DOES A REMOVAL POWER EXIST? JOSEPH STORY AND SELECTIVE LIVING ORIGINALISM

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ABSTRACT

This article analyzes Joseph Story's discussion of the power to remove executive officers in his famous *Commentaries on the Constitution of the United States*. This article's analysis of Story's views casts a fresh light on the modern Court, suggesting that the Supreme Court practices living originalism by favoring originalist sources that support its own views of what political arrangements best meet current needs.

In spite of burgeoning interest in the unitary executive theory, which maintains that the Constitution grants the President unfettered removal authority, Story's landmark treatment has not received sustained attention. Yet Joseph Story served as an early Supreme Court Justice, wrote the most highly regarded early treatise on constitutional law, and made Harvard Law School a leading institution through his teaching and scholarship. His views deserve to be taken seriously.

Story's *Commentaries* suggest that the Constitution does not empower the President to unilaterally remove executive officers. Instead, Story explains, removal occurs by operation of law when the Senate approves a new nominee to replace an incumbent official that the President wishes to replace. Story's view enjoys substantial originalist support. Indeed, evaluation of the evidence supporting this view shows that the Supreme Court's contrary view stems from selective originalism—where only a portion of constitutionally germane text is analyzed and only a moment of constitutional history is given any weight.

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I. INTRODUCTION

Joseph Story is one of the most seminal figures in United States constitutional law. He served as Justice of the United States Supreme Court for thirty-two years, writing more opinions than any of the Marshall Court's Justices except Marshall himself. His opinions in cases such *Martin v. Hunter's Lessee*[1] and *Swift v. Tyson*[2] became landmarks of constitutional law. He championed the notion of legal science and the idea that proper uniform application of law would strengthen the recently established union.

Joseph Story also played a key role in establishing Harvard Law School as a leading institution. In 1827, Harvard had but one law student and one law professor. In that year, Justice Story assumed the Dane Professorship with the goal of establishing Harvard as a training ground for lawyers serving as "leaders of the common good."[3] His teaching and scholarship rescued and established Harvard Law School.

This scholarship included several major treatises, none more famous than his *Commentaries on the Constitution,* first published in 1832. The *Commentaries* are widely considered the leading treatise on constitutional law from the nineteenth century. The *Commentaries* are comprehensive and include an extended discussion of the power to remove officers of the federal government.

They suggest that absent contrary legislation, "removal" of executive officers "takes place, in virtue of the new appointment, by mere operation of law."[4] Removal "results," wrote Story, "from the appointment itself."[5] In other words, absent legislation to the contrary, the Constitution does not permit the President to remove an executive officer by himself. Instead, if the President believes that an officer should be removed, he must nominate a successor. If the Senate approves the nominated successor, that approval removes the predecessor from office.

1. 14 U.S. (1 Wheat.) 304 (1816).

2. 41 U.S. (16 Pet.) 1 (1842).

3. *Looking Back at the Founding of Harvard Law School*, HARV. L. TODAY (Sept. 13, 2017), https://hls.harvard.edu/today/looking-back-founding-harvard-law-school.

4. JOSEPH STORY, II COMMENTARIES ON THE CONSTITUTION § 1538 (2d ed. 1851). This article generally cites to the second edition, which appeared in 1851. But with one significant exception, which is noted, the language quoted is identical in the first edition, published in 1833.

5. *Id*.

Story's *Commentaries* go on to describe this doctrine—of removal by appointment of a successor—as "the doctrine maintained with great earnestness by the Federalist."[6] Here he cites to Federalist No. 77,[7] in which Alexander Hamilton wrote: "It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to *displace* as well as to appoint."[8]

The term "displace" suggests exactly what Story posited, that removal takes place via appointment of a successor.[9] An officer is not removed to create a void; he is displaced by another official. And that displacement requires the consent of the Senate.

This suggestion by one of our early Supreme Court Justices and the author of a one of our oldest constitutional law treatises gives rise to a question: Does the Constitution contain a unilateral presidential removal power? This question differs from the question occupying most modern judges and scholars. Most of them assume that the Constitution creates a presidential removal power and focus on the question of whether Congress may qualify it under the Necessary and Proper Clause—for example, by only authorizing removal for cause.[10] If the Constitution does not

6. *Id*. § 1539.

7. *Id*. § 1539 n. 4.

8. THE FEDERALIST NO. 77 at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

9. Seth Tillman appears to question this position in a puzzling passage. *See* Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 151-54 (2010). This passage suggests that the displacement language used by Hamilton does not refer to removal. *Id*. at 153–54. Practically no authority supports such a view and a wealth of authority supports Hamilton's (and therefore Story's) view that displacement was intended to remove the incumbent officer, as Tillman notes. *See id*. at 151, 161–64 (noting that Supreme Court majority and dissenting opinions, scholars, and debaters in the first Congress all maintained that Hamilton's displacement language included removal). The best reading of Tillman, however, suggests that he recognizes that Hamilton likely meant to endorse removal through appointment of a successor. *See id*. at 157 (suggesting that the term displace indicates that an officer "is *removed* by . . . the act of *replacing* him."); e-mail from Seth Tillman to author (Aug. 30, 2023) (on file with author) (agreeing that Story is most likely referring to "removal by replacement of the incumbent").

10. *See* Collins v. Yellen, 141 S. Ct. 1761, 1783–84 (2021) (striking down for-cause removal protection for the director of the Federal Housing Finance Agency); Seila Law, LLC v. CFPB, 140 S. Ct. 2183, 2192, 2197 (2020) (striking down for-cause removal protection for the director of the Consumer Financial Protection Bureau); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (striking down two layers of for-cause removal protection for members of an accounting oversight board); Morrison v. Olson, 487 U.S. 654, 685–93 (1988) (upholding a statute authorizing removal of an

create a presidential removal power, then any removal power the President possesses would flow from a congressional decision to authorize removal under the Necessary and Proper Clause, not from Article II.

The modern Supreme Court identifies itself as originalist and the Court has maintained that this original intent establishes the President's right to unilaterally remove executive officers. But that view seems at odds with that of Justice Story.

This Article examines Justice Story's originalist case for maintaining that the Constitution does not create any unilateral presidential removal power at all. I cannot convince readers in a brief Article that this account is correct. I only aim to show only that Story's account represents a plausible understanding of original intent, despite the Supreme Court's ruling in *Myers v. United States* that the President does have a unilateral removal authority.[11] The plausibility of Story's account suggests that the Court practices selective originalism, where it chooses sources or original intent that supports its views of wise contemporary constitutional policy and slights opposing views.

I am not aware of any previous focused and sustained analysis of Joseph Story's treatment of the removal question.[12] Yet, his views command some attention both in Supreme Court cases and scholarly debates on the removal power.[13] Most recently, Aditya Bamzai and Saikrishna Prakash, writing in the *Harvard Law Review*, "enlist Justice Story as" an "all[y]" in an article claiming that the Constitution grants the President

independent counsel only by the attorney general for cause); Wiener v. United States, 357 U.S. 349 (1958) (holding that Congress may prohibit removal of members of a quasi-judicial commission except for cause); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (holding that Congress may forbid presidential removal except for cause of the member of a commission with quasi-legislative and quasi-judicial authority); *cf.* Bowsher v. Synar, 478 U.S. 714, 726–27 (1986) (holding that Congress may not vest itself with the power to remove an officer performing executive functions).

11. *See* Myers v. United States, 272 U.S. 52, 176 (1926) (striking down a law requiring Senate approval of presidential removal).

12. *Cf.* J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, THE CONTESTED REMOVAL POWER: 1789-2010, at 79–80 (2013) (offering a cogent summary of Story's views as part of a more general work without critiquing the evidence about Story's specific claims or tying it to originalist theory).

13. *See*, *e.g.*, *Myers*, 272 U.S. at 148–50, 154, 159, 162, 179, 183 (majority and dissenting opinions) (containing extensive discussion and quotation); *Seila Law*, 140 S. Ct. at 2227 (Kagan, J., dissenting) (citing Story to support limitations on the rigidity of separation of powers).

unfettered removal authority.[14] Andrea Katz and Noah Rosenblum cite their treatment of Story's views as an example of their "selective engagement" with sources.[15] This analysis therefore makes a contribution to current debates by carefully summarizing and analyzing Story's views.

This analysis of Story's views on removal does more than recover an interesting piece of lost history and original understanding. It sheds light on how contemporary originalism works. Consideration of Story's account helps show that the current Supreme Court's take on removal stems from textually and temporally selective originalism. A literature has developed regarding selective originalism generally.[16] Most commentators characterize it as a practice of seizing on an aspect of historical doctrine that fits "the result" justices "desire to reach," while neglecting contrary originalist evidence.[17]

The Court's originalist jurisprudence on removal features what one might call temporally selective originalism.[18] The Court considers evidence of original intent from a particular moment of post-ratification constitutional evolution, while "discounting" evidence of original intent from before ratification or after the chosen moment. The Court also proves selective in what

14. *See* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. FORUM 404, 422 (2023) (stating that Bamzai and Prakash enlist Joseph Story as an ally); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1776 & n.141 (2023) (mentioning Joseph Story as maintaining "that [the Decision of 1789] Congress endorsed the view that the Constitution gave the President the power to remove executive" officers).

15. *See* Katz & Rosenblum, *supra* note 14, at 422 & n.127 (chiding Bamzai and Prakash for "enlist[ing] . . . Justice Story" as an ally even though his writing criticizes the unitary executive theory).

16. *See* Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles' Forfeiture Exception to Confrontation Were or Were not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605 (2009); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 636–37 (2008) (discussing selective originalism in the context of interpreting the Bankruptcy Clause and the Eleventh Amendment); *cf.* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 742 (1999) (treating the selection of "specific aspects of historical doctrine as guides to decisions" as selective originalism).

17. *See*, *e.g.*, Davies, *Selective Originalism*, *supra* note 16, at 607; *cf.* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality* 3–4 (Harv. Pub. L. Working Paper, Paper No. 23-15, 2023) available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347334 (finding the Justices' originalism "selective" because they sometimes rely on original intent and sometimes rely on precedent instead).

18. *Cf.* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 877 (2009) (flagging the problem of determining the "temporal boundaries of the originalist inquiry").

constitutional text it considers. It focuses on a small part of the constitutional text, while neglecting textual evidence pointing away from where it wants to go. Consideration of Story's interpretation makes these types of selective originalism quite evident.

This contribution to the growing concern about selective originalism gives rise to a further question: What determines where the Court wants to go? The analysis of Story's views renders implausible the notion that the constitutional text and original understanding dictate the results we see in removal opinions. Instead, I show that the Supreme Court practices what Jack Balkin has called "Living Originalism," adapting the Constitution to modern needs as it sees them.[19]

But I argue that the Supreme Court proves an inadequate forum for originalist resolution of the separation of powers claims at stake in the removal debate as illuminated by Joseph Story and contemporary history, given the range of originalist constitutional values at stake. The political process provides a better opportunity to balance the competing concerns animating debates about removal than adjudication.

This argument for a stronger political role in removal jurisprudence builds on Justice Story's assumptions about the role of politics in resolving removal questions. It also comports with Nikolas Bowie and Daphna Renan's recent claim that historically the political branches have resolved separation of powers claims of the type first decided in *Myers*.[20]

I suffuse my analysis with recent insights about the plethora of originalist approaches found in Supreme Court opinions and the scholarly literature.[21] My conclusions comport with Heidi Kitrosser's plea for "interpretive modesty" in addressing original intent.[22]

19. *See* JACK M. BALKIN, LIVING ORIGINALISM (2011).

20. *See* Nikolas Bowie & Daphna Renan, *The Separation of Powers Counterrevolution*, 131 YALE L.J. 2020, 2028 (2022) (characterizing *Myers* as the first decision to limit "Congress's power to structure the executive branch.").

21. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (characterizing originalism as a "smorgasbord of distinct constitutional theories").

22. *See* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 461–65 (2016) (suggesting that originalism is unreliable and indeterminate).

This Article also contributes to a recent literature questioning the unitary executive theory—the theory that the Constitution gives the President sole control over the executive branch of government—on originalist grounds.[23] Finally, this Article forms the third in a series of articles that I have published on the relationship between appointment and removal.[24] For Justice Story's theory relies heavily on an interpretation of the Appointments Clause's implications for removal, a topic usually neglected in the literature.

The first part presents Justice Story's thoughts on the removal authority. It maps Story's arguments against competing types of originalist methodologies.

The second part critically analyzes Justice Story's views, considering additional evidence and context. It uses a theory of original intent advanced by two leading proponents of the unitary executive theory (Steven Calabresi and Saikrishna Prakash) to organize the exposition and highlight the dilemmas in originalist thought that Story's account brings to the fore.[25]

23. *See*, *e.g.*, Christine K. Chabot, *Is The Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 3 (2020) (arguing that original intent supports the Federal Reserve's independence, as Alexander Hamilton, George Washington, and the First Congress supported establishment of an independent Sinking Fund Commission with many of the powers later bestowed upon the Federal Reserve); David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71 (2009) (showing that text and history support a duty-based theory at odds with the unitary executive theory); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 66 (2021) (explaining that for-cause statutory removal restrictions comport with an expansive reading of the Take Care Clause); Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1, 35 (2009) (claiming that drafting practices at and before the Founding indicate that Article II's Vesting Clause did not grant authority but designated the chief executive); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 263 (2009) (arguing that the Constitution allows Congress to regulate presidential decisions about the enforcement of law); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 343–44 n.66 (2016) (showing that faithful Execution and Vesting Clauses in state constitutions often were accompanied by removal provisions that did not give explicitly give the Governor sole or any removal authority); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022) (arguing that originalist evidence suggests that the "vesting" of executive power in the President did not imply sole control).

24. *See* David M. Driesen, *Appointment and Removal*, 74 ADMIN. L. REV. 421 (2022); David M. Driesen, *Making Appointment the Means of Presidential Removal of Officers of the United States*, 26 LEWIS & CLARK L. REV. 315 (2022).

25. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550–59 (1994) (explicating originalist "methodology").

The third part explains how the plausibility of Joseph Story's account highlights the extent to which the Court relies on temporally and textually selective originalism to draw conclusions about presidential power. But it argues that quite contemporary policy considerations heavily influence the Court's selection of materials and the results reached, in keeping with Jack Balkin's theory of Living Originalism.

The final part briefly sketches the analysis's potential implications. First, it develops the idea that the political branches are much more likely than the Court to wisely adapt the Constitution to changing circumstances consistent with the various competing policy considerations in play at the founding (and now). Second, it suggests that, in spite of *Myers*, Congress can and should adopt Justice Story's proposal by making appointment of successors the means of presidential removal. An Article cannot fully defend these suggestions, but I have defended the second point extensively[26] and the first draws some support from the original intent put forward by Story and contemporary scholarly and judicial opinions.

II. JOSEPH'S STORY

Justice Story's understanding that appointment of a successor, at least as a matter of original intent, serves as the principal means of removal requires some explanation and context. Story's discussion of removal flows from his discussion of the Appointments Clause.[27] Echoing *The Federalist*, Story sees potential for abuse in either presidential or congressional appointment.[28] He sees the procedure of having the President nominate and the Senate approve the principal officers of the government as minimizing this potential for abuse.[29]

He identifies this method of appointment with rule of law values, stating that a Republic must fill offices with people who will give "dignity, strength, purity, and energy to the administration of the laws."[30] He contrasts this with the vice of

26. *See* Driesen, *Making Appointment the Means of Removal*, *supra* note 24, at 345–60 (analyzing the proposal to make appointment the means of removal again).

27. STORY, *supra* note 4, § 1524.

28. *Id*. §§ 1527–31.

29. *Id*. § 1531.

30. *Id*. § 1530.

selecting "cringing favorites or court sycophants."[31] Instead of appointing like-minded officials to carry out a presidential program, he argues that the President should "disregard . . . the bias of party" in choosing nominees for office.[32] For Story, executive officers must have some degree of independence, rather than function as obedient presidential servants.[33] He also describes the joint appointment method as a means of avoiding corruption.[34]

Story begins his analysis of the removal question by noting that "the constitution makes no mention of any power of removal by the executive of any officers whatsoever."[35] In saying this he avoids a mistake apparently made recently by Justice Kagan, who wrote that the Constitution does not mention removal.[36] Kagan's statement, if taken literally, is incorrect, because the Constitution mentions removal by the Senate upon impeachment by the House.[37] But the Constitution says nothing about the removal of "Officers of the United States" *by the President*. Story infers from the lifetime tenure of judges during good behavior provided for in Article III that appointments of executive officers must be under "pleasure, unless congress [sic] shall have given them some other duration to their office."[38] But this assumption does not, for Story, answer the question of whose displeasure produces removal.

Story apparently infers from the congressional authority to determine who appoints inferior offices under the Appointments Clause a congressional authority to determine who can remove them and on what grounds.[39] In other words, Congress may

31. *Id*.

32. *Id*. § 1533 (quoting Rawls on the Constitution).

33. *Cf*. Driesen, *Appointment and Removal*, *supra* note 24, at 424 (explaining that the Supreme Court's appointments jurisprudence recognizes the constitutional value of having "somewhat independent officials" while its removal "opinions sometimes look at these same officials as" presidential "lackeys").

34. STORY, *supra* note 4, § 1539.

35. *Id*. § 1537.

36. *See* Seila Law, LLC v. CFPB, 140 S. Ct. 2183, 2225 (2020) (Kagan, J., dissenting) (stating that "[n]othing" in the Constitution "speaks of removal").

37. *See* U.S. CONST. art. I, § 3, cls. 6–7.

38. STORY, *supra* note 4, § 1537; Calabresi & Prakash, *supra* note 25, at 597 (inferring a presidential power of removal from the lifetime tenure of judges without considering joint Senate and presidential removal).

39. Story writes, "[a]s far as congress constitutionally possess [sic] the power to regulate and delegate the appointment of 'inferior officers,' so far they may prescribe the term of office, the manner in which, and the persons by whom the removal . . . shall be made." STORY, *supra* note 4, § 1537.

through legislation provide for removal, and it need not be by the President. But Story deems the question of who possesses removal authority in the absence of legislation worthy of more extended consideration.[40] He sees two possible answers, the President or the "appointing power"—defined as the President and the Senate jointly.[41]

Story supports the proposition that the President possesses no removal authority (in the absence of legislation) through a set of inferences based on the Appointments Clause. He notes that the "power to *nominate* does not naturally or necessarily include the power to remove."[42] But if the power to appoint includes the power to remove, he writes, then the removal power "belongs conjointly to the executive and the senate."[43] He therefore suggests that the removal takes place by virtue of the appointment of a successor, by operation of law, as explained in the introduction.[44]

He goes on to defend this understanding of removal in originalist terms. First, he states that this doctrine of removal by appointment "was the doctrine maintained with great earnestness by the Federalist," citing Hamilton's statement in *Federalist No*. 77.[45] But he then shifts his attention from the Framers to the People who ratified the Constitution. He suggests that the Federalist endorsement of removal by appointment "quiet[ed] the just alarms of the overwhelming influence, and arbitrary exercise of this prerogative of the executive."[46] Story goes on to explain why the ratifiers were so alarmed at the prospect of a presidential removal power and why their concerns were justified. Arbitrary use of the removal power, he states, might interfere with the "personal independence and freedom of opinion of public officers."[47] Thus, Story identifies proper law execution not just with presidential power and duty, but with the freedom of officers to exert some judgment about what the law requires

40. *Id*.

41. *Id*.; *cf*. *Seila Law*, 140 S. Ct. at 2197 (suggesting that the appointments power is "in its nature executive") (quoting 1 ANNALS OF CONG. 463 (1789) (statement of James Madison)).

42. STORY, *supra* note 4, § 1538 (emphasis added).

43. *Id*.

44. *Id*.

45. *Id*. § 1539 & n.4.

46. *Id*.

47. *Id*.

independent of a President.[48] He goes on to identify presidential removal as a threat to liberty. Arbitrary removal, he explains:

> . . . might prove fatal to . . . the public liberties of the country. Indeed, it is utterly impossible not to feel, that, if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing man, of high ambition, and feeble principles, an instrument of the worst oppression, and most vindictive vengeance.[49]

He argues that "even in monarchies" ordinary government officers remain in their offices irrespective of court favorites' "policy or . . . passions," a point about the limits of monarchial power recently confirmed by Daniel Birk.[50] Story saw arbitrary removal as providing the basis for corrupting "elections at their very source" and "those who seek office will have every motive to delude and deceive the people."[51] Story does not explicitly justify the link between arbitrary presidential removal and corruption of elections and the spreading of lies. He might be suggesting that once one drives independent officials from office a President and his party can corrupt elections by lying to delude the public. He also may be indicating that once the President has a removal power, he can condition keeping office upon supporting the President in elections. He characterizes unfettered presidential removal authority as "monarchical" and "eminently dangerous to the best interests, as well as the liberties, of the country."[52]

He then appears to endorse the doctrine that the "power of removal [is] incident to the power of appointment."[53] And he

48. *See* ALVIS ET AL., *supra* note 12, at 84–85 (quoting a letter from Joseph Story indicating that when Congress assigns a duty to the Secretary of the Treasury the President may not interfere).

49. STORY, *supra* note 4, § 1539 & n.4; *cf.* DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER 104–13 (2021) (explaining the role of abusive removal in eroding Hungarian, Turkish, and Polish democracy).

50. *See* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 181–82 (2021) (finding "no evidence" that removal of executive officers was within the executive or prerogative power of the king); *cf.* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 162 (2020) (claiming without citing a source that the King had the prerogative "to remove most officers at will.").

51. STORY, *supra* note 4, § 1539.

52. *Id*.

53. *Id*.

alludes to reasoning along those lines being used by participants in debates about the removal power during the First Congress.[54]

In 1851, Joseph Story's son revised his father's 1833 treatise and emphasized the link of his argument to Hamilton's *Federalist No*. 77 statement by quoting it:

> The consent of that body (the senate) would be necessary to displace, as well as to appoint. A change of the chief magistrate, therefore, could not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension, that a discountenance of the senate might frustrate the attempt and bring some degree of disgrace upon himself.[55]

Although Story does not emphasize it, this passage identifies another Founding-era value served by removal through appointment rather than presidential fiat, stability in administration.

Story, however, pays attention to the People who ratified the Constitution not only by citing their "just alarms" about removal but also by noting that the Constitution's opponents cited a presidential power of removal as a reason to reject the Constitution.[56] But, he explains, none of the Constitution's proponents suggested that it gave the President a removal power.[57] After having maintained, in essence, that pre-ratification evidence and a reasonable inference from constitutional text supports removal through appointment, Story turns his attention to post-ratification debates.

He focuses on the 1789 congressional debates about who should have the power to remove the Secretary of State and endorses the conclusion reached subsequently in the *Myers*

54. *Id*. §§ 1537–39 (after mentioning the 1789 debates about the removal power Story states that it was urged that "the power of removal was incident to the power of appointment" in the "animated discussions already alluded to").

55. *Id*. § 1540 (quoting THE FEDERALIST NO. 77).

56. *Id*. § 1541 (noting that before the Constitution's adoption "its opponents" urged the doctrine of presidential removal power "as a reason for rejecting it").

57. *Id*. (noting that before the Constitution's adoption the doctrine that "the power of removal belonged to the president" "never appears to have been avowed by any of [the Constitution's] friends").

decision. He reads it as indicating that the House of Representatives (but not the Senate) concluded that the President should have a removal power with respect to officers of the United States.[58] He cites the reasons given for this conclusion in the 1789 debates in the House:

> [The removal power] was clearly in its nature a part of the executive power, and was indispensable for a due execution of the laws, and a regular administration of the public affairs.[59]

Story then lists examples of the potential need for a President to remove an officer, emphasizing cases where good cause would exist for removal. He cites the need to remove a corrupt officer engaged in government finances, an officer not executing the laws, or an "unfaithful public officer" during a Senate recess.[60] In light of Story's reading of the Constitution as designed to avoid appointment of loyalists to a President's party, his statement about an unfaithful officer must refer to somebody not faithful to the United States and the rule of law. One can see why an officer loyal to a foreign power, for example, might require urgent removal even if Congress were not in session.

What of the concerns about a President arbitrarily removing competent officers faithful to the law that Story references? Story suggests that under the influence of the revered George Washington, many participants in the 1789 debate posited that elections would provide a sufficient safeguard to make sure that the removal power was not abused.[61] Besides, Story tells us, "[o]ne of the most distinguished framers of the constitution" opined that "wanton removal of meritorious officers" would trigger impeachment.[62] This suggests that the proponents of presidential removal power in 1789 did not find an unfettered removal power in the Constitution, but rather a limited power to ensure competent administration.

Story, however, does not read the "Decision of 1789"—the adoption of language not squarely resolving the removal issue in

58. *Id*. § 1542.
59. *Id*. § 1541.
60. *Id*.
61. *Id*. §§ 1541, 1543 (stating that somebody elected by a majority "must be presumed to possess integrity, independence, and high talents" and would be deterred from abuse of removal by the possibility of "public odium" and suggesting that the 1789 conclusion "was greatly influenced by the exalted character of the president then in office").
62. *Id*. § 1541.

the legislation creating the Foreign Affairs Office—as changing the Constitution with respect to Inferior Officers, 99% of the government (as Story points out).[63] Congress may, with respect to all of those officers, require the consent of the Senate to remove the officeholder.[64]

Story, in the end, provides an account of extraordinary constitutional evolution. After noting that even in 1789 illustrious opposition to presidential removal existed, he characterizes it as "the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of congress, which has not been questioned on many other occasions."[65]

Story goes on to claim that since 1789, Presidents have rarely removed officers and have generally done so for cause, a point echoed by modern historians.[66] Even Thomas Jefferson, who helped create partisan politics in the early Republic, disclaimed any power to remove officers over mere differences of opinion, according to Story.[67]

Story explains, however, that Andrew Jackson pursued "a system of removals and new appointments to office," which "has reached a very large proportion" of the most important offices.[68] Story states that this abuse has led "most eminent statesmen" to conclude "that the only sound interpretation of the constitution is that avowed upon its adoption"—"that the power of removal belongs to the appointing power."[69] In other words, Story suggests a return to original intent at the founding based on then contemporary experience.

But Story doubts that originalism can turn back political precedent, finding it "difficult, and perhaps impracticable" after forty years "to recall the practice to the correct theory."[70] To the

63. *Id*. § 1544.

64. *Id*. ("in regard to 'inferior officers'—"ninety-nine out of a hundred" officers—Congress may "requir[e] the consent of the senate to removals").

65. *Id*. § 1543.

66. *Id*. (discussing the practices of Washington, Adams, Jefferson, Madison, Monroe, and J.Q. Adams); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 72 (1993) (noting the "common understanding" that Presidents would only remove officers "for just cause").

67. STORY, *supra* note 4, § 1543.

68. *Id*.

69. *Id*.

70. *Id*. § 1544.

extent that Story is an originalist, he is a faint-hearted one.[71]

Story, however, does not read the Constitution as granting the judiciary power to settle the question of whether to return to the original understanding or to continue in the tradition of the "Decision of 1789." Instead, he says that this constitutional judgment "must be left to the sober judgment of the community."[72] And, in a prescient remark at the end of his exposition on removal, he opines that "the remedy for any permanent abuse is still within the power of congress, by the simple expedient of requiring" Senate consent to removals.[73]

III. STORY'S ACCOUNT: BASIC STRUCTURE AND ADDITIONAL EVIDENCE

The structure of Story's argument tracks the views some leading originalist advocates of the unitary executive make about how to apply an originalist approach to constitutional questions. Steven Calabresi and Saikrishna Prakash have argued that the proper method for applying originalism starts with constitutional text and ends there if the text's meaning is inarguably clear.[74] This approach comports with the general trend among modern originalists, many of whom endorse focusing on the "agreed upon public meaning" of constitutional text at the founding.[75] But if the text does not clearly resolve an issue, write Calabresi and Prakash, then one must consult the views of the People who ratified the Constitution.[76] By advocating a focus on the ratifiers' views,

71. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861, 864 (1989) (characterizing himself as a "faint-hearted originalist" because he accepts precedent and some requirement to make constitutional rulings socially tolerable); *cf.* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13–14 (2006) (claiming that Scalia is not an originalist because his "faint-hearted originalism" offers escape from original intent allowing him "to reach any result he wishes"); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 896 n.56, 942 (1985) (disputing Raoul Berger's claim that Joseph Story's work embraces the Framers' intention as the appropriate determinate of constitutional interpretation).

72. STORY, *supra* note 4, § 1544.

73. *Id*.

74. Calabresi & Prakash, *supra* note 25, at 550 (asserting that an interpreter should "begin with the text" consulting history only if "one could assert plausibly that an ambiguity exists").

75. *See* Barnett, *supra* note 71, at 9 (crediting Justice Scalia with helping shift originalism to "original public meaning" to overcome many "practical objection[s] to originalism").

76. *See* Calabresi & Prakash, *supra* note 25, at 551 (commending exhaustive

Calabresi and Prakash sidestep an important problem in old style originalism, which relied heavily on the Framers' intent. The Framers did not themselves believe that their intentions should govern future constitutional interpretation.[77] And the Framers differed among themselves as to what the Constitution should mean.[78] Furthermore, reliance on the Framers' views conflicts with the idea of popular sovereignty, since the Ratifiers made the Constitution a charter of government, not the Framers.[79] Calabresi and Prakash then suggest that scholars and courts should only consult post-ratification evidence if the pre-ratification evidence is unclear.[80]

A. CONSTITUTIONAL TEXTS

Story's account begins with relevant constitutional text—the Appointments Clause. The Appointments Clause negates the unitary executive theory. The unitary executive theory suggests that the President has sole and complete control over the executive branch of government.[81] The Appointment Clause shows that this cannot be true.[82] The Constitution requires that the Senate have some control over the executive branch of government through appointments. The constitutional text also shows that the President does not have sole control over removals, as the Constitution authorizes impeachment by the House followed by removal by the Senate.[83]

One can further support Story's more specific inference about removal that he draws from the Appointments Clause. The Appointments Clause shows that the Constitution aims to have executive officers properly executing the law whom the Senate

examination of pre-ratification material first with resort to "post-ratification material" if "absolutely necessary").

77. Powell, *supra* note 71, at 903–04 (explaining that the Framers shared the general common law view that interpretation would depend upon the "intrinsic" meaning of words in the constitutional text, not the Framers' intentions).

78. *See generally* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213–27 (1980) (explaining why determination of original intent is probably impossible and would not be considered binding at the Founding).

79. *See* Barnett, *supra* note 71, at 9 (noting that most originalists understand that popular sovereignty means that the ratifiers' intent, not that of the Framers, provides "relevant authority").

80. *See* Calabresi & Prakash, *supra* note 25, at 551.

81. *Cf.* Birk, *supra* note 50, at 179 (noting that the unitarians are not completely unified as to the scope of presidential control over the executive branch).

82. *See* U.S. CONST., art. II, § 2, cl. 2.

83. *See id.* art. I, § 2 cl. 5, § 3, cl. 6; art. II, § 4.

has confirmed. If the President could remove such officers unilaterally, he could defeat the principle aim of the Appointments Clause. (I have elaborated this point at length elsewhere).[84] Furthermore, there is a constitutional tradition predating the founding of aligning appointment and removal power.[85] This alignment seems necessary to provide for continued operation of the government under the control of jointly chosen officers.[86]

Story does not explain why Congress may specify who removes Inferior Officers. But the structure of his argument reveals a partial answer. Since Congress may specify the appointing power for inferior officers, it must have the right to vest the removal authority with the appointing authority, whether the President, a department head, or a court.[87]

A little more intriguingly though, Story reads the decision of 1789 as having endorsed a political practice of presidential removal for cause. Why then, should the tradition of Inferior Officers being subject to removal by others survive?

The Necessary and Proper Clause would support Story's argument. That clause specifies that Congress may regulate the executive branch of government.[88] It follows that Congress may structure removal of Inferior Officers as it pleases. That Clause also explains why it is plausible to argue, as Justice Story does, that Congress may depart from the decision of 1789 and require Senate consent to removal. Notice here that this view might be read as endorsing not only removal by appointment, but simply an arrangement like that arrived at in the subsequent Tenure of Office Act, that no removal take place without express Senate concurrence for specified offices. Story sees a politically

84. *See* Driesen. *Appointment and Removal*, *supra* note 24, at 425 (explaining that a President could "make sure that Senate-approved officials never exercise power by simply removing them all" and that several presidents "have removed officials" to undermine the law and fair elections); Driesen, *Making Appointment the Means of Presidential Removal*, *supra* note 24, at 316–20 (illustrating the point that presidential removal can undermine the rule of law with key examples from the Trump administration).

85. *See* Manners & Menand, *supra* note 23, at 33 (referring to the "oft-asserted dictum that the power to remove is 'an incident' of the power to appoint").

86. *See* Driesen, *Appointment and Removal*, *supra* note 24, at 425 (explaining that unfettered removal authority can thwart the intended effect of the Appointments Clause, since it would allow the President to remove all Senate approved officials the day after their confirmation).

87. U.S. CONST. art. II, § 2, cl. 2.

88. *See id*. art. I, § 8, cl. 18.

determined constitutional tradition, which the political process may alter. This perspective is congruent with Daphna Renan and Nikolas Bowie's view that prior to *Myers*, the judiciary generally did not question legislation resolving questions about the relative powers of the President and Congress.[89] Rather, the Constitution's separation of powers produced self-executing safeguards—arrangements that invite politically agreed upon adjustments of the respective powers of Congress and those of the executive branch.[90] It is also consistent with Jack Balkin's theory of "Living Originalism," which maintains that the original meaning of the Constitution contemplates political adaptation and change.[91]

Story's reading of the Decision of 1789, however, shows awareness of the argument that vesting executive power in the President and charging him with an effort at faithful execution justifies a constitutionally grounded presidential removal power. But he does not regard the Article II text as clearly overriding inferences from the Appointments Clause or, presumably, the plain import of the Necessary and Proper Clause. Indeed, it proves difficult to read the Vesting Clause as unequivocally and indefeasibly granting the President plenary control over the executive branch of government, once one reads the Appointments, Impeachment, and Necessary and Proper Clauses.[92]

B. PRE-RATIFICATION HISTORY

While Story's general philosophy of constitutional interpretation focuses on text rather than the Framers' intentions,

89. *See* Bowie & Renan, *supra* note 20, at 2046 (explaining that in the first seventy years Congress and the President resolved separation of powers questions, with the Supreme Court only acting to enforce statutory agreements).

90. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 860 (1986) (finding that "separation of powers and . . . checks and balances . . . were intended to operate as a self-executing safeguard against the . . . aggrandizement of one branch at the expense of the other") (citation and internal quotation omitted).

91. *See* BALKIN, *supra* note 19, at 6–7 (reading the Constitution's general language as requiring the application of general principles to "our own circumstances in our own time.").

92. *See* Driesen, *Appointment & Removal*, *supra* note 24, at 91–94 (showing that the Vesting Clause cannot be read as establishing sole presidential control over government in light of these clauses); *see generally* John F. Manning, *Separation of Powers as Ordinary Constitutional Interpretation*, 124 HARV. L. REV. 1939, 1965–69 (2011) (explaining that the unitary executive theory cannot be based on the Vesting Clause alone in light of the Necessary and Proper Clause).

he finds himself considering the Framer's intentions for several reasons.[93] First, he states that the failure of the Constitution to mention a removal power outside of the impeachment context leaves the question of a presidential removal power to inference.[94] Apparently, he wishes to consult original understanding to help resolve a problem not squarely resolved by constitutional text and therefore amenable to varying arguments based on inference. But he does that in a nondogmatic way, considering whether reason justifies the concerns reflected in the *Federalist*'s position on removal. And he does not confine his reasoning to that offered in the *Federalist Papers*—which focus on stability in administration. He also includes the problem of arbitrary removal fostering despotism, which, he says, justly concerned the ratifiers.

He does not cite any evidence to support his notion that the ratifiers harbored fears about removal undermining liberty, which Hamilton's polemic helped quiet. But the history of the American Revolution shows that the problem of unconstrained removal authority leading to lost liberty was on the mind of those who led the American Revolution and drafted or ratified the Constitution.

Complaints about the royal governor of Massachusetts and the powers assigned him under the Massachusetts Government Act of 1774 (MGA) (one of the "Coercive Acts") played a large role in causing the American revolution, and arbitrary unilateral removal figured among the abuses fueling complaints of tyranny in Massachusetts.[95] The MGA displaced an earlier charter, which did not expressly authorize removal of duly appointed officers.[96]

93. H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1305–06 (1985) (explaining that Story did not think one can determine the ratifiers' intent and rejected the concept of intent apart from constitutional text).

94. *See* STORY, *supra* note 4, § 1537 (noting that "the constitution makes no mention of any power of removal by the executive of any officers whatsoever" and then reasoning on the subject based on inference).

95. *See* An Act for the Better Regulating the Government of the Province of the Massachusetts Bay, in New England, 14 Geo. 3 c. 45, §§ 3, 5 (1774) (Eng.) [hereinafter MGA]; JOHN THOMAS SCHARF, HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT DAY: THE STRUGGLE FOR LIBERTY–1765 TO 1812, at 142 (1879) (ebook) (noting that the MGA deprived the Massachusetts colonists of their most important rights by enabling the royal governor to unilaterally remove executive officials); CATO INST., THE AMERICAN REVOLUTION AND THE DECLARATION OF INDEPENDENCE, at 64 (2017) (ebook) (explaining that the MGA contributed to revolutionary fervor in the colonies partly because it granted the royal governor the ability to "appoint or fire" executive branch officials).

96. *See* MGA, *supra* note 95, § 1; THE CHARTER OF THE PROVINCE OF THE MASSACHUSETTS-BAY (1691). In spite of the Massachusetts Charter's failure to mention

In 1774, the Crown displaced members of the executive council, a body elected by the House in part to serve as a check on gubernatorial power.[97] The Crown appointed thirty-six new councilors to displace the elected council, forming a "mandamus council[]."[98] The MGA also gave the Governor authority to remove provosts and marshals, and Governor Gage interpreted it as giving him unilateral authority to remove sheriffs appointed by previous administrations.[99]

While the Gage administration's appointments, dissolution of the General Court (a legislative body), removal of judges, and much else helped fuel the revolution, critics of the MGA both here and in England also focused on the problems of arbitrary unilateral removal of executive branch officials.[100] This removal power may have caused enormous anxiety in part because it might lead to appointment of people like General Gage's notorious

removal, most contemporary authorities indicate that the Charter should not foreclose removal of officers for misconduct. But Massachusetts practice varied over time as to who had this authority to remove for cause. *See* Myers v. United States, 272 U.S. 52, 292 n.82 (1926) (noting that early royal governors in Massachusetts asserted a removal right, but that later ones required the consent of a council to remove); JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1773–1774, at 232–36 (Mass. Hist. Soc'y ed., 1981) (recognizing a removal power derived from the Charter for misconduct of officers); Answer of the Council to the Governor's Message (Mar. 7, 1774), *reprinted in* COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 343–53 (Mass. Hist. Soc'y ed., 1897).

97. *See* L. KINVIN WROTH, PROVINCE IN REBELLION: A DOCUMENTARY HISTORY OF THE FOUNDING OF THE COMMONWEALTH OF MASSACHUSETTS 1774–1775, at 46 (1975) (explaining that towards the end of summer in 1774, the Crown sent Governor Gage a list of the thirty-six newly appointed councilors to replace the prior Council); Francis G. Walett, *The Massachusetts Council, 1766–1774: The Transformation of a Conservative Institution*, 6 WM. & MARY Q. 605, 605 (1949) (describing the Council as "an executive organ" elected by the House to advise the governor and aid in execution of the law).

98. *See* JOHN W. TYLER, SMUGGLERS & PATRIOTS 227 (1986) (explaining that the patriots in Massachusetts chose the "mandamus" label for the newly appointed councilors); WROTH, *supra* note 97, at 46 (noting that the thirty-six newly appointed councilors became known as the "mandamus" councilors).

99. *See* MGA, *supra* note 95, §§ 3, 5; WROTH, *supra* note 97, at 47 (documenting an occasion where the mandamus council informed Governor Gage that he was "alone empowered to remove any of the Sheriffs now in Office" that were not first appointed by himself).

100. *See Supplement*, 4 BOS. GAZETTE & COUNTRY J., Aug. 29, 1774, at 560, https://www.masshist.org/dorr/volume/4/sequence/643 (opining that the MGA granted the royal governor an unsettling amount of executive power due to his ability to appoint and remove at pleasure executive officials); 27 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE FOR THE YEAR 1774, at 69–70 (4th ed. 1774) (noting that the British of the MGA lamented that the royal governor could remove sheriffs at his pleasure).

Provost Marshall, William Cunningham, who tortured and starved prisoners under his control.[101]

Boston newspapers from this period contain heated criticism of gubernatorial removal power, with one author opining that if the degradation of the legislature was not sufficient to enrage the people of Massachusetts, then the fact that the governor functions as an "uncontrolled commander" with "every branch of the executive power absolutely in his own hands" should.[102] He linked this to the power to nominate, appoint, and "displace . . . at pleasure, in direct opposition to the express words of the [Massachusetts] charter."[103] Delegates from the town of Middlesex in Massachusetts passed resolutions bolstering complaints about tyranny and oppression under the MGA by explaining that the governor's unilateral removal power "entirely subverts a free administration of justice; as the fatal experience of mankind, in all ages, has testified that there is no greater species of corruption, than when . . . executive officers depend, for their existence and support, on a power independent of the people."[104]

Committees of Correspondence in Massachusetts informed those in other colonies that the MGA violated the principle of government by the consent of the governed, constituted an exercise of arbitrary government power, and dissolved the union between Great Britain and Massachusetts.[105] The Boston Committee of Correspondence opined that suffering the removal of sheriffs (and judges) at pleasure would make us "the most abject slaves."[106] The Continental Congress meeting in 1774

101. *See* DANSKE DANDRIDGE, AMERICAN PRISONERS OF THE REVOLUTION (1911) (explaining that Cunningham hung and starved prisoners).

102. *Supplement*, *supra* note 100, at 560.

103. *Id*.

104. 1 SAMUEL ADAMS DRAKE, HISTORY OF MIDDLESEX COUNTY, MASSACHUSETTS: CONTAINING CAREFULLY PREPARED HISTORIES OF EVERY CITY AND TOWN IN THE COUNTY 108 (1880).

105. *See* Letter from the Boston Comm. of Correspondence to the New Hampshire Comm. of Correspondence (June 4, 1774), *reprinted in* 7 PROVINCIAL PAPERS: DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE FROM 1764 TO 1776, at 406 (Nathaniel Bouton ed., 1873) (showing that the Boston Committee of Correspondence characterized the MGA as cruel and oppressive in a letter sent to a New Hampshire Committee of Correspondence); 4 BOS. EVENING POST, Sept. 5, 1774, at 562, https://www.masshist.org/dorr/volume/4/sequence/645 (sharing the resolutions passed by multiple Committees of Correspondence, in which they resolved that the MGA dissolved the union between Great Britain and Massachusetts and constituted an act of arbitrary power).

106. Letter from the Boston Comm. of Correspondence (June 8, 1774), MASS. HIST.

endorsed the view that people who accepted commissions on the mandamus council (thereby acquiescing in the arbitrary removal of their predecessors) violated "the duty they owe to their country."[107] A subsequent resolution called for a boycott of British merchants, a prelude to war.[108] The Coercive Acts triggered protests and riots, including the Worcester revolt—a direct prelude to the American revolution.[109]

America's friends in Parliament, including Edmund Burke, objected to sheriffs holding their positions at the pleasure of the governor as likely to "subver[t] . . . publick and private justice"[110] and, more specifically, put "the lives and properties of the people absolutely into the hand of the governors."[111] Jonathan Shipley, appointed Bishop of St. Asaph in 1769, suggested that arbitrary removal power was bound to inflame public opinion in the colonies.[112]

When Gage used his removal power to oust John Hancock from his post as captain of the cadets' corps, the rest of the corps dissolved that institution.[113] The removed Hancock would go on

SOC'Y, at 1, https://www.masshist.org/database/viewer.php?item_id=687&pid=2 (last visited Feb. 12, 2023).

107. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 34 (Worthington Ford ed., 1904) (endorsing the Suffolk Resolves, which condemned those who took their seats on the mandamus council).

108. *See id*. at 35 (advocating a boycott of British merchandise, until the rights of the colonists were fully restored).

109. *See* Melvin Bernstein, *Setting The Record Straight: The Worcester Revolt of September 6*, *1774*, THE MASS. SOC'Y SONS OF THE AM. REVOLUTION (Jan. 23, 2013), https://www.massar.org/2013/01/23/setting-the-record-straight-the-worcester-revolt-of-september-6-1774 (explaining that on September 6, 1774, over 4,000 militiamen from thirty-seven Worcester County towns in Massachusetts marched to a local courthouse to prevent the new Crown-controlled courts from opening a new session).

110. WILLIAM GRIFFITH, HISTORICAL NOTES OF THE AMERICAN COLONIES AND REVOLUTION FROM 1754 TO 1775, at 184 (1843) (ebook).

111. *See* THE ANNUAL REGISTER 70 (4th ed. 1774).

112. *See* JONATHAN SHIPLEY, A SPEECH INTENDED TO HAVE BEEN SPOKEN ON THE BILL FOR ALTERING THE CHARTERS OF THE COLONY OF MASSACHUSETT'S BAY 30 (2d ed. 1774) (declaring that the MGA's grant of removal power to the royal governor would create "perpetual discord" between Great Britain and Massachusetts); Irving H. King, *Dr. Jonathan Shipley*, *Defender of the Colonies*, *1773–1775*, 45 HIST. MAG. OF THE PROTESTANT EPISCOPAL CHURCH 25, 25–27 (1976) (discussing Dr. Shipley's appointment as a bishop in 1769 and his involvement in colonial politics in England).

113. *See To John Adams from William Tudor*, *21 August 1774*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Adams/06-02-02-0035 (last visited Feb. 19, 2023) (explaining that the Cadets dissolved the organization to protest Hancock's removal from that body); 4 BOS. GAZETTE & COUNTRY J., Aug. 29, 1774, at 556, https://www.masshist.org/dorr/volume/4/sequence/639 (reporting Hancock's response to his removal, where he stated he would rather retire than be used as a "Tool in the Hand

to become Massachusetts governor, the first to sign the declaration of independence, and the president of the Massachusetts ratifying convention.[114]

While Joseph Story's citation to Hamilton's statement in the Federalist does support his claim that the Constitution's friends did not suggest that the Constitution contains a presidential removal authority during the ratification debates, he cites no material to support his claim that the Constitution's *opponents* regarded it as containing a presidential removal power. The evidence that the antifederalists read the Constitution that way is thin. Some antifederalists, such as the dissenters to Pennsylvania's ratification of the Constitution, read it as Hamilton did, as permitting removal by the "president and senate," and disapproved of it on that ground.[115] Similarly, An American Citizen stated that the President could not "'take away offices [held] during good behavior.'"[116] On the other hand, Luther Martin, who became an opponent of the Constitution, reported

of Power to oppress my Countrymen.").

114. *See Gov. John Hancock*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/john-hancock (last visited Mar. 29, 2023) (describing Hancock as "the first governor of Massachusetts [after ratification of the Constitution] and the first to sign the Declaration of Independence," and president of the 1788 ratifying convention).

115. *See* Bamzai & Prakash, *supra* note 14, at 1772 & nn.107–08 (citing *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, PA. PACKET (Dec. 18, 1787), *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 617, 634 (John P. Kaminski & Gaspare J. Saladino eds., 1986)).

116. *Id*. at 1772–73 (citing An American Citizen, *On the Federal Government No. 1*, INDEPENDENT GAZETTEER (Phila.), Sept. 26, 1787, at 2, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 247, 251 (John P. Kaminski & Gaspare J. Saladino eds., 1981). Bamzai and Prakash read this statement as supposing that the President could remove officers not held during good behavior. *Id.* at 1773. Even if they are correct, this implies that a President's removal authority was not absolute, but subject to good cause protection by Congress. *Cf. Ex Parte* Hennen, 38 U.S. 230, 239 (1839) (holding that a judge may only oust a clerk for cause based on common law principles). But their inference is debatable. In the eighteenth century, appointments were made either "for good behavior," for a limited term of years, or "at pleasure." *See* Manners & Melamed, *supra* note 23, at 20. An American Citizen may have assumed that, absent impeachment, the occupant of an office for a limited term had an absolute right to the office for that term, but that there must be some ability to remove an officer without a term limit for bad behavior, thereby creating an issue that needed comment. *Cf. Ex Parte Hennen*, 38 U.S. at 236 (noting a general common law principle that appointments were not revocable); Manners & Melamed, *supra* note 23, at 18–19 (stating that terms-of-years tenures in England and America were considered "inviolable," terminable only through "impeachment or other extraordinary measure[s]"). While officers appointed "at pleasure" would be removable, that statement, as Story explained, does not tell one who they must please to remain in office. STORY, *supra* note 4, § 1537.

that some of those concerned that the Constitution would lead to monarchy thought that military officers would be "dependent on" the President's "will and pleasure."[117] This fairly general statement might be understood as suggesting that the President has a removal authority as Commander-in- Chief, but it is hard to see this statement as probative of the theory that the President's executive power includes a power to remove executive officers of the civil government.[118] Story, writing in the 1830s, may have had access to information now lost to us indicating that at least some antifederalists thought that the President had a general removal power.[119] Martin's statement appears to pertain to removal and therefore to support Story's claim that those considering ratification were concerned that removal authority would lead to tyranny, at least in the context of army officers.[120]

By focusing on the ratifiers' intent, Story, much more faithfully than the courts or unitary executive theorists, follows the best precepts of originalists by taking popular sovereignty seriously. As Julian Mortensen has shown recently, many of the men called upon to ratify the Constitution feared that presidential

117. *See* Luther Martin, *Genuine Information*, MD. GAZETTE & BALT. ADVERTISER, Dec. 28, 1787–Feb. 8, 1788, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, 218 (Max Farrand ed., 1911). Bamzai & Prakash also cite a participant in the Virginia ratification debates as suggesting that the privy council advocated by Richard Henry Lee would not restrain the President well, because the councilors would be "removable at the President's pleasure." *See* Bamzai & Brakash, *supra* note 14, at 1772. While Story might have considered this a statement assuming a general presidential removal power, it might have been a more specific statement about how privy councils operated or simply an argument to defeat Lee's proposal.

118. *See Ex Parte Hennen*, 38 U.S. at 235 (explaining that the President must have the power to dismiss the heads of the Army and Navy as part of his commander-in-chief authority); *cf.* STORY, *supra* note 4, § 1537 (treating the question of whether Congress can remove officers from the military by abolishing their positions as separate from general questions about the removal power); Bamzai & Prakash, *supra* note 14, at 1772 (interpreting Luther's statement as indicating an opinion that the President has the power to remove, rather than just reassign, military officers). In context, even the assumption that this statement recognizes a unilateral presidential authority to remove military officials is debatable. The passage cited assumes that the President would have effective control over appointments, even though that power is shared with the Senate. Martin, *supra* note 117. This implies that these critics would also interpret a formally shared removal power as leaving military officers "dependent on his will and pleasure." *Id.*

119. *See* Ronald D. Rotunda & John E. Nowak, *Joseph Story: A Man for All Seasons*, 1990 J. SUP. CT. HIST. 17, 17–18 (1990) (stating that Joseph Story was "[f]or all practical purposes . . . present at the creation of our constitutional system of government" because of his age and ties to people deeply involved in formation of the Republic).

120. *See* Martin, *supra* note 117 (linking the dependence of military officers upon the President to establishment of hereditary monarchy).

power carried with it the potential seeds of monarchy.[121] *The Federalist Paper* that Story relies on constitutes but one of a series of papers designed, in large measure, to allay the deep concerns among the Constitution's audiences in state ratifying conventions regarding monarchial presidential power.[122] *The Federalist Papers* assure the ratifiers that the Constitution confers powers on the President that better approximate the powers bestowed upon the Governor of New York than those the King of England possessed.[123] Thus, Hamilton's assertion that the Senate had the power to prevent abusive removal constituted part of the Federalist case that the Constitution would prevent a President from becoming a despot.

This does not mean that Story's reading of Hamilton's displacement explanation is necessarily correct. We know (from the debates of 1789) that many of the Constitution's ratifiers read the Impeachment Clause as exclusive, meaning that executive officers could not be removed except via impeachment. While the term "displace" in *Federalist No. 77* most naturally means what Story says it means, Jeremy Bailey has pointed out that Hamilton himself sometimes used the term "displace" as a synonym for "remove."[124] Therefore, Hamilton may have read the Constitution as making impeachment the sole means of removal, since only the provisions on impeachment mention removal. But from a perspective that takes popular sovereignty seriously, Hamilton's precise meaning does not matter that much. Instead, the relevant question is what did the ratifiers understand Hamilton and the Constitution to mean with respect to removal. This popular sovereignty perspective suggests that the main point

121. Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1294–96, 1299–302 (2020) (discussing strong fears of monarchy among the antifederalists and the consensus that the Constitution must guard against tyranny whilst empowering vigorous law execution); THE FEDERALIST NO. 67 (Hamilton), *supra* note 8 (claiming that the Constitution's opponents have sought to describe the President as "not merely . . . the embryo, but as the full-grown progeny of that detested parent.").

122. THE FEDERALIST NOS. 67–77, *supra* note 8; Reinstein, *supra* note 23, at 265 (stating that "*The Federalist* attempted to assure Americans that the President would not be a potential king.").

123. THE FEDERALIST NO. 69 (Hamilton), *supra* note 8 (finding it "difficult to determine" whether the President has "more or less power than the Governor of New York" and no justification for the claim that the President has as much power as the King of Great Britain).

124. 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, 178 (2010).

is more general. The People ratified the Constitution in part because of assurances that the President did not have the right to remove government officials unilaterally. To interpret the Constitution differently, therefore, may betray the People who ratified it.

For many originalists, Hamilton's statement proves puzzling. As Seth Tillman asks, why would a strong proponent of executive power advocate a Senate role in removal?[125] Two complementary answers present themselves. One is that Hamilton knew that his quasi-monarchial views did not prevail at the constitutional convention. Indeed, members of the Constitutional Convention, including Hamilton, had proposed that the President appoint government officials unilaterally and have the power to remove them "at pleasure."[126] The Convention, however, aware that such strong presidentialism might defeat ratification, jettisoned these proposals in favor of a system of joint appointments and removal via impeachment. A complementary answer is that Hamilton and his colleagues wrote the Federalist papers to convince their compatriots to ratify the Constitution, in spite of the compromises and imperfections it contained. Given the Peoples' intense fear of monarchy, this required some emphasis on the protections the Constitution offers against despotism.[127] But the main point is that if one takes popular sovereignty seriously, the ratifiers' views matter more than Hamilton's view. Hamilton's views only matter as they might have influenced ratifiers. Since the Federalists wrote their papers to influence ratification, those papers constitute some evidence of what the ratifiers understood the Constitution to mean and have special standing for that reason. Their subsequent changes of mind or privately expressed views should carry much less weight.

Furthermore, Julian Mortenson has shown, through an exhaustive review of founding-era evidence, that those who ratified the Constitution regarded the phrase "executive power" as the power to execute the law.[128] The uniformity of evidence on

125. *See* Tillman, *supra* note 9, at 152 (stating that Hamilton's statement in *Federalist No. 77* appears "inconsistent with everything we know (or, at least, . . .is commonly taught) about Hamilton the premiere Founding-era spokesman" for presidential power).

126. *See* Driesen, *Toward a Duty-Based Theory*, *supra* note 23, at 98–99.

127. *Cf.* Calabresi & Prakash, *supra* note 25, at 612 (arguing that Hamilton sought to downplay aspects of presidential power that might jeopardize ratification).

128. Mortenson, *supra* note 121, at 1305–40; Julian Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1263–69 (2019)

this point is surprising (given how much disagreement about terminology is normal in political discourse) and overwhelming.[129] This implies that the term "executive power" does not include a removal power. Removal might be useful in securing presidential control over law execution, but so is presidential appointment. The Constitution's text shows that the Constitution does not necessarily justify implying that the President must have exclusive possession of all powers useful to law execution, because it denies some of these powers to the President (e.g., through the Appointments Clause and through the Impeachment Clause) and grants the power to aid law execution through general rules to Congress (not the President or the courts) through the Necessary and Proper Clause.[130]

Story points out, in effect, that the pre-ratification evidence overwhelmingly negates an original intent to authorize presidential removal.[131] This suggests that originalists adhering to the notion that the intent at the founding governs when the text does not unambiguously resolve an issue should find that the uniform pre-ratification evidence resolves the matter against presidential removal.[132]

C. POST-RATIFICATION EVIDENCE

1. The First Congress

Unlike many contemporary originalists, Joseph Story accepts the idea of a living Constitution, whose meaning (at least within the bound of plausible textual interpretation) the political

(reviewing the use of the term executive power and related terms in founding-era dictionaries).

129. *See* Mortenson, *supra* note 121, at 1312 (finding the "sheer unanimity" of founding era authority on this point "overwhelming").

130. *See generally* David M. Driesen & William C. Banks, *Implied Presidential and Congressional Power*, 41 CARDOZO L. REV. 1301, 1313–14 (2020) (noting that the Necessary and Proper Clause authorizes laws shaping presidential administration); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effects of "the Sweeping Clause,"* 36 OHIO STATE L.J. 788 (1975) (arguing that the Necessary and Proper Clause counsels against judicial creation of implied presidential power).

131. *Cf.* MCCONNELL, *supra* note 50, at 161–69 (suggesting originalist support for presidential removal without finding a single statement suggesting that prior to ratification).

132. *Cf. id.* at 167 (making an affirmative argument based on the notion that the President must be able to fire those who do not support "his program"—an apparent reference to the modern practice of a President campaigning based on policy issues).

branches may alter through practice. But most historians dispute his view that this happened in 1789.[133] The 1789 debate showed that the Members of the House at that time did not all agree about what the Constitution should mean for removal. Some thought that impeachment constituted the sole removal method.[134] Others thought that Congress could specify the location of removal under the Necessary and Proper Clause.[135] And still others endorsed the notion of a presidential removal right, albeit one focused on removal for cause.[136]

The 1789 debate that Story referenced, moreover, took place in a narrow context. It focused on the Secretary of State office,[137] where there are better functional reasons for sole presidential control than exist in some other contexts,[138] like in the creation of a national bank. And the legislation passed did not squarely resolve the removal issue.[139] In other contexts, the First Congress made varying arrangements.[140] Hence, most historians' reading of the decision of 1789 suggests that Story got it wrong: the Congress did not amend the Constitution to create an indefeasible presidential removal right in 1789. It should be noted, however, that some prominent Framers, including Hamilton, changed their views in 1789. For originalists who accept either the notion of popular sovereignty or of agreed upon meaning of the constitutional text at the Founding, some Framers' change of

133. Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023).

134. *See* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1023 (2006) (noting that "a handful of Representatives asserted that impeachment was the only permissible means of removing an officer of the United States").

135. *Id*. (describing a group of representatives that "declared that . . . Congress could vest a removal power with the President" if it so chose).

136. *See id*. (explaining that "some Representatives" asserted a presidential removal authority under Article II).

137. *See* Myers v. United States, 272 U.S. 52, 111 (1926) (beginning an extended treatment of the "decision of 1789" by discussing a motion to establish a foreign affairs department headed by a Secretary).

138. *See Ex Parte* Hennen, 38 U.S. (13 Pet.) 230, 234–35 (1839) (explaining that the President's large discretionary powers over foreign relations justifies a presidential right to remove a Secretary of State).

139. *See* Shugerman, *supra* note 133, at 760 (explaining that the final bill omitted language stating that the Secretary of State would "be removable by the President," which had appeared in an earlier version, instead making reference to handling of papers in the event of a vacancy).

140. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 16–22, 27–32 (1994) (discussing degrees of presidential control over various executive branch components in the early republic).

heart in 1789 should be irrelevant. There is no evidence that these Framers' views in 1789 reflected an agreed upon textual meaning at the Founding or the views of the ratifiers. Post-ratification views might be considered germane evidence of pre-ratification meaning and intentions when they seem representative of a consensus and no pre-ratification evidence contradicts those views. But the views expressed by Hamilton and others do not represent a consensus in the House at the time (let alone the Senate, which split 20–20 on the relevant bill). Moreover, Hamilton admitted that he changed his views, meaning that his views in 1789 cannot be evidence of the agreed upon public meaning of the constitutional text that informed the People's ratification decision.[141]Here, Story's interpretation is helpful. He suggests that some of the Framers changed their minds in light of their faith in George Washington. In keeping with the observation that the Framers were not originalists, Story's suggestion rings true. In other words, the Framers were likely adapting the Constitution to mean what they thought it should mean in 1789 with a very well-regarded President in place, not what it meant at the time of ratification. And some of them, almost certainly Hamilton, likely were renewing a battle that they had lost in the Philadelphia Convention for greater executive power in the Constitution than the other delegates or the People would accept.

2. Constitutional Custom Respecting Removal

Story explains that *the public* acquiesced in the Decision 1789 because Presidents before Andrew Jackson rarely removed officials and generally countenanced only removal for cause.[142] That point leaves the reader with the impression that removal by appointment never took hold. But Daniel Webster explained in 1832 (the same year in which Story's treatise first appeared in print) that no President ever removed an official except by means of securing Senate approval of a successor.[143] Daniel Webster had a long distinguished career in Congress and, like Story, was a

141. *See* Katz & Rosenbloom, *supra* note 15, at 412–13 (pointing out that Hamilton's change of mind cannot be evidence of a consensus favoring presidential removal at the time of ratification).

142. STORY, *supra* note 4, § 1543.

143. *See* Myers v. United States, 272 U.S. 52, 260 (1926) (Brandeis, J., dissenting) (stating that "[i]n all removals which have been made, they have generally been effected simply by making other appointments" (quoting 4 DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 189 (7th ed. 1853)).

leading nineteenth-century constitutional lawyer.[144] Andrew Jackson's biographer, Robert Remini, likewise, notes that before Jackson "no . . . President had ever dismissed a cabinet officer."[145] Furthermore, Justice Brandeis' dissent in *Myers*, uncontradicted by the majority, suggests that this practice of removal by appointment generally persisted at least until the date of the *Myers* decision.[146]

In fact, George Washington established the custom of removal by appointment and it endured for more than one hundred years afterwards. The rare exceptions to this custom triggered censure and impeachment.

Webster and Brandeis did not mean that those being removed learned of their removal from news reports or records of the Senate's proceedings.[147] Rather, they explained, Presidents who wished to replace an existing official would inform the official that the President would be seeking the approval of a successor and that the official would lose his office upon confirmation of the successor.[148]

Presidents in the Early Republic were extremely reluctant to remove officers approved by the Senate lest they be perceived as attacking the government.[149] This was especially true in the very early years, when something like the stable administration sought by the Framers occurred, with Presidents even keeping on their predecessors' cabinet members.[150] When a President wished to

144. *Id*. at 151 (characterizing Webster as a "great . . . expounder of the Constitution").

145. ROBERT V. REMINI, 3 ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845, at 101 (1984).

146. *See Myers*, 272 U.S. at 259–60 & n.28 (Brandeis, J., dissenting) (claiming that an "administrative practice" consistent with a Senate role in removal existed from the Founding until 1926 and describing Webster's statement and forms used to effectuate removal via appointment as evidence of the practice's shape). The *Myers* majority claims that Webster had inconsistent positions on the President's removal power. *See id*. at 151–52. But the majority does not dispute Webster and Brandeis' claim that the *method* of removal was through appointment of a successor.

147. C*f*. Manners & Menand, *supra* note 23, at 34 n. 187 (explaining that at common law, notice was required before an officer could be removed).

148. *See Myers*, 272 U.S. at 261 (Brandeis, J., dissenting) (discussing the custom of notifying an incumbent that he will be removed by the appointment of a successor).

149. *Cf*. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 53 (2000) (explaining that Presidents prior to Jackson were unsure about whether they had constitutional authority to remove officers appointed by their predecessors).

150. *Id*. (stating that John Adams retained Washington's cabinet "in full" even though "three of the four cabinet officers had no personal allegiance to Adams").

replace a cabinet member needed in another post or to remove an incompetent or cabinet member not loyal to the United States from the government altogether, the President generally replaced him by nominating a replacement to the Senate.[151] Moreover, our early Presidents almost never removed cabinet members even by appointment, except for cause.[152]

Washington established the custom of removing officers through the appointment of successors. While Washington never removed a cabinet officer for political reasons, he had to reshuffle his cabinet to deal with resignations. After Thomas Jefferson

151. *See Myers*, 272 U.S. at 259–61 (Brandeis, J., dissenting) ("In all the removals which have been made, they have generally been effected simply by making other appointments." (quoting WEBSTER, *supra* note 143, at 189)). *Compare* Bamzai & Prakash, *supra* note 14, at 1780 (discussing Jefferson and Adams removals without discussing whether the officers were removed by appointment of successors), *with* Katz & Rosenblum, *supra* note 14, at 420–22 (chiding Bamzai and Prakash for failing to distinguish outright removal from removal by appointment of a successor). Bamzai and Prakash cite instances of Presidents informing the Senate that "they had ousted officers." Bamzai & Prakash, *supra* note 14, at 1781. The cited sources do not demonstrate that any President removed officers on his own authority in advance of (instead of by the means of) an appointment of a successor. *Cf. id.* n.189. The letter from George Washington that they cite nominates William Benson to "succeed" Walker because it has "become necessary to remove . . . Walker." Letter from George Washington to the U.S. Senate (May 17, 1796), in 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 208 (Washington, D.C., Duff Green 1828). Washington's letter does not state that Walker has already been removed, but rather suggests that something has occurred that makes it necessary to remove him through appointment of his successor. While the letter he cites from Thomas Jefferson does state that various revenue inspectors have been removed, it does not indicate who removed them, how, and on what authority. *See Letter from Thomas Jefferson to U.S. Senate (Jan. 11, 1803)*, *in* JOURNAL OF THE EXECUTIVE, *supra*, at 432, 432–33 (noting removal of several officers*); cf.* Bamzai & Prakash, *supra* note 14, at 1781 n.189 (citing this letter as providing examples of removal by Jefferson). Furthermore, the overall context of this letter suggests that revenue inspectors he lists as removed were displaced via recess appointments. The letter as a whole serves the purpose of nominating those appointed during the recess for permanent appointments. By not indicating the context of these letters, Banzai and Prakash exaggerate the strength of this evidence in establishing their thesis. *Accord* Katz & Rosenblum, *supra* note 14, at 421–22 (finding that Bamzai and Prakash treated many cases of removal via appointment as freestanding presidential removal, without examining possible statutory authority for removal); *see also Myers*, 272 U.S. at 251–52 (Brandeis, J., dissenting) (showing that early statutes governing Treasury Department employees required removal for violating a statute); Act of May 8, 1792, ch. 37, § 6, 1 Stat. 279, 280–81 (creating commissioners of revenue and placing them under the direction of the Secretary of the Treasury); *cf.* Letter from Thomas Jefferson to Elias Shipman and Others (July 12, 1801) (responding to complaints about a "removal" of an inspector by suggesting that it was not a removal but calling for some "displacement" of members of the opposite party).

152. *See* SKOWRONEK, *supra* note 66, at 72 (noting the "common understanding" that Presidents would only remove executive officers "for just cause").

resigned, Washington wanted Attorney General Edmund Randolph to succeed Jefferson as Secretary of State, which required not only Senate consent to Randolph's new appointment, but also his removal from his old post.[153] Washington effectuated Randolph's removal from the Attorney General post by securing Senate approval for his successor, William Bradford.[154] Randolph, however, voluntarily resigned from his Secretary of State post after Washington and his cabinet asked him to explain evidence that he had accepted a bribe.[155] Because the Senate was in recess, Thomas Pickering, the Secretary of War, filled in as Secretary of State and Secretary of War following Randolph's resignation.[156] Washington relieved Pickering of his War Department duties by securing the approval of a successor to his War Department post, James McHenry, thereby allowing Pickering to focus on his State Department responsibilities.[157]

While subsequent Presidents sometimes removed cabinet members from the government, they generally did so by nominating a successor, and usually only to address incompetence or to promote a cabinet member.[158] President James Madison,

153. Dice Robins Anderson, *Edmund Randolph*, *in* 2 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 97, 100–01 (Samuel Flagg Bemis ed., 1963).

154. S. EXEC. JOURNAL, 3d Cong., 8th Sess. 147 (1794).

155. Anderson, *supra* note 153, at 152–54 (describing the course of events and noting that Washington described Randolph's resignation as "'voluntarily and unexpectedly offerred [sic]'"); Robert D. Arbuckle, *Edmund Randolph: A Reappraisal*, W. PA. HIST. MAG., Jan. 1978, at 61, 64–65. While some have interpreted Randolph's resignation as a removal, if so, it was a removal for cause. *See* 2 PAGE SMITH, JOHN ADAMS 1784-1826, at 1030 (1963).

156. Henry J. Ford, *Timothy Pickering*, *in* 2 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY, *supra* note 153, at 163, 167.

157. *See* S. EXEC. JOURNAL, 4th Cong., 11th Sess. 198 (1796).

158. *See*, *e.g.*, S. EXEC. JOURNAL, 6th Cong., 17th Sess. 353 (1800) (showing that Adams nominated Secretary of State Pickering's successor on May 12, 1800); Ford, *supra* note 156, at 240–41 (showing that Hamilton requested Pickering's resignation on May 10, but that when Pickering refused two days later, on May 12, Hamilton discharged him); S. EXEC. JOURNAL, 13th Cong., 35th Sess. 346–51 (1813) (nominating Secretary of Treasury Albert Gallatin as envoy to Great Britain and Russia following recess appointment); S. EXEC. JOURNAL, 13th Cong., 37th Sess. 623–26 (1814) (nominating Gallatin as envoy to France in place of William H. Crawford, who would subsequently be nominated Secretary of War); *cf.* Charles C. Tansill, *Robert Smith*, *in* 3 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 151, 195–96 (Samuel Flagg Bemis ed., 1963) (showing that Madison did not accept the incompetent Robert Smith's resignation until he had secured James Monroe's consent to serve pursuant to a recess appointment); S. EXEC. JOURNAL, 15th Cong., 40th Sess. 95–96 (1817) (approving Richard Rush at the end of his term as Attorney General as Minister to Great Britain and William Wirt to succeed him as Attorney General); S. EXEC. JOURNAL, 20th Cong., 50th Sess. 616 (1828) (moving Adam's

however, dismissed Postmaster General Gideon Granger, a Jefferson holdover. He did so primarily because Granger threatened the political neutrality of government service delivery, by firing Postmasters and making controversial appointments for political reasons.[159] Even though Granger was a holdover, his dismissal did not meet with wholesale acquiescence. It excited debate in Congress in which Madison was accused of monarchism and the near passage of a bill seeking disclosure of Madison's reasons for removal in the Senate.[160]

This dismissal proved controversial because it looked like a discharge for political reasons, not because it violated Webster's rule. Granger stayed on until his successor obtained Senate approval—strong evidence that the founding constitutional custom did not permit political removal except through appointment of a successor.[161] This custom generally prevailed at least up until the time of the *Myers* decision in 1926.[162]

Secretary of War James Barbour to the post of Minister to Great Britain through confirmation to the new post and confirmation of his successor the next day).

159. CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 29, 41–42, 44 (1905) (discussing Postmaster Granger's policy of removing Federalist postmasters); *Letter from James Madison to Thomas Jefferson, 13 February 1814*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-07-02-0121 (discussing Granger's appointment of Leib as Postmaster in Philadelphia).

160. *See* 27 ANNALS OF CONG. 1764–65 (1814) (likening Madison to the British monarch because Madison interfered with the department head's choice of appointees by removing him).

161. S. EXEC. JOURNAL, 13th Cong., 36th Sess. 499, 511 (1814) (showing that the Senate approved Return J. Meigs, Granger's successor, on March 17, 1814); BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, 1774–1989, at 151 (Robert Sobel ed., 1990) (showing that Granger's last day in office was the same day, March 17, 1814).

162. *See*, *e.g.*, Message from Rutherford B. Hayes to United States Senate (Dec. 11, 1877), *reprinted in* 7 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 438, 481 (James D. Richardson ed., 1898); S. EXEC. JOURNAL, 26th Cong., 1st Sess. 240, 246–47 (1840) (removing Henry D. Gilpin from his post as Solicitor of the Treasury by elevating him to the Attorney General position and obtaining approval of his successor and removing Matthew Birchard from his post as Solicitor General of the Land Office by elevating him to the vacated Solicitor of the Treasury post, and appointing a new Solicitor General for the Land Office); S. EXEC. JOURNAL, 20th Cong., Spec. Sess. 8 (1829) (replacing the Secretary of War by appointment of a successor); S. EXEC. JOURNAL, 25th Cong., 2d Sess. 144–45 (1838) (replacing the Attorney General by appointment of a successor); S. EXEC. JOURNAL, 26th Cong., 1st Sess. 240 (1840) (nominating officials to replace those who had resigned or whose term was about to expire). Presidents James K. Polk and Millard Fillmore did not remove cabinet officials, but when they accepted high officials' resignations, they made them effective only when a replacement could be appointed. *See*, *e.g.*, 2 JAMES K. POLK, THE DIARY OF JAMES K. POLK 121 (Milo Milton Quaife ed., 1910); S. EXEC. JOURNAL, 31st Cong., 1st Sess. 121 (1850) (discussing a reshuffling of the cabinet in which resignations took effect upon appointment of

The first major deviations from the spirit of this custom took place under Andrew Jackson around the time that Story published his *Commentaries*. Jackson removed officials without Senate approval of a successor, as Story notes. Most famously, he removed a series of Treasury Secretaries to destroy the national bank established by laws Jackson did not wish to execute.[163] His actions triggered a censure and condemnation by constitutional scholars (including Story), which suggests that the custom of removal by appointment and the values supporting it were firmly established before Jackson.[164] Joseph Story said, "Though we live under the form of a republic we are in fact under the absolute rule of a single man."[165]

Even Jackson, however, nominally conformed to the custom of removal through appointment. He appointed successors to the people he removed on the day of removal.[166] On the other hand, he relied on the Recess Appointments Clause to make many of these appointments.[167] By timing the removal and appointment to make them occur during a recess, he evaded compliance with the requirement of Senate consent to appointments, which the removal-by-appointment procedure was designed to protect.

replacements). While John Tyler likewise did not remove cabinet members from office, many resigned in response to policy decisions they disapproved of and Tyler broke custom by allowing those resignations to take effect before appointment of a successor. *See*, *e.g.*, S. EXEC. JOURNAL, 28th Cong., 1st Sess. 193 (1843); *id.* at 349 (1844) (nominating George Bibb to Secretary of the Treasury on June 15, 1844, more than a month after John Canfield Spencer's resignation from the post); Randolph G. Adams, *Abel Parker Upshur*, *in* 5 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 62, 67, 85–86 (Samuel Flagg Bemis ed., 1963) (showing that Tyler waited more than a month to appoint Upshur to succeed Daniel Webster as Secretary of State in the wake of Webster's resignation May 8, 1843).

163. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815–1848, at 387–90 (2007); ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 109, 113–115, 118, 122–25 (1967); Driesen, *Making Appointment the Means of Presidential Removal*, *supra* note 24, at 329–31, 349–50.

164. WILLIAM R. EVERDELL, THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS 209 (2000) (discussing the attitudes of constitutional scholars); HOWE, *supra* note 163, at 387–90 (noting that the Senate censured Jackson for improperly firing two subordinates); ARTHUR SCHLESINGER, JR., THE AGE OF JACKSON 106–07, 110 (quoting Clay as characterizing Jackson's efforts as a "revolution" concentrating "all power in the hands of one man" and Webster as charging Jackson with "despotism").

165. SCHLESINGER, *supra* note 164, at 110 (quoting Joseph Story).

166. *See* HOWE, *supra* note 163, at 387–88 (stating that Jackson replaced Treasury Secretary McClane with William Duane on June 1, and then replaced Duane with Taney on September 23).

167. *See* S. MANUAL, S. DOC. NO. 107-1, at 1146 (1st Sess. 2001) (detailing Jackson's numerous recess appointments, including those of Taney and Duane as Treasury Secretaries).

While the Constitution authorizes unilateral recess appointments, it does so to ensure that unavoidable vacancies "that may happen during the Recess of the Senate" do not thwart the nation's business, not to provide a tool for the President to avoid replacing incumbent Senate-approved officials with new Senate-approved officials.[168]

Andrew Johnson, an avowed white supremacist, defied the custom altogether as he sought to evade his responsibility to faithfully execute the law governing reconstruction.[169] His widespread abuse of removal to get rid of officials faithfully executing the law caused Congress to finally adopt the reform recommended by Story in the age of Jackson.[170] It enacted a statute—The Tenure in Office Act—requiring Senate approval of the removal of key Lincoln holdovers.[171] Johnson arguably defied the statute (and certainly violated the prior custom) by removing Secretary of War Edwin Stanton and unilaterally appointing Adjutant General Lorenzo Thomas as interim War Secretary when the Senate was in session, thereby using removal to evade the Appointments Clause procedure.[172] But subsequent presidents and Congress restored the custom of appointment by removal as soon as Johnson left office.[173]

168. U.S. CONST. art. II, § 2, cl. 3; *see* NLRB v. Noel Canning, 573 U.S. 513, 523–24 (2014) (explaining that Senate confirmation was intended to be the "norm" and that recess appointments should not be routine).

169. *See* BRENDA WINEAPPLE, THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION 83, 184–85 (2019) (quoting Johnson as saying, "[T]his is a country for white men and, by God, as long as I am president it shall be a government for white men" and discussing his use of widespread removal to suppress dissent and defy legislative policy on reconstruction).

170. Driesen, *Making Appointment the Means of Presidential Removal*, *supra* note 24, at 332 (stating that Congress adopted the Tenure of Office Act "to avoid the sort of presidential subversion that had occurred with respect to the Freedmen's Bureau").

171. Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (repealed 1887).

172. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1999) at 215–16 (explaining that the removal of Stanton in favor of Lorenzo Thomas occurred on Feb. 21, 1868, and that the Senate actively resisted immediately). Johnson had earlier suspended Stanton and installed Ulysses S. Grant as an interim appointee. *Id*. at 213–14. Stanton regained the office when the Senate disapproved his suspension in January, setting the stage for the removal through the unconstitutional appointment of Thomas. *Id*. at 215.

173. LOUIS A. COOLIDGE, ULYSSES S. GRANT 325–27, 388–89 (1922) (showing that Grant had requested Hoar's resignation from the post of Attorney General); Letter from Ulysses S. Grant to Ebenezer R. Hoar (June 15, 1870), *in* 20 THE PAPERS OF ULYSSES S. GRANT 170 (John Y. Simon ed., 1995) (accepting Hoar's resignation at "the appointment and qualification of your successor"); Letter from Ulysses S. Grant to Benjamin H. Bristow (June 19, 1876), *in* 27 THE PAPERS OF ULYSSES S. GRANT, 136–37 (John Y. Simon ed.,

With respect to officers of the United States below the cabinet level, the custom of only removing through appointment generally prevailed as well (with exceptions under Johnson and Jackson). Presidents after the civil war customarily removed officials by submitting a form indicating that the incumbent would be removed upon the Senate's confirmation of a successor. Justice Brandeis's *Myers* dissent provides a table documenting nearly 5,000 presidential removals effectuated through such a form.[174] Thus, the practice of removal by appointment was very pervasive and longstanding, lasting much longer than one hundred years.

IV. STORY'S ACCOUNT AND THE SUPREME COURT'S SELECTIVE ORIGINALISM

Story's account plus the history discussed above suggest the following. The Appointments Clause, while not speaking directly to removal, necessarily implies that the Senate and President jointly exercise removal authority by appointing successors. This was likely the original understanding at the time of adoption of the Constitution. In 1789, however, some of the Framers, including some who had sought to establish a stronger presidency than the Constitution countenanced during the Philadelphia Convention, supported other interpretations of the Constitution. But Congress and the President settled on removal via appointment as the correct reading of the Constitution through practice. The exceptions to this long-established constitutional custom occurred under law defying Presidents and were recognized at the time as deviations from constitutional requirements.

2005) (accepting Secretary Bristow's resignation effective on June 20, 1876); S. EXEC. JOURNAL, 44th Cong., 1st Sess. 184 (1876) (confirming Bristow's successor Lot M. Morrill on June 21, 1876); *id.* at 244 (removing Taft from the War Department by appointing his War Department successor, James Cameron, on the same day and removing Pierrepont from his Attorney General post by confirming Taft as the new Attorney General); *id.* at 279 (indicating that President Grant nominated James N. Tyner as Postmaster General to succeed Marshall Jewell on July 11, 1879, with the appointment confirmed on July 12, 1879); 27 THE PAPERS OF ULYSSES S. GRANT, 184 (stating the President Grant requested the resignation of Postmaster General Marshall Jewell on July 11, 1876); *cf.* ALVIS ET AL., *supra* note 9, at 110–11 (discussing "suspension[s]" under Presidents Hayes and Cleveland).

174. Myers v. United States, 272 U.S. 52, 259–60 n.28 (1926); s*ee*, *e.g.*, Parsons v. United States, 167 U.S. 324, 325 (1897) (quoting a letter from President Cleveland removing a U.S. Attorney in Alabama "to take effect upon the appointment and qualification of your successor"); Shurtleff v. United States, 189 U.S. 311, 312 (1903) (quoting a letter from President McKinley removing an appraiser "to take effect upon the appointment and qualification of your successor").

This obviously is not the reading of the modern Supreme Court. What accounts for the difference? The answer lies partly in what I flagged at the outset as temporally and textually selective originalism.

A. TEMPORALLY SELECTIVE ORIGINALISM

In 1926, Chief Justice Taft, a former President, wrote an opinion in *Myers v. United States* that adopted, for the first time, the doctrine of unilateral presidential removal. President Taft's opinion discounted original intent at the Founding and ignored most of the germane constitutional text.[175] Instead, he relied principally upon the "Decision of 1789." He read this decision as establishing a constitutional rule that the President must have unilateral removal authority. The parade of articles disputing his reading of what Jed Shugerman has called the "Indecision of 1789" began shortly thereafter.[176] Although Story seems to have read the 1789 debates much as Justice Taft did, he did not see them as establishing an immutable constitutional rule. Thus, his thought highlights a key issue that arises even if Taft's reading of the 1789 debates is correct: Why should a decision reached in 1789 not compelled by constitutional text trump the ratifiers' understanding at the Founding and longstanding practice beginning in the Washington administration?

It seems fairly clear that the Court has not seriously grappled with this question. To the extent that the Justices and scholars rely on the 1789 debate in Congress, they engage in temporally selective originalism, where they select a moment in time when they can find some evidence to support their views. All contrary evidence outside that moment in time is neglected or explained away. This procedure is at odds with what originalists claim to be doing. In particular, Justice Roberts opinion for the Court in *Seila Law LLC v. Consumer Financial Protection Board* admits that the

175. *See Myers*, 272 U.S. at 108–10 (citing Article II, but not the Necessary and Proper Clause or the Appointments Clause and providing a barebones account of the establishment of Article II). Justice Taft does quote Hamilton's statement in the Federalist Papers, but summarily discounts its import because Hamilton, as Washington's Secretary of the Treasury, "changed his view." *Id*. at 136–37.

176. *See* Shugerman, *supra* note 133; *see*, *e.g.*, Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927); *cf.* Prakash, *supra* note 134.

Court has discounted contrary evidence.[177] *Federalist No. 77* figures among the statements the Court admits to discounting.[178]

B. TEXTUALLY SELECTIVE ORIGINALISM

Modern originalist scholars often advocate reliance on the public meaning of constitutional text, partly because of the problems in identifying original intent. Because constitutional text is open-ended and therefore provides uncertain guidance, they often fall back on original intent as their method of discerning public meaning.[179] Thus, the problem of temporally selective originalism taints efforts to discern the agreed upon public meaning of text relevant to the removal power.

But Story's treatise highlights an even more fundamental problem with agreed upon public meaning, at least as it pertains to the unitary executive theory. The problem of selecting the proper text.

The landmark modern opinions expanding the presidential right to remove executive officers focus on Article II's Vesting and Take Care Clauses and fail to even mention any of the other constitutional text. In *Morrison v. Olson*, the Court *upheld* the Independent Counsel Act, despite a claim that it violates the Constitution by not authorizing the President to fire the independent counsel. Justice Scalia, however, penned a landmark dissent arguing that the Constitution's clause vesting the executive power in the President necessarily includes the right to fire prosecutors, such as the independent counsel.[180] The *Morrison* majority focuses on the constitutional clause requiring the President to "take care that the laws be faithfully executed" and

177. 140 S. Ct. 2183, 2205 (2020) (stating that the Court has "discounted" contrary statements by Madison, Hamilton, and Chief Justice Marshall).

178. *See id*. (citing *Myers*, 272 U.S. at 137–39) (referencing President Taft's embrace of Hamilton's statements as Secretary of the Treasury in preference to Hamilton's statements to the ratifiers).

179. *See* Shane, *supra* note 23, at 332 (noting that original public meaning must "be what people voting on ratification thought they were voting for or against."); *cf*. Richard Fallon, Jr., *The Meaning of Legal Meaning and its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1289–95 (2015) (explaining that most originalists no longer identify the original public meaning of the Constitution with the Framers' intent, but that they do not have an agreement about what constitutes the agreed upon public meaning).

180. 487 U.S. 654, 697–98 (1988) (Scalia, J., dissenting) (describing the Vesting Clause as "the provision at issue here").

addresses the Vesting Clause.[181] It concludes that the separation of powers does not preclude for-cause removal protection for the Office of Independent Counsel.[182] More recently, Justice Robert's opinion for the majority in *Seila Law, LLC v. Consumer Financial Protection Board,* held that the President must have "unrestricted" authority to fire the single head of an administrative agency, striking down a provision that authorized removal only for cause.[183] Justice Roberts relied heavily on the Vesting and Take Care Clauses. Neither the majority nor the dissent in either of these opinions discuss the Appointments Clause.

Joseph Story, as we have seen, focuses on the Appointments Clause, inferring from its text a Senate role in removal. This helps secure continuous administration of the government through officials selected jointly by the President and the Senate. Some of the Framers and many modern scholars and judges, however, embrace the Necessary and Proper Clause, which strongly supports the notion that Congress gets to choose who may remove officers of the United States.[184] But the majority opinions of the modern Supreme Court do not mention that clause either, even when the dissent relies upon it.[185] Finally, at the Founding, some of the Framers focused on the Constitution's removal provision to determine who has removal authority.[186] That provision authorizes only the Senate to remove executive officers, after impeachment by the House. While perhaps the textually strongest argument, given the elaborate procedure established and the lack of an express mention of removal elsewhere, this view has little contemporary support.[187] In short, interpreters grappling with the removal authority often engage in selective textualism, focusing

181. *See id*. at 690 & n.29; *id.* at 692.

182. *Id.* at 685–93.

183. *Seila Law*, 140 S. Ct. at 2192.

184. *See*, *e.g.*, *id.* at 2227 (Kagan, J., dissenting) (discussing Congress' "broad authority to establish and organize the Executive Branch" under the Necessary and Proper Clause); Manning, *supra* note 92, at 1965–69 (explaining that the Necessary and Proper Clause qualifies the Vesting Clause).

185. *See Seila Law*, 140 S. Ct. at 2197–207.

186. *See* Calabresi & Prakash, *supra* note 25, at 642–43 (discussing the impeachment theory of removal and its support in the First Congress).

187. *Cf.* INS v. Chadha, 462 U.S. 919, 951 (1983) (finding that the existence of a "single, finely wrought and exhaustively considered, procedure" precludes allowing other procedures to govern).

on a preferred constitutional text while ignoring or discounting constitutional text pointing away from where they want to go.

C. WHAT DETERMINES SELECTION OF SOURCES IN REMOVAL DECISIONS?

The plausibility of Justice Story's view of the removal power illuminates the cases that many think of as originalist, suggesting that Justices select and interpret originalist materials to support their views of what powers the President should have.[188] This subpart considers the two leading "originalist" removal cases, *Myers* and *Seila Law* in turn to explore how the Justices' political preferences shape their selection of originalist material to rely upon.

1. Myers

Although *Myers* is widely regarded as an originalist opinion, Andrea Katz and Noah Rosenblum have argued that one should understand *Myers* as a manifestation of a progressive-era belief that more presidential (as opposed to congressional) control of the executive branch would improve administration.[189] President Taft, who wrote the opinion, was one of the principal architects of the progressive view that a rather muscular presidency would help improve law and policy.[190] Taft fairly openly admits that he relied upon the "Decision of 1789" not because he considered it binding authority, but because he agreed with the reasoning which the proponents of presidential removal in 1789 advanced in support of their position.[191] Taft's views also reflect the progressive movement's support for expert judgment and efficient administration as an alternative to an executive branch riddled with patronage.[192] He carefully insisted, contrary to the implications of a strict unitary executive theory, that Congress

188. *See*, *e.g.*, Scalia, *supra* note 71, at 851–52 (characterizing *Myers* as an exemplar of originalism).

189. *See* Scoseria Katz & Noah A. Rosenblum, *Becoming the Adminsitrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2210–13 (2023).

190. *See id*. at 2218–20.

191. *See* Myers v. United States, 272 U.S. 52, 136 (1926) (stating that "We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but . . . because of our agreement with the reasons upon which it was avowedly based"). Justice Taft, however, goes on to cite the pedigree of the members of the First Congress as a reason to give that reasoning weight. *Id*.

192. Katz & Rosenblum, *supra* note 189, at 2225–32.

could protect civil servants from removal by vesting their appointment in heads of departments, rather than the President.[193] In this respect, the *Myers* Court followed Story, who insisted that Congress retained the power to check presidential removal of inferior officers. Where Taft disagrees with the validity of Founding-era concerns he simply explains that the Founders who articulated these concerns were wrong. He recognizes that members of the First Congress expressed concern that abuse of a unilateral presidential removal authority could lead to tyranny.[194] He explains that the widely shared Founding-era concern about despotism was based on a "misconception that the President's attitude in his exercise of power is one of opposition to the people."[195] This repudiates not just the Founding-era position of many that the President should not have a unilateral removal authority, but the very widely agreed upon idea that even with elections a tyrannical President was a possibility that the Constitution must guard against. While not every founder agreed about removal at all times, the Impeachment, Oath, and Appointments Clauses all affirm what every student of history knows, that anxiety about tyranny stemming from the head-of-state was widespread at the Founding. But Taft simply dismisses this Founding-era consensus as wrong.

2. Seila Law

This likewise reflects selection of sources of original intent to match the deciding Court's view of what law should look like now. His opinion sounds in originalism, as it prominently features constitutional text, history, and structure.[196] But Chief Justice Roberts' opinion for the Court also objects to the Consumer Financial Protection Board (CFPB) Director's ability to "issue final regulations," litigate, and impose penalties "on private parties" without, Roberts writes, meaningful control by the President.[197] He protests that the Director "may dictate and enforce policy for a vital segment of the economy affecting

193. *See Myers*, 272 U.S. at 173–74 (affirming that Congress can extend the merit system by making officials subject to appointment by departments and therefore not removable by the President).

194. *Id*. at 123.

195. *Id*.

196. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192, 2197 (2020).

197. *Id*. at 2203–04.

millions of Americans," a statement congruent with conservative distaste for government regulation.[198] While Roberts supports his opposition with a debatable structural argument, he ultimately comes to rest on a very contemporary view of presidential power completely at odds with the expectations and customs at the Founding.[199] In this view, Presidents make campaign promises about policy and get elected to carry those views out.[200] An elected President should, in Roberts's view, have the power to "shape" administration to fit his policy views.[201] His views of the presidency are congruent with contemporary practice in an intensely partisan age. But they are antithetical to the Founding-era aims to foster stable administration across presidential election cycles, to vest Congress (not the President) with policy-making power, to charge the President with faithful execution of the laws, and to contain the vice of "faction." During the early Republic, Presidents did not actively campaign for office, let alone make promises about policy.[202] Thus, *Seila Law* cloaks a modernist conservative view of how the presidency should operate in originalist garb.[203]

V. IMPLICATIONS

Once one realizes that the Court's removal decisions stem from living selective originalism, questions about the wisdom of judicial resolution of these separation of powers cases arise. Wise constitutional reasoning of the sort seen in Justice Story's *Commentaries* must weigh not only competing sources but also the competing policy considerations animating those sources. The Founders supported an energetic executive branch headed by an

198. *Id*. at 2204.

199. *See* David M. Driesen, *Political Removal and the Plebiscitary Presidency: An Essay on* Seila Law, LLC v. Consumer Financial Protection Board, 76 N.Y.U. ANN. SURV. AM. L. 707, 722 (2021) (explaining the Court's structural argument but showing that the argument leads to collapse of the separation of powers).

200. *See id*. at 719–20 (showing that this is what the opinion does).

201. *Seila Law*, 140 S. Ct. at 2204 (objecting to the CFPB director's five-year term on the grounds that it deprives an incoming President of the opportunity to "shape" CFPB's "leadership").

202. *See* SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 49–51 (2020) (explaining that the tradition of campaign promises began in the late nineteenth century but did not take hold fully until the twentieth century).

203. *See* Driesen, *supra* note 199, at 713–20 (explaining how *Seila Law* starts with arguments sounding in originalism but ends up relying on a modern theory of a plebiscitary President).

elected President rather than a council, but also sought to avoid tyranny.[204] They differed about how to achieve these potentially conflicting objectives, but they all agreed that the purpose of having a removal authority was to remove unfit officers, not to secure presidential control over policy. Given the rise of delegated authority, however, modern Justices are correct to see that there is a constitutional problem respecting who controls administrative discretion. But their answers to this questions suggest such a limited understanding of the considerations that our Founders debated as to call the enterprise of adjudication of separation of powers claims respecting removal into question.

In *Seila Law*, the Court decided that the President should have what I have called a political removal authority—an authority to remove an officer who is properly performing his duty but not following the President's policy preferences.[205] The Court considered the advantages of this approach—the possibility of democratic control over discretionary policy decisions.[206] But it did not consider the disadvantages flagged by Story and much evident in contemporary practice. Removal can be used to remove those faithful to the law to put in place policies at odds with the law, to enforce the law in a partisan vindictive manner, or even to dismantle democracy.[207] I have shown elsewhere that these problems arose during the Jackson, Andrew Johnson, Nixon, and Trump administrations.[208]

Once one realizes that wise constitutional decisionmaking involves balancing the advantages and the disadvantages of centralized power, doubt about judicial competence arises. Since *Myers*, none of the Justices have explicitly considered the problem

204. *See* Mortenson, *supra* note 121, at 1294–96, 1299–1302 (discussing the consensus that the Constitution must guard against tyranny whilst empowering vigorous law execution); *see*, *e.g.*, THE FEDERALIST NO. 77, *supra* note 8 (James Madison) (characterizing the reconciliation of an energetic executive with liberty as a key difficulty "encountered by the [constitutional] convention.").

205. *See* Driesen, *Political Removal and the Plebiscitary Presidency*, *supra* note 199, at 710–13 (contrasting removal for political reasons with removal for cause).

206. *See Seila Law*, 140 S. Ct. at 2204 (explaining that presidential removal power enables a President to remove a director who aims to thwart achievement of the statutory consumer protection goals).

207. *See* David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 32–41 (2020) (discussing how establishment of head-of-state control of the executive branch hastened democratic decline in Poland, Hungary, and Turkey).

208. *See* Driesen, *Making Appointment the Means of Presidential Removal*, *supra* note 24, at 329–40 (providing details).

of removal being used to subvert the rule of law, thereby showing a dismaying lack of attention to history or contemporary practice. In *Seila Law*, for example, Justice Roberts discusses the problem of a President saddled with a non-removable holdover Director who stands in the way of his realizing a campaign promise to protect consumers.[209] This hypothetical casts the President in the role of faithfully executing law designed to protect consumers and restraints on his removal authority as obstacle to performance of presidential duty. But neither the majority nor the dissent discuss the converse problem. Suppose that a President campaigns on the goal of reducing the burdens of regulation and wants to thwart consumer protection by removing a Director dedicated to properly implementing consumer protection law. For-cause removal protection in that scenario serves to secure faithful law execution by thwarting a law defying President. The inclusion of for-cause removal protection in the statute suggests that Congress considered the latter scenario a potentially serious problem. Neither the majority *nor the dissent* even discuss this possibility.

Even the *Morrison* Court evaluated the problem of for-cause removal protection as one of whether it allowed a good faith President to "assure that the counsel is competently performing . . . her statutory responsibilities."[210] The majority concluded that the Attorney General's for-cause removal authority sufficed to allow a good faith President to ensure faithful law execution.[211] Justice Scalia's dissent suggests that the Court may have been aware that the Independent Counsel Act was passed to guard against bad faith removal of a special counsel to shield legal violations by high-level officials.[212] But none of the Justices explicitly consider the idea that the possibility of a bad faith President suggests that for-cause removal protection serves the Constitution and the rule of law. [213]

But if the Justices consider originalist constitutional values, how much faith can we place in their judgment about how to

209. *Seila Law*, 140 S. Ct. at 2204.

210. Morrison v. Olson, 487 U.S. 654, 692 (1988).

211. *See id*.

212. *See id*. at 706 (Scalia, J., dissenting) (recognizing that the "whole object of the statute" is to "deprive[] the President of exclusive control" of prosecution decisions).

213. *Cf. id*. at 689–92 (recognizing that for-cause removal protection for an independent counsel does not prevent the President from faithfully executing the law without discussing the problem that he might use unfettered removal authority to prevent faithful execution of the law against members of his administration).

weigh them? Will the Court know how often Presidents use removal to accomplish policy ends not advertised to the People? Will they recognize that people often vote on the basis of personality rather than on the basis of policy promises? Can they assess the potential for delivery of campaign promises through removal and reassignment of duties or acting appointments to subvert the rule of law?

To raise these questions suggests that the political branches should resolve removal issues through negotiation and compromise and that the judicial branch should either stay out of it or at least give the presumption of constitutionality enormous weight in this area. The idea of staying out of it is not new. Justice Story assumed that Congress could reclaim its removal power through legislation. Nikolas Bowie and Daphna Renan have claimed that the Court did not disrupt legislation structuring the executive branch before *Myers*.[214] And a noted scholar of the previous generation, Jessie Choper, argued against judicial review of separation of powers cases.[215] But at a minimum the Court, should, as some of the Justices suggested, behave much more modestly and show a measure of deference to legislation enacted by Congress and signed by the President.[216] Perhaps the Justices should take the idea that the Constitution embodies "self-executing" safeguards seriously.[217]

214. *See* Bowie & Renan, *supra* note 20, at 2072 (describing *Myers* as the "first Supreme Court decision to consider the constitutionality of a statute . . . whose only alleged fault was" violating a "limit" on congressional "power to regulate the executive branch.").

215. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

216. *See* United States v. Arthrex, 141 S. Ct. 1970, 1994 (2021) (arguing that the Appointments Clause grants Congress "a degree of leeway" in how it structures the government); Seila Law, LLC v. CFPB, 140 S. Ct. 2183, 2224–25 (2020) (Kagan, J., dissenting) (arguing that the Constitution "grants Congress authority to organize all the institutions of American governance" and "[w]ithin broad bounds, it keeps the courts . . . out of the picture"); Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring) (stating that differences between the President and Congress should "turn on political . . . considerations" and that the "Judicial Branch should not decide" such issues absent a "constitutional impasse"); *id.* at 1003 (plurality opinion) (finding that a dispute about whether the President has the power to unilaterally terminate a treaty "should be left for resolution by the Executive and Legislative Branches of the Government.").

217. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) (finding that "separation of powers and . . . checks and balances . . . were intended to operate as a self-executing safeguard against the . . . aggrandizement of one branch at the expense of the other") (citation and internal quotation omitted).

Story's admonition that it might be "difficult, and perhaps impracticable . . . to recall the practice" of removal-by-appointment rings even more true today than it must have in 1833.[218] But, I have argued elsewhere that it should be possible for Congress to make appointment of a successor the means of presidential removal, in spite of the tension between such a proposal and *Myers*, given the long constitutional custom supporting this approach.[219] This proposal does not contradict *Myers*, because it allows the President to remove executive officers of the government whether Congress approves it or not. It simply changes the procedural mechanism. Congress might, however, enhance such a proposal's chance of surviving judicial review by an activist Court by making presidential nomination of a qualified successor the removal trigger, rather than Senate approval.[220] That would make prevent the Senate from controlling removal indirectly by abusing its advice and consent function to reject competent and law-abiding nominees.

Lessons from this analysis of Joseph Story's views will help defenders of democracy and the Court cope with President Trump's plans to establish an autocracy if he becomes President. Specifically, he plans to consolidate presidential control over the civil service and the independent agencies.[221] Elected autocrats destroy democracy by firing civil servants faithful to the rule of law and gaining control of independent agencies, especially electoral commissions (like the FEC) and media authorities (like the FCC).[222] Doing this allows them to tilt the electoral playing field in their favor, wipe out critical media outlets, and use the law more generally as an instrument to consolidate personal power. This effort will likely come to the Court in the form of cases about the constitutionality of the laws governing independent agencies and the civil service. *Seila Law* undermined prior decisions upholding the constitutionality of independent agencies and its logic makes attacks on the civil service possible (in spite of

218. STORY, *supra* note 4, § 1544.

219. *See* Driesen, *Making Appointment the Means of Presidential Removal*, *supra* note 24, at 345–60 (developing and defending an argument that Congress could make appointment the means of removal).

220. *See id*. at 357 (explaining how a nomination trigger "avoid[s] the constitutional difficulty *Myers* creates).

221. *See* Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES, July 18, 2023.

222. *See* DRIESEN, *supra* note 49, at 104–13.

statements protecting the civil service in *Myers*).[223] Advocates should not, as they have in the past, rest their faith entirely in the limited power of precedent. They need to remind the Court of the association Story made between wanton removal and autocracy. The Court itself needs to consider the possibility of bad faith administration and the way unfettered removal power facilitates circumvention of the Appointments Clause by allowing removal of faithful officers and their replacement with acting appointees.[224]

VI. CONCLUSION

Joseph Story's *Commentaries* suggest that the Constitution does not bestow a unilateral removal authority upon the President, but instead authorizes removal by appointment. A detailed examination of the support for this theory highlights the "selective originalism" exhibited in the Court's removal decisions and reminds us of constitutional values that should inform the Court and Congress in addressing future removal problems.

223. Prior to *Seila Law*, the Court had upheld the constitutionality of for-clause removal protection for independent agencies exercising quasi-judicial or quasi-legislative authority. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958). Justice Roberts reconciled these cases with his decision to strike for-cause removal protection of the CFPB director by reading the prior cases narrowly, as only protecting the independence of members of multimember commissions not performing any executive function. Seila Law, LLC v. CFPB, 140 S. Ct. 2183, 2199–2201 (2020). Justices Thomas and Gorsuch indicated that they would "repudiate what is left" of the "erroneous precedent" protecting independent agencies. *Id.* at 2211–12 (Thomas, J., concurring).

The Court had also upheld the power of Congress to provide for-cause removal protection for inferior officers, most recently in *Morrison*. The *Seila Law* Court characterized *Morrison* as an exemplar of an exception to the rule of complete presidential control for "inferior officers with limited duties and no policymaking or administrative authority," thereby suggesting that civil service protection for officials with some administrative or policymaking authority violates the Constitution. *Id.* at 2199–2200. President Trump sought to take advantage of this theory by issuing Executive Order 13957, which exempted policy-making civil servants from civil service protections. PROJECT 2025 PRESIDENTIAL TRANSITION PROJECT, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 80 (Paul Dans & Steven Groves eds., 2023). President Trump's supporters plan to have him reinstate this order, *id.* at 80–81, thereby teeing up a constitutional challenge to protections for high level civil servants.

224. *See* Driesen, *Appointment and Removal*, *supra* note 24.