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A Government of Laws and Not of Men: Why Justice Brandeis Was Right to Assume Congress Can Restrain the President's Removal Power

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A GOVERNMENT OF LAWS AND NOT OF MEN: WHY JUSTICE BRANDEIS WAS RIGHT TO ASSUME CONGRESS CAN CONSTRAIN THE PRESIDENT'S REMOVAL POWER

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Since the Founding, the extent of the president's power to remove executive officials from office remains unsettled. While the Appointments Clause in Article II, Section 2 empowers Congress to participate in the hiring of executive officials, the United States Constitution's text is silent on whether Congress can limit the president's ability to fire such employees. The debate on the proper scope of the president's removal power is significant because it serves as a proxy for a larger constitutional question: whether constraints on presidential power advance or sit in tension with democracy. This Article argues that Justice Brandeis was right to champion a shared removal power between Congress and the president to prevent the arbitrary exercise of executive power and uphold democratic values.

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INTRODUCTION

In the words of the late Justice Brandeis, "[c]hecks and balances were established . . . [so] this should be a 'government of laws and not of men.'"[1] Though uncontroversial at first glance, this statement reflects one side of the longstanding debate over the appropriate scope of the president's power to remove executive officials from office.

Proponents of the unitary executive theory, for example, contend that the executive's removal power should not be shared with another branch.[2] The theory derives from an interpretation of the United States Constitution that provides the executive "direct control over all aspects of the executive branch."[3] Indeed, unitary executive theorists posit that because the president is uniquely accountable to the American people, constraining the president's removal authority "undermines the ability of the public" to hold independent agencies accountable.[4]

The other side of this debate can be characterized as the "checks and balances" approach, which Justice Brandeis articulated in his dissenting opinion in *Myers v. United States*.[5] According to this view, congressional checks on the executive's removal power lessen the risk that the power is deployed in an arbitrary manner and ensure that the law is carried out in line with the will of the people.[6] Determining whether the president and Congress should share the removal power is critical because it brings broader constitutional questions to light; particularly, whether limitations on presidential power enhance democracy. Indeed, with political partisanship and polarization in the United States at an apex,[7] promoting faith in

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[1] Myers v. United States, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting).

[2] *See generally* John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935 (2009); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). *See also* THE FEDERALIST NO. 70 (Alexander Hamilton) ("A feeble Executive implies a feeble execution of the government.").

[3] Martha Kinsella, *Supreme Court Preview: Collins v. Mnuchin and the Expanding 'Unitary Executive' Theory*, JUST SEC. (Dec. 8, 2020), https://www.justsecurity.org/73746/supreme-court-preview-collins-v-mnuchin-and-the-expanding-unitary-executive-theory [https://perma.cc/Y23K-Q7DG]; Christopher Y. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 604 (2005).

[4] COREY L. BRETTSCHNEIDER, GOVERNMENTAL POWERS: CASES AND READINGS IN CONSTITUTIONAL LAW AND AMERICAN DEMOCRACY 356 (2014) [hereinafter GOVERNMENTAL POWERS].

[5] 272 U.S. 52, 240–95 (1926) (Brandeis, J., dissenting).

[6] *See, e.g.*, Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 128 (1994) ("[S]uch congressional actions restore a proper balance of powers consonant with the framers' view of checks and balances.").

[7] *See* Michael Dimock & Richard Wike, *America is Exceptional in its Political Divide*, PEW CHARITABLE TRS. MAG. (Mar. 29, 2021), https://www.pewtrusts.org

democratic institutions and ensuring that no single branch accumulates too much power remain key concerns.

First, this Article briefly describes the relevant constitutional provisions, caselaw, and historical developments regarding the longstanding debate over the president's authority to fire executive officers. Next, this Article examines the merits and limitations of the two competing views on this issue. Ultimately, this Article contends that Justice Brandeis was correct to assert that presidential removal power can be constrained by the United States Senate because a well-functioning democracy must protect individual officials from the arbitrary exercise of executive removal power. To this end, congressional checks on the executive's removal power reclaim the true meaning of separation of powers: "[T]o save the people from autocracy."[8]

I. HISTORICAL DEVELOPMENTS OF THE PRESIDENT'S REMOVAL POWER

To provide historical context for the modern debate over the president's removal power, Part I examines both the Framers' views on the removal authority and the United States Supreme Court's various attempts at resolving this debate. First, Part I.A addresses the lack of a constitutional provision that squarely defines the scope of the president's removal power, and analyzes how two key Framers espoused contrasting views on whether Congress should constrain this power. Next, Part I.B examines four pivotal cases that set forth how the Supreme Court has both enforced and constrained the executive's removal power over the last century.

A. Constitutional Provisions and Post-Ratification Debates

Since the Nation's Founding, the source and scope of the president's authority to remove executive officials from office has remained an unsettled question.[9] Article II, Section 4 of the United States Constitution provides that all civil officers "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[10] This provision, however, does not precisely define what types of officials

/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide [https://perma.cc/UHZ8-BU6F].

[8] *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting).

[9] *See generally* L.C.C., *Constitutional Law. Removal Power of the President*, 13 VA. L. REV. 122 (1926).

[10] U.S. CONST. art. II, § 4.

qualify as civil officers, nor does it describe how impeachment or conviction relates to the president's removal power.[11]

Moreover, while the Appointments Clause in Article II, Section 2 requires "most administrative appointments" to be "made with the advice and consent of Congress," it is silent on the removal process of these officials.[12] This silence suggests that the Constitution's text alone is insufficient in resolving this issue, particularly since the Appointments Clause specifically grants the Senate power to participate in certain appointments.[13]

During post-ratification debates, the Framers diverged in their views regarding the extent of the president's removal power.[14] Notably, the Framers did not define the president's removal authority in the Constitution's text, nor did they resolve this question during the Constitutional Convention and ratification debates.[15] One year after the Constitutional Convention, however, Alexander Hamilton pushed for a shared removal power with the Senate.[16] In Federalist No. 77, Hamilton expressed "that the Senate should wield a veto over presidential removals."[17] He also advocated for the Senate's participation in removals to mirror its role in appointments.[18] Hamilton's argument for a constrained removal power stemmed from his desire to maintain stability in the executive branch; he feared that if the removal power were vested entirely in the president, each new administration would arbitrarily remove previously-appointed executive officers to distinguish their administration from the prior one.[19]

Conversely, James Madison believed that the president's removal power should not be constrained by Congress.[20] In his view, the removal power is "executive by nature" and "granted by

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[11] *See generally Interpretation & Debate, Article II, Section 4*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/349 [https://perma.cc/S5SX-LB6R] (last visited Mar. 20, 2023).
[12] GOVERNMENTAL POWERS, *supra* note 4, at 356.
[13] *See* L.C.C., *supra* note 9, at 123.
[14] *See* Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 455 (2008).
[15] *See* Jed Handelsman Shugerman & Ethan J. Leib, Opinion, *Will the Supreme Court Hand Trump Even More Power?*, N.Y. TIMES (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/opinion/trump-supreme-court-fed.html [https://perma.cc/PS8W-F7R3].
[16] Bailey, *supra* note 14, at 458 (citing THE FEDERALIST NO. 77 (Alexander Hamilton)).
[17] *Id.* at 463–64 (citing THE FEDERALIST NO. 77 (Alexander Hamilton)).
[18] *See* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("[T]o prevent arbitrary executive action . . . [the] clause was construed by Alexander Hamilton . . . as requiring like consent to removals.").
[19] *See* Bailey, *supra* note 14, at 458.
[20] *See* COREY L. BRETTSCHNEIDER, THE OATH AND THE OFFICE: A GUIDE TO THE CONSTITUTION FOR FUTURE PRESIDENTS 111 (2018).

the vesting clause."[21] Madison feared that too much stability in the executive branch would result in officers who served for life without properly discharging their duties.[22] The debate between Hamilton and Madison over inherent executive power reflects the difficulty of resolving issues not expressly enumerated in the Constitution's text.[23]

While Article II, Sections 2 and 4 of the Constitution, along with viewpoints from two Framers, provide insight on whether the removal power should be shared by the president and Congress, the following landmark Supreme Court cases provide a helpful framework for analyzing this issue.

B. Supreme Court Jurisprudence on the Removal Power

In 1926, the Supreme Court initially resolved the question of the president's removal authority in *Myers v. United States*.[24] In *Myers*, the Court ruled that the Constitution granted the president exclusive power to remove any officer who was presidentially appointed and approved by the Senate.[25] Previously, President Woodrow Wilson appointed—and the Senate approved—Frank Myers as a federal postmaster in 1913.[26] In 1917, President Wilson appointed Myers for a second four-year term, and the Senate again confirmed his appointment.[27] But after several controversies in Myers's second term, the Wilson Administration demanded that Myers resign before his term's expiration.[28]

Myers did not go quietly, however, and subsequently filed suit, contending that he could not be removed without the Senate's consent.[29] In removing Myers, the Wilson Administration ignored an applicable statute that provided that federal postmasters "be

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[21] *Id.* at 461.
[22] *See id.* at 463 (citing 1 ANNALS OF CONG. 515–16 (1789)); *Myers*, 272 U.S. at 115 ("Madison insisted that article 2 by vesting the executive power in the President, was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article".).
[23] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (Jackson, J., concurring) ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result.").
[24] 272 U.S. 52 (1926).
[25] *See id.* at 106 ("[T]he President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."); Jonathan L. Entin, *The Curious Case of the Pompous Postmaster:* Myers v. United States, 65 CASE W. RES. L. REV. 1059, 1061 (2015).
[26] Entin, *supra* note 25, at 1061.
[27] *Id.* at 1062.
[28] *Id.* at 1062–64.
[29] *See id.* at 1064–65.

appointed and may be removed by the President by and with the advice and consent of the Senate."[30] Writing for the majority, Chief Justice Taft invalidated the statute and upheld the decision to remove Myers without Senate involvement.[31] He reasoned that "as [the President's] selection of administrative officers is essential to the execution of the laws by him . . . so must be his power of removing those for whom he cannot continue to be responsible."[32] The implications of this decision were enormous, as the Court affirmed the president's "illimitable power to remove all executive officers whom he appoints."[33]

But less than a decade later, the Court scaled back the scope of the president's removal power. In *Humphrey's Executor v. United States*,[34] the Court ruled that the president's authority to remove officials could be constrained when Congress explicitly established terms of office for appointed officers in independent agencies.[35] Specifically, *Humphrey's Executor* involved the firing of an officer from the Federal Trade Commission ("FTC").[36] The Court noted that Congress established the FTC, along with other independent agencies, to "carry out quasi-legislative and quasi-judicial functions without direct control from political actors."[37] Accordingly, the Court limited *Myers* by holding that Congress can constrain the president's removal power of officers who perform "quasi-legislative" or "quasi-judicial" functions.[38]

The Watergate Scandal of the early 1970s generated renewed concerns about executive powers.[39] To ensure the independence of attorneys charged with investigating the executive branch, Congress passed the now-expired Ethics in Government Act of 1978.[40] Under this Act, when the attorney general had reason to believe an executive official committed a federal crime, the attorney general could request the appointment of an independent counsel to investigate the official.[41] Furthermore, the attorney general could

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[30] *See Myers*, 272 U.S. at 52, 107 (citing Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80–81).
[31] *See id.* at 117.
[32] *Id.*
[33] James Hart, *The Bearing of* Myers v. United States *Upon the Independence of Federal Administrative Tribunals*, 23 AM. POL. SCI. REV. 657, 660 (1929).
[34] 295 U.S. 602 (1935).
[35] *Id.* at 623, 629.
[36] *See id.* at 612.
[37] Greene, *supra* note 6, at 172 (citing *Humphrey's Executor*, 295 U.S. at 628–32).
[38] *Humphrey's Executor*, 295 U.S. at 628–32.
[39] GOVERNMENTAL POWERS, *supra* note 4, at 414.
[40] Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified at 28 U.S.C. §§ 591–599 (1987)).
[41] Greene, *supra* note 6, at 174.

only remove the independent counsel for "good cause."[42] Accordingly, the Act amounted to congressionally imposed limits on the president's power to remove "purely executive officers by vesting appointment . . . and by limiting presidential removal to good cause."[43]

In *Morrison v. Olson*,[44] the Court upheld the Ethics in Government Act, finding that the independent counsel was an "inferior" officer rather than a "principal" officer.[45] The *Morrison* Court examined whether the removal restrictions impeded the president's "ability to perform his constitutional duty."[46] The Court also stressed that the independent counsel should ideally be independent of the president.[47] Further, the Court emphasized that the statute does not prohibit all removal; rather, the attorney general may fire the independent counsel for "good cause."[48] In upholding the constitutionality of this limit on the removal power, the Court ruled that the Act did not violate the Appointments Clause, Article III, nor the separation of powers doctrine.[49]

More recently, in 2020, the extent of the president's removal power reemerged. In *Seila Law LLC v. Consumer Financial Protection Board*,[50] the Court invalidated a statuary provision that protected an independent agency head from removal except for "inefficiency, neglect of duty, or malfeasance in office."[51] In *Seila Law*, the removal restriction applied to a single agency head, the director of the Consumer Financial Protection Board ("CFPB").[52] Chief Justice Roberts's majority opinion struck down the limits on the removal as inconsistent with Article II, reasoning that the agency's "single-Director configuration" violated the separation of

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[42] In other words, if the prosecutor contravened their job duties or could not fulfill those duties for mental or physical reasons, removal would be proper. *See* BRETTSCHNEIDER, *supra* note 20, at 65.
[43] Greene, *supra* note 6, at 174–75.
[44] 487 U.S. 654 (1988).
[45] *Id.* at 672–73. Under the Appointments Clause, the president is charged with appointing principal officers with the advice and consent of the Senate, while inferior officers can be appointed by the judiciary, the president, or department heads. U.S. CONST. art. II, § 2. Thus, if the independent counsel was found to be a principal officer, the law—which did not require Senate confirmation—would violate the Appointments Clause. *See Morrison*, 487 U.S. at 671.
[46] 487 U.S. at 691.
[47] *See id.* at 656 ("Congress was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers.").
[48] *Id.* at 685–86.
[49] *See id.* at 696–97.
[50] 140 S. Ct. 2183 (2020).
[51] *Id.* at 2197.
[52] *See id.* at 2193.

powers doctrine.[53] In contrast to the dissent, the majority interpreted *Myers* as establishing a general rule of unencumbered presidential removal for all officers.[54] Ultimately, the *Seila Law* Court determined that its 2010 precedent[55] left in place two exceptions to the president's unrestricted removal power: *Humphrey's Executor* and *Morrison.*[56]

These cases—*Myers*, *Humphrey's Executor*, *Morrison, and Seila Law*—are useful in providing a precedential framework for how the Court has conceived the president's removal power throughout the last century. As the law now stands, the president may remove executive officials, but Congress may restrain the power in certain situations.[57] In the nine decades since *Humphrey's Executor*, however, constitutional jurisprudence has become increasingly skeptical of federal agency authority.[58] Although the Supreme Court recently declined to consider a full-scale review of *Humphrey's Executor*, several pending lower court cases raise similar issues and could conceivably lay the groundwork for future changes.[59] The recent debates over the scope of the president's

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[53] *Id.* at 2202.

[54] *See* Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw [https://perma.cc/EQ6C-X2WB] ("The dissenters agreed that precedent controlled. But for them *Myers* was no landmark. It was that rare case where Congress tried to give itself the power of removal over an executive officer, and the case had been so understood since *Humphrey's* limited it to that situation a mere nine years after *Myers* was decided.").

[55] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court refused to extend the *Humphrey's Executor* exception of for-cause removal protection for members of the Public Company Oversight Accounting Board, where the multi-member Board was subject to removal by members of another multi-member agency—the Securities and Exchange Commission—who themselves enjoyed for-cause removal protection. *See* 561 U.S. 477, 513–14 (2010); Mashaw, *supra* note 54 (noting that the Court "invalidated the for-cause removal provision protecting the members [of the oversight board] because the removal power over those officers was lodged in the Securities and Exchange Commission whose members were themselves . . . removable only for cause.").

[56] *See supra* text accompanying notes 34–49.

[57] *See* BRETTSCHNEIDER, *supra* note 20, at 108.

[58] *See* Asheesh Agarwal, *The FTC's Recent Moves Could Cost It in the Supreme Court*, YALE J. ON REG. NOTICE & COMMENT (Oct. 23, 2022), https://www.yalejreg.com/nc/ftc-recent-moves [https://perma.cc/T5BV-VP4R]. *See also* David M. Driesen, *Appointment and Removal*, 74 ADMIN. L. REV. 421, 423 (2022) ("[T]he Court usually treats appointment and removal as separate problems. . . . In its Appointments Clause cases, it acknowledges that the Framers did not adopt a pure separation of powers system, but instead created checks and balances constraining the Executive Branch of government. In its removal cases, it often treats the Executive Branch as a completely separate institution unconstrained by checks and balances.").

[59] *See* Agarwal, *supra* note 58.

removal power further underscore the competing perspectives on this issue: democratic accountability[60] and checks and balances.[61]

II. DEMOCRATIC ACCOUNTABILITY: A MISGUIDED FRAMEWORK

One viewpoint in the modern debate over the president's removal power is grounded in the unitary executive theory—which claims that the Constitution's text and history comport with the president's total possession of "executive powers like removal, exclusive from congressional limitations."[62] To demonstrate the "continuing worth" of the unitary executive theory, some originalists claim that a unitary executive advances democratic norms.[63]

While the president may theoretically be accountable to the American people at large, scholars argue that individual members of Congress are equally—if not more—accountable and responsive to the specific needs of their constituents.[64] Congress has similar "claims to popular mandates" and reflects "the will of the electorate as a whole."[65] In this vein, it is critical to conceive of democratic accountability as diffused among the different branches rather than concentrated in a singular executive. Accordingly, the president's possession of an unrestricted removal authority is not essential to, nor does it guarantee, democratic accountability.

A. Development of the Democratic Accountability Theory

The origins of the notion that a unitary executive, and in turn, an unconstrained removal power, is essential for democratic accountability traces back to 1788. In Alexander Hamilton's view, a unitary executive would remain accountable to the people, because it would enable them to "bestow praise and blame with relative ease."[66] According to Hamilton, "[e]nergy in the Executive is a

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[60] *See infra* Part II. For the purposes of this Article, democratic accountability reflects the notion that a single chief executive remains accountable to the people, because "presidential elections ensure that the 'unfairness will come home to roost in the Oval Office.'" Bailey, *supra* note 14, at 456 (citing Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting)).

[61] *See infra* Part III.

[62] Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1479 (2022).

[63] Bailey, *supra* note 14, at 456.

[64] *See, e.g.*, Nicolas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 990 (2018).

[65] Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563, 1591 (1997) [hereinafter *Relearning Founding Lessons*].

[66] Bailey, *supra* note 14, at 459 (citing THE FEDERALIST NOS. 70–72 (Alexander Hamilton)).

leading character in the definition of good government," and "unity is conducive to energy."[67]

Similarly, Justice Scalia elaborated on "the functional benefits" of a unitary executive in his dissenting opinion in *Morrison*.[68] Specifically, he claimed that the Founders themselves considered a unitary executive to be "essential for democratic accountability."[69] To Justice Scalia, the difference between the Vesting Clauses of Articles I and II "is the difference that the Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished."[70]

Relying on both Hamilton and Justice Scalia, Professor Steven Calabresi has made the modern case for an unconstrained removal power grounded in the president's role as the "only nationally elected official."[71] According to Calabresi, every member of Congress is incentivized to "please the constituency that elected them," which leads to a "collective action problem."[72] In his view, "the essential ingredient" to remedying this problem lies with "the President's national voice" because the president alone "speaks for the entire American people."[73] Calabresi argues that this national voice can counterbalance "the regional pressures placed on Congress by its selection process."[74] As such, "unity in the executive is the best—maybe the only—way to ensure that administration is accountable to the people."[75] In the context of the president's removal authority, Calabresi asserts that an unconstrained removal power would promote democratic accountability "by making it easier for the people 'to detect policy errors and to punish those responsible for them.'"[76]

B. Application of the Theory to the Removal Power

From a normative perspective, Calabresi is correct to assert that members of Congress are elected to represent their constituents in the federal government and serve their particular needs. And from an empirical perspective, it cannot be disputed that the

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[67] THE FEDERALIST NO. 70 (Alexander Hamilton).
[68] Bailey, *supra* note 14, at 456 (citing Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting)).
[69] *Id.*
[70] *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting).
[71] Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995).
[72] *Id.* at 34–35.
[73] *Id.* at 36.
[74] Bailey, *supra* note 14, at 457 (citing Calabresi, *supra* note 71, at 70).
[75] *Id.*
[76] *Relearning Founding Lessons*, *supra* note 65, at 1564.

president may represent the idea of democratic legitimacy more than any singular senator or representative. Indeed, the election of the president every four years by a plurality of the national popular vote translates into the president being uniquely "accountable to the people as a whole."[77] In this sense, to be re-elected, the president surely has incentives to be "clearly responsible to and representative of the interests of the whole of his national, electoral constituency."[78]

Nevertheless, Calabresi's democratic accountability argument overlooks the concept of "joint accountability," which some scholars describe as the "proper reconstruction of accountability."[79] Joint accountability acknowledges that the different branches each "represent different manifestations of the people."[80] Unlike the "excesses associated with simple accountability," joint accountability reflects a system of "shared, interbranch, government responsiveness."[81] According to Professor Martin Flaherty, the Founding was committed to a "notion of joint accountability that aimed to prevent any one part of government from taking ill-considered or oppressive measures in the name of last year's election results."[82] With this understanding, congressional checks on the executive's removal power actually comports with joint accountability. Though with the increase in populist candidates in recent years, Flaherty notes that the executive branch, unlike the legislature, is more likely to abuse electoral mandates.[83] As such, congressional checks on the president's removal power advance a key Founding value.[84]

Thus, what Calabresi conceives as a "congressional collective action *problem*" is less of a problem than it is a solution.[85] Proponents of the unitary executive theory should not fear that sharing the president's removal power with Congress "undermines the ability of the public to hold these agencies accountable."[86] Democratic accountability to the people is most successfully achieved when that accountability is both jointly held and dispersed among members of Congress—not when it stems exclusively from the executive branch.[87]

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[77] GOVERNMENTAL POWERS, *supra* note 4, at 351.
[78] Calabresi, *supra* note 71, at 47.
[79] *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1836 (1996).
[80] *Id.* at 1838.
[81] Flaherty, *supra* note 79, at 1805.
[82] *Relearning Founding Lessons*, *supra* note 65, at 1590.
[83] *See id.*
[84] *See id.*
[85] Calabresi, *supra* note 71, at 36 (emphasis added).
[86] GOVERNMENTAL POWERS, *supra* note 4, at 356.
[87] *See id.* ("When the goal is diffusing accountability rather than concentrating it, and when the presidency lays the most plausible claim to the concentrated version,

Although the president is uniquely accountable to the American people, the desire for re-election creates narrow incentives for the president to be responsive to the interests of their electoral base.[88] On this point, Calabresi does not explain why the president's accountability to their constituents should take precedence over the accountability between members of Congress and their constituents.[89] While the president occupies a unique role in representing the American people at large rather than constituents in a single district or state, the president does not necessarily speak for, nor represent the ideals of, the American people as a whole at any given time.[90] Even individuals who voted for an incumbent president may only agree with the president's views in one or two policy areas.

In any event, the risk of partisanship or bias in executive firing, and the threat of another Saturday Night Massacre[91] taking place again, seems more likely where the removal power is exclusively vested in one person.[92] To this end, the dangers of concentrating democratic accountability in a singular executive are equally apparent when considering the reality that democratic

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congressional involvement in the critical area of removal should meet with approval instead of invalidation."); Flaherty, *supra* note 79, at 1836.

[88] Calabresi, *supra* note 71, at 35 ("[T]he President at least has an incentive to steer national resources toward the 51% of the nation that last supported him.").

[89] Professor Jeremey Bailey offers one compelling explanation: the difference in modes of election between the Senate and president. Because the Senate "hold[s] staggered terms of six years," senators are arguably "less concerned about public opinion and therefore less responsible." Bailey, *supra* note 14, at 461.

[90] *See Relearning Founding Lessons*, *supra* note 65, at 1836 ("Congress would have no other way of checking officials who . . . promulgated massive environmental legislation at the President's behest, in a manner consistent with a general statutory delegation, but not reflective of an electorate that has yet to back the President's approach fully by returning a compliant House and Senate."). Indeed, even individuals who voted for an incumbent president have admitted to agreeing with only one or two of the president's views in specific areas of policy. *See* Calabresi, *supra* note 71, at 68 (explaining that policy bundling, wherein voters elect a president because they agree on one set of issues but not another, "means that the unitary President is only crudely representative of the preferences of the national electorate, because his electoral success does not reflect approval of his entire policy platform.").

[91] On October 20, 1973, the infamous "Saturday Night Massacre" took place when President Richard Nixon sought to shut down Special Prosecutor Archibald Cox's Watergate investigation. Nixon was unable to instruct neither his Attorney General, Elliot Richardson, nor Richardson's successor, Deputy Attorney General William Ruckelshaus, to fire Cox. After Richardson and Ruckelshaus had both resigned, Nixon successfully instructed the new acting Attorney General, Solicitor General Robert Bork, to fire Cox. *See* Ken Gormley, *The Saturday Night Massacre: How our Constitution Trumped a Reckless President*, NAT'L CONST. CTR. (Oct. 20, 2015), https://constitutioncenter.org/blog/the-saturday-night-massacre-40-years-later-how-our-constitution-trumped-a-r [https://perma.cc/KG5A-5X9K].

[92] *See* BRETTSCHNEIDER, *supra* note 20, at 63.

elections do not automatically guarantee the rule of law for all citizens.[93] For example, many dictators have been "democratically" elected into power through what appear on the surface to be legitimate victories in open and fair elections.[94] Along these lines, countries, such as Egypt, Georgia, Iran, Iraq, Russia, Turkey, and Venezuela, have even been characterized as "non-democratic democracies."[95] Although these countries have elected leaders under the guise of democracy, their governance structures more closely resemble autocracies.[96]

In sum, the rationale that the president's accountability to their own electoral base mandates "the creation of a much stronger and more unitary presidency" and an unrestricted removal authority is misguided for three main reasons.[97] First, the Founders demonstrated a greater commitment to a system of joint accountability, where no branch can justify the possession of greater authority or use oppressive measures based on a popular mandate.[98] In this sense, congressional checks on the president's removal power only serve to further the Founders' support for a version of accountability equally shared among the three branches. Second, members of Congress represent just as much, if not more, accountability and responsiveness to the people. This is particularly apparent where individual members of Congress can represent the interests of the electorate not captured by the president's interests, policies, or decisions. Lastly, Calabresi's conception of democratic accountability is mistakenly premised on the notion that a single executive is responsive to and representative of the people at large. Presidential elections do not in themselves, however, guarantee that the law equally protects all citizens.

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[93] *See* GOVERNMENTAL POWERS, *supra* note 4, at 351.

[94] *See* Neil S. Buchanan, *Elected Dictators? The Limits of What Government Officials Can Do with Their Power*, JUSTIA (June 13, 2019), https://verdict.justia.com/2019/06/13/elected-dictators-the-limits-of-what-government-officials-can-do-with-their-power [https://perma.cc/B4N2-C28J].

[95] *See* Melik Kaylan, *The New Wave of Elected Dictatorships Around the World*, FORBES (July 31, 2014, 11:15 AM), https://www.forbes.com/sites/melikkaylan/2014/07/31/the-new-wave-of-elected-dictatorships-around-the-world [https://perma.cc/E9FX-DBL5].

[96] *See id.* For example, Nicolas Maduro continues to lead Venezuela despite Juan Guaido's win in the 2019 presidential election. *See In Venezuela, Confidence in the Democratic Process Wanes as Maduro Maintains Power*, PBS (Jan. 23, 2022, 4:35 PM), https://www.pbs.org/newshour/show/in-venezuela-confidence-in-the-democratic-process-wanes-as-maduro-maintains-power [https://perma.cc/7663-PZFQ].

[97] Calabresi, *supra* note 71, at 36–37.

[98] *See Relearning Founding Lessons*, *supra* note 65, at 1589 ("The changed circumstance most relevant to a principal of joint accountability is obvious, sweeping, and entirely consistent with the idea that presidents have spent the last two centuries in vigorous pursuit of power.").

Accordingly, the democratic accountability theory, rooted in the idea of the unitary executive, does not provide a sufficient rationale for expanding the president's removal authority. To truly foster democratic values and avoid the potential for oppression, the president's removal power should be shared with Congress.

III. CHECKS AND BALANCES: A DEMOCRATIC APPROACH

The checks and balances approach, advanced by Justice Brandeis in his dissenting opinion in *Myers*, underscores the competing view on the proper scope of the president's removal power.[99] Under this view, Congress may constrain the president's removal power to protect individual officers from the arbitrary exercise of executive power and to ensure that the executive does not thwart the will of the people.[100] Notwithstanding the concern that congressional constraints on the president's removal power could increase Congress's own power at the expense of the executive, Part III contends that Justice Brandeis's checks and balances approach aligns with the separation of powers doctrine and advances the same goal of safeguarding against autocracy.

A. Historical Origins of Checks and Balances

While the separation of powers doctrine was widely recognized at the time of the Founding,[101] the Framers built on the ideas of several philosophers to develop the basis for our modern system of checks and balances.[102] For instance, Montesquieu's contention that "checks and balances were the foundation of a structure of government that would protect liberty" greatly influenced the Framers.[103] Indeed, James Madison echoed his

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[99] Myers v. United States, 272 U.S. 52, 240–95 (1926) (Brandeis, J., dissenting).

[100] *See* GOVERNMENTAL POWERS, *supra* note 4, at 351. Justice Brandeis recognized how an unrestricted presidential removal power threatened the balance of governmental powers. *See* Flaherty, *supra* note 79, at 1835–36. *See also* Greene, *supra* note 6, at 173 (noting it is appropriate to "regulate the President to ensure against the corruption of such power, against the risk of self-dealing, self-judging, and self-exemption—in short, against the risk of tyranny.").

[101] *See* GOVERNMENTAL POWERS, *supra* note 4, at 349.

[102] *See* Brian Duignan, *Checks and Balances*, BRITANNICA, https://www.britannica.com/topic/checks-and-balances [https://perma.cc/6TW6-C73R] (last visited Mar. 20, 2023) ("The framers of the U.S. Constitution, who were influenced by Montesquieu and William Blackstone among others, saw checks and balances as essential for the security of liberty under the Constitution.").

[103] Bowsher v. Synar, 478 U.S. 714, 722 (1986). Montesquieu, an eighteenth-century French political theorist, was widely read by the Founders—particularly, his theory of the separation of powers. GOVERNMENTAL POWERS, *supra* note 4, at 349.

support for such a system in Federalist No. 51, advocating for a governmental structure that furnished the proper checks and balances between the branches such that the powers of each branch were not rigidly separated.[104] Although Madison conceded that each branch should have "a will of its own," he expressed the importance of "some deviations" from this principle.[105]

Madison emphasized "the normative desirability" of a system in which each branch's powers were separate, yet shared.[106] He opposed the concept of a rigidly pure separation of powers, instead advocating for some intermixing of powers to permit the creation of a system of checks and balances.[107] Justice Brandeis adopted similar views, noting that the separation of powers doctrine does "not make each branch completely autonomous."[108] Rather, he argued that the doctrine leaves each branch dependent upon the other, granting "each [the] power to exercise, in some respects, functions in their nature executive, legislative and judicial."[109]

B. Justice Brandeis's Rationale for a Shared Removal Power

In dissenting from the *Myers* Court's endorsement of an unconstrained removal authority, Justice Brandeis championed a shared removal power for the following three reasons, each of which merits more significance than the last. First, Justice Brandeis relied upon the fact that the Constitution does not expressly deny Congress the authority to share in the exercise of the removal power:

> It is true that the exercise of the power of removal is said to be an executive act, and that, when the Senate grants or withholds consent to a removal by the President, it participates in an executive act. But the Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof; *and it has not in terms denied to Congress the power to control removals*.[110]

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[104] THE FEDERALIST NO. 51 (James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."). Indeed, Montesquieu may have influenced Justice Brandeis's assertion that Congress can restrain the president's removal power. *See* Myers v. United States, 272 U.S. 52, 245 (1926) (Brandeis, J., dissenting) ("The ability to remove a subordinate executive officer . . . is not a power inherent in a chief executive.").

[105] *Id.*

[106] Calabresi, *supra* note 71, at 45.

[107] *Id.*

[108] *Myers*, 272 U.S. at 291 (Brandeis, J., dissenting).

[109] *Id.* at 291–92.

[110] *Id.* at 245 (emphasis added).

While Justice Brandeis correctly asserts that the Constitution has not explicitly denied Congress the power of removal, this fact alone does not necessarily invite Congress to constrain the executive's removal power, nor does it change the fact that the Constitution remains silent in this respect. Indeed, Justice Taft's majority opinion in *Myers* made a similar inference grounded in constitutional silence, reasoning that no explicit constitutional limitation on the president's removal power must mean that the president retains *all* removal power.[111] Taken together, the opposing arguments made by Justices Brandeis and Taft demonstrate how constitutional silence can be easily manipulated to reach a desired objective. As a result, Justice Brandeis's reliance on constitutional silence does not serve to strengthen his overall assertion that Congress can impose limits on the president's removal power.

Second, Justice Brandeis maintained that the Constitution expressly granted Congress the power to participate in the *appointment* of executive officers "in order to prevent arbitrary executive action."[112] He noted how Hamilton, in Federalist No. 77, construed the Appointments Clause to similarly require Congress's consent to removals, which scholars refer to as the "advice-and-consent theory."[113] Under this theory, the Senate's "power to appoint implied a parallel power to remove."[114] Although it is unclear whether Justice Brandeis unequivocally agreed with the advice-and-consent theory, it seems compelling to assert that Congress may limit the president's removal authority where there already exists constitutional support in Article II for Congress to impose constraints on the president's appointment authority.[115]

On the other hand, the Constitution's explicit grant of congressional power in the appointments context suggests that the Framers considered, but ultimately decided against, granting the same power for removals.[116] Even if Justice Brandeis is correct to

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[111] *See id.* at 117 ("[I]n the absence of any express limitation respecting removals, that, as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.").

[112] *Id.* at 293.

[113] *See id.* at 293–94; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1036 (2006).

[114] Prakash, *supra* note 113, at 1036.

[115] *See* U.S. CONST. art. II, § 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.").

[116] *See* L.C.C., *supra* note 9, at 124 ("The power of removal is primarily an executive power and was so understood by the framers . . . *if it had been intended otherwise* the Constitution would have either specifically granted this power to

assume that the Senate's participation in the appointments power was intended to fend off arbitrary executive action—absent any constitutional text on point—it does not follow that Congress automatically has a corresponding role in the executive's removal power.[117] Thus, Justice Brandeis's reference to the advice-and-consent theory does not provide a sufficient basis for contending that Congress should share in the executive's removal power.

Finally, Justice Brandeis's best rationale for congressional checks on the president's removal authority, and the heart of the checks and balances approach itself, lies in his normative desire to protect individuals from the exercise of arbitrary executive removal power. In his dissent in *Myers*, Justice Brandeis argued that a president performs their "full constitutional duty" when they act within the "means and instruments provided by Congress" and "within the limitations prescribed" by the Constitution.[118] To this end, Justice Brandeis explained: "Checks and balances were established in order that this should be 'a government of laws, and not of men.'"[119]

Justice Kagan's dissent in *Seila Law*, for example, tracks with Justice Brandeis's checks and balances approach.[120] There, Justice Kagan explained that the Constitution "grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties."[121] In other words, the Necessary and Proper Clause gives Congress broad authority to check executive power through legislation so long as Congress does not hinder the president's ability to carry out their duties.[122] But the *Seila Law* majority "dismisses the idea of checks

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some other body, or expressly restricted the President in the use of it." (emphasis added)).

[117] *See* Prakash, *supra* note 113, at 1037 ("The Constitution did not make the Senate an all-purpose executive council, armed with a check on all of the President's executive functions.").

[118] Myers v. United States, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting).

[119] *Id.*

[120] Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2225 (2020) (Kagan, J., dissenting). *See also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 513–14 (2010) (Breyer, J., dissenting) (arguing that it is desirable to have an independent board because it allows for protection from removal, does not interfere with the president's executive power, and does not violate separation of powers).

[121] Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2225 (2020) (Kagan, J., dissenting).

[122] *See id.* at 2227–28 (explaining that Article I's Necessary and Proper Clause authorizes Congress to restrain executive power). Justice Kagan further emphasized how Congress and the president are uniquely equipped with the necessary "knowledge and experience" to address disagreements regarding administrative offices. *Id.* at 2225. In her view, courts do not maintain this

and balances limiting presidential power more explicitly than perhaps any other opinion."[123]

As set forth above, Justice Brandeis clearly did not seek to constrain the president's removal powers purely for the sake of enlarging congressional power, or alternatively, because he assumed the legislative branch was most qualified to oversee the removal power. Rather, he sought to ensure that the president would execute the laws faithfully by exercising the executive power in an appropriate, non-arbitrary manner to promote liberty and safeguard the separation of powers. To Justice Brandeis, it was of no import that the implications of these goals meant that the executive branch should share the removal power with Congress.

C. Responding to Critiques of Justice Brandeis's Shared Removal Power Rationale

On the whole, supporters of the democratic accountability theory, and the unitary executive theory at large, would likely find Justice Brandeis's assumption that Congress can impose checks on the president's removal power flawed. First, those who support the president retaining total discretion to discharge executive officers at-will would likely assert that sharing the removal power with Congress implicates separation of powers concerns.[124] As discussed, the unitary executive theory presumes that "all purely executive power must be under the control of the President," and removal power is one such power.[125]

In *Bowsher v. Synar*,[126] for example, the Court held that Congress could not retain ultimate removal power over the U.S. Comptroller General.[127] Chief Justice Burger reasoned that if an executive officer was exclusively answerable to Congress, Congress would have control over the way the laws were executed, which would be an usurpation of executive power.[128] To this end, the Court reasoned: "To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto."[129]

"knowledge and experience needed to address" disagreements, and thus courts should stay "out of the picture." *Id.*

[123] *See* Driesen, *supra* note 58, at 458 ("Chief Justice Roberts's opinion for the Court, however, treats the Constitution's vesting clause as moving the entire executive power from the ambit of congressional regulation, endorsing a pure separation of powers view.").

[124] *See generally* Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527 (2012).

[125] Morrison v. Olson, 487 U.S. 654, 734 (1988) (Scalia, J., dissenting).

[126] 478 U.S. 714 (1986).

[127] *Id.* at 717.

[128] *Id.* at 727.

[129] *Id.* at 726.

Defenders of the democratic accountability theory would likely agree with the *Bowsher* Court's rationale that Congress cannot share the executive's removal power on at least two grounds: first, the removal power is inherently executive in nature; and second, Congress does not possess the power to execute the law. As such, congressional constraints on the president's removal authority could enable Congress to indiscriminately increase its own powers at the expense of the executive branch. Relatedly, democratic accountability theorists might contend that the president is in a better position to evaluate the performance of their subordinates, and that the president alone can act faster in removing officers than if the power was shared with Congress.[130]

The above concerns are warranted to the extent that the president has a constitutionally-mandated duty to "take Care" to faithfully execute the law.[131] Justice Brandeis would likely agree that the president's faithful execution of the law requires the president to exercise control over their subordinate officers to a certain degree, and that sharing the removal power with Congress could infringe on this duty.[132] Justice Taft acknowledged this concern in his majority opinion in *Myers*, writing: "[T]hose in charge of and responsible for administering functions of government who select their executive subordinates need, in meeting their responsibility, to have the power to remove those whom they appoint."[133]

Nevertheless, Justice Brandeis's checks and balances approach would not cause Congress to increase its own authority at the expense of the executive branch, nor would it allow Congress to infringe on the executive's power to execute the laws. At its core, the goal of Justice Brandeis's approach sought to "prevent tyrannical accretions of power" as a means to "a greater constitutional end."[134] Because Justice Brandeis was ostensibly motivated by a desire to prevent autocracy, his checks and balances approach would only permit Congress to impose limits on the president's removal power insofar as it could also achieve the greater goals of preserving democracy and preventing arbitrary government action. It does not follow, then, that affording Congress the ability to impose checks on the executive's removal power would lead to a disproportionate concentration of congressional power. If anything, "the functional inquiry promotes balance by enabling Congress to exercise some control over the vast

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[130] *See, e.g.*, BRETTSCHNEIDER, *supra* note 20, at 112–13.
[131] U.S. CONST. art. II, § 3.
[132] *See* BRETTSCHNEIDER, *supra* note 20, at 97 ("After all, are you really the boss if you can't fire a bad employee? The [Wilson Administration] maintained that Congress could only set standards for when such a firing was permissible.").
[133] Myers v. United States, 272 U.S. 52, 119 (1926).
[134] Flaherty, *supra* note 79, at 1741.

policymaking authority that the executive branch would otherwise wield solely at the whim of the President."[135]

Accordingly, congressional checks on the president's removal power do not "trigger constitutional concern"; rather, these checks "maintain interbranch balance, especially when Congress limits its own removal authority to neutral, 'for cause' reasons."[136]

D. Compatibility with the Separation of Powers Doctrine

In his *Myers* dissent, Justice Brandeis did not conflate the doctrines of separations of powers and checks and balances.[137] Rather, he viewed them as sharing the same purpose: "to save the people from autocracy."[138] In light of his checks and balances approach, Justice Brandeis clarified that separation of powers was adopted at the 1787 Constitutional Convention "not to promote efficiency, but to preclude the exercise of arbitrary power."[139] Justice Brandeis further noted that the "purpose was not to avoid friction" but—given the inevitable friction incident to the distribution of government power among the three branches—"*to save the people from autocracy*."[140] This assertion of purpose makes clear that Justice Brandeis did not specifically take issue with setting distinct, delineated responsibilities for each of the three branches under a system of separated power. On the contrary, Justice Brandeis approved of this governance structure because it meant that any part of the government's authority would not be overconcentrated in one single branch. This rationale comports with his checks and balances approach, whereby Congress can impose constraints on the president's removal authority, particularly when doing so achieves the same objective of avoiding autocracy.

Democratic accountability theorists would likely contend that Justice Brandeis's checks and balances approach conflates the doctrines of separation of powers and checks and balances. The democratic accountability theory promotes a unitary executive who is "more responsive to the people" and more "efficient and energetic."[141] Accordingly, defenders of this theory are more likely

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[135] *Id.* at 1742.
[136] *Id.* at 1836.
[137] By contrast, the Supreme Court at times conflates separation of powers with checks and balances. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721–22 (1985) (mentioning checks and balances while praising the separation of powers doctrine); Buckley v. Valeo, 424 U.S. 1, 120–22 (1976) (emphasizing the separation of powers doctrine and suggesting that the doctrine performs the function of both balancing and checking the government branches' activities).
[138] Flaherty, *supra* note 79, at 1836.
[139] Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
[140] *Id.* (emphasis added).
[141] *Id.* at 1741.

to conceive of separation of powers as a "commitment to complete and total separation between the various branches of government,"[142] whereby the president exclusively controls the executive branch.[143]

On the one hand, this concern is justifiable: conceiving of the separation of powers doctrine to achieve democratic accountability and efficiency clearly sits in tension with Justice Brandeis's support for a constrained removal power. To this end, diluting the president's ability to remove their subordinate officers could be problematic if "Congress were able to direct an executive officer to contravene the will of the president," and the people could not trace the conduct of executive officers back to the president.[144]

This view overlooks, however, the way Justice Brandeis reconceptualized the doctrine of separation of powers as a tool to maintain balance and prevent the overconcentration of power in a single branch, striking at the core of the checks and balances doctrine.[145] While it is true that "separation of powers and checks and balances have distinct meanings"—with the former suggesting independence and the latter evoking interdependence—these ideas can also be used interchangeably.[146] For instance, each doctrine is often understood to imply the other, as "separation routinely enables checking, and checking often depends upon the existence of separation."[147]

To that end, Justice Brandeis's checks and balances approach properly maintains that Congress can constrain the president's removal power to prevent the arbitrary exercise of executive power.[148] Justice Brandeis's most robust rationale for permitting Congress to share in the removal power lies in his

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[142] GOVERNMENTAL POWERS, *supra* note 4, at 352.
[143] Flaherty, *supra* note 79, at 1740.
[144] Bailey, *supra* note 14, at 457.
[145] *See* Flaherty, *supra* note 79, at 1740. As Professor Flaherty notes, "the minority of scholars who defend the functionalist caselaw, and its trinitarian consequences, see separation of powers in different, more negative terms." *Id.* For this group of scholars, "what matters most is preventing the tyrannical accretion of power in any one part of government." *Id.*
[146] Jon D. Michaels, *An Enduring, Evolving, Separation of Powers*, 115 COLUM. L. REV. 515, 520 n.11 (2015).
[147] *Id.* at 521 n.11.
[148] *See supra* Parts III.A, III.B, III.C. *See also* Driesen, *supra* note 58, at 435 ("The problem of political presidential removal decisions interfering with the Senate's role in appointments has played a role . . . in our history when a president wished to defy or evade legal restraints, he has removed government officials committed to rule of law values and replaced them with people not approved by the Senate and willing to subvert the laws."). For an analysis on the problem of removal evading the Senate confirmation requirements, see *id.* at 435–48 (analyzing abuse of the removal and appointment authority of former presidents Andrew Jackson, Andrew Johnson, Richard Nixon, and Donald Trump).

normative desire to ensure that the president faithfully exercises the executive power to promote liberty and prevent autocracy. Although supporters of the democratic accountability theory might assert that constraining the president's removal power could allow Congress to indiscriminately increase its own authority at the expense of the executive, this concern is misguided.

Rather, the checks and balances approach permits this sort of "power-sharing arrangement" precisely to prevent the executive branch from possessing a disproportionate amount of power than the other branches.[149] Accordingly, congressional checks on the executive's removal power only seek to maintain balance, not foster further imbalance. The same rationale applies in response to attacks by unitary executive proponents who may accuse Justice Brandeis of conflating the doctrines of separation of powers and checks and balances. Yet, Justice Brandeis's checks and balances approach simply views the separation of the branches as a means of preventing autocracy, which matches his assumption that Congress can constrain the president's removal power.

CONCLUSION

Ultimately, the source and scope of the president's removal power, and whether Congress should be able to regulate this power, remain unresolved. On the one hand, some individuals maintain that a unitary executive with an unconstrained removal power promotes democratic accountability.[150] Because the president, along with the vice president, is the "only nationally elected official,"[151] this view maintains that vesting the removal power solely in the executive branch would enable the people to attribute actions taken by executive officers to the president. But this logic is misguided. Sharing the removal power with Congress does not actually undermine democratic accountability. Since each branch "represent[s] different manifestations of the people,"[152] Congress remains equally, if not more, accountable to the people than the president. Indeed, the Framers were more committed to a system of joint accountability shared among the three branches, where the executive cannot rely on their popular mandate to legitimize the use of oppressive tactics. Thus, the democratic accountability theory does not sufficiently explain why the president should retain total removal authority, especially given that congressionally imposed checks on the executive's removal power ensure the law is carried out with the will of the people.

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[149] Flaherty, *supra* note 79, at 1741.
[150] *See supra* Part II.
[151] Calabresi, *supra* note 71, at 354.
[152] Flaherty, *supra* note 79, at 1838.

Furthermore, the checks and balances approach contends that Congress can constrain the executive's removal power because a well-functioning democracy should protect against the exercise of arbitrary executive power.[153] Justice Brandeis's position on the president's removal power reflects a deep concern for preserving democratic values and the rule of law. He believed appropriate limitations on the president's removal power were necessary to prevent the arbitrary exercise of executive power, not to benefit Congress nor burden the president's ability to carry out the law. His checks and balances approach thus aimed to ensure that the president could not contravene the law by removing officials for political or personal reasons.

Justice Brandeis's approach has significant implications for the role of Congress in preserving democratic governance. Indeed, by limiting the president's removal power, Congress can enforce the principle of a "government of laws, and not of men."[154] Additionally, by placing checks on the president's power, Congress can help to prevent the concentration of power in the executive branch, which provides a fundamental safeguard against the rise of autocratic rule.

Considering the challenges facing modern democracies, including the erosion of democratic norms and the concentration of power in the hands of strong leaders,[155] Justice Brandeis's checks and balances approach takes on renewed importance. Both the separation of powers and system of checks on governmental branches are vital for preserving the integrity of democratic institutions and ensuring that no single branch of government becomes too powerful. By limiting the president's removal power, Congress can play a crucial role in protecting the rights of citizens and preserving the Nation's constitutional democracy.

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[153] *See supra* Part III.B.
[154] Myers v. United States, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting).
[155] *See* Kaylan, *supra* note 95.