

REMOVAL REHASHED

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INTRODUCTION

We are grateful to the *Harvard Law Review Forum* for the chance to respond in these pages to *The Executive Power of Removal*.¹ In this new piece, Professors Aditya Bamzai and Saikrishna Bangalore Prakash aim to persuade readers that the President’s power to remove executive officers is exclusive and nondefeasible; textually mandated; and a matter of common assent at the time of the Founding.

There are high hurdles to proving this argument, and this piece fails to scale them. There is little evidence for any of these separate contentions, whether we look to the Constitution’s text or the history of the Founding.

We are not convinced that the Article says much that is new, either. For nearly fifty years, defenders of the “unitary executive” have relied on the same historical set pieces and sources to make the same arguments.² Professors Bamzai and Prakash propose to reinvigorate this old debate by offering “new materials” and a rejoinder to recent critics.³ Yet it was unclear to us which materials were new or what the new materials added. And while a response to critics would be valuable, Bamzai and Prakash all but ignore the most compelling recent work critiquing unitary theory and a nondefeasible presidential removal power.

Despite these significant scholarly weaknesses, the piece may well receive a favorable reception at the Supreme Court. Over the last decade, its conservative majority has increasingly embraced a unitary theory of Article II, according to which the singular person of the President enjoys far-reaching powers over the government.⁴ Over the same

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¹ Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023).

² For the paradigmatic defense of the unitary executive theory, see Justice Scalia’s dissent in *Morrison v. Olson*, 487 U.S. 654, 697–734 (Scalia, J., dissenting). See also *Buckley v. Valeo*, 424 U.S. 1, 121–37 (1976).

³ Bamzai & Prakash, *supra* note 1, at 1.

⁴ The Court’s commitment to this theory has deepened in a series of recent cases. See generally *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *United States v.*

period, the Court has committed itself to a simplistic originalist theory of interpretation, which takes the Constitution to mean what it was understood to mean when it was written.⁵ Putting these two trends together, the Court might be in search of an originalist foundation for unitary theory.

The potential utility of such a theory to the Court's current jurisprudential project became apparent in the last two terms. In *Seila Law LLC v. Consumer Financial Protection Bureau*⁶ and its successor *Collins v. Yellen*,⁷ the Supreme Court announced that the Constitution grants the President an indefeasible power to remove the leaders of single-headed agencies.⁸ Yet it grounded its ruling in a democratic theory that no scholar believes traces back to the Founding.⁹ At the same time, in *Dobbs v. Jackson Women's Health Organization*¹⁰ and *New York State Rifle & Pistol Ass'n v. Bruen*,¹¹ the Court wrapped itself more fully in history and tradition, making them privileged sources of constitutional meaning.¹²

This has made the Court's current Article II jurisprudence intellectually indefensible. The Justices have discovered a new presidential power of removal. But they have not yet found how to ground it in

Arthrex, Inc., 141 S. Ct. 1970 (2021). For scholarship advancing the theory of the unitary executive, see, for example, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 418 (2008).

⁵ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008). See generally Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009) (exploring the role of originalism in judicial decisionmaking, especially in *Heller*). For classic statements of originalism, see generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); and JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). While originalism has continued to evolve as a scholarly practice, and is now often quite distinct from the kind of interpretation judges and Supreme Court Justices call "originalism," Bamzai and Prakash "use[] an originalist lens for understanding the Constitution" and "aim to persuade nonoriginalists who regard original meaning as relevant to interpreting the Constitution." Bamzai & Prakash, *supra* note 1, at 1762 n.32. For an exploration of some of the distance between the Court's originalism and scholarly originalism, from an originalist perspective, see generally Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4338811> [<https://perma.cc/8QF6-KKVG>].

⁶ 140 S. Ct. 2183.

⁷ 141 S. Ct. 1761.

⁸ *Seila L.*, 140 S. Ct. at 2192 (observing that an independent agency led by a single director "clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control"); *Collins*, 141 S. Ct. at 1784 (applying *Seila Law*'s rationale to strike down an agency's single-director structure because such a structure "restricts the President's removal power").

⁹ See *Seila L.*, 140 S. Ct. at 2203 ("[T]he Framers made the President the most democratic and politically accountable official in Government."); Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 16–17) (on file with the Harvard Law School Library).

¹⁰ 142 S. Ct. 2228 (2022).

¹¹ 142 S. Ct. 2111 (2022).

¹² See *Dobbs*, 142 S. Ct. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *Bruen*, 142 S. Ct. at 2131.

history.¹³ Worse, the Court's separation of powers decisions over the last decade have sparked a boom in research on the history of the early republic, the bulk of which undercuts the Court's rulings.¹⁴

The Court would thus benefit from scholarly reinforcement. *The Executive Power of Removal* might seem like a wished-for brief to deliver the Court from its predicament. The Court might be tempted to embrace it as a new originalist defense of its new jurisprudence.

This would be a mistake. The Article is not up to the task. *The Executive Power of Removal* fails to persuade on its own terms. It fails to seriously respond to critics of unitary theory. And it presents some of its sources in a way that could mislead less historically informed readers.

This Response proceeds in two Parts. Part I takes up the logic of Bamzai and Prakash's argument. To establish an originalist executive power of removal, Bamzai and Prakash need to prove that at the time of the Constitution's ratification, a consensus existed around the idea that the executive power included the power of removal. But their Article does not establish this. Part II then looks at the Article in scholarly context. It argues that Bamzai and Prakash's argument is not new, that the evidence they use to support their claim does not support it and in fact undermines it, and that the Article does not address other scholars' most powerful counterarguments.

A short conclusion reflects on the meaning of our critique for jurisprudence and scholarship.

I. THE INSUFFICIENT EVIDENCE FOR AN ORIGINALIST THEORY OF INDEFEASIBLE EXECUTIVE REMOVAL

Bamzai and Prakash draw upon four caches of evidence to support their reading of executive power: (1) antecedents to the Philadelphia Constitutional Convention in the form of British law and early state constitutions;¹⁵ (2) the debates at Philadelphia by the Constitution's drafters;¹⁶ (3) writings of the period, including the *Federalist Papers* and judicial opinions;¹⁷ and finally, (4) early political practice, particularly

¹³ For a history of how unitary executive theory came out of the Watergate/Vietnam period before percolating up to the highest levels of the executive branch and the Supreme Court, see Stephen Skowronek, Essay, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2096 (2009); and JEFFREY P. CROUCH ET AL., THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT 18–22 (2020).

¹⁴ Bamzai and Prakash identify several sources. Bamzai & Prakash, *supra* note 1, at 1760 n.18. In addition, see generally SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING (2015); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2020); and JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012).

¹⁵ See Bamzai & Prakash, *supra* note 1, at 1768–70.

¹⁶ See *id.* at 1770–73.

¹⁷ See, e.g., *id.* at 1773 n.117 (citing the *Federalist Papers*); *id.* at 1776 n.141 (citing a judicial opinion).

the “Decision of 1789,” by which the First Congress wrote the founding statutes for the Departments of War, Foreign Affairs, and Treasury.¹⁸ These sources do not meet the demands for establishing executive removal on originalist grounds. And subsequent history raises deep questions about whether such an executive removal power ever existed.

A. The State Constitutional Evidence that the Authors Rely on Is Not Strongly Probative of Indefeasible Executive Removal

Take the early state constitutions first. Bamzai and Prakash rely on these to draw conclusions as to the meaning of the phrase “executive power.” At the time of the Framing, their argument goes, so many people knew what the “executive power” comprehended — powers such as conducting war and receiving diplomats and, most relevantly, firing officers — that the Federal Constitution’s silence on the question does not mean that the President lacks that power.¹⁹

We agree that state constitutions may offer persuasive evidence of commonly held understandings that informed the U.S. Constitution.²⁰ But in this case, they fail to reveal a “conceptual core”²¹ of executive power that included the power to remove.

For starters, state constitutions said little about removal per se. So, for example, Bamzai and Prakash suggest we “[c]onsider the stark contrast with some state constitutions and their treatment of removal,” and point to Delaware and South Carolina in particular.²² But neither constitution actually assigned the executive the power of removal.²³ Meanwhile, Pennsylvania’s charter made no mention of executive removal and instead specified multiple times that the Assembly enjoyed removal power over certain officers.²⁴ State constitutions did often give the head of the executive some powers of appointment. But they exhibited wide variation there as well, as Bamzai and Prakash’s own proffered evidence indicates.²⁵ Thus Delaware formally gave its “President” a power of appointment of some officers under specific circumstances, and gave the President authority to appoint “necessary civil officers not herein before mentioned” “until otherwise directed by the Legislature,”²⁶ while New York vested the power to appoint officers who were appointed by the colonial governor under colonial charters to a council of

¹⁸ See, e.g., *id.* at 1773–77 (discussing congressional actions, including the Decision of 1789); *id.* at 1777–82 (discussing presidential exercise of the removal power).

¹⁹ *Id.* at 1764–70.

²⁰ Cf. PRAKASH, *supra* note 14, at 6–7 (arguing that “state antecedents . . . help us better grasp the original executive’s powers, duties, and constraints”).

²¹ Bamzai & Prakash, *supra* note 1, at 1764.

²² *Id.* at 1784.

²³ See DEL. CONST. of 1776, art. XVI; S.C. CONST. of 1778, art. XXXII.

²⁴ PA. CONST. of 1776, §§ 20, 22–23, 30, 34.

²⁵ Bamzai & Prakash, *supra* note 1, at 1769–70.

²⁶ DEL. CONST. of 1776, arts. XII, XVI.

appointments.²⁷ It is simply not the case that, as a group, state constitutions specified that the executive enjoyed the power of removal. Even New York, which had one of the strongest executives and whose governor has been identified as the closest state constitutional model for the Federal President,²⁸ did not explicitly grant the executive a power of removal and indeed prevented its governor from exercising even the appointment power on his own as to certain officers.²⁹

Bamzai and Prakash's argument is perplexing in light of Prakash's own earlier work. As he has documented in detail, many delegates at Philadelphia were quite critical of state arrangements.³⁰ Several, if not most, thought the existing state constitutions had overly empowered legislatures at the expense of the executive.³¹ The new Federal Constitution redressed this imbalance by explicitly departing from state constitutions to create a stronger President.³² This self-conscious break offers reason to suspect that Article II would not simply import state constitutional ideas about the content of executive power.

B. The Debates on the Constitution and Political Writings from the Founding Period that the Authors Rely on Are Not Strongly Probative of Indefeasible Executive Removal

The authors seek to reinforce their claim about the “conceptual core” of executive power by appealing to the debates at the Constitutional Convention and classic political writings from the Founding era about the Constitution — source caches two and three.³³ On their view, these records, too, show that the Framers shared an understanding that the executive power vested in the President included the power of removal and that this understanding was reflected in the Constitution.

We think this argument is inconsistent with what we know of how the Philadelphia Convention unfolded and, in particular, how it handled questions of executive power. The Framers initially convened in May 1787,³⁴ but it was not until mid-September — a mere two weeks before the Convention disbanded — that the President's powers were locked into place.³⁵ This was partly due to delegates' diverging

²⁷ See N.Y. CONST. of 1777, art. XXXVI.

²⁸ See CHARLES C. THACH, *THE CREATION OF THE PRESIDENCY, 1775–1789*, at 53–54 (1922); PRAKASH, *supra* note 14, at 33.

²⁹ See N.Y. CONST. of 1777, art. XXIII (requiring advice and consent of council of appointments for officers other than those for whom another method of appointment was specified); *id.* art. XXXVI.

³⁰ See PRAKASH, *supra* note 14, at 3, 31–34.

³¹ See *id.*

³² See *id.* at 32–34; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 467 (1998).

³³ Bamzai & Prakash, *supra* note 1, at 1770–73.

³⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 1 (Max Farrand ed., 1911).

³⁵ FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 163 (1994).

views on the executive power.³⁶ Skeptics of a strong presidency included Massachusetts's Rufus King, Connecticut's Oliver Ellsworth, and Virginia's George Mason, while military men, like South Carolina's General Charles Cotesworth Pinckney or Colonel Alexander Hamilton, or those with government service, like New York's Gouverneur Morris, wanted a strong one.³⁷

But the delay was also partly due to an inability to agree on how the President should be selected. The intellectual historian Professor Forrest McDonald's account of the deadlock remains classic:

Nobody had been able to devise a satisfactory mode of electing the president that would make him independent of Congress, and nobody was willing to vest real power in an office that was subordinate. It seemed safer simply to lodge executive authority directly in Congress, and, accordingly, the draft constitution as it stood in early September — a scant eight days before the final version was written — deposited most of the traditional domestic executive powers in Congress and lodged the federative powers in the Senate.

Then, building upon a suggestion made by Pierce Butler of South Carolina, the convention worked out the electoral college system in a matter of three days. Suddenly the constitutional order clicked into place. All that remained was to transfer a few powers from the Senate to the executive, and the presidency had been born.³⁸

In designing the presidency, the Framers did not assume a set of powers that were fixed and known in advance. Quite the opposite, as the chronology makes clear: not until the Electoral College was invented were delegates comfortable defining the President's powers, and even these underwent some alterations in the final stretch.³⁹ The Constitution's eventual distribution of authorities depended not purely on an abstracted "core" of executive power informed by theory or state practice but also on practical give-and-take during the negotiations.⁴⁰

This should not surprise us. The drafters were politicians, not philosophers or legal theorists. They mixed and matched powers to achieve their governance aims and make deals that would win majorities.⁴¹ Over the course of the debate, they tweaked past arrangements into something new in the hopes of making their government powerful enough to do the people's will without becoming corrupt.

³⁶ *Id.* at 160–63.

³⁷ *Id.* at 160–61.

³⁸ *Id.* at 163 (footnote omitted).

³⁹ *Id.* at 178–79.

⁴⁰ *Id.* at 179 ("Because of the way the presidency evolved in the convention, the Constitution did not adhere to the Montesquieuan doctrine of the separation of powers even though most delegates endorsed the doctrine as an abstract principle."); see also Noah A. Rosenblum, *The Missing Montesquieu: History and Fetishism in the New Separation of Powers Formalism* 13–15 (Feb. 14, 2023) (unpublished manuscript) (on file with the Harvard Law School Library).

⁴¹ See MCDONALD, *supra* note 35, at 165.

So, for example, even though the British Crown might design offices, the Framers did not hesitate to assign that power to the legislature.⁴² This suggests that they did not view it as a necessary executive entailment. They denied the President this power on the pragmatic grounds that it would lead to corruption.⁴³ If this departed from Blackstonian strictures, so much the worse for Blackstone.

Well into August, the working draft provided that it was Congress that wielded most of the powers previously belonging to the Crown, including conducting diplomacy and “mak[ing] war.”⁴⁴ And the final draft split the appointment power between the President and the Senate,⁴⁵ despite this being, on Bamzai and Prakash’s own account, a quintessentially executive power.⁴⁶ In *The Federalist No. 51*, Madison conceded that “[s]ome deviations, therefore, from the principle [of the separation of powers] must be admitted.”⁴⁷ Ultimately, the Framers’ approach was more inductive than deductive, more practical than doctrinaire.

This is why alleging that, at the time of the Philadelphia debates, removal was understood to be an executive power tells us nothing about whether the Framers intended to lodge it in the President, Congress, or a combination thereof. As Bamzai and Prakash recognize, “[t]he content of ‘executive power’ was conceptually distinct from who wielded it.”⁴⁸ Abundant evidence from the Founding shows us that there was no simple answer to where powers that executives exercised should be lodged.

*C. The Early Republic Political Practice that the Authors
Rely on Is Not Strongly Probative of Indefeasible Executive Removal*

The authors’ final cache of evidence, from early political practice, does not support an originalist theory of executive removal either. Bamzai and Prakash point to various political events from the first years

⁴² See U.S. CONST. art. I, § 8, cl. 18.

⁴³ See WOOD, *supra* note 32, at 32–36, 118–24, 413–17 (discussing the Framers’ preoccupation with corruption); *id.* at 134–43, 143–50, 413–17, 436–38, 551–52 (discussing how fears of corruption related to regulation of the power of appointment).

⁴⁴ MCDONALD, *supra* note 35, at 171–73.

⁴⁵ See U.S. CONST. art. II, § 2, cl. 2.

⁴⁶ Bamzai & Prakash, *supra* note 1, at 1765–69. The Framers also toyed with allowing Congress to nominate certain officers on its own, including the Secretary of the Treasury. See MCDONALD, *supra* note 35, at 171–72. Up until September 14, 1787, the working draft provided that it was Congress that would appoint the Secretary. See *id.* at 178–79.

⁴⁷ THE FEDERALIST NO. 51, at 318 (James Madison) (Clinton Rossiter ed., 2003). Alexander Hamilton echoed this point in *The Federalist No. 66*:

The true meaning of [the separation of powers] has . . . been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other.

THE FEDERALIST NO. 66, *supra*, at 399–400 (Alexander Hamilton).

⁴⁸ Bamzai & Prakash, *supra* note 1, at 1767.

of the Republic, most prominently the “Decision of 1789,” to suggest that early Presidents and members of Congress also believed that the Constitution granted the President an indefeasible removal power.⁴⁹ But they do not establish a consensus sufficient to liquidate constitutional meaning.⁵⁰

Start with the Decision of 1789, a hoary trope of the removal debate for nearly two hundred years already.⁵¹ In order to show that the statutes establishing the Secretaries of Foreign Affairs,⁵² War,⁵³ and Treasury,⁵⁴ and the debates around their enactment, contribute to the originalist case for removal, the authors must prove three corollary propositions: (1) the First Congress’s views as to the meaning of the Constitution are authoritative in some way those of future Congresses are not; (2) the three statutes and the debates on them express a single legislative view on the Constitution’s meaning with respect to removal; and (3) the reasoning disclosed is not limited to the Secretaries of Foreign Affairs, War, and Treasury, but applies equally to all other officers whose offices are not comprehended by the bills and were not discussed that day.⁵⁵

We believe that the Article fails to establish these three claims.

As to the first point, the authors do not say why they believe the debates over these statutes are probative of constitutional meaning. It cannot be because Bamzai and Prakash believe Congress can elaborate constitutional meaning through legislative enactments, since they state plainly that Congress lacks the “power to refashion the separation of

⁴⁹ See *id.* at 1773–77 (discussing the Decision of 1789 and other congressional action); *id.* at 1777–82 (discussing presidential action).

⁵⁰ See generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). The Decision of 1789 is a poor candidate for liquidation as (1) it featured no agreement, (2) it lacked explicit decisional rationale, (3) its significance remains contested, and (4) subsequent political practice continuously varied and departed from its supposed conclusions. In any case, this does not appear to be the approach to originalism reflected in doctrine or to which Bamzai and Prakash subscribe in this Article. See *supra* note 5.

⁵¹ See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 3–6 (1997) (showing that Americans have been parsing the First Congress’s decisions since the very beginning); Katz & Rosenblum, *Becoming the Administrator-in-Chief*, *supra* note 9 (manuscript at 26–27, 75–77) (discussing the use of the Decision of 1789 in nineteenth-century removal cases); J. DAVID ALVIS ET AL., *THE CONTESTED REMOVAL POWER, 1789–2010*, at 10–11 (2013) (discussing early interpretations of the Decision).

⁵² See Act of July 27, 1789, ch. 4, §§ 1–2, 1 Stat. 28, 28–29 (codified as amended at 5 U.S.C. § 301, 22 U.S.C. §§ 2651, 2656–2657).

⁵³ See Act of Aug. 7, 1789, ch. 7, §§ 1–2, 1 Stat. 49, 49–50 (codified as amended at 5 U.S.C. §§ 301, 7012, 7831).

⁵⁴ See Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (codified as amended at 5 U.S.C. § 301, 31 U.S.C. §§ 301, 331).

⁵⁵ Several of these points are forcefully made in Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. (forthcoming 2023) [hereinafter Shugerman, *The Indecisions of 1789*], <https://ssrn.com/abstract=3596566> [<https://perma.cc/KD3T-2ZVE>]; and Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085 (2021) [hereinafter Shugerman, *Presidential Removal*].

powers.”⁵⁶ Of course Bamzai and Prakash are not the first to rely on the Decision of 1789. Chief Justice William Howard Taft, for instance, relied on the debates because some of the participants had been delegates at Philadelphia.⁵⁷ But this does not seem to be Bamzai and Prakash’s approach. Why, then, do this vote and debate, conducted two years after Philadelphia and under drastically different conditions, tell us what the Constitution means?

As to the second point, Bamzai and Prakash do not present evidence to show that there was a single legislative view on the Constitution’s meaning with respect to removal during these debates. Their Article does show that New York Representative Egbert Benson believed in a constitutional removal power⁵⁸ — but of course Benson was just one vote. Bamzai and Prakash claim that his was “the dominant [view]”⁵⁹ but recent efforts to count noses in New York suggest that Benson’s view was always a minority position.⁶⁰

The simple fact of division presents a deeper problem for Bamzai and Prakash than they acknowledge. A profusion of divergent views is a major stumbling block for an interpretive theory that depends on an imagined consensus. And divergence and pluralism were everywhere — not just in the halls of Congress, but even in the minds of single individuals. The authors treat Alexander Hamilton as an ally,⁶¹ despite his assertion in *The Federalist No. 77* that, given the shared nature of the appointment power, the Senate’s concurrence “would be necessary to displace as well as to appoint” officers.⁶² Of course, Hamilton famously changed his mind on this question.⁶³ But the point is that Hamilton *changed his mind*. He argued one thing when he tried to convince

⁵⁶ Bamzai & Prakash, *supra* note 1, at 1786.

⁵⁷ *Myers v. United States*, 272 U.S. 52, 122, 136 (1926). In any case, Chief Justice Taft’s analysis is difficult to sustain. Just twenty of the First Congress’s seventy-nine elected representatives were present at Philadelphia. Compare *Meet the Framers of the Constitution*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/S8RY-ZBC6>], with *Members of the First Federal Congress*, GEO. WASH. UNIV., <https://www2.gwu.edu/~ffcp/exhibit/p1/members> [<https://perma.cc/3TGE-FUPB>]. Furthermore, the context of debate was radically different, and the intentional act giving the Constitution its validity — ratification — had already happened. See Shugerman, *The Indecisions of 1789*, *supra* note 55 (manuscript at 37–55), on this point. And see generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006), which construes the Debate of 1789 as a “legislative construction” of the Constitution, *id.* at 1021.

⁵⁸ Bamzai & Prakash, *supra* note 1, at 1794.

⁵⁹ *Id.* at 1775.

⁶⁰ Shugerman, *The Indecisions of 1789*, *supra* note 55 (manuscript at 6–7, 31–44); see also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1965 n.135 (2011) (reviewing evidence on both sides and concluding that Congress was “deeply divided” on the issue and that “the implications of the debate, properly understood, [are] highly ambiguous and prone to overreading”).

⁶¹ Bamzai & Prakash, *supra* note 1, at 1771–72, 1779–80, 1813–14.

⁶² THE FEDERALIST NO. 77, *supra* note 47, at 458 (Alexander Hamilton); see also Bamzai & Prakash, *supra* note 1, at 1771 (quoting this passage).

⁶³ E.g., *Myers v. United States*, 272 U.S. 52, 136–37 (1926).

delegates to vote to ratify the Constitution, and another thing when he was serving in Washington's Administration, by his own admission.⁶⁴ This is not evidence of consensus in favor of executive removal at the time of ratification.

Finally, as to the third point, whatever the First Congress may have thought about the Secretaries of Foreign Affairs, War, and Treasury, they treated different offices differently. Research by Professors Christine Chabot and Jerry Mashaw on the creation of the government under the First Congress has restored to our knowledge a range of "independent agencies," staffed by agents immune from presidential removal.⁶⁵ The Sinking Fund Commission, which was to manage federal debt repayment, included two commissioners completely independent of and unremovable by President Washington,⁶⁶ and Hamilton's initial draft for the Commission included even more.⁶⁷ Congress also "created commissions and boards outside of any of the major departments to oversee the Mint, to buy back debt of the United States, and to rule on patent applications."⁶⁸ Early Presidents respected these arrangements.⁶⁹

These governance bodies were diverse, but they responded to a shared concern among early American state builders about politicization and corruption.⁷⁰ For the Framers, the threat of corruption could come from either the legislature or the Executive. For this reason, the appointment power was divided between the President and the Senate and offices designed with different levels of tenure security.⁷¹ *Marbury v. Madison*⁷² reflected this conception when it observed that some offices should be held at the Executive's pleasure; for these, it was critical that the Executive have influence over the officeholder.⁷³ But for officers, like local sheriffs, whose responsibilities significantly affected the life and liberty interests of ordinary people, the primary goal was to protect the officeholder from political interference by either the legislature or the Executive, and to hold him accountable to the people through the use of short, secure terms in office. Different offices required different terms and protections.⁷⁴ Removal was not, in other words, an authority

⁶⁴ *Id.* at 136–39.

⁶⁵ Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 134–36, 164–84 (2022). See generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006).

⁶⁶ Chabot, *supra* note 65, at 135.

⁶⁷ *Id.* at 134.

⁶⁸ Mashaw, *supra* note 65, at 1291 (classifying these as "'independent commissions' in an even stronger sense than those we recognize today").

⁶⁹ See *Myers*, 272 U.S. at 242–86 (Brandeis, J., dissenting).

⁷⁰ On classical republican themes among the Framers, see WOOD, *supra* note 32, at 49–50.

⁷¹ See U.S. CONST. art II, § 2, cl. 2.

⁷² 5 U.S. (1 Cranch) 137 (1803).

⁷³ See *id.* at 156–57.

⁷⁴ See Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 3–4 (2021).

inherent to the Executive. It was instead a power that depended entirely on the way in which the office itself was designed.⁷⁵

*D. Subsequent Political Practice Is Not Probative
of Indefeasible Executive Removal*

Arrangements that limited the President's power to fire persisted well into the twentieth century. With few exceptions, Presidents complied with these statutory constraints, undercutting the contention that Presidents claimed a competing, incompatible, indefeasible executive removal power.⁷⁶ None of Bamzai and Prakash's examples of presidential removal demonstrate that early Presidents considered themselves entitled to disregard statutory limits. On the contrary, as a large body of scholarship shows, early American government was characterized by cooperation and mutual accommodation by the President and Congress in a number of areas, including trade, foreign policy, debt financing, warmaking, and administration.⁷⁷

This early "political constitutionalism" was consistent with a Madisonian understanding of checks and balances.⁷⁸ In such a system, power was fluid. The Court was not in the business of ruling Congress out of checks on the presidency; instead, party and federalism absorbed these conflicts.⁷⁹ The judicialization of the separation of powers is a modern invention, reflecting the breakdown of party government, rising social conflict, a twentieth-century President ascendant, and a shrinking Congress.⁸⁰ Elsewhere, we have told the story of *Myers v. United States*,⁸¹ a 1926 opinion written by Chief Justice Taft — the only President-turned-Chief Justice — that upset this history of mutual give-and-take by the branches, and instead sought to ground the President's power in Article II, as Bamzai and Prakash do.⁸² Notwithstanding its pretensions, *Myers*, the granddaddy of the unitary theory, was swiftly curtailed by *Humphrey's Executor v. United States*⁸³ then largely ignored for decades, until its approach resurfaced on the new conservative

⁷⁵ See generally *id.* (arguing that Congress could and did regularly define offices for a term of years, barring the Executive from removing officials during that term).

⁷⁶ See Bamzai & Prakash, *supra* note 1, at 1761.

⁷⁷ See generally Julian Davis Mortenson & Andrew Kent, *Executive Power and National Security*, in THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 261, (Karen Orren and John Compton eds., 2018); DAVID BARRON, WAGING WAR (2016); MASHAW, *supra* note 14; Conor Clarke, The Debt Limit (n.d.) (unpublished manuscript) (on file with the Harvard Law School Library).

⁷⁸ RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007).

⁷⁹ See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028 (2022).

⁸⁰ See *id.* at 2025.

⁸¹ 272 U.S. 52 (1926).

⁸² Katz & Rosenblum, *supra* note 9 (manuscript at 24–30); see also Bowie & Renan, *supra* note 79, at 2028.

⁸³ 295 U.S. 602 (1935).

Roberts bench in 2010.⁸⁴ There is very little about the unitary executive that is “originalist” at all.⁸⁵

* * *

In light of the foregoing evidence — diversity in the ranks of the early state constitutions, divergent preferences among the constitutional delegates toward executive power, glaring uncertainty about the shape of the finished product well into the final weeks of the Philadelphia Convention, the explicit blending of powers found throughout the text, and a practice of mutual accommodation and statutory compliance during the early republic — the authors’ insistence on the executive power being determinate, obvious, and settled at the Founding is unwarranted.⁸⁶

The Framers may have been luminaries, but they could not and did not resolve every question presented to them.⁸⁷ The Constitution left several matters open-ended and unresolved: the size of the electorate, how many (if any) federal courts would be established, the future of slavery, and so on. The same was true of several aspects of presidential design.⁸⁸ It is no slight to our founding document to say that its drafters punted on some of the great problems of the age.⁸⁹ When it comes to removal, they may well have overlooked the question and left it out.⁹⁰

II. METHODOLOGICAL ERRORS AND MISSED OPPORTUNITIES

None of our criticisms offered in Part I are particularly esoteric. The problems with originalist defenses of unitary theory in general — and an executive power of removal in particular — have been well known

⁸⁴ Bowie & Renan, *supra* note 79, at 2082; see *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 141 S. Ct. 2183, 2233 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (noting that “within a decade the Court abandoned [*Myers*’s] view” of an unrestricted removal power and “unceremoniously — and unanimously — confined *Myers* to its facts”).

⁸⁵ See generally Katz & Rosenblum, *supra* note 9; Bowie & Renan, *supra* note 79.

⁸⁶ This theory also makes it difficult to explain why the Constitution bothered to provide for presidential pardons and diplomatic powers — two authorities that had previously belonged to the monarch on almost any account. Only a theory treating text the same as the *absence* of text allows a slippery slope argument like the one the authors make at page 1786: If Congress can limit removal, why not judicial judgments or grounds for impeachment? The Constitution specifies clear processes, and institutional homes, for those powers. It places no limits on removal. An interpretive rule that makes text and textual silence mean the same thing is, we emphasize again, not a good interpretive rule.

⁸⁷ See JONATHAN GIENAPP, *THE SECOND CREATION* 20–74 (2018).

⁸⁸ CURRIE, *supra* note 51, at 28–29.

⁸⁹ Cf. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 143–44 (1988) (arguing that ambiguities in the text of the amendment were necessary to its passage); Stephen Skowronek, *The Constitution Unbound: Political Inclusion and Institutional Adaptability* (n.d.) (unpublished manuscript) (on file with the Harvard Law School Library).

⁹⁰ See MCDONALD, *supra* note 35, at 180 (describing how, at this point in the convention, “the delegates were tired and irritable and anxious to go home” and “neglected to provide a method for removing appointees except through the impeachment process”).

for years.⁹¹ Bamzai and Prakash's argument is vulnerable to these old critiques because it largely rehashes old arguments with old sources. Moreover, the Article's use of those sources sometimes gave us pause. And while the Article does respond to some criticisms, it does not address the most powerful recent arguments against their interpretation. These weaknesses make it unlikely that *The Executive Power of Removal*, whatever its possible role in future judicial controversies, will have much effect on the scholarly conversation.

*A. Bamzai and Prakash Make an Old Argument
with Mostly Old Evidence*

Bamzai and Prakash's argument about the removal power is, on their own account, venerable. They identify their position with "Madison, Jefferson, Washington, Hamilton, and so many other Founding figures."⁹² On their read, these early politicians shared their conviction that "[t]he Vesting Clause's grant of power has several components, one of which is the power to remove executive officers."⁹³

The historian might wonder why this argument, if once so widespread, disappeared so quickly.⁹⁴ But Bamzai and Prakash are not interested in providing an intellectual history of the argument for an executive removal power. They want to make the old case anew, "using early understandings and practices as a benchmark."⁹⁵

In their Article's introduction, they mention that they will do so on the basis of "new evidence from the Constitutional Convention, the *Federalist Papers*, and the overlooked writings of several Antifederalists," along with some other sources.⁹⁶ But their affirmative case rests on the four caches of evidence canvassed in Part I, which are not new. And their footnotes mostly rely on the primary source collections long used by scholars of the early republic: Farrand's *Records of the Convention*, the *Documentary History of the Ratification of the*

⁹¹ On the historical case for the unitary executive, see generally, for example, Lawrence Lessig & Cass R. Sunstein, *The President and Administration*, 94 COLUM. L. REV. 1 (1994).

⁹² Bamzai & Prakash, *supra* note 1, at 1763.

⁹³ *Id.*

⁹⁴ Writing in 1916 and looking back at the development of American law, the great legal scholar Frank Goodnow observed that courts "have held that the [the Vesting Clause] has little if any legal effect, and that for the most part it is to be explained by the powers which are later specifically mentioned." FRANK GOODNOW, *PRINCIPLES OF CONSTITUTIONAL GOVERNMENT* 88–89 (1916).

⁹⁵ Bamzai & Prakash, *supra* note 1, at 1763.

⁹⁶ *Id.* at 1762. We are unsure on what the claim to novelty rests. It seems that the novel source is the discussion of "for pleasure" at the Convention. Bamzai and Prakash may be the first to quote from the debate in this way for the purposes of this scholarly intervention, although we are not sure. In any case, they do not make that discussion dispositive for their argument; it seems, as we read it, to be just one more additional source that confirms what they believe is a general trend already evinced by other evidence.

Constitution, the *Annals of Congress*, and the papers of the major Founding Fathers.

We are unsure what Bamzai and Prakash believe is new about their argument, as they do not engage systematically with previous scholarship in law and history. We expect that experts will be not only familiar with the sources Bamzai and Prakash rely on, but also surprised that they are presented here without scholarly apparatus.

B. Bamzai and Prakash's Handling of Sources Makes Us Worry that They Are Not Reliable Guides to Meaning in the Founding Era and Early Republic

Engaging more fully with historians of the early republic might have led Bamzai and Prakash to avoid some errors and distortions. Dismayingly, it seems to us that some of the evidence they proffer does not say what the authors claim it does.

Consider the Article's treatment of a provision from Pennsylvania's 1776 Constitution on officer impeachment and removal. According to language the authors cite, any officer "whether judicial or executive, shall be liable to be impeached [by the General Assembly], either when in office, or after his resignation or removal, for mal-administration."⁹⁷ As Bamzai and Prakash gloss the passage: "[T]he Pennsylvania Assembly could impeach an officer even after he had been removed, implying that state officers served at the pleasure of the plural state executive."⁹⁸ They seem to be arguing that because the state legislature had the power to impeach officers after removal, it could not remove them, and the officers therefore must have been removable by someone else, namely the executive. To bolster their reading, Bamzai and Prakash claim that the Pennsylvania Council of Censors, a body whose function was to ensure that the government followed the constitution, had written "that removal was an 'executive power' and that many officers served 'at pleasure.'"⁹⁹

In fact, the Censors' report probably means nearly the opposite of what Bamzai and Prakash claim.¹⁰⁰ This is because the full passage in

⁹⁷ See PA. CONST. of 1776, § 22; see also Bamzai & Prakash, *supra* note 1, at 1769 (citing this language).

⁹⁸ Bamzai & Prakash, *supra* note 1, at 1769.

⁹⁹ *Id.* at 1769–70 (quoting A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS 22 (Philadelphia, Francis Bailey 1784)).

¹⁰⁰ The authors thank Professor Jane Manners, a legal historian of the early republic, for first suggesting this point and for significant help in making sense of the 1784 Censors' Report. Understanding the Censors' Report is complicated by the existence of at least two different versions of the report: a shorter version, relied on by Bamzai and Prakash and available through Gale's Eighteenth Century Collections Online database, and a longer version appended to an edition of Pennsylvania's constitution, also available through the same Gale database as well as through the HathiTrust. Both versions were published by Francis Bailey in 1784. Our response cites to the

question recognizes the existence of officers who do not serve at the executive's pleasure.

To see how, we have to parse the text in some detail. The Censors discussed the relevant passage of the Pennsylvania Constitution in light of a specific interpretive controversy: the meaning of the comma placed before "for mal-administration" in the passage quoted above.¹⁰¹ Apparently some Pennsylvanians read the passage as if there were no comma — that is, as if the General Assembly had the power to impeach officers only either (1) while in office, or (2) after their resignation or removal for maladministration.¹⁰² The Censors identified several problems with this reading. In particular, it made it impossible to impeach some officers after they were no longer in office — a necessity if the General Assembly wanted to bar them from future office-holding. This and other problems went away if the comma was given meaning:

Restore this, and the impeachment will be restrained, as it ought, to officers in their public capacity; and removal will apply to such civil officers as hold at pleasure, and who may be superceded; and also to others, whose times expire, as counsellors and sheriffs, who upon the erroneous construction, which we reprobate, would not be liable to impeachment, if the mal-faisances charged upon them, should happen not to be prosecuted, till after they were out of place.¹⁰³

As we see, the Censors recognized two categories of officers. Some held their tenure "at pleasure," and so "may be superceded."¹⁰⁴ But counsellors and sheriffs were different. They were in office until their "times expire."¹⁰⁵ According to the bad reading of the constitutional provision — the one without the comma — these officers could not be impeached unless "the mal-faisances charged upon them" had been prosecuted while they were in office.¹⁰⁶ Why? Well, the bad reading of the constitution limited the General Assembly to impeachments (1) while in office, or (2) after resignation or removal for maladministration. By construction, the hypothetical counsellor or sheriff — positions that per the 1776 Pennsylvania Constitution had terms of three years and one year, respectively¹⁰⁷ — was no longer in office. So there must have been some difference when it came to removal between officers serving "at pleasure" and officers "whose times expire." If counsellors and sheriffs whose times expire could be removed by the executive at pleasure, then

second, longer version as it is more complete, more easily available to readers, and was apparently published at the explicit instructions of the Censors. See A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS, *supra* note 99, at ii.

¹⁰¹ *Id.* at 60.

¹⁰² See *id.*

¹⁰³ *Id.* at 60–61.

¹⁰⁴ *Id.* at 61.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 60–61.

¹⁰⁷ PA. CONST. of 1776, §§ 19, 31.

there would have been no need for the Censors to distinguish them in their analysis.¹⁰⁸

Removal, here, is not an executive power. Nor does the passage Bamzai and Prakash cite from the Censors' report about "executive power" say otherwise.¹⁰⁹ By the time the Council of Censors ordered their full report published, it read:

It has been contended from the words, "or removal for mal-administration," that the General Assembly may remove justices of the peace in order to impeach them, not considering, that there is nothing in this Section, to give any power to the House. If such power were indeed designed at all, the Council would take it, because it is executive business.¹¹⁰

The Censors' meaning is compressed. But on our read, they seem to be saying: if a power to remove justices of the peace for maladministration "were . . . designed," then its exercise would be executive business, and so belong to the Council. What would it mean for the power to be "designed"? Presumably it would be in the design of the office. In other words, if the law creating justices of the peace allowed for their removal for maladministration, then it would be for the executive, not the General Assembly, to exercise that power. This would not mean that removal was an inherently executive power. Rather, it would say no more than that if the law had specified provisions for removal for maladministration, it would be for the Council to exercise them — or, in other words, that the execution of the law is an executive power.¹¹¹

¹⁰⁸ The example may be easier to understand with a hypothetical. Suppose a sheriff had engaged in malfeasance. If he served at pleasure, then under either the good or the bad reading of the constitution he could be removed from office and then impeached. But the Censors say that, under the bad reading, he could not be impeached unless he were charged while in office. It seems to follow, then, that the Censors thought the sheriff could not be removed at pleasure. If he could be removed at pleasure, he would be removed and then eligible for impeachment, whether he was charged while in office or not.

¹⁰⁹ See Bamzai & Prakash, *supra* note 1, at 1769–70.

¹¹⁰ A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS, *supra* note 99, at 60. For the evolution of the passage in question, compare page 22 of the version of the report cited by Bamzai and Prakash ("It is contended that, by virtue of these words, officers may be removed by the Assembly, previously to impeachment; thus assigning executive power to the house, without express words for that purpose.") with page 60 of the longer version cited above ("It has been contended from the words, 'or removal for mal-administration,' that the General Assembly may remove justices of the peace in order to impeach them, not considering, that there is nothing in this Section, to give any power to the House. If such power were indeed designed at all, the Council would take it, because it is executive business.") and the discussion of amendments to the Censors' Report in the Council's journals, apparently adding this language. See RECORDS OF CONSTITUTIONAL CONVENTIONS: RECORDS OF THE COUNCIL OF CENSORS, 1783–1784: JOURNALS (VOLS. 1–3), at 676–78, https://digitalarchives.powerlibrary.org/psa/islandora/object/psa:ccj_542?overlay_query=RELS_EXT_isMemberOfCollection_uri_ms:%22info:fedora/psa:ccj%22 [<https://perma.cc/KY6S-WFUU>].

¹¹¹ A counterargument might be raised that the Censors' Report's distinction is limited to offices that are defined by the constitution as held for a term of years, but does not apply to new offices

Perhaps Bamzai and Prakash have a different reading of these passages. But their Article does not give their reader the tools to assess their interpretation. And their selective quotation retrojects what is an interpretive argument into a complex text.

Or consider another claim from the Article, about removal practice during the presidencies of John Adams and Thomas Jefferson. The

created by the legislature. This would explain why the Report uses counsellors and sheriffs, which are both defined in the constitution.

This idea raises other questions though. In particular, the language of the Censors' Report distinguishes not between offices defined in the constitution and other offices, but between "civil officers as hold at pleasure" and "others, whose times expire" — and the use of "as" suggests that counsellors and sheriffs are being proffered as examples of such officers. A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS, *supra* note 99, at 60. Meanwhile, the legislature created other offices not defined by the constitution with appointment for a term of years. *See, e.g.*, An Act to Declare and Regulate Escheats § 3 (1787), in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED 425, 426 (Philadelphia, John Bioren 1810) (creating the office of "Escheator-General . . . who shall hold his office for the term of seven years, if he shall so long behave himself well"); An Act for Establishing a Land Office, And for Other Purposes Therein Mentioned § 3 (1781), in THOMAS MCKEAN, THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, CAREFULLY COMPARED WITH THE ORIGINALS 469, 469 (Philadelphia, Francis Bailey 1782) (creating offices of secretary of the land office, receiver general, and surveyor general and providing that people appointed to these roles should hold their offices "for the term of five years, unless sooner removed by the representatives of the freemen of this commonwealth, in general assembly met"). On service for a term of years in general, see Manners & Menand, *supra* note 74, at 5–6.

A stronger argument from the Censors' Report in favor of an executive power of removal comes from a passage following the one Bamzai and Prakash focus on. The Pennsylvania Constitution explicitly granted the General Assembly the power to remove justices of the peace "for misconduct." A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS, *supra* note 99, at 60. This apparently rankled the Censors. "It is the opinion of this committee," they explained, "[t]hat the misconduct of justices of peace [sic] ought to be established elsewhere, before the General Assembly can proceed to remove them." *Id.* This was because the Censors thought that a group as large as the Assembly was "so liable to be tainted by prejudice, favour and party" that it was "wholly incompetent" to determine misconduct. *Id.* The Censors concluded that the justices of the peace should be tried for misconduct somewhere else first — presumably by a court — and only then removed by the General Assembly. *See id.* "Resting, therefore, on our principle, that this is an executive power, put out of its proper place," they wrote, "we construe it literally, and carry it not beyond the words." *Id.*

This language might be read to suggest that the Censors believed removal was "an executive power" and so support Bamzai and Prakash's argument. Then again, by its own construction, the Report is discussing the General Assembly's power to remove after a finding of misconduct by a court or judge. In context, that would be executing a judicial determination, which would be an act of "executive power, put out of its proper place," since it was assigned to the General Assembly, which does not usually execute judicial determinations. This would go against Bamzai and Prakash's argument.

Or perhaps the whole thing is confused. The preceding discussion about the power to remove justices of the peace for misconduct was about the power to try justices of the peace, which the Censors thought was a "judicial authority." It is not clear how "judicial authority" at the start of the paragraph becomes "executive power" by its end. *See id.* The matter is particularly opaque in light of the clear constitutional language assigning removal of justices of the peace to the General Assembly, which exercises legislative power. *Id.* A study of removal practice in late eighteenth-century Pennsylvania might resolve this puzzle, but it lies beyond the scope of this Response.

We thank Professors Daniel Hulsebosch and Jane Manners for helping us think through these issues.

authors observe that “John Adams and Thomas Jefferson both removed officers, with the former ousting over two dozen and the latter over one hundred.”¹¹² For support, they cite to Professor Carl Russell Fish’s 1900 study *Removal of Officials by the Presidents of the United States*.¹¹³ But Fish’s study did not show that Presidents Adams and Jefferson removed officers on the basis of an indefeasible executive power of removal.

For starters, Fish cautioned against relying too much on his data.¹¹⁴ He explained that he based his tabulation on the Executive Journal of the Senate, which he called “by no means an easy [source] to use.”¹¹⁵ He went on: “[T]he cases in which the removal is actually mentioned [in the Journal] do not truly represent the total number in which the change is made by the direct authority of the President. Many cases are ambiguously worded; the usage of several Presidents varies somewhat, and in some the fact of removal seems to be glossed over by such phrasing.”¹¹⁶ There were other problems with the data,¹¹⁷ which he “mentioned . . . to guard against a too complete acceptance” of his figures.¹¹⁸

In any case, Fish’s data did not purport to illustrate an indefeasible executive power of removal. Fish noted, in aggregate, how many officers he found who were removed according to different formulations in the Executive Journal.¹¹⁹ But he did not look into the underlying statutes that defined the offices, to see what kind of removal protections, if any, they established. In other words, he included a removal in his tables whether the officer served at pleasure and was fired or was appointed with the advice and consent of the Senate and then someone else was nominated and confirmed to the position. (In the latter case, removal was incident to appointment: the appointment and confirmation of someone new removed the previous officeholder.)

Our own attempts to reconstruct Fish’s data reveal many cases of officers who were not removed, but simply superseded when the President nominated their replacement. Thus, for example, Fish noted that there were four removals of “Consuls, etc.” under President Adams.¹²⁰ One was presumably Edward Church, Consul General in

¹¹² Bamzai & Prakash, *supra* note 1, at 1780.

¹¹³ *Id.* n.184.

¹¹⁴ See Carl Russell Fish, *Removal of Officials by the Presidents of the United States*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1899, at 67, 67 (1900).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ In particular, Fish decided to include officers who were not “reappoint[ed] at the end of an expired term,” since these were “practically . . . removals.” *Id.* But, he decided to leave out resignations, which “may have been forced,” and cases where “the simple announcement of an appointment may . . . conceal a removal,” since “[t]hese cases are . . . obviously too vague to warrant their inclusion.” *Id.* at 68.

¹¹⁸ *Id.* at 68.

¹¹⁹ See *id.* at 67–69.

¹²⁰ See *id.* at 70.

Portugal, who was displaced on July 6, 1797.¹²¹ But Adams does not seem to have removed Church, at least not in the way Bamzai and Prakash use the term in their Article. Rather, he nominated Thomas Bulkely to succeed Church, and Church in turn was “superseded.”¹²² There are many other such examples, involving Consuls as well as other officers who, like Consuls, required Senate confirmation.¹²³

Fish included such removals in his aggregate counts. But these “removals” do not show an indefeasible executive power of removal. They show, at most, that the President could displace a duly appointed officer by appointing his successor.

We have not engaged in a systematic review of the sources Bamzai and Prakash cite, but these are not the only places in the Article where the authors seem to engage in overreading or selective engagement with alternatives and counterarguments. They rely on a sentence of *The Federalist No. 66* for the claim that the appointment power includes a baseline standard of “at pleasure” removal and that whoever holds the power of appointment also holds the power of removal.¹²⁴ But, as their own quotation of the document shows, the single sentence in question refers only to “those who hold offices during pleasure,” not all officers.¹²⁵ Elsewhere, Bamzai and Prakash enlist Madison, Hamilton, Justice Story, and Justice Marshall as allies,¹²⁶ although all four put sentiments in writing critical of the unitary executive theory.¹²⁷ These essentially

¹²¹ 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 248 (Washington, D.C., Duff Green 1828). There is some confusion about the date: the Library of Congress docket the relevant letter in the Executive Journal of the Senate on July 6, 1797, but the transcription of the letter gives the date as June 6, 1797. *See id.*

¹²² *Id.*

¹²³ *See, e.g., id.* at 252–53 (noting the December 4, 1797, dismissal of Joseph Fenwick, Consul of the United States at Bordeaux, in the same message as the nomination of Thomas Crafts as his successor); *id.* at 260 (noting the February 7, 1798, supersession of Philip Feliechy, Consul of the United States at Leghorn, by Thomas Appleton); *id.* at 261–62 (nominating Nathaniel Rogers as Supervisor of the Revenue for New Hampshire and dismissing Joshua Wentworth). The requirement for Senate confirmation for consuls is in Article II of the Constitution. U.S. CONST. art. II, § 2, cl. 2. For the statutory provisions requiring advice and consent of the Senate for supervisors of the revenue, see Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200.

¹²⁴ Bamzai & Prakash, *supra* note 1, at 1771–72 (quoting THE FEDERALIST NO. 66, *supra* note 47, at 402 (Alexander Hamilton)).

¹²⁵ *Id.* at 1771 (quoting THE FEDERALIST NO. 66, *supra* note 47, at 402 (Alexander Hamilton)).

¹²⁶ *Id.* at 1802.

¹²⁷ *See* THE FEDERALIST NO. 77, *supra* note 47, at 458 (Alexander Hamilton) (appearing to argue that the President would require Senate consent under the Constitution to remove executive branch officers); ALVIS ET AL., *supra* note 51, at 11, 73, 79–80 (construing Justice Story as a critic of the Decision of 1789); Shugerman, *Presidential Removal*, *supra* note 55, at 2090 (discussing Chief Justice Marshall’s opinion in *Marbury* as opposed to the unitary executive). Madison is the most ardently and consistently unitarian of the lot, but his *Federalist No. 39* allows that Congress had power to “regulat[e]” the “tenure of ministerial offices,” along the lines proposed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156–57 (1803). THE FEDERALIST NO. 39, *supra* note 47, at

forensic uses of sources make us hesitate to trust the Article as a reliable guide to the Founding Era and early republic.

C. Bamzai and Prakash Do Not Engage with Strong, Widely Known Counterarguments to Their Position

According to its authors, the Article’s remaining major scholarly contribution is in offering a response to critics.¹²⁸ As Bamzai and Prakash note, recent Court decisions have generated much new academic writing on separation of powers at the Founding.¹²⁹ Having a guide to the literature that explains the new state of the field and defends executive removal against these new critiques would indeed be helpful.

Unfortunately, this Article is not that guide. Here again, Bamzai and Prakash engage selectively, in ways that make their rejoinders unpersuasive.

Recall Bamzai and Prakash’s core claim: “The ‘executive power’ granted by Article II encompassed multiple strands, one of which was the power to remove executive officers.”¹³⁰ Based on their originalist methodology, this is a claim about what executive power meant at the Founding and in the early republic.

As it happens, Professor Julian Davis Mortenson has spent the last many years investigating precisely this question. Across several prominent articles, Mortenson has sought to reconstruct how the Founding generation thought about separation of powers in general and executive power in particular.¹³¹ He has analyzed thousands of pages of political and legal writing to reconstruct not only “Madison’s bookshelf” but also what someone who read it all might have thought.¹³² He has pored over the debates at the Constitutional Convention and during ratification, scrutinized the records of the Continental Congress and the First Congress, reviewed the works of influential philosophers great and small, and delved into the legal minutiae of the era.

His conclusion, supported by a veritable library of sources and hundreds of pages of argument, can be stated simply: “The Executive

238 (James Madison). In fact, during the debates over establishing the Treasury, Madison told legislators:

Surely the Legislature have the right to limit the salary of any officer . . . [I]f they have this, and the power of establishing offices at discretion, it can never be said that, by limiting the tenure of an office, we devise schemes for the overthrow of the executive department.

Bowie & Renan, *supra* note 79, at 2043 (alteration in original) (quoting 1 ANNALS OF CONG. 638 (1789) (Joseph Gales ed., 1834)).

¹²⁸ See Bamzai & Prakash, *supra* note 1, at 1758, 1789.

¹²⁹ *Id.* at 1760–61.

¹³⁰ *Id.* at 1762.

¹³¹ See generally, e.g., Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019) [hereinafter Mortenson, *Article II*]; Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020) [hereinafter Mortenson, *Executive Power Clause*].

¹³² Mortenson, *Article II*, *supra* note 131, at 1188.

Power' Was Unanimously Understood as an Empty Vessel, Both Subsequent and Subordinate in Character."¹³³ Or, in other words, "executive power' was a discrete subset of the Crown prerogative, which was itself a long list of substantive authorities ranging from the consequential . . . to the mundane," and it meant nothing more than "the Power to Execute the Laws."¹³⁴

Mortenson's study suggests that executive power was not understood to have positive subject-matter content. It was, rather, a step in the process by which a "complete" government implemented authoritative directives.¹³⁵ Many thought this necessarily entailed the power to appoint assistants to help with implementation, although this implication was contested, and some Founding-era actors disagreed.¹³⁶ But the organizing understanding was of executive power as a substantively empty vessel, to be filled by legislation. The argument for appointment as incident to execution was connected with the needs of execution itself.

Several conclusions follow from Mortenson's analysis. The most obvious and important for our purposes is that removal was a power within the legislature's authority to bestow or refashion by law. Appointment — not removal — was the power sometimes claimed to be part of executive power. Yet even that was contested. And, as Bamzai and Prakash know, state constitutions experimented with where to lodge the appointment power and proliferated rules for how it could be exercised. It was not universally lodged in the executive as a subset of executive power. Mortenson's research thus poses a serious obstacle to the claim that, in the late eighteenth century, executive power was widely understood to include an indefeasible power of removal.

How do Bamzai and Prakash address this understanding of executive power so at odds with their own? Their only discussion of Mortenson's work seems to accuse him of contradiction and fails to engage with his central argument.¹³⁷

This is not an adequate response to Mortenson's analysis. It is not simply a matter of wishing Bamzai and Prakash had written a different article or responded to other critics. Mortenson's is the most serious, sustained, and systematic scholarly engagement with Founding-era thinking about the meaning of executive power. And he finds that executive power has no substantive content. The implication is that Congress can, as a matter of course, shape the offices that make up the government, including restricting the President's power of removal. This is a very serious scholarly challenge to Bamzai and Prakash's thesis.

¹³³ Mortenson, *Executive Power Clause*, *supra* note 131, at 1334.

¹³⁴ Mortenson, *Article II*, *supra* note 131, at 1230.

¹³⁵ Mortenson, *Executive Power Clause*, *supra* note 131, at 1319–21.

¹³⁶ *See id.* at 1325.

¹³⁷ *See* Bamzai & Prakash, *supra* note 1, at 1765 n.56.

Other scholarship on the early republic bears Mortenson's analysis out. Professor Jonathan Gienapp's recent work confirms that, at the Founding and in the early republic, there was no settled opinion on where the Constitution placed the removal power.¹³⁸ During ratification, Antifederalists feared that Article II created an overweening presidency and critiqued it relentlessly.¹³⁹ Yet they largely ignored the Vesting Clause and the supposed additional powers it bestowed.¹⁴⁰ No one, at that time, argued that by vesting the President with executive power the Constitution had given him the power of removal. Except for a proposal during the Constitutional Convention that would have specified that the heads of departments served at pleasure, removal seems not to have come up during the process of crafting the Constitution at all.¹⁴¹ And, in any case, that proposal was rejected, saw no debate, and was promptly forgotten by contemporaries.¹⁴²

Things remained unsettled into the First Congress. Perhaps the most important point about the removal debate in 1789 is simply that it happened at all. As Gienapp argues, there is significant evidence that it was wholly unexpected and covered new ground.¹⁴³ In other words, the question of removal was open and people did not know how to settle it. This history is difficult to reconcile with the claim that the executive power was already widely understood at the time to include removal.

Perhaps Bamzai and Prakash have persuasive ways of accounting for these arguments. But their Article's lack of engagement presents a missed opportunity. Critics of the executive power of removal have raised what seem, to us at least, dispositive arguments in opposition. And Bamzai and Prakash have offered no response. Nor does their Article alert their readers to these criticisms. As a result, specialists will be unpersuaded and generalist readers may walk away with an inaccurate perception of the state of debate.

CONCLUSION: THE JUDICIAL POLITICS OF LEGAL HISTORY

If our criticisms above are fair and correct, *The Executive Power of Removal* is unlikely to make much scholarly impact. Its core argument is unpersuasive. Scholars of the removal power or American history will find little new in it, while students and professors who have been following these debates at a distance will wonder why the strongest counterarguments are left unaddressed.

¹³⁸ See generally GIENAPP, *supra* note 87, at 125–63.

¹³⁹ Jonathan Gienapp, Removal and the Changing Debate over Executive Power at the Founding 34–37 (2023) (unpublished manuscript) (on file with the Harvard Law School Library).

¹⁴⁰ See *id.*

¹⁴¹ *Id.* at 8–9.

¹⁴² *Id.* at 9.

¹⁴³ *Id.* at 5–6.

Of course, this may make little difference to the current Supreme Court. As Bamzai and Prakash recognize, the debate they join “is not merely a faculty-lounge quarrel.”¹⁴⁴ We are living through a jurisprudential revolution in separation of powers law.¹⁴⁵ The resulting doctrine has empowered the current Court at the expense of past and future Congresses while creating an increasingly unaccountable President.¹⁴⁶

The Court has justified its power grab with an appeal to history, but its use of historical scholarship has been disappointing. Even as it has given history a more important role in constitutional adjudication, it has turned away from rigorous academic engagement, shielding itself from intellectually principled decisionmaking by announcing arbitrary limits on the kind of historical inquiry it will consider.¹⁴⁷ Where the Justices have engaged with historical scholarship, they have sometimes done so selectively, citing articles without considering their strengths or weaknesses. Famously, in *West Virginia v. EPA*,¹⁴⁸ decided last Term, Justice Gorsuch purported to respond to specific historical arguments raised by the dissent in reliance on a pair of law review articles through a long, unelaborated string citation of other articles.¹⁴⁹ Many of those articles had been subject to significant criticism in the scholarly literature, however. And Justice Gorsuch did not seek to adjudicate the merits of the scholarly debate. Citation took the place of argument.

This is a dangerous development, as it risks distorting both law and history. Law first. We happen to think that an indefeasible executive removal power is not normatively appealing. Bamzai and Prakash disagree and invoke a parade of horrors that might follow if the law did not recognize one.¹⁵⁰ This is a rich and ongoing debate; the plebiscitary president has many champions and critics. Recently, even strong presidentialists like former White House Counsel Bob Bauer and former Office of Legal Counsel head Jack Goldsmith have recognized the dangers of overweening presidential influence.¹⁵¹ Bamzai and Prakash fail to acknowledge their critics’ concerns. Even worse, their approach

¹⁴⁴ Bamzai & Prakash, *supra* note 1, at 1762.

¹⁴⁵ See Rosenblum, *supra* note 40, at 3–10.

¹⁴⁶ See Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 757 (2022).

¹⁴⁷ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2131 (2022) (arguing for the propriety of looking only at the text of the Second Amendment and its historical understanding).

¹⁴⁸ 142 S. Ct. 2587 (2022).

¹⁴⁹ See *id.* at 2625 n.6 (Gorsuch, J., concurring).

¹⁵⁰ See, e.g., Bamzai & Prakash, *supra* note 1, at 1834–35, 1841–42.

¹⁵¹ BOB BAUER & JACK GOLDSMITH, AFTER TRUMP 362 (2020). In prior work, Prakash has seemed to find real dangers in concentrating power in the President, too. SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 1–3 (2020). For other entries in the scholarly debate, see generally, for example, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (1st Harvard Univ. Press paperback ed. 2013); PETER M. SHANE, DEMOCRACY’S CHIEF EXECUTIVE (2022); DANIEL A. FARBER, CONTESTED GROUND: HOW TO UNDERSTAND THE LIMITS OF PRESIDENTIAL POWER (2021); DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP (2021).

obscures the critical stakes of this question, turning what should be a thoughtful debate over the proper balance of government powers into a quarrel over historical sources.

The consequences for legal history are more subtle but potentially more pernicious. Legal history has always responded to current concerns and judicial decisions. But the discipline remains empirical, as new work builds on the work of prior scholars, expanding on their sources and arguments.

The growing disconnect between the Court's use of history and scholarly historical debate thus poses acute problems for students of legal history. The history the Court relies on does not always meet scholarly standards of rigor. It has sometimes focused on questions with a short half-life. And it can present the state of research in a skewed way, aiming to make the weaker argument defeat the stronger one. Scholars cannot put their trust in the Court's historical analyses. We need rigorous academic work that stands at some distance from the Court's own arguments on which to build our future research.

On this score, *The Executive Power of Removal* is a false start. It mostly relies on sources that have already been subject to much analysis and its treatment of other sources raises concerns. We agree with Bamzai and Prakash that there remain many open historical questions about the place of officers in the early republic. But whether "executive power" included an indefeasible removal authority is just not one of them.