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# PRESIDENTIAL REMOVAL: THE *MARBURY* PROBLEM AND THE MADISON SOLUTIONS

*Jed Handelsman Shugerman\**

[Marbury’s] appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

—Chief Justice John Marshall<sup>1</sup>

## INTRODUCTION

This sentence from *Marbury v. Madison*<sup>2</sup> is both a potential argument against the unitary executive theory of total executive removal power . . . and in favor of it. Why was William Marbury’s office as justice of the peace irrevocable? Why didn’t President Thomas Jefferson just fire Marbury and moot this case? On the other hand, this sentence also seems to tell us that “vested” rights are irrevocable, so perhaps vested powers are also irrevocable (or “indefeasible” by Congress and not conditional by legislation)?

Here is another sentence relying on this absolutist connotation of “vested”: “Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”<sup>3</sup>

In *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>4</sup> which struck down protections for the Consumer Financial Protection Bureau’s (CFPB) single agency head, Chief Justice Roberts opened his constitutional analysis with that sentence. Recent historical work, much of it highlighted in this Symposium, has been unpacking the assumptions about unitary executive power and exclusive presidential removal power reflected in this ahistorical sentence by Chief Justice Roberts. Article II’s Vesting Clause,<sup>5</sup>

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

2. 5 U.S. (1 Cranch) 137 (1803).

3. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. CONST. art. II, §§ 1, 3).

4. 140 S. Ct. 2183 (2020).

5. U.S. CONST. art. II, § 1, cl. 1.

the Take Care Clause,<sup>6</sup> and the “Decision of 1789”<sup>7</sup> do not accomplish what Chief Justice Roberts assumes that they do: establish an exclusive, indefeasible presidential removal power.

This Essay summarizes recent historical research, especially by Professors Jane Manners and Lev Menand, on the breakthrough solution hidden in plain sight in *Marbury*. *Marbury* also hints at two problems (first, the question of judicial offices versus executive offices; and second, the little word “vest”), but I summarize how Madison (not as a defendant in 1801–03 but as leader of the House of Representatives in 1789) solves these problems, too.

Unitary executive theory depends on the exclusivity of executive power to deny a role for Congress to set conditions on removal of officers, to reject congressional and judicial oversight, or to otherwise limit presidential power. Unitary theorists often attempt to squeeze exclusivity back into the text of the Constitution, despite glaring gaps and textual problems. In his *Morrison v. Olson*<sup>8</sup> dissent arguing that the independent counsel statute<sup>9</sup> infringed on the presidential removal power, Justice Antonin Scalia wrote of the Vesting Clause: “[T]his does not mean *some* of the executive power, but *all* of the executive power.”<sup>10</sup> A century ago, Chief Justice William Howard Taft made a similar textual insertion of the word “alone” into Article II’s Vesting Clause in *Myers v. United States*.<sup>11</sup> Unitary scholars also insert “all” into Article II’s Vesting Clause. For example, Professors Steven Calabresi and Saikrishna Prakash contend that “Article II’s vesting of the President with all of the ‘executive Power’ [unambiguously] give[s] him control over all federal governmental powers that are neither legislative nor judicial.”<sup>12</sup> They further note that the “Constitution . . . gives an exclusive grant of all of the executive power to the President alone.”<sup>13</sup> The Office of Legal Counsel’s

6. *Id.* § 3, cl. 1.

7. The Decision of 1789 refers to “the First Congress’ vigorous debate about the removal of executive officers.” *Seila L.*, 140 S. Ct. at 2213.

8. 487 U.S. 654 (1988).

9. 28 U.S.C. §§ 49, 591.

10. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). Intriguingly, Justice Breyer has added the word “entire” to the Vesting Clause: “Article II’s vesting of the entire ‘executive Power’ in a single individual [is] implemented through the Constitution’s structural separation of powers, and revealed both by history and case precedent.” *Clinton v. Jones*, 520 U.S. 681, 710–11 (1997) (Breyer, J., concurring).

11. 272 U.S. 52 (1926). “Article II of the Constitution evidently contemplated . . . vesting general executive power in the President alone.” *Id.* at 135.

12. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 568–69 (1994). Many scholars suggest that the Vesting Clause vests “all” the executive power in a president. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1203 n.244 (1992) (“Not only does the Vesting Clause of Article II grant all the executive power exclusively to ‘a President,’ but even the later provisions of Article II contemplate only presidential exercises of executive power.” (citation omitted)). It is important to note how common it is for unitary scholars to add the word “all” to Article II’s Vesting Clause, even though only Article I’s Vesting Clause uses the word “all.” *See, e.g.*, Calabresi & Prakash, *supra*, at 568–69.

13. Calabresi & Prakash, *supra* note 12, at 588. In another major unitarian article, the unitarians posit that Article II’s Vesting and Take Care Clauses “creat[e] a hierarchical, unified executive department under the direct control of the President . . . . [Thus,] the

recent memo expanding presidential power over “so-called ‘independent’ agencies” based its argument on the Vesting Clause, repeating these same assertions of exclusivity: the clause vests “the executive power in the President *alone* . . . Article II vests *all* of ‘[t]he executive Power’ in the President.”<sup>14</sup>

One immediate problem: the text of Article II’s Vesting Clause does not include the word “all”—or “sole” or “alone” or anything of the like.<sup>15</sup> “The executive power shall be vested in a President of the United States.”<sup>16</sup> The Framers used the word “all” elsewhere to convey entirety, such as in Article I’s Vesting Clause and in Article III on jurisdiction but not in Article II. It is telling that textualists add words to the text, instead of noting their conspicuous absence (and citing *expressio unius*).

Why are textualists adding missing (or excluded) words to constitutional texts? Perhaps because the historical evidence for exclusive presidential removal is so thin and contradicted. The Constitution is famously silent on removal, so unitary theorists rely more heavily on the First Congress of 1789 than on the text of the Constitution or the debates of 1787–1788, which rejected unitary theory.<sup>17</sup> In a pair of forthcoming papers, I show that the First Congress did not, in fact, adopt the ostensible Decision of 1789 and in

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President alone possesses *all* of the executive power.” Calabresi & Rhodes, *supra* note 12, at 1165 (footnotes omitted); *see also* Brief for Separation of Powers Scholars as *Amicus Curiae* in Support of Petitioner at 3, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7) [hereinafter Brief for Separation of Powers Scholars] (offering a statement on exclusivity of removal, signed by Calabresi, Prakash, and other unitarian scholars); STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008); SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 67, 82–83, 194–95 (2015) (taking a more moderate stance on the Vesting Clause but asserting a general rule of exclusivity and reaffirming the Decision of 1789). Professors Calabresi and Christopher Yoo make the same claim about the theory in *The Unitary Executive*: “the Constitutional Convention was clear in its decision to grant all of the executive power,” as the Decision of 1789 “definitively establish[ed].” CALABRESI & YOO, *supra*, at 35; *see also* Brief for Separation of Powers Scholars, *supra*, at 3–4; Saikrishna Prakash, *Resolved, the Unitary Executive Is a Myth: Con*, in *DEBATING THE PRESIDENCY: CONFLICTING PERSPECTIVES ON THE AMERICAN EXECUTIVE* 25, 27 (Richard J. Ellis & Michael Nelson ed., 2014).

14. Extending Regul. Rev. Under Exec. Order 12866 to Indep. Regul. Agencies, 43 Op. O.L.C. 1, 8 (2019) (quoting *Myers*, 272 U.S. at 135).

15. *See* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 3, 23–25 (2018); Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 247 (2019); *see also, e.g., Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

16. U.S. CONST. art. II, § 3.

17. In both *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Seila Law*, Chief Justice Roberts wrote, “Since 1789, the Constitution has been understood to empower the President to keep officers accountable—by removing them from office, if necessary.” *Seila L.*, 140 S. Ct. at 2212 (quoting *Free Enter. Fund*, 561 U.S. at 483). He continued, “The President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, [and] was settled by the First Congress.” *Id.* at 2191–92. Chief Justices Taft and Roberts and Justices Thomas and Kavanaugh have similarly built their unitary theories as much on the legislative histories of 1789 as the texts of 1787, if not more so. *See id.* at 2213; *Myers v. United States*, 272 U.S. 52, 114 (1926).

fact made a very different decision: rejecting exclusive presidential removal by enacting a series of statutes giving removal power to judges and juries, along with relatively independent prosecutors. These debates indicate that the First Congress was unpersuaded by James Madison's reversal and the majority rejected his textual arguments for unitary presidentialism.

And why were those textual arguments, which often cited Article II's Vesting Clause, so unpersuasive to a wide majority of Congress? Was the Constitution silent on presidential removal because it was clearly implied? Or because there was no consensus? This Essay builds on some outstanding recent historical research relating to the Vesting Clause and removal, particularly by Professors Julian Davis Mortenson,<sup>18</sup> Martin Flaherty and Curtis Bradley,<sup>19</sup> Robert Natelson,<sup>20</sup> Robert Reinstein,<sup>21</sup> Peter Shane,<sup>22</sup> Jonathan Gienapp,<sup>23</sup> Christine Kexel Chabot,<sup>24</sup> Daniel Birk,<sup>25</sup> and Jane Manners and Lev Menand<sup>26</sup> that examines Article II's Vesting Clause and helps reach the following conclusions: it did not "vest" exclusive removal power, because the notion of "executive power" did not include a general or exclusive removal power and the word "vesting" did not convey indefeasible power in the eighteenth century.

In some of the most recent pathbreaking work, it turns out that *Marbury* plays a central role as problem, solution, and—what I identify as—a new problem for the Vesting Clause debate. Professors Daniel Birk and Jane Manners and Lev Menand identify a passage from Chief Justice John Marshall that has puzzled many:

[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. . . .

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18. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020).

19. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553–56 (2004).

20. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009).

21. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009).

22. Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 324 (2016).

23. JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018).

24. Christine Kexel Chabot, *Is the Federal Reserve Constitutional?: An Originalist Argument for Independent Agencies*, 96 NOTRE DAME. L. REV. 1, 3–4 (2020).

25. Daniel D. Birk, *Interrogating the Historical Basis for an Unitary Executive*, 73 STAN. L. REV. 175 (2021).

26. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

. . . [A]s the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.<sup>27</sup>

William Marbury was not an Article III judge. He was a justice of the peace without life tenure, just a five-year term. The statute establishing his office did not specify “good behaviour” or any removal conditions like “good cause.” Why did Justice Marshall think he was not removable? Some scholars debate whether this discussion was just dicta, but that question is minor. Apparently President Jefferson and Madison agreed with Justice Marshall; if President Jefferson thought he could, he probably would have tried to moot the lawsuit by simply dismissing Marbury, with or without his precious commission. Some have suggested that Marbury’s office as justice of the peace had special protection as a territorial office under congressional power<sup>28</sup> or as an inferior office,<sup>29</sup> but these points are speculative and not indicated by anything in Justice Marshall’s opinion. Alternatively, a justice of the peace had a partially judicial nature, reflected in the office’s name, its historical mixed role, and its association with the Judiciary Act of 1801<sup>30</sup> and the “Midnight Judges.” Perhaps Marshall was making a confused assumption that a judicial-like office would be insulated from removal. Although a justice of the peace was clearly not an Article III judge with lifetime tenure but rather one that held a five-year term, nevertheless Marbury’s counsel Charles Lee seemed to make such an assumption when he cited *Federalist Nos. 78 and 79* on the importance of an independent judiciary and the necessity of Senate concurrence in removals (despite the ostensible Decision of 1789). Lee argued that justices of the peace, “because they exercise a part of the judicial power, ‘ought . . . to be independent.’”<sup>31</sup> To be honest, these were my assumptions when I wrote my own article on this case, “*Marbury and Judicial Deference*”<sup>32</sup> in 2002, in the context of vested property rights in judicial offices and the arguably more contentious fight over Federalist judges in the state courts. One could imagine an emerging rule similar to a thin *Humphrey’s Executor v. United States*<sup>33</sup> and

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27. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803); see also Birk, *supra* note 25, at 187 n.68; Manners & Menand, *supra* note 26, at 25.

28. See C. B. Cross, *The Removal Power of the President and the Test of Responsibility*, 40 CORNELL L.Q. 81, 83 (1954).

29. See *Myers v. United States*, 272 U.S. 52, 242 (1926) (Brandeis, J., dissenting) (“In *Marbury v. Madison* . . . it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding.”); see also James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1603 (2001).

30. Ch. 4, 2 Stat. 89, *repealed by Act of Mar. 8, 1802*, ch. 8, 2 Stat. 132.

31. Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1110 (1988) (quoting *Marbury*, 5 U.S. (1 Cranch) at 151).

32. Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58 (2002).

33. 295 U.S. 602 (1935).

its quasi-judicial category: Executive offices are removable, but Congress can establish limits on presidential removal for significantly judicial, judicial-adjacent, or judge-like offices.

I believe Professors Birk, Manners, and Menand have come very close to solving this *Marbury* puzzle as a bigger, bolder limit on presidential removal. Working in conversation with Manners and Menand, we submit that in 1789, the original public meaning was that this limited-term-of-years understanding against presidential removal applied to more traditionally executive offices, as well as quasi-judicial ones.<sup>34</sup> This Essay finds that some of the gaps and questions left open by Professor Birk are addressed by Professors Manners and Menand, and it also adds some new answers, drawing from the congressional debates of 1789. The main point of this Essay is to draw from the First Congress's debate over presidential removal and Madison's proposal for a "good behaviour" comptroller in June 1789, which reveals that the first Congress understood that a fixed term of years for an office meant that either an officer could not be removed or that removal could be limited by conditions similar to requirements of high crimes and misdemeanors, much like Chief Justice Marshall understood *Marbury's* irrevocable job security.

Together, I believe we offer an anti-unitary (a pluralistic? congressionalist?) answer for *Marbury*. Taken together, this cadre of legal historians help explain the otherwise puzzling absence of removal and an explicit separation of powers clause in the Constitution: removal power was mixed and shared between the legislature and the executive in the Anglo-American tradition, which the Framers adopted as part of overlapping checks and balances, not hermetically sealed separation of powers. And taking a step back, I note a fundamental incongruity in the unitarians' assumptions: why would the Framers dramatically curtail the president's appointment power relative to kings—who needed no parliamentary approval for the Privy Council and other executive officers—but then increase the president's executive removal power relative to kings? It makes more sense that Congress could impose limits like requiring "neglect of duty," misbehavior, good faith, and good cause.

Part I provides more background about *Seila Law* and the upcoming *Collins v. Mnuchin*<sup>35</sup> and a summary of the Constitutional Convention, the ratification debates, and the First Congress, reflecting a mix of indecision and rejection of the unitary theory. Part II focuses on the unitary scholars' added

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34. Professors Manners and Menand initially identified the comptroller debate as a possible source of this original public meaning circa 1789 but with a different interpretation of the context consistent with unitary removal. Manners & Menand, *supra* note 26, at 22–24. In conversation with them, I identified a different meaning of the debate against the unitary removal thesis: that President Madison was not proposing "removal at the pleasure" of the president but good behavior removal, contradicting the unitary assumptions. The collaboration and conversations with Professors Manners and Menand have been mutually beneficial. In addition, I identified the Judiciary Act of 1789, ch. 20, 1 Stat. 73, as further evidence of this anti-unitary understanding.

35. 938 F.3d 553 (5th Cir. 2019), *cert. granted*, 89 U.S.L.W. 3001 (U.S. July 9, 2020) (No. 19-422).

word “all,” showing the opposite of what they intend—that one should infer from absence, rather than add and rewrite. Part III explores whether executive power includes removal, via *Marbury* and Madison’s misunderstood proposal for an independent comptroller in June 1789. Part IV summarizes some observations about the misunderstood word “vesting.”

## I. THE DECISIONS OF 1787, 1788, AND 1789

### A. *Seila Law LLC v. Consumer Financial Protection Bureau and Mnuchin v. Collins: The Decisions of 2020 and 2021*

When Congress created the CFPB, it included a limit on the president’s removal authority for its single agency head: “The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”<sup>36</sup> For over 130 years,<sup>37</sup> this has been roughly the formula Congress has used to protect the heads of independent agencies within the executive branch from politics, partisanship, or personal caprice.<sup>38</sup>

The arguments in *Seila Law* and *Collins* focus on the common provision in statutes creating independent agencies that limit the president’s removal power to “inefficiency, neglect of duty, or malfeasance in office.”<sup>39</sup> They insist these provisions impermissibly violate separation of powers. Indeed, the version of the “unitary executive” put forth by President Donald Trump, the U.S. Department of Justice, and the Fannie Mae and Freddie Mac shareholders would allow a president to fire any executive official for any reason—even personal reasons unrelated to the public interest—including any head of an administrative agency and the heads of “independent agencies,” like the CFPB, the Federal Reserve, the FTC, and the Nuclear Regulatory Commission.

In *Seila Law*, Chief Justice Roberts opened his analysis with a paraphrasing of the Vesting Clause—with the additional word “the”: “The President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*.”<sup>40</sup> But Chief Justice Roberts cited few historical sources, whether about the Vesting Clause, the Take Care Clause, the ratification debates, or from the First Congress in 1789.<sup>41</sup> This is odd for an ostensibly historical argument. One of the few original sources in Chief Justice Roberts’s decision was a letter from Madison, which he used to contend that “[t]he view that ‘prevailed, as most consonant to the text of the Constitution’ and ‘to the requisite responsibility and harmony in the Executive

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36. 12 U.S.C. § 5491(c)(3).

37. See generally Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139 (2015).

38. See Manners & Menand, *supra* note 26, at 6.

39. 12 U.S.C. § 5491(c)(3).

40. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020).

41. See *id.* at 2197.

Department,’ was that the executive power included a power to oversee executive officers through removal.”<sup>42</sup> Unfortunately, most of Madison’s House colleagues rejected these arguments. Chief Justice Roberts concluded: “But text, first principles, the First Congress’s decision in 1789, *Myers*, and *Free Enterprise Fund v. Public Co. Accountability Oversight Board*<sup>43</sup> all establish that the President’s removal power is the rule, not the exception.”<sup>44</sup> However, the text is far from clear and what Chief Justice Roberts means by “first principles” is even less clear.

This line of cases and the Vesting Clause have become a foundation for other assertions of exclusive executive power. These same historical questions shape the separation of powers and executive power debates in the even more high-profile cases over Trump’s tax documents: *Trump v. Mazars USA, LLP*<sup>45</sup> and *Trump v. Vance*.<sup>46</sup> In the D.C. Circuit, Judge Naomi Rao’s dissent in *Mazars* also relied on *Myers* and *Free Enterprise Fund*.<sup>47</sup> “[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.”<sup>48</sup>

In *Seila Law*, the Department of Justice asked the Court to overturn *Humphrey’s*.<sup>49</sup> In addition, in 2021, the Roberts Court has another chance to overturn *Humphrey’s* via *Collins*, as the Department of Justice contests the similar structure of the Federal Housing Finance Agency. On the D.C. Circuit, then judge and now Justice Brett Kavanaugh signaled his interest in revisiting and perhaps overturning *Humphrey’s*.<sup>50</sup> Will the Roberts Court use the Vesting Clause this year to push its unitary theory that far?

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42. *Id.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 890, 891 (Charlene Bangs Bickford & Kenneth R. Bowling eds., 2004)).

43. 561 U.S. 477 (2010).

44. *Seila L.*, 140 S. Ct. at 2206.

45. 140 S. Ct. 2019 (2020).

46. 140 S. Ct. 2412 (2020); *see id.* at 2437 (Thomas, J., dissenting) (citing *Myers v. United States*, 272 U.S. 52, 117 (1926)); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 747–48 (D.C. Cir. 2019) (citing *Myers v. United States*, 272 U.S. 52, 293 (1926)), *rev’d*, 140 S. Ct. 2019; *id.* at 780–81, 783 (Rao, J., dissenting) (first citing *Free Enter. Fund*, 561 U.S. at 493; and then citing THE FEDERALIST NOS. 47, 48 (James Madison)); Brief for the United States as Amicus Curiae Supporting Petitioner at 12, *Vance*, 140 S. Ct. 2412 (No. 19-635) (citing *Free Enter. Fund*, 561 U.S. at 505–06) (discussing executive removal); Brief for the United States as Amicus Curiae Supporting Petitioners at 13–14, *Mazars*, 140 S. Ct. 2019 (Nos. 19-715 & 19-760) (“The Constitution entrusts the President with . . . nominating, appointing, and removing officers.” (emphasis added)); *id.* at 14 (discussing *Clinton v. Jones*, 520 U.S. 681, 714 (1997) (Breyer, J., concurring), on the exclusivity of the Vesting Clause).

47. *Mazars*, 940 F.3d at 783 (citing *Free Enter. Fund*, 561 U.S. at 493).

48. *Id.* at 781 (quoting *Myers v. United States*, 272 U.S. 52, 116 (1926)).

49. *See* Brief for Respondent at 16 n.2, *Seila L.*, 140 S. Ct. 2183 (No. 19-7).

49. *Id.*

50. Jed Shugerman, *Brett Kavanaugh’s Legal Opinions Show He’d Give Donald Trump Unprecedented New Powers*, SLATE (July 19, 2018, 2:45 PM), <https://slate.com/news-and-politics/2018/07/brett-kavanaugh-would-give-donald-trump-unprecedented-new-powers.html> [<https://perma.cc/EZX4-99ZP>].

### B. *The Convention and The Federalist Papers*

Before digging into the Vesting Clause, it is crucial to understand that the Constitutional Convention of 1787 and the ratification debates of 1787–1788 did not come close to resolving the removal question. If anything, the evidence from the Convention and ratification leans against the unitary interpretation and in favor of a congressional check. This background is vital to understand the open-ended nature of the debate in the First Congress and the viability of the “congressional” and “senatorial” interpretations.

The unitary theory relies on the Take Care Clause, but it is vital to read the full clause and its historical context: “[The President] shall take care that the laws be *faithfully executed*.”<sup>51</sup> The references to “care” and “faithfulness” in the Take Care Clause are both vague (what precisely are the standards of “care” and “faithful execution”?) and ambiguous (do these words mean to expand power or to limit it?).<sup>52</sup> Chief Justice Taft relied on a president’s duty to take care as a constitutionally permissible basis for the president’s power to fire agency heads for any reason or no reason.<sup>53</sup> However, the Constitution’s emphatic double command of “faithful execut[ion]”<sup>54</sup> in the Take Care Clause and the presidential oath limits presidential discretion.<sup>55</sup> The word “faithfully” is a signal the Framers used to limit the exercise of presidential powers to good faith and *bona fide* purposes and fidelity to the public interest. That signal is supported by six centuries of history leading up to the Framers’ choice to add this duty in the Constitution.<sup>56</sup> This cluster of duties constrains the president with something similar to fiduciary duties.<sup>57</sup> The Framers chose language emblematic of the oath of high- and

51. U.S. CONST. art. II, § 3 (emphasis added).

52. These clauses are both ambiguous (possible different meanings) and vague (imprecise meanings). See, e.g., William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 14 (2019); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–99 (2010); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509 (1994).

53. *Myers v. United States*, 272 U.S. 52, 117 (1926).

54. U.S. CONST. art. II, §§ 1, 3.

55. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2189–90 (2019).

56. *Id.* at 2141; see also Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-delegation*, 17 GEO. J.L. & PUB. POL’Y 463, 466 (2019). The scholars’ amicus brief in *Seila Law* arguing against the CFPB’s good cause protections takes an odd turn when it describes “Faithful Execution and Article II”: “This argument fails, however, because it effectively transfers the duty to ‘take care’ from the President, to whom the Constitution gives such duty explicitly, to Congress. The argument is simply a disagreement with the Constitution.” Brief for Separation of Powers Scholars, *supra* note 13, at 17. “Faithful Execution and Article II” never suggested that the Take Care Clause empowered Congress to enact or specify “good faith” protections against removal. However, this Essay does. Moreover, it is unclear why an amicus brief would purport that others with a different interpretation of an ambiguous clause are simply “disagree[ing] with the Constitution.” This Essay suggests that neither the Constitution nor the First Congress supports this narrow orthodoxy.

57. “Fiduciary Constitutionalism, Corporate Defaults, and ‘Good Cause’ Removal,” my forthcoming paper with Ethan Leib, will suggest that Article II’s default removal rule is “good cause,” drawing on corporate default rules and founding-era public and private charters. Together, this research offers new evidence supporting Congress’s power to protect

mid-level ministers, not the royal coronation oath, which contained nothing like “faithful” execution—indicative of a more circumscribed scope of executive power.<sup>58</sup> The “faithful execution” clauses thus indicate that the president is already bound to remove someone only for good faith reasons in the public interest, similar to how Professor Peter Strauss has relied on “faithful execution” to frame the president’s role as a limited “overseer,” not an interventionist “decider.”<sup>59</sup>

The tenure of department heads did come up on the Convention floor. According to Madison’s notes on the Convention, Delegate Charles Pinckney proposed a long series of resolutions on August 20, 1787, including basic rules for each of the three branches, forerunners of the First Amendment on the press and the Third Amendment on quartering troops, and a habeas clause and other details.<sup>60</sup> Delegate Gouverneur Morris, seconded by Delegate Pinckney, added an executive council of six department heads who would serve “during pleasure.”<sup>61</sup> After debate focused on Delegate Pinckney’s proposals, the long slate was submitted to the Committee of Detail on August 20, 1787.<sup>62</sup> The Convention debates focused on Delegate Pinckney’s

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independent agencies. The Framers understood the Constitution to be a kind of corporate charter and the default rule for corporate charters, if silent on removal, is that they implicitly empower removal—but the removal power is limited by good cause. The Constitution is silent on executive removal, though it recognized impeachment as a mechanism of loss of office. Thus, the Constitution’s default rule for removal was a requirement of good cause. Charters before and during the founding era frequently used the language of “neglect of duty” or “malfeasance” for removal powers. Congress thus has a solid historical basis to translate, elaborate, or specify “good cause” as “inefficiency, neglect of duty, or malfeasance” in a range of contexts. This approach is consistent with the “essential” or “naturalistic” common-law approach from the 1789 debates. See GIENAPP, *supra* note 23, at 150–51, 153–54, 157. See generally Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993). Professors Gary Lawson and Guy Seidman used a similar fiduciary syllogistic argument for agency instruments and constitutional interpretation. GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION 4 (2017).

58. Kent, Leib & Shugerman, *supra* note 55, at 2127–28, 2159.

59. Peter L. Strauss, *Overseer, or “The Decider”?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702–03 (2007); see also, e.g., EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957: HISTORY AND ANALYSIS OF PRACTICE AND OPINION 80–81 (4th rev. ed. 1957); Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175, 180 (1993); Shane, *supra* note 22, at 361. For a similar concept of parallelism of delegation and supervision, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Abner S. Greene, *Discounting Accountability*, 65 FORDHAM L. REV. 1489 (1997).

60. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340–43 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

61. *Id.* at 342–43.

62. The Journal of the Constitutional Convention indicated at the beginning of the day’s notes that the propositions “passed in the affirmative.” *Id.* at 334. Why was this notation at the beginning of the day, not at the end, after debate? Was this early note on a preliminary vote to open debate? A vote on Delegate Pinckney’s propositions? Or a vote on Delegates Pinckney and Morris’s propositions together? The House adjourned after debating Delegate Pinckney’s proposals and then moved on to the question of debt the next day. From Max Farrand’s collection of three sources, it remains unclear whether there was any vote specifically on Delegate Morris’s proposal, but it seems more likely that there was no debate and no vote on the details of it. *Id.* at 334–51.

legislative proposals and the language on treason; there appears to have been no debate on any of Delegate Morris's proposals before the day adjourned and the debates turned to debt the following day.<sup>63</sup> No one spoke for or against Delegate Morris's proposal, but it was rejected in committee. Charles Thach, who was otherwise sympathetic to presidential removal power, described the failure as "*pro tanto* an abandonment of the English scheme of executive organization."<sup>64</sup>

Turning now to *The Federalist Papers*, Madison wrote that Congress had significant power to shape executive offices and removal. In *Federalist No. 39*, Madison discussed removal of executive officers in a remarkably prolegislative, open-ended way:

The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State Constitutions.<sup>65</sup>

Perhaps today the word "ministerial" has more of a connotation of inferior officers, but Madison was offering a dichotomy of judicial offices versus "ministerial" ones; thus he was more likely comparing the highest offices in each branch. It is important to recall that the English used the word "minister" for their highest executive offices. Thus, it seems Madison included principal officers as under "legal regulation" of tenure. In 1789, Madison would clarify further in the direction of congressional power. On May 19, 1789, Madison stated at the beginning of the department debates: "[I]t is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour, or during pleasure."<sup>66</sup> And in the treasury debates, he proposed good behavior tenure for the comptroller.<sup>67</sup>

*The Federalist Papers* alternately emphasized separation of powers and the overlap necessary for checks and balances. Checks and balances work only if there are overlapping powers and not siloes. Separation of powers depends on checks and balances and vice versa. But Madison's titles are instructive as to his own priorities: *Federalist No. 48* is titled "These Departments Should Not Be so Far Separated as to Have No Constitutional

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63. *Id.* at 340–50. (Aug. 20, 1787).

64. CHARLES C. THACH JR., CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 125 (1922).

65. THE FEDERALIST NO. 39, at 209 (James Madison) (E. H. Scott ed., Chicago, Scott, Foresman & Co. 1898).

66. 1 ANNALS OF CONG. 389–90 (1789) (Joseph Gales ed., 1834). Madison also acknowledged that the states had a mix of approaches to removal generally, including legislative powers over removal. On the references to state practices, William Loughton Smith, the leading supporter of the impeachment-only view, said, "I have turned over the constitutions of most of the states, and I do not find that any of them have granted this power to the governor." *Id.* at 490.

67. Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 890, 891 (Charlene Bangs Bickford & Kenneth R. Bowling eds., 2004) [hereinafter THE DOCUMENTARY HISTORY].

Control over Each Other.”<sup>68</sup> The title of *Federalist No. 51* is “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.”<sup>69</sup> Functional overlap was vital for Madison’s system. The nonexclusivity of presidential appointment, in favor of Senate advice and consent, and the nonexclusivity of congressional legislative power, in favor of the presidential veto, are two examples of checks and balances, rather than exclusivist separation.

Perhaps it is because of this emphasis on overlapping checks and balances that the Framers did not add a separation of powers provision to the Constitution. Maryland, North Carolina, and Virginia all included explicit separation provisions in 1776, followed by Massachusetts in 1780 and New Hampshire in 1792.<sup>70</sup> Did Madison and the Framers deliberately omit such a clause to avoid separation formalism and instead invite checks and balances functionalism?

Alexander Hamilton took a more checks and balances approach of overlapping removal powers, too. In *Federalist No. 77*, Hamilton wrote:

The consent of [the Senate] would be necessary to displace as well as to appoint. 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.<sup>71</sup>

Thus, Secretary Hamilton, a well-known supporter of strong executive power, nevertheless had presumed the Senate would be coequal with the president on “displacing”—that is, removing—officers. In the middle of the removal debates in the House in 1789, Secretary Hamilton announced that he had changed his mind,<sup>72</sup> but one year after that, he successfully proposed a proto-independent commission, the “sinking fund,” for purchasing debt,<sup>73</sup> which by statute included as members the chief justice of the U.S. Supreme Court and the vice president—neither of whom were removable by the president, though they were granted executive power.

It is also worth noting that Madison acknowledged in the 1789 debates that he initially favored the Senate removal position: Madison said his “original impression” was that “the same power which appointed officers should have the right of displacing them”—i.e., the Senate.<sup>74</sup> “But on examining the

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68. THE FEDERALIST NO. 48, *supra* note 65 (James Madison).

69. THE FEDERALIST NO. 51, *supra* note 65 (James Madison).

70. MD. CONST. of 1776, para. VI; MASS. CONST. of 1780, pt. 1, art. XXX; N.C. CONST. of 1776, DECLARATION OF RIGHTS, para. IV; N.H. CONST. of 1792, pt.1, art. XXXVII; VA. CONST. of 1776, BILL OF RIGHTS, § 5.

71. THE FEDERALIST NO. 77, *supra* note 65, at 419 (Alexander Hamilton) (footnote omitted); *see also* Jeremy D. Bailey, *The Traditional View of Hamilton’s Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL’Y 169 (2010). *But see* Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149, 149–54 (2010).

72. GIENAPP, *supra* note 23, at 154.

73. *See* Chabot, *supra* note 24, at 3–4.

74. *Congressional Intelligence: House of Representatives*, DAILY ADVERTISER (N.Y.), June 18, 1789, *reprinted in* 11 THE DOCUMENTARY HISTORY, *supra* note at 67, at 845, 845–46.

constitution by its true principles,” he also changed his mind.<sup>75</sup> If one is looking for clear original public meaning, Madison all by himself took all three major positions (senatorial, congressional, and presidential) and was more consistently congressionalist from 1787 through 1789.

### C. *The Indecision of 1789*

One reason it is so important to reexamine the text of the Vesting Clause is that it is the historical context on which the Supreme Court arguably relies more than any other evidence; in this context, the Decision of 1789 does not stand up to scrutiny.

The unitary theory relies heavily on the Decision of 1789. This may be because of the Constitution’s notable silence on removal and the vagueness and ambiguity of these clauses.<sup>76</sup> However, the three statutes establishing the U.S. Departments of Foreign Affairs (now the Department of State), War (now the Department of Defense), and the Treasury were also deliberately ambiguous about whether the president has the power to remove. Thus, the unitary theorists rely heavily on a fragmentary legislative history—the House debates and voting patterns—to interpret the statute’s ambiguous text as implying a constitutional basis for removal power.<sup>77</sup> In a forthcoming paper, I offer six overlooked moments from 1789 that dispel unitary assumptions<sup>78</sup>:

(1) The Decision of 1789 was actually a strategic ambiguity, a wily switch from an explicit grant of power to an ambiguous contingency clause, because Madison and the presidentialists lacked support in the House and Senate. Explanatory clauses were common for Madison and the First Congress but here, Madison steered in the opposite direction. His allies acknowledged their switch was a strategy to “obtain the acquiescence” of the Senate.<sup>79</sup> House opponents called this move a retreat and questioned its

75. *Id.*

76. “Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary.” *Free Enter. Fund v. Pub. Co. Accountability Oversight Bd.*, 561 U.S. 477, 483 (2010) (citing *Myers v. United States*, 272 U.S. 52 (1926)). “This ‘Decision of 1789’ provides ‘contemporaneous and weighty evidence’ of the Constitution’s meaning since many of the Members of the First Congress ‘had taken part in framing that instrument.’” *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)); *see also* *Parsons v. United States*, 167 U.S. 324, 332 (1897) (observing that the Decision of 1789 provides the “settled and well-understood construction of the Constitution”). The Supreme Court also narrowed its reading of the Decision of 1789 and permitted more congressional latitude in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). For other cases examining the Decision of 1789, *see Parsons*, 167 U.S. 324; *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1854). There are robust arguments about the constitutional significance of the First Congress and the Decision of 1789. *See, e.g.,* Baude, *supra* note 52, at 61; Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745, 1777 (2006).

77. *See, e.g.,* Calabresi & Rhodes, *supra* note 12, at 1165.

78. Jed Handelsman Shugerman, *The First Congress Rejected Unitary Presidentialism: The Indecisions of 1789, Strategic Ambiguity, and Removal by Judiciary* (Fordham L. Legal Stud., Working Paper No. 3596566, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3596566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566) [<https://perma.cc/W7SG-S67N>].

79. 1 ANNALS OF CONG. 608 (1789) (Joseph Gales ed., 1834).

integrity. The debates and votes suggest that only one third of the House supported Madison's theory, but a majority likely voted for the final bill because the clause was sufficiently unclear and malleable, and it was more important to move forward on an urgent legislative agenda.

(2) A senator's diary (overlooked by unitary scholars and the Supreme Court) shows that a majority of the Senate indeed opposed the bill—until political deals appear to have swung two or three votes. Critics emphasized the bill's confusion and its "illegally concealed [design]."<sup>80</sup> Sponsors, however, seem to have implied the clause had no "design" against the Senate's power and that the House's intent was irrelevant. The diary suggests that the bill's supporters followed through on a strategy of ambiguity and confusion, instead of clarifying the text.

(3) A tale of two Roberts: two scandalous finance ministers served as context for independent checks on executive power. In the shadow of "Robinarchy" self-dealing, the first Congress focused on the dangers of a corrupt president who would abuse at-pleasure removal power to raid the treasury and build a "throne."

(4) Justices have asserted that the First Congress decided officers served "at will," but very few members of Congress spoke in favor of presidential removal at pleasure in 1789. The First Judiciary Act and the debate over the treasury indicate Congress did not think "at will" was the rule for removal. Members discussed the justiciability of for-cause removals in the English writ tradition, suggesting an oversight role for Congress and the courts.

(5) In the treasury debate, Madison's comptroller proposal was understood as "good behavior" tenure, revealing a lack of consensus about removal conditions. Modern judges, including Chief Justice Roberts in 2010 and 2020, have misunderstood Madison.

(6) The Treasury Act's<sup>81</sup> anticorruption clause established removal by the judiciary, empowering relatively independent prosecutors and judges to check presidential power. Congress frequently enabled judicial removal over the next fifty years.

A majority of the first Congress opposed the powers cited by unitary theorists (the constitutional basis for presidential removal power and offices held "during pleasure"). On whether the president had exclusive removal power, the First Congress decisively answered no.

Perhaps because the historical record from 1789 is so weak, and because the Vesting Clause is so short and vague, the unitary theorists feel the need to add words to it, like the word "all."

## II. "ALL" THE PROBLEMS

The judges and scholars who find an exclusive presidential removal power in the Constitution cite two clauses from Article II: (1) the Executive Power or Vesting Clause: "The executive Power shall be vested in a President of

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80. 9 THE DOCUMENTARY HISTORY, *supra* note 67, at 118 (July 18, 1789).

81. Act of Mar. 3, 1809, ch. 28, 2 Stat. 535.

the United States”;<sup>82</sup> and (2) the Take Care Clause: the president “shall take Care that the Laws be faithfully executed.”<sup>83</sup> This Essay is not a deep dive into the textual and historical arguments, but it does highlight the basic textual problems in *The Federalist Papers* if one is claiming a formal and exclusive presidential removal power generally and “at pleasure” removal specifically.

The word “all” appears in Article I’s Vesting Clause (“All legislative Powers herein granted shall be vested in a Congress”<sup>84</sup>) but not in Article II or III’s Vesting Clauses,<sup>85</sup> raising some questions about executive exclusivity.<sup>86</sup> Article III’s Vesting Clause does not include the word “all,” but the word is used repeatedly in Article III to convey exclusive jurisdiction.<sup>87</sup> The Article I Vesting Clause’s addition of “herein granted” gives a possible answer to this issue.<sup>88</sup> Yet it is worth noting the absence of the word “all”—and the unitarians’ nontextual insistence on inserting it anyway.<sup>89</sup> As noted above, in his lone dissent in *Morrison*, finding the independent counsel a violation of the Executive Power Clause, Justice Scalia wrote, “[T]his does not mean *some* of the executive power, but *all* of the executive power.”<sup>90</sup> Similarly, Chief Justice Roberts’s first sentence of constitutional analysis in *Seila Law* also added the word “all” to Article II’s Vesting Clause: “Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President.’”<sup>91</sup> Professor Victoria Nourse calls this addition “pragmatic enrichment.”<sup>92</sup> The *expressio unius canon* might suggest that

82. U.S. CONST. art. II, § 1.

83. *Id.* § 3, cl. 1.

84. *Id.* art. I, § 1.

85. *Id.* art. II, § 1 (“The executive power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

86. See THACH JR., *supra* note 64, at 138; Calabresi & Prakash, *supra* note 12, at 575; Calabresi & Rhodes, *supra* note 12, at 1185, 1193 n.204; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583–86, 598 (1984). For more thorough discussion of “all,” see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 224, 252 n.151 (1985); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 762 (1999).

87. U.S. CONST. art. III.

88. See, e.g., Calabresi & Rhodes, *supra* note 12, at 1186, 1193 n.204. *But see generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

89. Many scholars suggest that Article II’s Vesting Clause vests “all” the executive power in a president. See, e.g., Calabresi & Rhodes, *supra* note 12, at 1203 n.244 (“Not only does the Vesting Clause of Article II grant all the executive power exclusively to ‘a President,’ but even the later provisions of Article II contemplate only presidential exercises of executive power.” (citation omitted)). It is important to note how common it is for unitarians to add the word “all” to Article II’s Vesting Clause, even though the word does not appear in the text of Article II’s Vesting Clause, while Article I’s Vesting Clause does use the word “all.” See, e.g., Calabresi & Prakash, *supra* note 12, at 568–69.

90. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

91. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. CONST. art II, § 1, cl. 1).

92. Nourse, *supra* note 15, at 4, 23–24; Shane, *supra* note 15, at 247; see also, e.g., *Morrison*, 487 U.S. at 705.

adding the word “all” belies and disguises the significance of its absence.<sup>93</sup> Justice Scalia taught that it is common sense to attribute meaning to conspicuous absences.<sup>94</sup>

Some scholars have offered solid explanations for why Article II’s Vesting Clause did not imply powers beyond those named explicitly in Article II. Some unitary theorists argue that Article II was simply listing exceptions to full presidential control (e.g., treaties and war powers needed congressional support). Professors Bradley and Flaherty respond that Article II listed powers that were entirely presidential: the power to require written opinions, the pardon power, and the ambassadorial receipt power.<sup>95</sup> Given that Article II offers examples of such executive powers, Bradley and Flaherty note that the *expressio unius canon* indicates that their list was complete, “rather than merely illustrative.”<sup>96</sup> They also note that Article III’s Vesting Clause, which is textually the same as Article II’s, is followed by a list of judicial powers that are interpreted to be exclusive, even if one can imagine that “judicial power” in the English tradition could have referred to additional powers.<sup>97</sup>

Consistent with this interpretation, I would add that Madison cautioned against such an approach of finding expansive implied powers. During the Convention, he indicated that the scope of executive power was limited to the textually explicit powers, “*ex vi termini*”<sup>98</sup> (i.e., from the force of the word or boundary, by definition). Madison agreed with Delegate James Wilson’s suggestion that executive powers “are designed for the execution of Laws, and appointing Officers” and further added that “executive powers *ex vi termini*, do not include the Rights of war & peace &c. but the powers sh[ould] be confined and defined—if large we shall have the Evils of elective Monarchies.”<sup>99</sup> Madison echoed these statements in *The*

93. *Expressio unius est exclusio alterius*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius> [<https://perma.cc/4A96-LBPM>] (last visited Mar. 16, 2021) (“[W]hen one or more things of a class are expressly mentioned others of the same class are excluded.”).

94. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1998).

95. Bradley & Flaherty, *supra* note 19, at 556; see also A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1363 (1994).

96. Bradley & Flaherty, *supra* note 19, at 555.

97. *Id.* at 557 (“As Alexander Hamilton notes in *Federalist No. 80*, after he recites Article III’s list of cases and controversies, ‘This constitutes the entire mass of the judicial authority of the Union.’ If Articles II and III are to be treated the same, this may suggest that the powers referred to in Article II should be construed as exhaustive, not illustrative, of the President’s authority.” (footnote omitted) (quoting THE FEDERALIST NO. 80, *supra* note 65, at 488 (Alexander Hamilton))). Professors Bradley and Flaherty are responding to Professors Calabresi and Rhodes. See Calabresi & Rhodes *supra* note 12, at 1176; see also *Kansas v. Colorado*, 206 U.S. 46, 81–82 (1907); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994). For further arguments against the unitary interpretation, see Froomkin, *supra* note 95, at 1352–53.

98. 1 FARRAND’S RECORDS, *supra* note 60, at 70.

99. *Id.* In his dissent in *Myers*, Justice James Clark McReynolds explained that *ex vi termini* signifies a principle of enumeration and a rejection of implied executive powers. If executive powers were not stated explicitly, they were not granted. *Myers v. United States*, 272 U.S. 52, 205 (1926) (McReynolds, J., dissenting) (“In the proceedings of the Constitutional Convention no hint can be found of any executive power except those definitely enumerated or inferable therefrom or from the duty to enforce the laws.”).

*Federalist Papers*: in *Federalist No. 14*, he wrote that the national government “is limited to certain enumerated objects,”<sup>100</sup> and in *Federalist No. 45*, “The powers delegated to the federal government are . . . few and defined.”<sup>101</sup> Madison’s arguments at the Convention and the ratification debates are a caution against finding any implied executive powers in Article II.

Nevertheless, it seems formalists on nondelegation are willing to highlight Article I’s use of the word “all” when it advances these inclusions; and exclusions arguably have implications: Article I’s vesting of “all” suggests more exclusivity than Article II’s, and its “herein granted” phrase suggests a more limited vesting of enumeration. The use of “all” in Article I signifies formally exclusive legislative power; its absence in Article II signifies perhaps more functionalism or more exceptions. This textual distinction—the “all” in Article I—would seem to bolster the textual case for the nondelegation doctrine. In fact, in his *Gundy v. United States*<sup>102</sup> dissent that previewed a sea change in this area, Justice Gorsuch implicitly distinguished the “all” in Article I from its absence in Articles II and III.<sup>103</sup> If one emphasizes the “all” for formalism in the Article I nondelegation context, consistency seems to demand some opposite effect in an Article II context.

In a forthcoming paper, I show that the 1787 Constitution, the 1781 Articles of Confederation, and other early charters used the words “sole,” “alone,” and “exclusive” when they sought to convey sole and exclusive powers.<sup>104</sup> Similarly, Professor Blake Emerson has observed that the 1787 Constitution itself used the word “sole” when it meant exclusivity in the impeachment clause<sup>105</sup>: “The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment . . . . The Senate shall have the sole Power to try all Impeachments.”<sup>106</sup> Emerson noted, “It seems that when the drafters wanted to make a grant of power exclusive, they knew how to say so.”<sup>107</sup>

As another paper in my series will explain, there is a historical reason and logic for more exclusivity about legislative power than executive power: prosecution and administration were so decentralized in early modern England and the United States, a mix of private prosecution and government

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100. THE FEDERALIST NO. 14, *supra* note 65, at 77 (James Madison).

101. THE FEDERALIST NO. 45, *supra* note 65, at 278 (James Madison).

102. 139 S. Ct. 2116 (2019).

103. “In Article I, the Constitution entrusted all of the federal government’s legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.” *Id.* at 2133 (Gorsuch, J., dissenting).

104. See ARTICLES OF CONFEDERATION of 1781; see also Jed Handelsman Shugerman, “Vesting”: Text, Context, Dictionaries, and Unitary Problems (Fordham L. Legal Stud., Working Paper, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3793213](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793213) [<https://perma.cc/83F8-5TRS>].

105. Blake Emerson (@BlakeProf), TWITTER (Jan. 8, 2021, 4:38 PM), <https://twitter.com/BlakeProf/status/1347659077136961536?s=20> [<https://perma.cc/Z9WU-2CDE>].

106. U.S. CONST. art. I, § 2, cl. 5.

107. Emerson, *supra* note 105.

prosecution that crossed federal-state boundaries.<sup>108</sup> It turns out that there was tremendous flexibility about relying on state governments to execute federal law,<sup>109</sup> as well as some question about the role of federal judges in supervising district attorneys, U.S. attorneys, and marshals.<sup>110</sup> Given this fluidity, it makes sense that the Framers had concluded that “all” the executive power would be exclusively the president’s if state officials, judges, and private prosecutors would play a role in executing the law.

### III. MADISON’S COMPTROLLER

William Blackstone, an eighteenth-century English jurist, identified appointment as a royal prerogative (and one that also fits the “executive power” that Professor Mortenson more carefully identified), but he did not mention removal. Blackstone wrote in his *Commentaries* about the royal prerogative “of erecting and disposing of offices.”<sup>111</sup> In the context of the paragraph, “disposing” appears to mean “at his disposal”—for disposing them to his subjects—rather than disposing of the offices, as in removal or dissolution. In the same passage, he wrote “honours are in the disposal of the king.”<sup>112</sup> Blackstone did not mention removal specifically in discussing the king’s powers. Perhaps the recent scholarship helps us understand why Blackstone says nothing about executive removal power and why the Constitution says nothing about executive removal power.

First, it is not at all obvious that the English had a distinct conception of “executive removal,” as opposed to all other forms of removal, when they did not even have a modern American doctrine of separation of powers. More precisely, there was “removal,” and there were different institutions charged with removal power over different roles. For instance, Parliament had a form of removal power in impeachment and the courts had a role in removal through writs of scire facias, quo warranto, and mandamus. And of course, there was also the problem that kings could not remove peers or lords. And over time, as Professors Manners and Menand have shown, kings could not remove judges or officers with a limited term of years.<sup>113</sup> It makes sense

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108. See Shugerman, *supra* note 104.

109. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 281 (1989). “Congress vested jurisdiction in state courts over actions seeking penalties and forfeitures, granted concurrent jurisdiction to state courts over some criminal actions, and assigned state officials auxiliary law enforcement tasks.” *Id.* at 303. “Despite the executive branch’s leading part, Congress, the courts, private citizens, and state officials have played significant supporting roles in federal criminal law enforcement.” *Id.* at 281; see also JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 83 (2012); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 70 (1923); Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 941, 966 (1947).

110. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 131–34, 153–54, 167, 170 (2014).

111. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*272.

112. *Id.*

113. Manners & Menand, *supra* note 26, at 33–34.

that Blackstone did not mention removal as a royal prerogative or right because an eighteenth-century English lawyer would not recognize that the king had a general “removal” power, and an eighteenth-century English lawyer would not have had a conception of “separation of powers” to identify and separate out an “executive removal” power or an exclusive removal power.

Professors Manners and Menand trace back to the eighteenth century the origins of “neglect of duty” and “malfeasance,” which today are the for-cause removal standards for modern independent agencies.<sup>114</sup> Professor Birk also documents removal standards of “neglect of duty . . . or other just Causes” for Scottish Court of Exchequer officers in 1707,<sup>115</sup> “neglect of duty” for coroners in 1751,<sup>116</sup> and “[i]nability, or for other just Cause,” for constables in 1756,<sup>117</sup> as part of a surprising degree of pluralism about offices and tenure in early modern England.<sup>118</sup> However, each of these offices had a judicial, or at least a judicial-adjacent role, Justice Scalia’s *Morrison* dissent notwithstanding.

Professor Birk powerfully reminds us that not only is the past a different country, but also that England is a different country. A limited monarchy bargaining with a landed aristocracy is a very different country than one that rejected monarchy decisively. Something has gotten lost in translation. In a mixed monarchy/aristocracy, English kings consolidated power and used appointments to create heritable honors and offices as property rights, often held in fee or held for life.<sup>119</sup> The classic example was peerages, but Professor Birk shows that the practice extended to more functional government offices.<sup>120</sup> However, one gap in Professor Birk’s study is that most of his examples come from the fifteenth through the seventeenth centuries, and he acknowledges the curtailment or abolition of many of these practices in the late seventeenth century.<sup>121</sup> Perhaps England was modernizing from a feudal aristocracy to a hierarchical administrative state and, as such, was strengthening the hand of a central government after a century of civil war. Then Professor Birk offers more examples from the 1780s, which seem to coincide with questions about King George III’s stability.<sup>122</sup> Most of these examples seem too early or obsolete or too late to influence the Framers. The other problem is that most of these offices had some mixed judicial role: chancery, exchequer, attorneys general, solicitors general, sheriffs, coroners, and justices of the peace. To his great credit, Professor Birk acknowledges that most of these offices had a judicial

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114. *Id.* at 29.

115. Exchequer Court (Scotland Act) 1707, 6 Ann. c. 26, § 4 (Scot.).

116. Coroner’s Act 1751, 25 Geo. 2 c. 29, § 6 (Eng.).

117. Westminster Act 1756, 29 Geo. 2 c. 25, §§ 1, 6 (Eng.).

118. Birk, *supra* note 25, at 223–24.

119. *Id.* at 204–05.

120. *Id.* at 205–06.

121. *Id.* at 206–08.

122. *Id.* at 204–08.

function,<sup>123</sup> including the sheriffs, coroners, and justices of the peace.<sup>124</sup> This is not surprising in a medieval or early modern system of local elites playing mixed roles in maintaining the peace. His argument is that they had enough executive function to count for executive purposes.<sup>125</sup> However, that approach does not solve our problem when trying to translate English mixed powers and practices to the United States with its newfangled separation of powers. Conversely, these offices were judicial enough to fit into a norm expressed by Marbury's lawyer, Charles Lee: judicial independence, with or without a life-tenured Article III judgeship.<sup>126</sup> The existence of a partial judicial role could explain an exception to a more general rule of royal removal.

Translating from English practice to the United States, Professors Manners and Menand fill in those gaps by finding that, surprisingly, when an office had a term of years but no removal conditions, the rule was that those offices were not removable.<sup>127</sup> Modern readers assume presidential removal at will, but it turns out English practice provided a different administrative system with different default rules. Crucially, Professors Manners and Menand pick up where Professor Birk left off, finding this rule in effect for more clearly executive offices in treasury/finance, in colonial America and mid-nineteenth-century America.<sup>128</sup> The question remains from their evidence from the late colonial period, the founding, and the early republic: most of these offices or treatises relate to the same kinds of semijudicial offices that Professor Birk identified.<sup>129</sup> In *Marbury*, attorney Charles Lee and Chief Justice Marshall still could be read as endorsing this property rule but arguably only for judge-like offices. What seems to be missing is a clear statement of this default rule for relatively nonjudicial *executive* offices in the United States in the founding era.

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123. *Id.* at 208–09, 208 n.199.

124. Professor Birk writes of the justices of the peace:

Although they exercised a local judicial jurisdiction, presiding over the Quarter-Sessions, they were also law enforcement officers, charged with keeping the peace and executing national laws. As to this latter function, Parliament vested the Justices of the Peace with significant administrative and regulatory authority. Statutes instructed them to execute laws related to infrastructure, the environment, public health and safety, and prisons, as well as to assess taxes, administer the poor laws, set wages and prices, and license wine retailers and alehouses.

*Id.* at 209 (footnotes omitted). Professor Richard Tompson describes justices of the peace as “[a] combination of police inspector, magistrate and county councilor.” Richard S. Tompson, *The Justices of the Peace and the United Kingdom in the Age of Reform*, 7 J. LEGAL HIST. 273, 273 (1986).

125. Birk, *supra* note 25, at 208–09, 208 n.199.

126. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 151 (1803).

127. Manners & Menand, *supra* note 26, at 33–34.

128. *Id.* at 38–45.

129. *Id.* Examples include a colonial Pennsylvania sheriff and coroner; New York's justices of the peace, county court judges, sheriffs, and coroners; and Massachusetts's, North Carolina's, and perhaps New Hampshire's justices of the peace. *Id.* As noted above, all of these offices had a semijudicial role in England and possibly also in the United States. Professors Manners and Menand offer some stronger evidence from Samuel Chase.

Inspired by Professors Manners and Menand, I offer one—or maybe three—such examples: the widely misunderstood debate over the comptroller in June 1789, plus two similar speeches in the First Congress.<sup>130</sup> It was none other than Madison who reflected this norm and his colleagues who opposed his proposal confirmed this understanding: they argued against Madison’s limited-year term precisely because they understood that this formula, as a matter of inherited practice, meant tenure “during good behaviour” and would have limited presidential removal as its default rule. Chief Justice Roberts misunderstood this comptroller debate in *Seila Law* because of his unitarian assumptions. Former judge Michael McConnell repeats the same assumptions in his 2020 book, *The President Who Would Not Be King*.<sup>131</sup>

I confess that I did not understand why Madison’s interlocutors assumed he was proposing “good behaviour” tenure until I read Professors Manners and Menand’s analysis on *Marbury* and nineteenth-century sources and applied the same context to the comptroller. I also found similar legal explanations about offices held for limited years offered elsewhere in the 1789 debates by Representatives John Laurance<sup>132</sup> and Samuel Livermore.<sup>133</sup>

There has been a long-standing historical puzzle in *Marbury*: why did Chief Justice Marshall conclude that President Jefferson could not withhold the office from Marbury? And why did President Jefferson and Madison fight out a commission if President Jefferson could have simply removed Marbury at will? Professors Manners and Menand answer that the Federalists enacted the justice of the peace offices with a term of five years—apparently deliberately—to protect Marbury and their other midnight appointments in the District of Columbia from presidential removal power.<sup>134</sup> Why would they have gone to such trouble to create these offices if everyone assumed that President Jefferson could remove the officers the day after his inauguration? Thus, the Federalists reflect the same understanding about fixed terms as unremovable property in the office, unless the statute specified a power of removal.

The lingering question is whether all of these assumptions would be consistent with a rule that applied only to judicial, judge-like, or judicial-adjacent offices. If so, presidents would still have removal power over predominantly executive officials. As noted above, Professors Manners and Menand offer significant evidence before and after this era, but there appears to be a gap in their evidence about whether the founding generation understood the rule to apply to more traditionally executive offices. It turns

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130. Professors Manners and Menand generously acknowledge my interpretation. *See id.* at 22 n.129.

131. MICHAEL MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 166–67 (2020).

132. 1 ANNALS OF CONG. 500–05 (1789) (Joseph Gales ed., 1834).

133. *Id.* at 564–66. Thanks to Professors Manners and Menand for helping interpret this statement.

134. Manners & Menand, *supra* note 26, at 6 n.23.

out that the First Congress—and James Madison himself, along with some of his colleagues—offers such evidence in the debate over the comptroller from June 1789.

The complicated debate about the comptroller has produced much confusion over the years. In the treasury debates, Madison and his colleagues confirmed that a term of years implicitly meant tenure during good behavior. On June 29, 1789, Madison proposed the following language: “the comptroller should hold his office during years, *unless sooner removed by the president.*”<sup>135</sup> Modern readers have assumed that this removal was at will, mainly because it is difficult to set aside our modern assumptions.<sup>136</sup> Secondly, for those who assume a unitarian 1789, it is difficult to read Madison’s pro-presidential speeches on foreign affairs in mid-June, and then a week later, and argue that he shifted to antipresidential views regarding the treasury in late June.

But, in fact, the presidentialism of his foreign affairs speeches<sup>137</sup> from June 16 to June 22 was actually the aberration in this era. First, as noted earlier, Madison told Delegate James Wilson during the Convention that he believed the scope of executive power was “*ex vi termini,*”<sup>138</sup> “confined and defined,”

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135. 1 ANNALS OF CONG. 636 (emphasis added).

136. Brief for Separation of Powers Scholars, *supra* note 13, at 24 (“But he did not propose any restriction on the President’s removal power; to the contrary, he proposed that the Comptroller be appointed for a relatively short term, ‘unless sooner removed by the President.’” (quoting 1 ANNALS OF CONG. 636). To their credit, Professors Prakash and Mashaw acknowledge that Madison was proposing more secure tenure for the comptroller but each misunderstood it. Professor Jerry Mashaw, while understanding Madison’s proposal to mean increased job security, also overstated the proposal: “Because of this authority to determine individual appeals, James Madison suggested that the Comptroller should not hold office subject to presidential removal, but should be given a term of years.” Jerry L. Mashaw, *Recovering American Administrative Law: Federalism Foundations, 1787–1801*, 115 YALE L.J. 1256, 1285 (2006). Madison’s proposal explicitly gave the president a power of removal, but it was the term-of-years language that limited that power. For an analysis of Professor Prakash’s arguments, see *infra* note 144 and accompanying text.

137. 1 ANNALS OF CONG. 473–98.

138. 1 FARRAND’S RECORDS, *supra* note 60, at 70. Madison’s perspective seems to shift modestly back and forth from 1787 to 1789, from more openness to congressional power to more emphasis on presidential power—and back again. See *infra* Part II.B; see also David S. Schwartz and John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033, 2076–77 (2021). Such a shift should give pause to originalists who focus on original public meaning circa 1787 because Madison’s arguments in 1789 and thereafter may reflect his changing political interests over time, rather than his recollecting a consensus from 1787 to 1788. See generally MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (discussing Madison manipulating records and recollections in the early republic to suit his political agenda). It is possible that Madison’s views did not change much after all, and he was simply more focused on rejecting Senate control over removal, a proposal that he had not addressed before. But it is also possible that he shifted his views as the republic came into shape after many compromises in the Convention and leaders could observe a new balance of power. Perhaps Madison’s increased support for presidential power after 1787 to 1788 was traceable to the trust of President George Washington or a desire to ingratiate himself to Washington. Or he shifted in order to win his surprisingly difficult race to win a House seat against James Monroe and his anti-Federalist backers (we know he changed his mind on a bill of rights in this race), and he needed Washington’s support to keep winning this district. Or he saw himself as needing to protect his Virginia constituents and slavery, as it became clear that Virginia, by far the most populous state, with 20 percent of the population,

and did not include implied powers,<sup>139</sup> as Justice James Clark McReynolds explained in *Myers*.<sup>140</sup> In *Federalist No. 39*, Madison wrote, “The tenure of the ministerial offices generally, will be a subject of legal regulation.”<sup>141</sup> On May 19, 1789, Madison repeated his endorsement of legislative control: “[I]t is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour, or during pleasure.”<sup>142</sup>

Instead of recognizing Madison’s more thorough congressionalism, jurists and scholars have read his comments in isolation. Thus, they miss that the rest of the debate clarified that Madison was proposing tenure “*during good behaviour*” for the comptroller, a Senate-confirmed executive office. This episode puts Madison in a new light. Many have noted how he previewed the quasi-judicial justification for independent agencies, but it is vital to read the full debate to see that Madison: (1) rejected the notion that the House had settled on at-pleasure tenure as the rule,<sup>143</sup> (2) was a more consistent

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had much more control over presidential politics than it had over the Senate. Madison may have understood more clearly that Virginia’s interests lined up more with a strong president—who was more likely to come from Virginia due to the Electoral College—than with the Senate, which was stacked in favor of the small states. But the rest of the 1789 debate might also be a cautionary tale.

139. See *supra* note 138 and accompanying text.

140. *Myers v. United States*, 272 U.S. 52, 205 (1926) (McReynolds, J., dissenting).

141. THE FEDERALIST NO. 39, *supra* note 65, at 211 (James Madison). Earlier in *Federalist No. 39*, Madison wrote:

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.

*Id.* The first sentence is not precisely about the Constitution, but it embraces a range of republican tenures. It seems more likely that by “administered,” Madison meant any office, and each form of tenure tracks the range of legislative, executive, and judicial offices: “[a] limited period” relates to Congress and the president; “good behavior” to judges and the president; and, depending on one’s interpretation, “pleasure,” or any of the three, to executive offices under the president. In light of Madison’s discussion of congressional discretion over “ministerial” offices, he seems to have been leaving a door open to all three. The next passage creates some confusion: “[T]hey hold their appointments by *either* of the tenures just specified.” *Id.* (emphasis added). Does his use of “either” suggest a dichotomy: during pleasure for a limited period versus good behavior? The answer is almost certainly no, given the breadth of the paragraph and its likely description of legislative offices. But this trichotomy, including the nonremovability of limited-term offices, seems to have been the understanding about options for executive offices in the First Congress. See Shugerman, *supra* note 78; see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 338–39 (Boston, Charles C. Little & James Brown 1851) (interpreting the first Congress making “at pleasure” the default but also suggesting that Congress could add a limited term of years to prevent any power of presidential removal); Manners & Menand, *supra* note 26, at 19 (citing 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW, BY A GENTLEMAN OF THE MIDDLE TEMPLE 732 (1740)).

142. 1 ANNALS OF CONG. 389–90 (1789) (Joseph Gales ed., 1834). Madison also acknowledged that the states had a mix of approaches to removal generally, including legislative power over removal. On the references to state practices, William Loughton Smith, the leading supporter of the impeachment-only view, said, “I have turned over the constitutions of most of the states, and I do not find that any of them have granted this power to the governor.” *Id.* at 490.

143. *Id.* at 636; see *infra* Part II.B.

skeptic of the unitary model, and (3) warned specifically about presidential corruption of the treasury.

Starting from presidentialist assumptions, the ensuing debate appears contradictory and incoherent. Unitary scholars claim that Madison's colleagues were "baffled"<sup>144</sup> and reacted with "incredulity."<sup>145</sup> Indeed, to modern readers with presentist assumptions about offices, Madison's language is confusing. But to the contrary, all of the debate participants understood that this proposal was for "good behavior" tenure, and the best explanation is that they immediately knew what a term limited to a fixed number of years legally implied.

#### IV. *MARBURY* AND VESTED RIGHTS?

Perhaps *Marbury* solved one problem but opens another question: did "vestedness" mean a special legal protection from being revoked? Chief

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144. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1070 (2006). Professor Prakash was confused about Madison's proposal, given that it is difficult for modern readers to set aside our presentist assumptions. He thought it was "at odds" with a judicial analogy, but that is because he missed the "good behaviour" context of the early modern law of offices during a term of years. To his credit, Professor Prakash recognized that Madison was protecting the comptroller, and this was constitutionally significant:

Despite the equivocal nature of this episode, it suggests that the Decision of 1789 did not encompass the conclusion that the President had the power to remove *all* officers of the United States lacking constitutionally granted tenure . . . . Though we cannot say how many members of the majority would have sided with Madison on this issue, there is no doubt that a split existed. Given the division on Madison's withdrawn motion, it is impossible to say that the Decision resolved the removal question regarding officers who are neither Article III judges nor executive officers. *Id.* at 1071–72. Even after Professors Manners and Menand have explained the different context of that era—and how it continued into ours—originalists still have trouble grasping this different historical framework. In a short critique of Professors Manners and Menand, Professor Ilan Wurman argues, "[M]oreover, their own evidence suggests that a fixed term with no removal would have been understood to be unconstitutional: for the first one hundred years, Congress almost always added to statutory provisions providing for fixed terms the proviso, 'unless sooner removed by the president.'" Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 143 n.205 (2020). Professors Manners and Menand point to a significant 1801 statute that established Marbury's office and the one recognized by Chief Justice Marshall as providing no removal power in *Marbury*. See An Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 103, 107 (1801); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803). Professors Manners and Menand also cite *United States v. Cooper*, 4 U.S. (4 Dall.) 341 (1800). In addition to Professors Manners and Menand's evidence, Joseph Story's *Commentaries on the Constitution of the United States* and Madison's *Federalist No. 39* and arguments in 1789 also lend support to their interpretation. See generally STORY, *supra* note 141; THE FEDERALIST NO. 39, *supra* note 65 (James Madison). A valid research question is how often Congress created similar fixed-term offices without a removal provision. Interestingly, Professor Wurman does not interrogate a constitutional basis for "at pleasure" versus "at will" removal beyond this footnote but just asserts that the removal power is "indefeasible." Wurman, *supra*, at 144. But elsewhere in amicus briefs, Professor Wurman makes assumptions about the term "unless sooner removed by the President" in other statutory contexts, by assuming it meant "removable at will." See *infra* Part III.C. However, this episode shows that these assumptions about the use of this phrase do not line up with the 1789 understanding.

145. Calabresi & Prakash, *supra* note 12, at 652.

Justice Marshall wrote: “[Marbury’s] appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.”<sup>146</sup>

*Marbury* reminds us of the vested rights doctrine in the Marshall Court, as it recognized Marbury had a “vested right” to his office that the president could not revoke.<sup>147</sup> Was this language a link from the vested rights doctrine—indeefeasible property excluding legislative interference—to the Constitution’s “vested powers”—exclusive indeefeasible powers excluding Congress and judicial interference? It is hard to find any unitary scholar making this connection explicitly, but perhaps this connotation influenced Justice Scalia, Chief Justice Roberts, and others to add the word “all” to Article II’s Vesting Clause. Unitary scholars use the words “exclusive” and “indeefeasible by Congress” when talking about presidential removal power,<sup>148</sup> words that are associated with the vested rights doctrine. It appears that they assume a connection between these concepts.

The first problem is that historians trace the vested rights doctrine, as a constitutional limit on legislative powers, to the early nineteenth century. The English common law had a notion of “vested rights” but in a common-law system without constitutionalized meaning. Instead, “vested rights” were in contrast to future interests and conditional interests. In eighteenth-century England, offices could become “vested” in this property sense, so that the king or another officer could not remove them from the office unilaterally. But this sense of “vesting” property from executive removal was fundamentally different from vesting the property from any legislative changes or conditions. This constitutionalized meaning evolved in a new legal system of written constitutions limiting legislative power over contract and property.

*Marbury* reflects this English sense, a limit on executive discretion, while empowering the legislature over the executive: Congress had the power to create a nonremovable office, limiting the president’s power to remove. Nothing in *Marbury* indicates that Congress could not abolish the office. In fact, *Stuart v. Laird*<sup>149</sup> indicates that the Marshall Court accepted the congressional abolition of Article III judgeships. *Marbury* itself did not indicate that the phrase “vested rights” meant a limit on legislative power, but the Marshall Court used it that way soon after in *Fletcher* and *Trustees of Dartmouth College*.<sup>150</sup>

Could this connotation be read back into the use of “vested” with respect to powers a few decades earlier? As I have found, the era’s dictionaries and eighteenth-century documents suggest this reading is an anachronistic

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146. *Marbury*, 5 U.S. (1 Cranch) at 162.

147. *Id.*

148. See, e.g., Prakash, *supra* note 144, at 1040.

149. 5 U.S. (1 Cranch) 299 (1803).

150. 17 U.S. (4 Wheat.) 518, 558 (1819). See generally *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

projection. As textualist critics warn, legislative history is “like entering a crowded cocktail party and looking over the heads of the guests for one’s friends.” Perhaps the unitary scholars have read a party of mid-nineteenth-century cases on contracts and property discussing “vested rights” and believe they are representative of eighteenth-century constitutions. My forthcoming study of eighteenth-century dictionaries and sources questions those assumptions. There is little evidence of “vesting” making a leap from property rights to powers with anything like a meaning of indefeasibility and exclusivity.

Only in the early nineteenth century did the language of “vested rights” emerge clearly in a constitutional/anti-legislative context, borrowing from the notion of present rights that were not contingent; but instead of the contingency of events on property title and fee simple, for example, the new contingency was against Parliament and imperial infringements.<sup>151</sup> Chief Justice Marshall seems to have been using “vested” in the sense that *Marbury*’s property was not a contingent or conditional future interest awaiting delivery of a commission but was already legally protected regardless of delivery. Chief Justice Marshall did not use the word “vested” with respect to congressional powers and in fact deferred to Congress’s power over even judicial offices in *Stuart*.<sup>152</sup> The vested rights doctrine does not seem to have been around long enough to have shaped the original public meaning of “vested” as exclusive.

My next paper in this series explains how the Constitution did not assign many traditional English executive powers to the president and that the word “vest” did not have the exclusive or indefeasible meaning assumed today, drawing from the era’s dictionaries, colonial charters, and early state constitutions.<sup>153</sup> For example, if the Vesting Clause implicitly delegated “all” traditional executive powers solely to the president, it requires some gymnastics to explain the shared appointment, war, and treaty powers and also the lack of prerogative and dissolution powers. One surprising finding was how the word “vested” was almost never used in colonial charters, and then it suddenly emerged in some, but not all, early state constitutions, and yet the word was not used in a context of exclusivity or unconditionality.<sup>154</sup> Based

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151. Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1444 (1999); see also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1699–703 (2012); George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 19–20 (1981) (citing *Turpin v. Lockett*, 10 Va. (1 Call) 113 (1804)); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 102 n.51 (1993); Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL’Y 253, 258 (2018) (“The doctrine of vested private rights is generally viewed as an American phenomenon of largely historical interest. The concept of vested private rights as a check on legislative sovereignty came into full flower on American soil at the time of the Revolution.”); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780–82 (1936).

152. 5 U.S. (1 Cranch) at 304.

153. Shugerman, *supra* note 104, at 21–37.

154. *Id.* at 23–28.

on a search of dozens of eighteenth- and nineteenth-century dictionaries and databases, “vest” was simply defined as “possess,” and if dictionaries, both legal and general, offered a legal context, it was in simple terms about property. Dictionaries overwhelmingly used the word “vest” in a less robust context, and many legal dictionaries did not include entries at all for the word. This next paper, titled “Vesting,” also examines the use of the word in the Articles of Confederation<sup>155</sup> and the 1787 Constitution,<sup>156</sup> finding only a limited meaning.

Professor Mortenson made an observation about the word “executive” as “semantic drift,” as separation of powers developed and became reflexive and assumed.<sup>157</sup> In a similar dynamic, lawyers and judges conflate the word “vested” as an eighteenth-century basic property rights doctrine with a nineteenth-century constitutional doctrine, and even then, the doctrine was about irrevocable property in holding offices, not irrevocable official powers over offices. It took some time to have written constitutions to produce a robust sense of constitutional law and to have judicial review of statutes to borrow such a term from the timing of property contingencies from a non-judicial-review context. This semantic drift then becomes constitutional drift as the unitary theorists assume, perhaps subconsciously, that “vested rights” can be read back into “vested powers.” This linguistic move is understandable, but it appears anachronistic. If one simply notes that the word suddenly appeared in U.S. state constitutions in 1776 without much context and then reads the Articles of Confederation and dictionaries from the era, one cannot claim a clear original public meaning for the vesting clauses beyond a simple statement of possession and no evidence of “indefeasibility.”

#### CONCLUSION

Taken together, this cadre of legal historians help explain the otherwise puzzling absence of removal and an explicit separation of powers clause in the Constitution: removal was mixed, shared, and subject to legislative regulation in the Anglo-American tradition, and the Framers adopted it as part of overlapping checks and balances, not hermetically sealed separation of powers. And taking a step back, I note a fundamental incongruity in the unitarians’ assumptions: why would the Framers dramatically curtail the president’s appointment power relative to kings—who needed no parliamentary approval for the Privy Council and other executive officers—but then increase the president’s executive removal power relative to kings? It makes more sense that Congress could impose limits like requiring

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155. ARTICLES OF CONFEDERATION of 1781, art X (“The United States in Congress assembled shall also have the *sole and exclusive right and power* of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.” (emphasis added)); *id.* art IX (“The United States in Congress assembled, shall have the *sole and exclusive right and power* of determining on peace and war.” (emphasis added)).

156. U.S. CONST. art. I, § 8; *id.* art. II, § 2.

157. Mortenson, *supra* note 18, at 1245.

“neglect of duty,” misbehavior, good faith, and good cause. Such an interpretation fits the larger project of this symposium: to excavate the original federalist, republican, democratic Constitution, stripped of the ahistoric royalism of the unitary scholars’ assumption and projections.