").

124. *See* Stack, *supra* note 122, at 294 (pointing out that "agency heads generally have a sense of loyalty to the President or commitment to the President's policies").

125. *Cf.* Strauss, *Overseer*, *supra* note 15, at 714 (pointing out that powerful executive branch officials, even when formally removable by the President, cannot be removed without substantial political cost).

sense of duty and mission, exactly as the Founders did when they inserted the Oath Clauses.

A sense of duty to the President probably explains why U.S. Attorneys, whom the Bush Administration ultimately fired, agreed to the Administration's request that they review voting rights cases.[126] If the President made this request, he exercised "executive power" and their agreement to invest substantial time in examining these cases suggests that even somewhat independent officers respect that power. The U.S. Attorneys also acted properly, however, when they refused to prosecute cases, having found insufficient evidence to warrant prosecution.[127] By doing so, they did not deny the President executive power. For his executive power consists of a power to lead and cajole, not to exercise complete control.[128]

The Constitution does not deny the President political influence. Vesting him with executive power and providing for his election does make him a powerful political actor. But to read the Vesting Clause so broadly as to deny the role of duty-bound officials or Congress in shaping executive branch political decisions about how to execute law simply ignores most of the provisions that speak directly about the relationship between the President and others.[129] Thus, the Constitution's text as a whole establishes a duty-based theory, even if the Vesting Clause in isolation might plausibly be read to establish the President's complete control over the executive branch.

C. *The Political Dimension: Structure and Intertextual Analysis*

The Constitution does not give any branch of government, let alone a single individual, sole control over political decisions. Instead, it sets up competing institutions precisely in order to instigate a process of competition to control policy, in hopes that the resulting compromises will reflect the People's will.

No branch of government has complete control over its political decisions. The primary body for political decision making, the Congress,

126. DAVID IGLESIAS & DAVIN SEAY, IN JUSTICE 86 (2008) (explaining that David Iglesias formed a task force to review evidence of voter fraud).

127. *See id.* at 87 (stating that Iglesias found no prosecutable cases after his extensive review of files); *Kondracke Assumed Voter Fraud as Fact in Claiming Prosecutor Firings Were About "The Failure To Prosecute" It*, MEDIA MATTERS FOR AM., July 12, 2007, http://mediamatters.org/research/200707120008 (reporting that former prosecutor, John McKay, who was accused of failure to pursue voter fraud, did not convene a grand jury on the issue because he thought "'there was no evidence of voter fraud'").

128. *See* Pierce, *supra* note 60 (manuscript at 10–11) (claiming that "jawboning" has always been the most important source of presidential influence over the bureaucracy); Stack, *supra* note 122, at 295–96 (distinguishing between the presidential power to influence an agency from a power to direct a particular outcome).

129. *Cf.* Froomkin, *supra* note 16, at 812–13 (arguing that the "Take Care Clause" authorizes the President to enforce congressional performance standards, not to "create the standards" himself).

does not have complete control over legislation, for the Constitution empowers the President to veto legislation.[130] Only in the rare case when public support for a particular piece of legislation produces a two-thirds congressional majority for a vetoed bill may Congress legislate without the President's assent.[131] Similarly, the judiciary, while obviously enjoying a great deal of independence, must implement laws passed by others. Congress may and sometimes does override even the Supreme Court's decisions interpreting statutes, by passing fresh legislation to overturn a judicial decision.[132] While considerably more difficult, the states may amend the Constitution to override a judicial construction of the Constitution, as they did with respect to an early judicial construction of the Eleventh Amendment.[133] And the Congress has substantial control over the judiciary's jurisdiction, for it can deny the Supreme Court authority to hear appeals in a category of cases, and the lower courts only exist because Congress decided to bring them into being.[134] In light of the significant interbranch controls over Congress and the judiciary, it would be surprising indeed to learn that the Constitution gave the President unilateral control over executive branch political decisions.

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130. U.S. CONST. art. I, § 7, cl. 3; *see* Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) (noting that the veto provision makes the President "a participant in the lawmaking process"); 1 ANNALS OF CONG., *supra* note 105, at 463 (statement of James Madison) (characterizing the President's veto power as a qualification of the grant of legislative power to Congress).

131. U.S. CONST. art. I, § 7, cl. 3.

132. *See, e.g.*, Robert Pear, *Congress Passes Civil Rights Bill, Adding Protections for Disabled*, N.Y. TIMES, Sept. 18, 2008, at A21 (explaining that a new disability rights bill overturns "several recent Supreme Court decisions").

133. *See* Alden v. Maine, 527 U.S. 706, 719–21 (1999) (discussing how the Eleventh Amendment overruled *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793)).

134. *See* U.S. CONST. art. III, § 2; United States v. Klein, 80 U.S. (13 Wall.) 128, 145–48 (1871) (prohibiting Congress from dictating the outcomes of cases through jurisdiction stripping); *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 513–14 (1868) (suggesting that congressional power to strip the Court of jurisdiction has few limits). The extent of congressional jurisdiction stripping power has been the subject of extended debate. *See, e.g.*, RAOUL BERGER, CONGRESS V. THE SUPREME COURT 1–2, 285–90 (1969); Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of the Federal Court: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Lawrence G. Sager, *The Supreme Court 1980 Term–Foreword: Constitution Limitations on Congress' Authority To Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981); Michael Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465 (1991); *cf.* Calabresi & Lawson, *supra* note 44, at 1008 (arguing that the Constitution does not authorize stripping the Court's jurisdiction, but rather just the moving of jurisdiction between the appellate and original jurisdiction categories).

The analysis of the Constitution's rejection of the patronage state presented above shows that the Constitution establishes a system of checks and balances to control executive branch political decision making as well, not a system of unilateral presidential control.[135] The congressional role in appointments, removal, and creating departments (not to mention budget) give it substantial leverage over political decision making within the executive branch. The requirement that executive branch officials swear an oath to defend the Constitution reinforces the congressional role in appointments in seeking to negate efforts by Presidents to turn executive branch officials into instruments of presidential pleasure. Instead, the Constitution envisions a dialogue between a powerful President and somewhat independent officials about appropriate discretionary decision making within a rule-of-law framework.[136]

D. *Pre-Enactment History*

Professors Calabresi and Prakash, both leading unitarians, emphasize that originalists find history preceding enactment of the Constitution more probative than post-enactment history.[137] The pertinent pre-enactment history supports a duty-based theory and shows that the Framers did not envision a patronage state.

While issues of how to structure the executive branch generated heated debate and elaborate compromises, all agreed on the object of securing obedience to the Constitution.[138] In the words of James Madison, the Constitution sought to make the "private interest of every individual . . . a sentinel over the public rights."[139]

The pre-enactment history shows the breadth of support for a Constitution based on duty.[140] The Convention unanimously approved of the idea that Oath Clauses should apply to federal officers.[141] These clauses followed the practice of the Rump Parliament, which after

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135. *Accord* 1 ANNALS OF CONG., *supra* note 105, at 487 (statement of James Jackson) (denying that the Constitution vests executive power in the President alone, because of the Senate's role in appointments and treaty making); THE FEDERALIST NO. 51 (James Madison), *supra* note 31, at 322 (describing the Constitution as arranging "the several offices in such a manner as that each may be a check on the other"); Strauss, *Agencies*, *supra* note 15, at 640 (noting that "[a] focus on checks and balances" legitimizes civil servants as a "fourth force in government").

136. *See generally* Stack, *supra* note 122, at 316 (discussing the value of a dialogue between the President and agencies for the rule of law and sound policy).

137. *See* Calabresi & Prakash, *supra* note 14, at 550–51.

138. *Cf.* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 88 (reporting Elbridge Gerry's remark that the Oath Clauses would assure that the Officers see themselves as part of the national government, thereby discouraging "a preference to the State Gov[ernments]").

139. THE FEDERALIST NO. 51 (James Madison), *supra* note 31, at 322.

140. *See, e.g.*, MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 7 (2d ed. 2000) (explaining that Morris cited the General Oath Clause's applicability to Senators as a reason to trust the Senate with the impeachment power).

141. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 84.

abolishing the office of King, required public officials to swear allegiance to a republican constitution and to promise faithful performance of the duties pertaining to their particular office.[142] Debate in the Constitutional Convention focused on the question of whether *state* officials must swear an oath of allegiance to the federal government, with the nationalists prevailing in their view that state officials must swear such an oath.[143]

The pedigree of the Take Care Clause shows that a clause vesting power in a single executive in conjunction with a responsibility to oversee faithful execution of the law does not imply executive control over executive branch officials. The Take Care Clause closely tracks the language found in the New York Constitution of 1777, which did have a single, rather than a plural, executive.[144] New York's Constitution, like many other state constitutions, also provided a model for the Vesting Clause, as it stipulated that the State's "executive power . . . shall be vested in a governor."[145] Yet, the combination of a Vesting Clause, a Take Care Clause, and a single executive in New York did not create a patronage state featuring executive control over executive branch appointees. Instead, New York's Constitution generally gave the appointments power to a "council for the appointment" in which the Governor had but one vote, while authorizing the Assembly to select the State Treasurer.[146] And the New York Constitution contained a general rule that offices are "held during the pleasure of the council of appointment," not the chief executive.[147] As Professor Edward Corwin explained long ago, the New York Constitution gave the Governor "very little voice in either appointments *or removals*."[148] Thus, the most relevant state antecedent suggests that the Constitution's Ratifiers would not have understood the choice of a single executive model

142. *See* Campbell, *supra* note 56, at 8.

143. *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 203–04.

144. *See* BRUFF, *supra* note 32, at 16 (pointing out that the New York Constitution required the Governor "to take care that the laws are executed to the best of his ability"); CALABRESI & YOO, *supra* note 18, at 32 (describing the New York Constitution as "more unitary" than other state constitutions and noting the Framers' approval of its "articles on executive power"); Casper, *supra* note 105, at 241 (describing the New York Constitution as the state constitution most "generous . . . toward the executive branch").

145. N.Y. CONST. OF 1777, art. XVII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2623, 2632 (Francis Newton Thorpe ed., 1909).

146. *Id.* art. XXIII. The Council consisted of one senator from each district and the Governor. *See id.*

147. *Id.* art. XXVIII.

148. 1 CORWIN ON THE CONSTITUTION 354 (Richard Loss ed., 1981) (emphasis added). Nor were these the only similarities between Article II and New York's constitutional framework for executive power. *See* CORWIN, *supra* note 40, at 7 (explaining that the New York governor was elected, bore the title of Commander-in-Chief, and possessed a power to pardon); THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 31, at 416 (stating that "there is a close analogy between [the President] and a governor of New York").

through the Vesting and Take Care Clauses as establishing complete executive control over officers.[149]

Indeed, the Framers of the Federal Constitution considered and rejected a model of complete presidential control over executive branch officials. Early on, the Framers supported a proposal that allowed the President alone to appoint executive officers "not otherwise provided for."[150] On June 18, 1787, Hamilton suggested that the President alone should appoint the heads of the departments of Finance, War, and Foreign Affairs.[151] The Framers, however, ultimately created a senatorial role in selection of high officeholders to appease a number of delegates to the Constitutional Convention who believed that "granting the appointment power to the executive would lead to monarchy."[152] The Senate power would serve as a safeguard against "incautious or corrupt" presidential nominations.[153] At the same time, the Framers rejected proposals to allow the legislature sole control over appointments, a model found in many state constitutions.[154] The requirement that only candidates securing the approval of both the President and the Senate assume high office increases the likelihood that only those likely to take their duties to properly implement the law seriously would assume office.

In addition, members of the Convention proposed that major cabinet officers "be appointed by the President during pleasure," which would mean that the President could remove them at will.[155] And a report of the Committee on Details reflects a proposal to empower the President to "suspend Officers, civil and military."[156] The Constitution eventually proposed and ratified, however, reflected the rejection of these proposals to empower the President to remove or suspend officers.

The records of the Federal Convention suggest that the proponents of executive power gave away complete presidential control over appointees in exchange for abandonment of a true plural executive model, with a committee playing a key mandatory role in determining executive actions. The rejected provisions making heads of departments removable at will

149. *See* 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 471–72 (1905) (describing John Jay, Robert Livingston, and Gouverneur Morris as exercising a "controlling influence in preparing" the New York State Constitution through their membership on the drafting committee).

150. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, at 47 (Bicentennial ed., W.W. Norton 1987) (1893); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 67; *see also* GERHARDT, *supra* note 100, at 19 (explaining that this proposal was generally intended to give the executive sole control over appointments).

151. GERHARDT, *supra* note 100, at 19. Even this proposal, however, contemplated a Senate role in other appointments. *See id.*

152. *Id.* at 17.

153. *Id.* at 23.

154. *See* Strauss, *Agencies*, *supra* note 15, at 599 & n.99.

155. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 335–36, 342–43 (proposing presidential appointment at pleasure for secretaries of domestic affairs, commerce, foreign affairs, war, marine, and state).

156. *See id.* at 158.

formed part of a proposal to have an executive council advising the President.[157] Proponents of a plural executive probably offered this presidential control over appointment and removal in a bid to secure adoption of this modest form of a plural executive, having failed to convince the majority to allow for a committee at the head of the executive branch.[158] The debates reveal that the Framers viewed a congressional check on appointments or an executive council as two ways of addressing the fears of monarchy that a number of Framers expressed and that could lead the people to reject the Constitution.[159] The Constitution adopted at the Convention (and ultimately ratified by the people) reflects a compromise in which the advocates of presidential power defeated the plural executive proposals, but gave up control over executive branch appointments and removal as part of the bargain.[160]

The decision in favor of a single executive did not establish complete presidential power over other executive branch officials. The Framers considered the question of whether they should propose a single executive model to the People as separate from the question of what power the executive would yield and how it would be checked.[161] Indeed, Madison, in an effort to bring some order to an unruly debate over his unitary executive proposal, suggested that the Convention "fix the extent of the Executive authority" before deciding between "a unity and a plurality in the Executive,"[162] an indication that he viewed the questions of plurality versus singularity and the general nature of executive authority as separate matters.[163]

Furthermore, the arguments that ultimately persuaded the Framers to choose a single President have little to do with the question of whether an official other than the President might yield authority unchecked by him. They expressed concern about the prospect of a committee running an executive branch failing to agree upon a question, especially in the context

157. *Id.* at 335–42.

158. *See id.* at 538–39, 542 (reflecting James Wilson's preference for a council over a Senate role in appointments).

159. *See, e.g.*, 1 *id.* at 66 (referring to the unitary executive as the "foetus of monarchy").

160. *See id.* at 66, 71–74, 88, 91–92; 2 *id.* at 335–37, 533, 537, 542; *see also* Buckley v. Valeo, 424 U.S. 1, 129–31 (1976) (per curiam) (describing the provisions providing for shared presidential and senatorial appointment as a compromise arrived at after considering provisions giving the President sole control over some appointments and the Senate sole control over others).

161. *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 96 (distinguishing questions of the degree of executive power from the question of whether to have "co-ordinate heads" of the executive department); *see also id.* at 63 (showing assignment of executive power and appointment power to an "executive" after postponement of a proposal to specify that the executive is unitary).

162. *See id.* at 66.

163. *Cf.* Strauss, *Agencies*, *supra* note 15, at 600 (acknowledging a decision to create a politically accountable unitary executive, but finding the Constitution "ambivalent" about the nature of the President's relationships with those actually administering the laws).

of war.[164] The advocates of a vigorous executive convinced their opponents that this paralysis possibility should lead them to accept a single President that would not be required to consult an executive council. Rejection of a committee, however, does not signal a clear decision rejecting giving authority to single independent officers of the government.[165]

Duty's centrality becomes even more apparent when one considers the important role the Framers envisioned for *state* execution of federal law. During the debate over the Constitution's ratification many expressed anxiety over federal officials enforcing laws within the states, especially in the context of collecting tax revenue.[166] If the Framers envisioned a unitary state, one would have expected them to have responded with assurances that the President would control and reign in abusive federal tax collectors. That, however, was not the response. Instead, the Constitution's proponents assured the fearful that *state officials* would collect federal taxes and enforce other federal laws.[167]

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164. *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 96–97 (showing that a resolution favoring a unitary executive passed just after Wilson and Gerry had raised the nonagreement problem, with Gerry opining that this problem would be "extremely inconvenient in many instances, particularly in military matters"); *id.* at 105 (citing the prospect of "anarchy and confusion" from nonagreement of a plural executive just before a motion affirming the unitary choice carried); *see also* Strauss, *Agencies*, *supra* note 15, at 600 (characterizing the choice of a single executive as a rejection of a large "executive body" (citing CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789, at 89 (1923))).

165. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 158 (proposing to "vest" the executive authority in the President but then imposing a duty to "attend to" the execution of the laws, rather than to actually carry them out); PHELPS, *supra* note 2, at 143 (discussing congressional abandonment during the Revolutionary War of "plural executives"—government by committee—in favor of "individual *secretaries* for war, marine, foreign affairs, and finance" (emphasis added)). Washington personally believed in a strong unitary executive model, where the President would have complete control over the executive branch of government, including appointments. *Id.* at 142–49. But the Constitutional Convention rejected that model when it allowed the Senate a role in approving appointments and provided for impeachment. *See* U.S. CONST. art. I, § 2, cl. 6 (granting the Senate the "sole Power to try all Impeachments"); *id.* art. II, § 2, cl. 2 (providing for appointment "with the Advice and Consent of the Senate").

166. *See* Prakash, *supra* note 76, at 1996–97, 2002–03 (discussing "those who feared the specter of a large federal bureaucracy" often in the context of discussions of tax collection).

167. *See id.* at 2003–04 (explaining that both Federalists and Anti-Federalists "understood that state officers" would enforce federal law); *see also* U.S. CONST. art. I, § 8, cl. 15; MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 101–28 (2003); THE FEDERALIST NOS. 27, 36 (Alexander Hamilton), *supra* note 31, at 176 (stating that the government would employ each state's "ordinary magistracy" in "the execution of" federal law and would give effect to the Constitution); THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 31 (explaining that in instances of disobedience and disorder state militiamen would serve under federal command); THE FEDERALIST NOS. 44, 45 (James Madison), *supra* note 31, at 289, 292 (respecting tax collection and state officers' "essential agency in giving effect to the . . . Constitution"); William C. Banks, *Providing Supplemental Security—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SECURITY L. & POL'Y (forthcoming 2009); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1343 (2006) (pointing out that use

The President, of course, would have no authority to appoint or remove these officials.[168] The Constitution does, however, contain a duty-based means of checking abusive state officials.[169] For the Constitution requires not just federal officials, but also state officials, to swear to support the Constitution under the General Oath Clause.[170] And the argument made above that this duty should make oath swearers responsive to legitimate presidential requests seeking to reign in abuse, while obligating them to resist illegal presidential directives, applies to state officials. The notion of a large federal bureaucracy under presidential control is a modern invention not within the contemplation of the Framers.[171]

As the ratification debate proceeded, Hamilton recognized that the Constitution adopted, in spite of his best efforts, did not provide for the patronage state, but instead embraced the concept of duty and fidelity to law. He explained in *The Federalist Papers* that with respect to appointments, the Constitution subjects the President "to the control of a branch of the legislative body," because of fears of "abuse of the executive authority" respecting appointment.[172] Hamilton explains, again in *The Federalist Papers*, that the Senate role in appointments prevents appointees too easily controlled by the President from assuming office. He describes the Senate advice and consent role as discouraging the President from nominating candidates "personally allied to him, or . . . possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."[173] This anti-quisling statement supports the implication already drawn from the General Oath Clause, that the Founders intended executive officers to have some degree of independence from the President, at least sufficient to make them a force for the rule of law. Thus, he justified the Senate's role in appointments as a measure designed to

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of state enforcers was viewed during the Federalist period "as a means of restraining" the federal government's power); Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1098 (2008) (pointing out that the debate over ratification focused on whether the state militia would be called out, with no room for the use of federal troops in the case of insurrection). The Constitution explicitly provides for presidential control over the state militias, but nowhere provides him with authority to direct state officials executing federal law absent an insurrection or rebellion necessitating a calling of a state militia into service. *See* U.S. CONST. art. II, § 2, cl. 1 (making the President "Commander in Chief" of state militias when they are pressed into federal service).

168. *See* Prakash, *supra* note 76, at 2000 (pointing out that Alexander Hamilton and James Madison recognized that "the federal government would have no direct influence on the selection of state officers" (citing THE FEDERALIST NO. 45 (James Madison), *supra* note 31, at 291)).

169. *See id.* at 2001 (explaining that state officials have a duty to enforce federal law).

170. U.S. CONST. art. VI, cl. 3.

171. *See* Ackerman, *supra* note 11, at 691 (pointing out that the Founders did not "have the slightest idea" that the federal government's civilian workforce would grow from the 2597 officials of 1802 to the 1,872,000 in 1997); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–37 (1994) (discussing the federal bureaucracy's growth over time).

172. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 31, at 464.

173. *Id.* NO. 76 (Alexander Hamilton), *supra* note 31, at 458.

discourage nomination of people that the President could completely control.[174]

Hamilton's comments on removal likewise acknowledge the Constitution's rejection of the patronage state. In *The Federalist Papers* Number 77 he explains that the requirement of Senate approval of appointments contributes to "stability of the administration."[175] This stability arises, Hamilton explains, because the *Senate's approval would be required in order to remove an executive officer.*[176] Thus, Hamilton assumed that the President would lack the power to unilaterally remove an executive officer; rather, he could only do so with the Senate's assent. This may reflect a belief that impeachment constitutes the exclusive procedure for removing executive branch officials, or it may instead assume that any additional procedures must conform to the principle that officeholders retain their positions "on the pleasure of those who appoint them."[177] His explanation of how the Senate's role in removal contributes to stability wholly rejects the patronage state and embraces a duty-based model:

> A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself.[178]

This passage clearly treats the lack of presidential control of removal as a virtue. Hamilton finds the Senate role salutary because it discourages replacement of fit officers with people "more agreeable" to the President.

This rejection of presidential political control through appointment of "agreeable" officers strongly suggests endorsement of a model of government based on expertise and duty and a rejection of the unitary executive theory's political dimension. The references to the President as merely the "Chief Magistrate," a modest locution found throughout *The Federalist Papers*, reinforces the impression that the Constitution that Hamilton here defended seeks a stable rule of law, not the rule of

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174. *Id.*

175. *Id.* NO. 77 (Alexander Hamilton), *supra* note 31, at 459.

176. *Id.* (stating that "The consent of [the Senate] would be necessary to displace as well as to appoint"); *cf.* Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y (forthcoming 2010) (manuscript at 1–15), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331664 (conceding that the courts and commentators have read this passage as addressing removal, but arguing that in spite of the juxtaposition of "displace and appoint" the term "displace" might refer to removal through an appointment only).

177. THE FEDERALIST NO. 66 (Alexander Hamilton), *supra* note 31, at 404 (claiming that all state governments follow the practice of "rendering those who hold office during pleasure dependent on the pleasure of those who appoint them").

178. *Id.* NO. 77 (Alexander Hamilton), *supra* note 31, at 459.

presidential personality based on a particular set of personal policy preferences.[179]

The intertemporal stability that Hamilton champions constitutes a well-established element of the very idea of a "rule of law" that the Constitution's drafters passed down to us. The "rule of law" implies that the election of a new President will not radically change the law's meaning, absent a congressional decision to amend it.[180] The Constitution locates the political power to alter policy, not in unilateral presidential preferences, but in the legislative process, which the President participates in, but does not control.[181]

The Founders shared a vision of a government not dominated by politics and faction, but rather by a public-regarding sense of duty, what historian Gordon Wood has referred to as a "vision of disinterested leadership."[182] The notion that the President would have a policy of his own different from that of Congress simply played no part in the Republican ideology of the Founders.[183] Indeed, at the founding the constitutional vision of congressional dominance in policy was so strong that it led George Washington to refrain from vetoing domestic measures he disagreed with on policy grounds and from proposing specific legislation.[184] The notion that the political preference of a sitting President, as opposed to the policy decisions embodied in statutes that the President has not vetoed, would

179. *See, e.g.*, *id.* NOS. 66, 68–77 (Alexander Hamilton), NOS. 3, 4 (John Jay), NOS. 39, 47, 48 (James Madison), NO. 18 (James Madison with Alexander Hamilton), *supra* note 31; Prakash, *supra* note 76, at 2034 (characterizing the magistracy as "servants of the laws of the land," rather than as sovereign (citing THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 31, at 117)). Prakash insists that the magistracy cannot "pick and choose" which laws to enforce. *Id.* While he makes these remarks in the context of explaining why state judges and executive officers must enforce federal law under the Constitution, *see id.*, *The Federalist Papers* clearly include the President as part of the magistracy, albeit as the Chief Magistrate.

180. *See* William N. Eskridge, Jr., & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1170 (2008) (describing "vertical predictability"—the consistency of law over time—as an element of the rule of law).

181. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 31, at 309–12 (discussing the legislature's superiority); THE FEDERALIST NO. 51 (James Madison), *supra* note 31, at 322 (stating that "[i]n republican government, . . . legislative authority . . . predominates"); *see also* Katyal, *supra* note 10, at 2317 (noting the Framers' assumption that "massive changes to the status quo required legislative enactments, not executive decrees").

182. WOOD, *supra* note 8, at 165.

183. *See* PHELPS, *supra* note 2, at 81 (stating that "[t]he idea that there could be equally valid, but different, notions of the public interest" appeared nonsensical to Washington, because he believed in a single "public interest to which virtuous men could unanimously subscribe").

184. *Id.* at 139–42, 150–54 (describing Washington's approach to vetoes and legislative proposals). Washington generally vetoed domestic legislation only on constitutional grounds and let domestic measures he disagreed with pass. *Id.* at 150–54. But he did veto measures implicating his foreign affairs power on policy grounds. *Id.* at 153–54.

govern administration of domestic law appears wholly foreign to the Framers.[185]

Hamilton's comments not only reflect a key Framer's intent, they also give us some of the best clues we have about what the people who adopted the Constitution thought it meant. For these statements appeared in newspaper articles intended to influence the debate over the Constitution's ratification.[186] Since the Constitution owes its authority, not to its drafters, but to the People who chose to adopt it, the Framers' public remarks aimed at securing the Constitution's adoption merit special weight.[187]

The Framers rejected Hamilton's effort to create a pure type of unitary executive reflecting a system of complete presidential control.[188] The Constitution reflects a compromise between those seeking an unfettered executive following a rather pure model of separated powers and those fearful of replicating monarchy, who sought congressional control of the executive branch.[189] Both the proponents of executive independence and vigor and those who sought legislative control and government by committee, however, aimed to secure a government animated by a sense of duty and fidelity to the law.

E. *Duty in the Early Republic*

The debates and actions of the early Republic provide some evidence of the Framers' intent, since so many of them remained active in government

185. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 109 (reporting Madison's description of the executive's powers as "limited"); *cf.* Strauss, *Agencies*, *supra* note 15, at 642 (arguing that the need for priority setting and coordination justifies presidential retention of "substantial lines of communication and guidance").

186. *See* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of The Original Meaning of The United States Constitution*, 87 B.U. L. REV. 801, 812–17 (2007) (discussing the early publication history of these papers).

187. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403–04 (1819) (pointing out that the Constitution "derives its whole authority" from state ratifying conventions, since "the people were at perfect liberty to accept or reject" the "mere proposal" the Framers made); GERHARDT, *supra* note 140, at 3 (stating that the "convention delegates themselves recognized that their views on the meaning of the Constitution mattered less than the opinions of the ratifiers"); Calabresi & Prakash, *supra* note 14, at 551 (describing originalism as based on "the text of the Constitution, as originally understood by the *people who ratified it*" (emphasis added)); Powell, *supra* note 17, at 936–39 (explaining that Madison and other federalists argued that the intentions of the ratifiers, not the drafters, should guide constitutional interpretation); *cf.* Calabresi & Prakash, *supra* note 14, at 612 (suggesting that Hamilton's remarks in *The Federalist Papers* have little probative value, because they seek to placate the Anti-Federalists).

188. *See, e.g.*, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 64–69 (showing that advocates of a unitary executive sought to defeat the proposal to make the President impeachable); *id.* at 538 (recounting objections to the Senate's role in appointments as "blending" legislative and executive power).

189. *See, e.g.*, *id.* at 639 (describing the power of the Senate over appointments and thus over the executive branch as a substitute for the rejected constitutional council). *See generally* Mashaw, *supra* note 167, at 1272 (describing Hamilton's defense of Article II in *The Federalist Papers* as an effort to assure doubters that the President would have modest power compared to the King of England).

after the Constitution passed.[190] The First Congress's actions in organizing the execution of the laws reflect a consensus favoring the duty-based theory and division on questions of presidential power.

The first statute the new Congress passed implemented the Oath Clause that applies to lower level executive branch officials and others.[191] Unlike the Presidential Oath Clause, the General Oath Clause did not set forth the required oath's language. The new Congress, before taking up the matter of structuring executive departments, passed a law setting out the oath's language.[192]

Society took oaths seriously at the time.[193] The customs of the age required a gentleman accused of violating an oath to seek satisfaction from the accuser, sometimes in the form of a duel.[194] The early Congresses added to this seriousness by passing statutes specifying penalties for oath violations or failure to take oaths.[195] They also frequently required officeholders to post bonds, which they would forfeit if they failed to perform certain duties properly.[196] The early Republic employed oaths and other mechanisms to seek to assure that those executing federal power conformed to the law.

Consistent with the promises made during the ratification debates, the early Republic relied heavily upon state officials to collect taxes and carry out other federal executive functions. The President did not participate in these officials' appointment to their offices and had no authority to remove them from those offices.[197] He did indeed exercise influence over them, exhorting them to properly enforce both the federal tax on liquors and later the Neutrality Laws, the latter in the face of considerable local opposition in some regions.[198] Having sworn an oath to support the Constitution, they generally cooperated with the federal government in enforcing federal laws, in spite of the President's inability to influence their appointment or removal.[199] In 1791, Congress also delegated significant authority to a

190. *See* Bowsher v. Synar, 478 U.S. 714, 723–24 (1986) (explaining that the first Congress's acts constitute "weighty evidence" of the Constitution's meaning, because "many" of its members helped frame the Constitution).

191. WATSON, *supra* note 74, at 1334.

192. Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23 (regulating the time and manner of administering certain oaths).

193. Mashaw, *supra* note 167, at 1309 n.167 (describing oaths as "serious business").

194. *Id.*; *see also* JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 159–98 (2001).

195. Act of Mar. 2, 1799, ch. 22, § 20, 1 Stat. 627, 641–42 (regulating the collection of duties on imports and tonnage); Act of Mar. 3, 1791, ch. 15, § 6, 1 Stat. 199, 200 (repealing duties on distilled spirits); Act of Aug. 4, 1790, ch. 34, § 12, 1 Stat. 138, 142 (making provision for the payment of the United States' Debt).

196. *See* Mashaw, *supra* note 167, at 1317–18 (providing examples).

197. *See* Prakash, *supra* note 76, at 2000 (pointing out that the President exercised no control over state officers' appointment).

198. *See* Calabresi & Prakash, *supra* note 14, at 640–41.

199. *Id.* & n.442 (discussing governors' willingness to enforce neutrality at Washington's request).

semiprivate corporation, the First National Bank, over which the President exercised precious little authority.[200]

The First Congress did not consistently favor executive control over the federal bureaucracy either. In statutes establishing the Departments of War, the Navy, and Foreign Affairs, Congress directed these departments' heads to follow the President's directions.[201] By contrast, Congress afforded the Secretary of the Treasury and the Postmaster General a measure of independence from the President.[202] Congress also lodged significant specific authorities in both the heads of the Treasury Department and Post Officers and other officials in these departments under the Necessary and Proper Clause.[203]

The First Congress confronted the issue of whether the President should be able to remove officers from government when it established the federal executive departments. The 1789 debate on this subject in Congress suggests that after ratification members of the founding generation no longer shared a common understanding of the Constitution's meaning with respect to removal or had decided to continue to pursue their disparate views of wise policy.[204] In the House debate, which we have a record of, some opined that impeachment was the only permissible means of removal; others insisted that the Senate must concur in removal decisions not involving crimes; others thought that the President must have removal authority; and still others believed that the Constitution permitted Congress to craft removal provisions as it saw fit without significant restraints.[205] The lack of consensus about the Constitution's meaning in this debate shows that the unitary Framers' intent favoring a senatorial role in removal that existed prior to ratification, vanished immediately thereafter.[206]

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200. Act of Feb. 25, 1791, ch. 10, § 1, 1 Stat. 191 (incorporating subscribers to the Bank of the United States); *see* Mashaw, *supra* note 167, at 1296 (describing the Bank as more independent of presidential direction than today's Federal Reserve).

201. *See* Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553, 553 (imposing a duty on the Secretary of the Navy to "execute such orders as he shall receive from the President"); Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (codified as amended at 5 U.S.C. § 301 (2006)) (directing the Secretary of War to conduct the department's business according to the President's instructions); Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28–29 (codified as amended at 22 U.S.C. § 2651 (2006)) (directing the Secretary for Foreign Affairs to perform duties "intrusted to him by the President" according to presidential instructions).

202. *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 65–66 (codified as amended in scattered sections of 31 U.S.C.); Act of May 8, 1794, ch. 23, § 3, 1 Stat. 354, 357; Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 74 (1983) (explaining how Congress made the Comptroller General independent of presidential direction).

203. *See* Mashaw, *supra* note 167, at 1284–89 (describing these duties and the complex mix of independence, congressional direction, and presidential control employed in the enactments establishing these departments and their duties).

204. *See* Casper, *supra* note 105, at 237 (identifying the "multitude of views expressed" about separation of powers as the most significant aspect of the House debate).

205. *See id.* at 234–35 (summarizing the various positions).

206. *See* 1 CORWIN, *supra* note 148, at 331–32 (claiming that only a small minority of the House found that the President's power under Article II entitled him to have sole removal authority); *cf.* Froomkin, *supra* note 16, at 795 n.37 (criticizing Chief Justice William H.

The House of Representatives eventually passed an enigmatic bill on removal. It rejected language that would have unequivocally given the President the authority to remove executive officers. Instead, the House adopted bills that stated who should retain custody of papers whenever the President removes the head of a department, by narrow margins.[207] The Senate at first refused to consent to including this language in the Treasury Department Bill.[208] Eventually though, the Decision of 1789—the decision to include this language in the bills creating the Treasury, War, and Foreign Affairs Departments—passed, because Vice President John Adams broke ten-to-ten ties on the removal issue in the Senate.[209]

While the closeness of these votes and the disparate positions taken in debate do not establish a post-ratification consensus on the proper constitutional removal theory, the House debates (there is no reliable record of the Senate debates) strongly suggest that the political dimension of the unitary executive theory enjoyed no support in the founding generation. Those who read the Constitution as requiring presidential removal authority argued that presidential removal authority encouraged presidential responsibility and made it more likely that official abuse would be checked. But they did not suggest that presidential policy should control executive branch administration of the law.[210] Even those who found that the Vesting Clause implied a presidential removal authority argued for it within a duty-

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Taft's reasoning in *Myers v. United States* as exaggerating the "degree of unanimity" in the Decision of 1789).

207. *See* Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67 (establishing the Treasury Department and giving the Assistant Treasury Secretary custody of papers if the President removes the Treasury Secretary); Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50 (establishing the Department of War and giving an inferior officer custody of papers whenever the President removes the Secretary of War); Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (establishing the Department of Foreign Affairs and giving the Chief Clerk custody of foreign papers if the President removes the Secretary of Foreign Affairs). Professor Prakash claims that this language indicates a belief that the Constitution granted the President a removal authority, so that congressional delegation of such an authority was either unnecessary or inappropriate. *See* Prakash, *supra* note 51, at 1026. Most scholars who have seriously considered the issue, however, disagree, arguing that the bill does not reflect majority support for the notion of a constitutional power of removal. *See* 1 CORWIN, *supra* note 148, at 332; DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 41 n.240 (1997); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 662–63 (2004). In any case, the closeness of the vote and the disparity of opinions expressed in the House show that no consensus existed among the participants in this debate. *See* Bradley & Flaherty, *supra*, at 658 (finding no consensus, or even majority support, for the thesis that the Vesting Clause implied that the Constitution requires the President to have a removal authority).

208. Prakash, *supra* note 51, at 1033 (explaining that the Senate deleted the entire section containing the removal language in the Treasury bill).

209. *See id.* at 1032–33 (discussing the Senate's treatment of the bills on Foreign Affairs and the Treasury).

210. *Cf.* Strauss, *Agencies*, *supra* note 15, at 604 (arguing, from a much later perspective, that execution of the law carries with it "a policy function" *within statutorily defined bounds*).

based framework uninfluenced by modern notions about broad presidential policy discretion.[211]

F. *Function*

A duty-based theory better serves the rule of law than the unitary executive theory. It invites those interpreting the Constitution in the present day to continue the Framers' project of trying to arrange power to produce a rule of law, respecting the specific decisions already made in the Constitution, but using the Framers' rule-of-law goal as the primary guide to filling in the blanks.[212] The unitary executive theory, by contrast, seems to depart from the Framers' vision of apolitical administration by viewing executive power as almost an end in and of itself.[213]

The danger of the President unraveling the rule of law that the early proponents of checks on executive authority recognized has become more acute with the passage of time. The President, for better or worse, has become a powerful political actor with influence far exceeding that which the Framers envisioned.[214] This growth in presidential power flows in part from the expansion of the federal government's functions, which accompanied the United States' growth and rise to power.[215] The increasing complexity and greater scope of the problems confronting the United States has led Congress to delegate substantial powers to the executive branch of government to address these problems, thereby contributing to the growth of the modern presidency.[216] The executive

211. *See, e.g.*, 1 ANNALS OF CONG., *supra* note 105, at 379, 387 (statement of James Madison) (describing the President's responsibility as that of superintending executive officers to ensure "good behaviour"); *see also* 1 Op. Att'y Gen. 624–26 (1823) (describing the President's duty as ensuring honest execution of the law, not perfectly correct judgment); LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY, 1789–1801, at 287–88 (First Free Press Paperback ed. 1965) (noting that President John Adams removed officers for administrative neglect and delinquency).

212. *Cf.* Ackerman, *supra* note 11, at 636–42 (proposing to advance critical thinking about the merits of competing arrangements of power).

213. *See* SAVAGE, *supra* note 12, at 335–36 (discussing David Addington's statement that "'[w]e're going to push and push'" with respect to expanding presidential power, "'until some larger force makes us stop'").

214. *Cf.* Ackerman, *supra* note 11, at 641 (claiming that the United States has an "excessively politicized style of bureaucratic government").

215. *See* SAVAGE, *supra* note 12, at 14–37 (contrasting the Framers' modest conception of the presidency with subsequent growth in the office's power); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1816–17 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (stating that the expansion of presidential power implies that his power, rather than that of the legislative branch, needs checking); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 506 (2008) (claiming that presidential power has been expanding since the Founding).

216. *See* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1022 (1997) (chiding the Supreme Court for forgetting "the contemporary reality" that Congress has delegated much of its lawmaking power to the executive branch); Katyal, *supra* note 10, at 2320 (tracing the growth of

branch often interprets the vast body of law it administers unilaterally. In some areas, courts have no opportunity to review its decisions.[217] Even when reviewable, the courts usually approach executive branch decisions deferentially and often correct errors in ways that leave continuing latitude for executive branch shaping of the law.[218] Because of the awkwardness of impeachment and funding cutoffs, congressional oversight provides only a very limited remedy for executive excess, and executive decisions to withhold information can further weaken oversight's effectiveness.[219] Because modern Presidents are so profoundly political, a danger exists that they will interpret the law opportunistically, to increase their own power and advance their faction's political agenda, rather than faithfully execute the laws Congress has publicly passed.[220] The opportunities for abuse have recently multiplied, because of the specter of terrorism, which tends to drive the executive toward secret policy making of his own largely unrestrained by law.[221]

A duty-based approach calls on the President and other officials to resist the temptation to employ unilateral policy making as a substitute for a rule of law. It empowers prosecutors, for example, to resist demands for prosecution based on broadly determined political priorities, when fine-grained analysis, which lower level officials are especially well suited to provide, indicates a lack of evidence of sufficiently serious offenses to justify prosecution. Often those with specialized knowledge of the law and technical issues related to it can execute the law more faithfully than a President who has his own political agenda, and a very broad one at that.[222]

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presidential power largely unchecked by Congress to the nondelegation doctrine's collapse in the 1930s and the Supreme Court invalidation of the legislative veto in *INS v. Chadha*).

217. *See, e.g.*, GOLDSMITH, *supra* note 11, at 32 (explaining that the executive branch usually decides legal issues related to war and intelligence for itself, because such issues rarely reach a court).

218. *See* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 858–59 (2004) (explaining that remands often do not specify cases' final outcomes).

219. Johnsen, *supra* note 10, at 1562–63 (explaining the limitations on congressional oversight, impeachment, funding, and justiciability); Froomkin, *supra* note 16, at 797–98 (explaining that congressional threats to cut off funding "on any project of political significance" lack credibility).

220. *See* GOLDSMITH, *supra* note 11, at 33 (discussing the danger of the executive branch "interpreting the law opportunistically to serve its own ends"); Ackerman, *supra* note 11, at 700, 712 (explaining that Presidents tend to "politicize the bureaucracy" in order to carry out their programs, especially when the President cannot obtain his goals through legislation).

221. *See* GOLDSMITH, *supra* note 11, at 183 (explaining that "[t]he President's control over the military and intelligence agencies, his ability to act in secret, and his power to self-interpret legal limits on his authority create extraordinary opportunities for abuse"); *see also* Katyal, *supra* note 10, at 2343–45 (discussing the need to check the modern executive, which conducts its business in secret and possesses far more power and resources than the Framers anticipated); *cf.* Ackerman, *supra* note 11, at 645–46 (noting that constitutions in Latin America emulating the American presidential model have all led, at one time or another, to dictatorship).

222. *See* Ackerman, *supra* note 11, at 689 (stating that "[u]nfettered political intervention" has "predictably toxic effects on the rule of law").

The specialists are more likely to have the time to fully investigate what the law means and to appreciate its specific ramifications, even though presidential leadership can play a role in shaping discretionary decisions and in discouraging specialists' myopia.[223] But that leadership is most likely to serve rather than subvert the rule of law when the President recognizes a duty to remain faithful to policy decisions made by others, such as the Congress, and when executive branch officials remain able to fulfill their oath of office without having to abandon their posts. This duty-based approach creates the conditions for a dialogue about how to exercise discretionary authority properly, to make wise decisions with the constraints of law.

III. THE DUTY-BASED THEORY'S IMPLICATIONS

This part explores the duty-based theory's implications for current law and practice. It elucidates some general implications, discusses its ramifications for current law governing removal and appointment of executive branch officials, and closes with a discussion of independent agencies. This analysis does not exhaust the duty-based theory's consequences, but illustrates how it should influence current debates.

A. *General Implications*

The duty-based theory has important implications for constitutional law, but cannot settle all issues of separation of powers by itself. It can support deference to political branches' joint decisions about arrangements of power or inform judicial decision making when courts intervene to review the political branches' structural decisions.

The argument for more deference to political decision makers flows from an appreciation of the difficulties involved in identifying institutional arrangements that conform to the Ratifiers' and Framers' desire to foster duty and the rule of law. These difficulties lie at the heart of the Framers' decision to enact a political compromise between proponents of strong presidential power as an aid in fostering "responsibility" and those who feared it as a means of escaping, rather than aiding, the rule of law. Presidents who respect the rule of law may use their power to check abuses of the duty to obey the law. Presidents who prize their own independence and wish to make policy themselves may undermine laws uncongenial to them. It is entirely appropriate for Congress to approve legislation embodying its own political judgments, within the bounds of express constitutional constraints, about which institutional arrangements best advance the rule of law with the pattern of executive branch conduct

223. *See* Eskridge & Baer, *supra* note 180, at 1174–75 (discussing an agency tendency toward "tunnel vision"); Strauss, *Agencies*, *supra* note 15, at 586 (describing civil servants as knowing the statutes they administer in detail and often holding "strong views of the public good in the field in which they work").

observed.[224] And if the President strongly disagrees with a particular congressional judgment of this kind, he can veto the legislation embodying that judgment, which will then only be sustained if sufficient popular support exists to override the veto.[225] From this perspective, the Court's decision in *Morrison* may have been wise. Congress is in a better position than a court to evaluate the question of whether the advantages of an independent counsel outweigh the risks of abuse that such a position entails. During an era when a President seems willing to fire Justice Department officials not willing to do his bidding, such an institution may prove salutary. But if evidence of prosecutorial abuse surfaces, as arguably has occurred, Congress can adjust by reverting to more orthodox procedures, as it did when it allowed the authorization for an independent counsel to lapse.[226] Congress and the President, on this model, continue the Framers' work of trying to craft arrangements that foster a duty to obey the law, within express constitutional constraints.

The duty-based approach can also aid courts in deciding separation of powers questions, even when they do not defer to legislative judgment. Such an approach, while not necessarily dictating any particular result in *Morrison*, could have improved the Court's reasoning. Justice Scalia rightly pointed out that the Ethics in Government Act made the independent counsel free of presidential control, for this was the statute's primary purpose.[227] The Court could have justified its decision better by recognizing that the Framers sought to foster a duty to properly execute the law, and that doing this is especially difficult when high-ranking government officials become potential objects of law enforcement.[228] In this context, interference with presidential control over executive branch officials may be appropriate, as presidential control may not serve rule-of-law values.[229] The Court should have inquired into whether the removal

224. *See* Strauss, *Agencies*, *supra* note 15, at 604 (arguing that the Constitution envisions shifts in the relative strength of the President and Congress over time).

225. *Cf.* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 160 (1994) (pointing out that vetoes are so difficult to override that a threatened veto usually suffices to force a "change [in] the shape of a bill").

226. *See* 28 U.S.C. § 599 (2006).

227. *See* Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

228. *See* BRUFF, *supra* note 32, at 437 (arguing that a true dilemma underlies the independent counsel provisions, since "[p]owerful personal and political loyalties" can lead to underprosecution of executive branch officials).

229. *See* S. REP. NO. 95-170, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4217 (stating that the purpose of the Ethics in Government Act is "to preserve and promote the accountability and integrity of public officials"). The majority did not rely on deference to congressional views to justify the Court's opinion. *See Morrison*, 487 U.S. at 670–74 (discussing the Appointments Clause issue with no reference to the values underlying the clause). Justice Scalia praised the majority for not deferring to Congress, stating that such deference is not appropriate when the two branches are in disagreement. *See id.* at 704–05 (Scalia, J., dissenting). *Morrison*, however, did not present a dispute between the executive branch and Congress, but rather a dispute among executive branch officials, namely the special prosecutor and the executive branch officials she was investigating. *See id.* at 665–68 (showing that this case arose out of an effort by three government attorneys under investigation by independent counsel Morrison to quash a subpoena). The President was not

provisions provided adequate checks to prevent abuses, for presidential power is but a means, and not the only means, the Constitution employs to secure a rule of law.[230] The duty-based theory would have provided a means of grappling with the core constitutional issues the case posed.

Of course, the *Morrison* Court did not write on a blank slate. The Court's opinion proved unsatisfactory, because it had to take into account prior dicta that reflects acceptance of some elements of the unitary executive theory, at least with respect to removal. We now must consider the duty-based theory's implications for patronage state, including the law on both appointment and removal.

B. *Whither the Patronage State?*

1. Removal

The duty-based theory implies that the Constitution does not require Congress to authorize presidential removal of purely executive officials "at will." An authority to fire employees "for cause" adequately secures faithful law execution, for such a provision authorizes removals for malfeasance in office.

The notion that the President must have an authority to fire at will comes from the political dimension of the unitary executive theory—that the President has a constitutional right to control the government for his own political ends. We have seen that this political dimension is utterly foreign to the Framers' conception of executive power.

The Supreme Court has regularly approved provisions prohibiting removal of officials except for cause.[231] While lawyers often cite the Supreme Court's case in *Myers v. United States*[232] for the proposition that the Constitution requires at-will removal,[233] that case has a much narrower

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a party to this suit. Moreover, the President had signed this legislation. Remarks on Signing S. 555 into Law, 14 WEEKLY COMP. PRES. DOC. 1854, 1855 (Oct. 26, 1978) (characterizing the Special Prosecutor as a "necessary . . . response" to past embarrassments); Devins, *supra* note 15, at 283–84 (noting President Ronald Reagan's approval of a legislation ceding executive authority to the independent counsel). Scalia's remarks provide an inadequate rationale for not seriously considering whether the Court should defer, at least to some extent, to the political branches' agreement that this reform would serve the rule of law.

230. *See Morrison*, 487 U.S. at 727–33 (Scalia, J., dissenting) (discussing the theoretical potential for vigorous prosecution of fairly minor offenses without any examination of the actual experience under the statute); *cf.* BRUFF, *supra* note 32, at 437 (noting lawyers' tendency to be overzealous).

231. *See Morrison*, 487 U.S. at 685–86 (upholding provision authorizing only for-cause removal of an independent counsel); Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that the President may not fire a member of the War Claims Commission, even though no statute limited removal); Humphrey's Ex'r v. United States, 295 U.S. 602, 628–29 (1935) (holding that Congress may limit the grounds for removing a member of a quasi-legislative or quasi-judicial agency).

232. 272 U.S. 52 (1926).

233. *See Morrison*, 487 U.S. at 688–89 (discussing appellee's contention that the President must be able to remove purely executive officers at will under *Myers*).

holding. The *Myers* Court invalidated a provision that only authorized the President to remove a postmaster if the Senate consented.[234] It held that the President has the authority to remove officers without the Senate's consent, but did not have before it a provision presenting the question of whether the removal must be at will.[235]

A clear rule allowing for-cause removal of all officers resolves contradictions in the Court's removal jurisprudence and supports a less ad hoc approach. In *Morrison*, the Court indicated that restrictions upon removal must not "impede the President's ability to perform his constitutional *duty*."[236] In response, Justice Scalia complained, not without reason, that this test provides no clear rule for decision, as it depends upon the Court's subjective assessment of how much removal restriction is tolerable.[237] A proper understanding of the Constitution's emphasis on duty and a rejection of the political dimension of the unitary executive theory solves this problem. Restrictions on removal should always be constitutional if they do not impede the President's duty *as defined in the Constitution*, which as we have seen, requires that he seek faithful execution of the law. He may wish to exercise policy control over all discretionary government decisions, but he does not have to do so in order to seek faithful execution of the law.[238]

This also solves another problem arising from the Court's jurisprudence. The Court has often suggested that the question of whether the Constitution requires at-will removal hinges on an assessment of whether the officer in question is performing executive, judicial, or quasi-legislative functions.[239] This functional approach makes the constitutionality of removal restrictions hinge upon unpredictable efforts by the Court to characterize particular official functions as executive, judicial, or quasi-legislative.[240] A bright-line rule accepting for-cause removal solves this problem. This functional

234. *See Myers*, 272 U.S. at 107, 162 (showing that the Court invalidated a provision requiring Senate approval of presidential removal decisions, because the President alone has removal power).

235. *See Morrison*, 487 U.S. at 687 n.24 (describing "the only issue actually decided in *Myers*" as whether the President could remove a postmaster without the Senate's consent); *Humphrey's Ex'r*, 295 U.S. at 626 (same).

236. *Morrison*, 487 U.S. at 691 (emphasis added).

237. *Id.* at 711–12 (Scalia, J., dissenting); *accord* BRUFF, *supra* note 32, at 442 (describing the test as generally "quite difficult to apply"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 354 (3d ed. 2006) (describing this test as neither "clear" nor "easy to apply").

238. *Cf. Myers*, 272 U.S. at 134 (justifying at-will removal by reference to the President's "discretion" to determine the "national public interest").

239. *See Morrison*, 487 U.S. at 687 (stating that Congress may limit the removal of officers, "at least" if they are performing quasi-judicial or quasi-legislative functions); Wiener v. United States, 357 U.S. 349, 353 (1958) (defining the issue before the Court in terms of the officer's function); *Humphrey's Ex'r*, 295 U.S. at 627 (distinguishing *Myers* as an opinion pertaining to an officer "restricted to . . . executive functions").

240. *See Morrison*, 487 U.S. at 689 n.28 (recognizing "[t]he difficulty of defining such categories"); *Ex Parte* Siebold, 100 U.S. 371, 397 (1879) (same); Strauss, *Agencies*, *supra* note 15, at 579 (stating that the separation-of-powers theory "breaks down" when applied to "agencies within one of the three branches").

approach emerges from an attempt to reconcile some of former President (and then-Chief Justice) William Howard Taft's statements in *Myers* suggesting that a postmaster must be removable at will with the Court's holdings that for-cause removal suffices.[241] *Morrison*'s upholding of for-cause removal of a purely executive officer supersedes *Myers*'s dictum on this point, and the Court should clarify the law by repudiating former President and Justice Taft's extraneous statements more clearly than it has in prior cases.[242]

The duty-based theory informs debate about more theoretical removal questions, even if it does not clearly resolve every question. The theory's originalism can clash with some views of duty-based functional considerations embedded in constitutional custom and precedent.

From a functional standpoint, the President's duty to faithfully execute the law may seem to require Congress to give him for-cause removal authority. But the Framers' omission of presidential removal authority suggests that the President can "take care that the laws be faithfully executed" without unilateral removal authority, even though he cannot personally assure their faithful execution without such an authority. Still, for-cause removal authority can serve rule-of-law values at the heart of theory.

If the duty-based theory allows unilateral presidential removal authority it may permit (even though it does not require) delegation of at-will removal authority. The Constitution does not, on this reading, prohibit presidential politics or congressional acquiescence in the growth of presidential power. If Congress finds that the President respects the rule of law and exercises his discretion wisely, Congress may properly decide that the President should have a broad removal power. But if it finds that the President uses the ability to fire employees at will to prevent employees of the executive branch from following the law, it should deny at-will removal authority. For.then the authority nullifies the Constitution's constraint on presidential abuse embodied in the General Oath clause, since it can render a duty-bound official's refusal to perform an illegal act nugatory.[243]

A strict adherence to original intention, however, supports forbidding presidential removal without Senate consent, at least in the case of "Officers

241. *Compare Myers*, 272 U.S. at 134 (claiming that the President must have the authority to fire those he loses confidence in), *with Morrison*, 487 U.S. at 691–92 (upholding provisions forbidding at-will removal of the independent counsel), *and Humphrey's Ex'r*, 295 U.S. at 629 (upholding provisions forbidding at-will removal of a member of the Federal Trade Commission).

242. *See Morrison*, 487 U.S. at 687 (disapproving of *Myers*'s dicta to some extent, but stating that for-cause removal is constitutional "[a]t least in regard to 'quasi-legislative' and 'quasi-judicial' agencies"); *Humphrey's Ex'r*, 295 U.S. at 626 (disapproving of unidentified statements supporting the government's argument for at-will removal "[i]n so far as they are out of harmony with the views here set forth"); *cf. id.* at 627 (acknowledging that dicta need not be followed unless persuasive).

243. *See generally* Froomkin, *supra* note 16, at 789 (noting that "autonomy requires insulation from politically motivated removal").

of the United States." Originalist precepts insist that text and contemporaneous history carry more weight than post-enactment history. The text and pre-enactment history support a mandatory Senate role in removal. In light of the lack of post-enactment consensus about presidential removal authority, especially in the Senate, it is poor originalism to invoke that Decision of 1789 to support a constitutional rule that Congress must allow the President to remove officers of the United States without Senate approval.[244]

Of course, *Myers* held that Congress may not insist on Senate consent to removal, and constitutional custom supports allowing Congress to delegate some removal authority to the President. So the duty-based theory's clarification of original intention raises issues of how much weight to give original intent in light of precedent and custom departing from that intent.

The duty-based theory reveals an original intent disfavoring unilateral presidential removal, even though for-cause removal authority can aid faithful law execution. Even if it is too late in the day to conform our practice to that intent, we should recognize that the Constitution does not affirmatively require Congress to give the President the power to remove officials.

2. Appointment

The duty-based theory supports an appointments process aimed at securing apolitical government, such as the civil service laws.[245] The theory's unremarked influence helps explain why these laws came into being. The political dimension of the unitary executive theory threatens this ideal of apolitical administration. The civil service laws require nonpartisan hiring. If we accept, however, the notion that the President has the right to have officials under him loyal to his priorities, rather than to the law's priorities, then the civil service laws appear constitutionally suspect.[246]

Justice Department attorneys, apparently viewing their job as the one suggested by the unitary executive theory, recently sought to hire

244. *Cf. Myers*, 272 U.S. at 108–39 (providing a brief discussion of constitutional text and pre-enactment history and a lengthy discussion of the post-enactment Decision of 1789).

245. *See* Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees*, 124 U. PA. L. REV. 942, 947–61 (1976) (discussing the history of civil service reform); Strauss, *Agencies*, *supra* note 15, at 582 (characterizing a "civil service, largely insulated from politics" as the "fourth effective branch" of government).

246. *Compare* Strauss, *Agencies*, *supra* note 15, at 608 (explaining that the civil service laws sharply limit presidential control of civil servants), *with* CALABRESI & YOO, *supra* note 18, at 230 (recognizing that "expansion of the civil service is often perceived as inconsistent with the unitariness of the executive branch," but opining that this perception is not correct). *See generally* Daniel Richman, *Political Control of Federal Prosecutors: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2091 (2009) (claiming that "decisions about enforcement-power allocation" are "inextricably intertwined with preferences about priorities").

employees "attuned to the interests and the policies of the Presiden[t],"[247] in violation of the civil service laws forbidding partisan appointments.[248] Indeed, one of these employees when called to account for this partisan hiring in a hearing before the Senate Judiciary Committee said that she took her "oath to the President very seriously."[249] In a contemporary illustration of the Oath Clause's continued relevance, Senator Patrick Leahy reminded her that she swore an oath to the Constitution, not the President, obviously in an effort to remind her of her duties to obey the law.[250] While even the Bush Administration did not explicitly claim that the civil service laws were unconstitutional, the political dimension of the unitary executive theory does raise this issue.[251]

The *Myers* Court confronted the conflict of the theory of the patronage state with the civil service laws and opted to preserve the civil service laws, declining to extend its dicta demanding at-will removal authority to the inferior officers covered by civil service restrictions on personnel actions.[252] Indeed, the *Myers* Court, consistent with the duty-based theory's rejection of the political dimension of the unitary theory, insisted that Congress could apply the merit system to a wider array of government officials by vesting the appointment power over officials then subject to presidential nomination and Senate approval requirements in heads of departments in order to "remove[] [them] from politics."[253]

The *Morrison* Court's approach to the Appointments Clause, however, calls the flexibility *Myers* envisioned for congressional classification of officers into question. For the Justices, both the majority and the dissent, sought to limit Congress's ability to choose whether Senate confirmation is required through an unsuccessful attempt to create judicial guidance about

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247. *Morrison*, 487 U.S. at 712 (Scalia, J., dissenting).

248. *See* OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 135–39 (2008), *available at* http://www.usdoj.gov/opr/goodling072408.pdf (concluding that Monica Goodling and others committed numerous violations of the civil service law requiring nonpartisan hiring practices); OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM 99 (2008), *available at* http://www.usdoj.gov/opr/oig-opr-investigation-hire-slip.pdf (finding political hiring practices that violated civil service law and Justice Department policy).

249. *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 411 (2007) (testimony of Sara M. Taylor, Former Deputy Assistant to President Bush and Director of Political Affairs at the White House).

250. *See id.* at 416–17.

251. *Cf.* SAVAGE, *supra* note 12, at 239–40 (noting that President Bush used a signing statement to argue that the President need not obey laws establishing minimum professional qualifications for Federal Emergency Management Agency employees).

252. Myers v. United States, 272 U.S. 52, 173–74 (1926) (affirming that Congress may attack the spoils system through civil service reform).

253. *Id.*; *accord* Strauss, *Agencies*, *supra* note 15, at 614 (describing *Myers* as recognizing that Congress may place the Postmaster General beyond presidential control by making him part of the civil service).

the meaning of the terms "Officers of the United States" and "inferior Officers."[254] The Constitution requires that the President nominate and the Senate confirm Officers of the United States, but allows Congress to vest the power to appoint Inferior Officers in the judiciary or other parts of the government.[255] Hence, a holding that an independent counsel is an Officer of the United States would require invalidation of the statutory provision authorizing the judiciary to appoint her.[256] The opaque language of these undefined terms left the Court rudderless.[257] The independent counsel's independence suggests that she is not an Inferior Officer, as Justice Scalia pointed out in dissent.[258] On the other hand, her limited jurisdiction suggests that she is nothing like the department heads that traditionally have been considered "Officers of the United States."[259] Hence, the Constitution's undefined language could not satisfactorily resolve the question, and neither the majority nor the dissent could make a persuasive argument for their positions on how to classify the office of independent counsel.[260]

A duty-based approach would have helped the Court address the issue at hand more effectively by encouraging it to grapple more forthrightly with the question of whether an independent counsel furthered the rule of law.[261] While formal rules might resolve some cases, in cases such as this where they cannot help much, value choices, whether articulated or not, control the results. When such a case arises under Article II, the principal relevant value choice animating this part of the Constitution, namely the Founders' and Ratifiers' decision to seek an executive branch dedicated to faithfully executing the law, should inform judicial decision making.

C. *Independent Agencies*

Congress has sought to make some agencies independent by limiting the President's power to appoint or remove their leaders.[262] These limits include requirements that commissioners have relevant expertise, serve for relatively long and staggered terms in office, and remain immune from at-will removal.[263]

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254. U.S. CONST. art. II, § 2, cl. 2.

255. *Id.*

256. Morrison v. Olson, 487 U.S. 654, 671 (1988).

257. *See id.* (acknowledging that the "line" between inferior and principal officers is unclear).

258. *See id.* at 716 (Scalia, J., dissenting).

259. *See id.* at 670, 672.

260. *See* BRUFF, *supra* note 32, at 403 (characterizing the arguments on this point as "approximately in equipoise").

261. *See, e.g.*, Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 126 (1988).

262. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 459 (2008).

263. *See id.* at 462 (characterizing "partisan requirements . . . and for-cause limits" on removal as intended to limit presidential control).

These arrangements seem, at first glance, to epitomize the ideal of relying on independent officials' sense of duty as a key element of administration. But this Article has defined the duty-based theory as one that contemplates presidential leadership aimed at securing faithful execution of the law. Unitarians might object that independent agencies involve not just a rejection of presidential control, but a rejection of the sort of presidential influence the duty-based theory embraces.

Happily for independent agencies' supporters, "empirical studies show that presidents have significant influence over policy," even in "independent agencies."[264] The duty-based theory only requires significant presidential influence over law execution aimed at avoiding faithless execution of law, not necessarily significant control over policy making.

Independent agencies, however, may properly exercise quasi-legislative authority without substantial presidential involvement. As the Supreme Court explained in *Youngstown Sheet & Tube v. Sawyer*,[265] the Constitution does not authorize the President to make law.[266] While *Youngstown* does not preclude Congress from delegating quasi-legislative authority to the President, it does show that the power to make law, unlike the power to execute law, does not inherently belong to the President. It comes into the President's office only because of congressional delegation.[267] And Congress may, if it likes, place the delegated power elsewhere, such as in independent agencies.

The unitary executive theory, even if it were correct, could not justify requiring that the President control execution of quasi-legislative or quasi-judicial authority, for that power is not what the Framers had in mind when they created a unitary executive.[268] This much flows from the textual limits of the Vesting Clause itself, which only vests "executive" power.[269] The

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264. Stack, *supra* note 122, at 298; *see also* Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 207–18 (1982) (finding a correlation between presidency changes and independent agency policy shifts); Terry M. Moe, *The Politicized Presidency*, *in* NEW DIRECTION IN AMERICAN POLITICS 235, 269–71 (John E. Chubb & Paul E. Peterson eds., 1985) (finding greater presidential than congressional control over the federal bureaucracy); Strauss, *Agencies*, *supra* note 15, at 590–96 (discussing sources of presidential influence over independent agencies); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 812–23 (1991).

265. 343 U.S. 579 (1952).

266. *Id.* at 587–88 (claiming that the President's faithful execution power "refutes the idea that he is to be a lawmaker").

267. *See* Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17 (1974) (describing how power has flowed to the President through delegations and acquiescence).

268. *See* 1 CORWIN, *supra* note 148, at 318–20 (explaining why it is desirable to create independence for officials carrying out quasi-judicial or quasi-legislative functions).

269. *Accord* Bruce Ledewitz, *The Uncertain Power of the President To Execute the Laws*, 46 TENN. L. REV. 757, 773 (1979) (pointing out that quasi-legislative and quasi-judicial power are "not now considered . . . part of the executive power" and are therefore beyond the "President's reach"). *Contra* Calabresi & Rhodes, *supra* note 15, at 1183 n.153 (arguing that powers exercised by bureaucrats must be executive, because Congress may only delegate executive power).

relevant Supreme Court precedent supports this. In *Humphrey's Executor v. United States*[270] and *Wiener v. United States*,[271] the Supreme Court distinguished and to some extent repudiated *Myers*'s unitary dicta, in order to uphold the practice of insulating independent agencies exercising quasi-judicial and quasi-legislative powers.[272] Accordingly, even Justice Scalia's articulation of the unitary theory in *Morrison* confined itself to the exercise of purely executive powers.[273]

The Framers did not contemplate making the President the sole author of quasi-legislative rules or judicial decisions.[274] And this is not only because they did not contemplate broad delegation at all. It is also because they did not contemplate the modern political role of the President. The Framers' rejection of the political dimensions of the unitary executive theory implies that Congress may delegate quasi-legislative and quasi-judicial authority to executive branch entities not completely under the presidential thumb.

While the duty-based theory accepts agency independence, the underlying analysis raises some questions about requiring collective executive branch decision making. After all, the theory accepts the idea that the Framers chose a single executive to avoid decision by committee, especially in the context of defense and foreign affairs. Collective decision making, unlike independent decision making by a single individual, threatens that model.[275]

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270. 295 U.S. 602 (1935).

271. 357 U.S. 349 (1958).

272. *See Wiener*, 357 U.S. at 352, 356 (recounting *Humphrey's* repudiation of *Myers*'s dicta and holding that the President lacked authority to remove a quasi-judicial member of the War Claims Commission); *Humphrey's Ex'r*, 295 U.S. at 626–29 (finding that Congress could protect officers exercising quasi-legislative and quasi-judicial powers from presidential removal and repudiating dicta in *Myers* to the extent inconsistent with its opinion).

273. *See* Morrison v. Olson, 487 U.S. 654, 705 (1987) (Scalia, J., dissenting) (arguing that the President's lack of "exclusive control" violates the Constitution in this case because prosecution is a "purely executive power").

274. Of course, the Supreme Court has held that Congress may not delegate legislative authority to anybody, even the President. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935) (holding that the Congress may not delegate its legislative authority to the President); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (holding that Congress may not delegate its "essential legislative functions" to others). It permits, however, delegation of quasi-legislative authority because of the difficulty of defining the difference between executive and legislative authority. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (explaining that the Court has "'almost never felt qualified to second-guess'" congressional judgments about the degree of discretion to leave agencies (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); *Mistretta*, 488 U.S at 371–79 (affirming delegation of power to a commission to establish ranges of sentences for numerous federal crimes). Having permitted broad delegation in practice, insisting on presidential control of that delegation would further erode the principal of congressional control of legislation that justifies the nondelegation doctrine. *Cf.* Strauss, *Agencies*, *supra* note 15, at 637 (finding presidential rulemaking "problematic").

275. *But see* Mashaw, *supra* note 167, at 1301–02 (describing the early Republic as employing the use of "Boards of Eminent Officers" to carry out various administrative functions (emphasis omitted)).

But the Framers only accepted a single "executive." This model need not extend to quasi-legislative and quasi-judicial functions, where the Constitution often employs models of collective decision making, as exemplified by Congress and the Supreme Court.

Still, the validity of a piece of the unitary executive theory might raise legitimate questions about legislation empowering a committee to carry out battles or conduct foreign affairs. The duty-based theory does not deny that the model of an energetic executive may require some limits on collective decision making outside of Congress. But it generally affirms the validity of independent agencies.

CONCLUSION

The Constitution requires that the law, not the President, control the executive branch of government. To that end, it relies heavily on instilling a duty to obey the law and chooses checks and balances over personal control by a single individual and his faction.