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*Boston University School of Law*

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# Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism

Jed Handelsman Shugerman\*

*The Supreme Court's recent decisions that the President has an unconditional or indefeasible removal power rely on textual and historical assumptions and a "removal of context." This article focuses on the "executive power" part of the Vesting Clause and particularly the unitary theorists' misuse of Blackstone. Unitary executive theorists overlook the problems of relying on England's limited monarchy: the era's rise of Parliamentary supremacy over the Crown and its power to eliminate or regulate (i.e., make defeasible) royal prerogatives. Unitary theorists provide no evidence that executive removal was ever identified as a "royal prerogative" or a default royal power. The structure of their historical comparison is flawed: the Constitution explicitly limits many royal powers, such war, peace (treaties), and the veto, so that the President is weaker than the king, but they still infer from Article II other unnamed "executive powers" (like removal) that would make a President stronger than a king.*

*When one investigates the unitary theorists' evidence and follows their sources, one finds a pattern of misinterpreting historical sources, especially Blackstone. In particular, the recent amicus brief by unitary scholars in Seila Law misinterprets Blackstone's use of the word "disposing" of offices as removing, instead of dispensing or appointing, and then misquotes a passage from Blackstone, reversing his meaning from his uncertainty about the relevant law of offices to a certain positive claim about removal. These misreadings are more than just small errors. They show that the unitary theorists were not following their claimed historical method of English "prerogative . . . defined by law." Blackstone provides clear evidence against a default royal removal power. These errors are also*

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\* Professor, Fordham Law School. Sincere thanks to Saul Cornell, Blake Emerson, Martin Flaherty, Jonathan Gienapp, Daniel Hulsebosch, Clare Huntington, Andrew Kent, Heidi Kitrosser, Joe Landau, Thomas Lee, Ethan Leib, Jane Manners, Lev Menand, Gillian Metzger, John Mikhail, Julian Mortenson, Robert Post, Noah Rosenblum, Peter Shane, and Ilan Wurman. I also thank Michael Albalah and Fordham librarian Jacob Fishman and Kelly Leong for research assistance.

*a cautionary moment about originalism's methodological flaws.*

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*Aren't syllogisms lovely? All executive power, unless otherwise specified, is vested in the President.” Major premise, undeniable as a textual matter. Overseeing executive underlings—those who execute the law—and sacking executive slackers is surely executive power. (Minor premise, functionally irrefutable or nearly so.) Therefore, the power to sack executive-branch slackers is vested in the President. QED.*

– Akhil Amar, *The Words That Made Us*<sup>1</sup>

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1. AKIL AMAR, THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION 358 (2021).

## INTRODUCTION

Akhil Amar’s hyperformalistic syllogism is representative of a series of mistaken assumptions in support of a unitary executive theory of unconditional presidential power. Is it “undeniable as a textual matter” that “all” executive power is vested in the President? The word “all” appears in Article I’s Legislative Vesting Clause, but not Article II’s Executive Vesting Clause:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.<sup>2</sup>

The executive Power shall be vested in a President of the United States of America.<sup>3</sup>

A textualist might find that omission worth noting. Instead, Amar just adds the word “all,” a major assumption in his major premise. The word “vest” did not imply “all,” exclusivity, completeness, or indefeasibility in the eighteenth century, the subject of my earlier article, “Vesting.”<sup>4</sup> Instead, I found that the Founding generation differentiated simple “vesting” from “fully vested” (and vesting “all power”). The Framers used the word “all” in other parts of the Constitution to signify completeness and exclusivity—but not in Article II’s Vesting Clause.

This Article, focusing on the meaning of “executive power” and the originalists’ misuse of Blackstone, is part of a series (and a book project) on Article II, questioning the unitary theory’s three pillars: the Executive Vesting Clause,<sup>5</sup> the Take Care Clause (or the “Faithful Execution” clauses),<sup>6</sup> and the Decision of 1789 (or more accurately, the Indecisions of 1789).<sup>7</sup> This Article is about the “executive” part of the Vesting Clause: Did “executive power” imply supervision and removal in the eighteenth century? Amar’s minor premise was that removal of executive officers is “surely an executive power,” but this assumption is worth interrogating. It may seem to be common sense to twenty-first-century readers in the modern imperial presidency. But was “the power to sack” common sense or

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2. U.S. CONST. art. I, § 1.

3. U.S. CONST. art. II, § 1.

4. Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. (forthcoming 2022) [hereinafter Shugerman, *Vesting*], at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3793213](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793213).

5. *Id.*

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

7. Contrast Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) with Jed Handelsman Shugerman, *The Indecisions of 1789*, 171 U. PA. L. REV. (forthcoming 2022) (Fordham Law Legal Studies, Research Paper No. 3596566, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3596566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566) [hereinafter Shugerman, *Indecisions of 1789*]; and Brief of Amicus Curiae Jed H. Shugerman in Support of the Court-Appointed Amicus Curiae at 24-29, *Collins v. Yellen*, Nos. 19-422 & 19-563, 2021 WL 2557067 (U.S. June 23, 2021), 2020 WL 6889214 [Hereinafter Shugerman, *Amicus Brief in Collins*].

“functionally irrefutable” in the eighteenth century? Other scholars have relied on Blackstone to suggest that it was. To the contrary, the historical evidence—particularly from research over the past few years—shows that there was no such default rule or prerogative. This article will focus on the use and misuse of William Blackstone in the work by unitary executive theorists, with four categories: “selective use,” “misuse,” “disuse,” and “selective disuse.”

The 2020 book by Michael McConnell, *The President Who Would Not Be King*, reflects a misuse of Blackstone, building a thesis around Blackstone’s list of royal prerogative powers, but then making serious errors about that list for the book’s most significant doctrinal claims.<sup>8</sup> Those errors were compounded in his co-authored amicus brief in *Seila Law v. CFPB* in 2019. Amar’s book reflects “selective disuse.” At least Amar is aware of Blackstone’s general perspective of legislative supremacy and mixed government, and elsewhere argues that the Founders were breaking from this tradition. Both Amar and Chief Justice Roberts compartmentalize and ignore Blackstone as they selectively misinterpret American sources in order to find support for presidential removal. The presidential removal precedents are more about the *removal of context* and the *convenient additions of text*.

As Paul Halliday summarized, Blackstone “has been the theorist of Anglophone law because there seem to be no needs or norms he cannot serve. He was a reformist and a reactionary . . . an Anglican apologist and an exemplar of liberal enlightenment, a Tory in his politics and a Whig in his historical sensibility.”<sup>9</sup> Thus, one often can find in Blackstone whatever one is looking for. And even then, the unitary theorists still need to selectively edit or misinterpret Blackstone’s words to find what they are looking for. In proper context, Blackstone shows that the executive removal power was an open question in eighteenth-century England. In the key section on the law of offices where he discussed the removal powers over some offices, Blackstone explicitly declined to make a general statement about the law of removal. The highest offices like the privy council and the cabinet served at the Crown’s pleasure, but there was no default removal power over other officers. Blackstone had passages in his *Commentaries* discussing royal prerogatives as “absolute,” but the larger context of his work was a Whig/republican emphasis on parliamentary supremacy and even legislative sovereignty.<sup>10</sup> Moreover, Blackstone never mentions

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8. MICHAEL MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* (2020); see Jed Shugerman, “Originalism and the Seila Law Brief, Part II: Prerogative vs. Royalism, Blackstone vs. Schmitt, McConnell vs. Amicus,” at <https://shugerblog.com.wordpress.com/2022/01/11/originalism-and-the-seila-law-brief-part-ii-prerogative-vs-royalism-blackstone-vs-schmitt-mcconnell-vs-amicus/>.

9. Paul D. Halliday, *Blackstone’s King*, in *RE-INTERPRETING BLACKSTONE’S COMMENTARIES* at 169 (Wilfrid Prest ed., 2016) (emphasis omitted).

10. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*46-47, \*49.

removal power as any kind of prerogative, and for good historical reason.<sup>11</sup> This conspicuous absence is one reason some unitary scholars have to tie themselves into knots trying to squeeze references—unsuccessfully—from other parts of Blackstone. Their errors tell us more about the risks and blindspots of originalist scholarship than about eighteenth-century executive powers.

One of the supposed virtues of originalism, in theory, is its emphasis on the democratic value of ratification and on updated historical research above the precedents decided by unelected judges. One of the supposed virtues of textualism, in theory, is its emphasis on the democratic process and the precision of language above judicial discretion. In practice, the case of presidential removal raises questions about the use of history, text, and precedent by an ostensibly originalist Supreme Court and legal scholars.

The Supreme Court has relied on two constitutional clauses and one historical moment for its unitary removal decisions in *Myers v. United States* in 1926 and *Free Enterprise Fund v. PCAOB* in 2010: The Executive Vesting Clause, the Take Care/Faithful Execution Clause, and “the Decision of 1789,” ostensibly when the first Congress, in creating the first departments, interpreted Article II as granting the President the removal power.<sup>12</sup> Over the past decade, historians have shown how none of the three sources supported the Supreme Court’s decisions. And yet in 2020 and 2021, the Roberts Court treated their historical conclusions as *res judicata*, relying on precedent to avoid taking a hard look at the new evidence, and then repeating the same erroneous assumptions. It is not *stare decisis* as much as it is *stare errata*, standing by the errors.

In an amicus brief I filed in 2020,<sup>13</sup> and in a forthcoming article,<sup>14</sup> I described a remarkable series of misinterpretations and misreadings of speeches and letters in the “Decision of 1789,” which both Chief Justice Roberts and Justice Thomas relied upon in *Seila*. The historical record is actually the opposite of what the unitary scholars have claimed. In this Article, I focus on some of the erroneous assertions by the Justices and scholars that the “executive power” in the eighteenth century included removal. This case study highlights oversights in *Seila Law* and the CFPB litigation, recent scholarship, and amicus briefs, especially their mistaken reliance on Blackstone for removal. Amar does not make this mistake. Amar rightly acknowledged Blackstone’s belief in legislative supremacy and acknowledged Blackstone as a “runaway best-seller in eighteenth-century America,”<sup>15</sup> and he argues that the Founders were breaking away

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11. See *infra* Part IV.

12. *Seila Law v. CFPB*, 591 U.S. \_\_\_\_ (2020).

13. Shugerman, Amicus Brief in *Collins*.

14. Shugerman, *Indecisions of 1789*.

15. AMAR, *supra* note 1, at 439; see also *Id.* at 566.

from the English model here.<sup>16</sup> However, if Amar's point was about discontinuity, that the Founders rejected the English structure, then how can one rely on other claims about the traditional structure, like "sacking"?

This project builds on recent historical work questioning similar assumptions, especially Manners and Menand, Birk, Chabot, Bradley & Flaherty, Natelson, Shane, Reinstein, Steilen, and Mortenson.<sup>17</sup> The unitary theory assumes that in order to execute the law, a President must have the power to remove and replace an officer who is unable, incompetent, or refusing to follow reasonable orders—and Congress may place no conditions on this power. But why would such a power necessarily be absolute and unlimited? If Article II requires "Care" and "faithful execution," is Congress not permitted to set parallel conditions on removal, requiring a showing of good faith, good cause, or a showing of neglect of duty, inefficiency, or malfeasance? Unitary scholars continue to argue that presidential removal power is beyond congressional regulation, i.e., indefeasible. The leading unitary scholars—Michael McConnell,<sup>18</sup> Steven Calabresi, Sai Prakash, Jeremy Rabkin, Michael Ramsey, Michael Rappaport, and Ilan Wurman—signed a scholars' amicus brief in *Seila Law* that heavily relied on the Vesting Clause against congressional conditions on presidential removal.<sup>19</sup> Their amicus brief and other work make serious errors, including misquoting Blackstone on their core historical argument. To his credit, McConnell shifted his reliance away from the Vesting Clause

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16. *Id.* at 22, 37.

17. Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Execution*, 73 STAN. L. REV. 175 (2021); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency*, 121 COLUM. L. REV. 1 (2021); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2021); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016). 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); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 263–64 (2009); Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557 (2018); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553–56 (2004). *See also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 49–52 (1994).

18. Michael McConnell signed this brief. To his credit, his recent book shifts away from the Vesting Clause. MCCONNELL, *supra* note 8. However, his reliance on the Take Care clause and the Decision of 1789 to re-establish indefeasibility for removal makes new dramatic errors and misuses of Blackstone. He assumes that "Take Care" and removal were part of Blackstone's list of prerogative powers, a basic error that raises doubts about his entire Blackstone-based thesis. In "Faithful Execution and Article II," we posited that the Take Care clause has a text and context of duty-imposing ("Care," "faithful execution" and fiduciary limitations) that would constrain presidential removal power. Kent, Leib & Shugerman, *supra* note 6. In a separate article, I show the Decision of 1789 actually rejected the unitary position. *See* Shugerman, *Indecisions of 1789*.

19. Brief for Separation of Powers Scholars as *Amici Curiae* in Support of Petitioners (No. 19-7), *Seila Law v. CFPB*, 591 U.S. \_\_\_\_ (2020); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 142 n. 205 (2020); Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUPREME COURT REVIEW 169, 171 n. 59.



and towards the Take Care clause to reconstruct an indefeasible removal power, but in so doing, he made some more fundamental errors on Blackstone.

The unitary theory offers a series of examples of “semantic drift” or projections from the present back onto an ideologically imagined past. Julian Mortenson earlier observed semantic drift in the pro-presidential interpretation of the word “executive” as separation of powers developed. Today, one assumes “executive” referred to both a power and a separate branch or office (an American innovation), even though the English did not have such a formal notion of a separation of powers.<sup>20</sup> In “Vesting,” I have shown that formalist scholars wrongly assumed that “vesting” in the eighteenth century had a meaning of “exclusive” or “indefeasible” because they associated it with the “vested rights” doctrine that emerged decades later.<sup>21</sup> In a second kind of drift, unitary theorists inflate the Crown’s power, seemingly because they conflate “royal” and absolutism. Instead of considering limited monarchy and parliamentary supremacy, they project modern notions of centralized executive power and administration onto the English and the Framers. They overlook how a limited monarchy was limited precisely to protect a landed aristocracy, its office-holders, and an increasingly powerful Parliament. Job security was not limited to aristocratic peerages and the House of Lords. Blackstone and others have explained that Parliament also could create administrative offices that could be inherited or held for life.<sup>22</sup> Many executive offices needed secure tenure to be worth the investment of time, labor, and opportunity costs.

England’s limited monarchy/mixed aristocracy was a different balance of executive powers, and an emerging legislative supremacy also creates a more limited executive power model. Parliament could limit or even abolish some royal “executive” powers (see, e.g., the pardon, prorogue, and suspension).<sup>23</sup> This leads to another puzzle, a kind of chiasmic reversal: If the Framers relied on the English king as a model, why would they have reduced and divided up so many of the explicit powers derived from Blackstone’s list of the king’s prerogatives (like war, treaty, and appointment), but when it came to implied powers like removal not listed by Blackstone at all, those powers would be indefeasible, and thus they gave the President *more* power than the king? Blackstone provided no evidence of a general royal removal power, let alone an indefeasible power. “Indefeasible” was a word the Founders used in other contexts of the

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20. Mortenson, *supra* note 17, at 1245.

21. Shugerman, *Vesting*.

22. 2 WILLIAM BLACKSTONE, COMMENTARIES \*36. See also G.E. AYLMER, THE KING’S SERVANTS: THE CIVIL SERVICE OF CHARLES I, at 106-20 (1961). See *infra* Section III.B for discussion of Edmund Burke and contemporary dictionaries.

23. See *infra* Part III.

people's rights and liberties, but not for the separation of powers.<sup>24</sup>

This Article identifies a third kind of drift, more institutional than semantic: our assumption that “execution” implies centralization. The unitary scholars assume that any bureaucracy must have a pyramid hierarchy of supervision and control (“Overseeing executive underlings,” as Amar says).<sup>25</sup> Such vertical oversight was not a given in early modern England. This assumption does not fit the pre-bureaucratic world of the decentralized eighteenth century. In the context of a new start-up government, a protean executive, unclear budgets, a vast frontier, and freedom to keep the national bureaucracy small, the Founders had reason to prefer practical flexibility sometimes to delegate enforcement to states and federal judges (and they did so over the ensuing decades). One puzzle about the conservative embrace of the unitary executive is that, if one imagines the Founders to have been small-government federalists, why not also imagine that the Founders would want to retain flexibility to keep the national administrative state small?

Part I provides more background about *Seila Law* and *Collins*, with a summary of the Constitutional Convention, the Ratification debates, and the first Congress rejecting the unitary theory. Part II starts with the mistaken assumptions in *Seila Law* and Amar's new book, starting with a summary of their additions of text and removal of context. Part III raises questions from the powers of appointment, war, and treaty, the Parliamentary curtailment of pardon and suspension, and the absence of prorogue powers. Part IV focuses on the erroneous claims by originalists that Blackstone included a general “removal” in his account of royal power, drawing on older and newer research on the English law of offices-as-property.

## I. PRESIDENTIAL POWER AND PRECEDENTIAL POWER

### A. *Stare Errata*

The unitary executive theory has an intriguing relationship to precedent. One of the most famous decisions in American history, *Marbury v. Madison*, contradicts the theory, because the Court took it for granted that William Marbury, justice of the peace, could not be removed by President Jefferson (more on this puzzle below).<sup>26</sup> The theory reveres one precedent established in 1926 (*Myers v. United States*), though it was sharply limited just nine years later (*Humphrey's Executor*), and it reveres another opinion, Justice Scalia's in *Morrison v. Olson*, though it was a lone dissent. Only since 2010 has the unitary theory started winning a series of cases, and the

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24. Shugerman, *Vesting*.

25. Amar, *supra* note 1.

26. Manners & Menand, *supra* note 17; Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085 (2021).

Roberts Court fiercely stands by them.

In 2010, the Roberts Court invalidated the Public Company Accounting Oversight Board's double-layer of "good cause" insulation within the Securities Exchange Commission (an independent commission assumed to have implied job security). Coincidentally, in the same year, Congress established the Consumer Financial Protection Bureau (CFPB), which had a single chair insulated from removal: "The President may remove the director for inefficiency, neglect of duty, or malfeasance in office."<sup>27</sup> Since the late nineteenth century,<sup>28</sup> this has been roughly the formula Congress has used to protect the heads of independent agencies within the executive branch from politics, partisanship, or personal caprice.<sup>29</sup> In 2020, the Supreme Court struck down this single-head independence in *Seila Law* as a violation of the separation of powers. One year later, the Court struck down a similar structure of the Federal Housing Finance Agency in *Collins v. Yellen*. Their formalist and seemingly absolutist description of Article II's text would seem to lead to overturning *Humphrey's* and the end of independent agencies, as both Justice Kavanaugh and Trump's Department of Justice had suggested,<sup>30</sup> and as the Ninth Circuit has hinted.<sup>31</sup>

The Roberts Court on the one hand seems headed toward overturning or sharply limiting precedent, but on the other, it also heavily relies on precedent rather than new historical evidence since *Free Enterprise*. The briefing in both *Seila Law* and *Collins* presented substantial research against the unitary assumptions and leaps in *Myers* and *Free Enterprise*.<sup>32</sup>

Instead of engaging this research directly, Roberts again and again relied on these precedents as if the historical questions were covered by *res judicata*. Here are some examples:

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U. S. 52 (1926).<sup>33</sup>

But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal

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27. 12 U.S.C. § 5491(c)(3) (2010).

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

29. Mannors & Menand, *supra* note 17.

30. Jed Handelsman Shugerman, *Brett Kavanaugh's Legal Opinions Show He'd Give Donald Trump Unprecedented New Powers*, SLATE, (July 19, 2018). See Brief for the Respondent (No. 19-7), *Seila Law LLC v. CFPB*, 140 S.Ct. 2183 (2020).

31. *Axon Enter., Inc. v. Fed. Trade Comm'n*, 986 F.3d 1173, 1187 (9th Cir. 2021).

32. In full disclosure, I filed a historical amicus brief in *Collins*, see see Shugerman, Amicus Brief in *Collins*.

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

power is the rule, not the exception.<sup>34</sup>

The dissent, for its part, largely reprises points that the Court has already considered and rejected: It notes the lack of an express removal provision, invokes Congress's general power to create and define executive offices, highlights isolated statements from individual Framers, downplays the decision of 1789, minimizes *Myers*, brainstorms methods of presidential control short of removal, touts the need for creative congressional responses to technological and economic change, and celebrates a pragmatic, flexible approach to American governance. . . . If these arguments sound familiar, it's because they are. They were raised by the dissent in *Free Enterprise Fund*.<sup>35</sup>

Roberts and Kavanaugh provide other examples of *stare errata*, a stubborn refusal to take a fresh look at new historical evidence and correct mistakes. For example, new research shows that Madison, as a congressman, soon after maneuvering the ostensible "Decision of 1789," proposed a comptroller who would be protected from removal and would serve "during good behavior," as his colleagues quickly understood him.<sup>36</sup> Even though he withdrew his proposal, this debate revealed the commonness of protections against removal for executive officers, merely by giving the officer a "term of years." This research answers the *Marbury* removal puzzle: Marbury was not removable because his office was for a term of five years, which in that era signaled a guarantee of five years without removal.<sup>37</sup> And this research was presented to the Court in both *Seila Law*<sup>38</sup> and *Collins v. Yellin*.<sup>39</sup>

In more recent years, judges on both sides cherry-picked the parts they liked from Madison's comptroller. Justice Kavanaugh, as a judge on the D.C. Circuit, wrote, "In *Free Enterprise Fund*, the Supreme Court definitively explained that the original Comptroller of the Treasury was removable at will by the President."<sup>40</sup> Definitively? Kavanaugh's source for his historical conclusion was no historical document, but Chief Justice Roberts's earlier decision. It turns out that Roberts did not make any claim about "at will" removal in the passage. But Roberts did misinterpret Madison in similar respects. Roberts's interpretation is consistent with Taft's Madison, but not Madison himself. Roberts overlooks Madison's observation that Congress had not decided on an "at pleasure" default rule and his opposition to "at pleasure" tenure for the Comptroller. In a

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34. *Id.* at 2206.

35. *Id.* at 2207.

36. Manners & Menand, *supra* note 17; Shugerman, *Indecisions of 1789*.

37. Manners & Menand, *supra* note 17; Shugerman, *Vesting*.

38. Amicus Brief for Separation of Powers Scholars, *supra* note 19.

39. Shugerman, Amicus Brief in *Collins*.

40. *PHH v. CFPB*, 881 F.3d 75, 177 n.4 (D.C. Cir. en banc) (Kavanaugh, J., dissenting).

microcosm, this sentence illustrates the problem: judges automatically deferring—without question—to the Supreme Court precedents, as opposed to the primary historical documents. Both Roberts and Kavanaugh were working from a set of presentist assumptions about default rules—default rules established in modern America, not early modern England. A stark example of *stare errata*, the Roberts Court preferred to stand by erroneous precedents as if they were the last word on historical events. Roberts claimed that both Breyer’s dissent in *Free Enterprise Fund* and Kagan’s dissent in *Seila Law*:

attribute[] to Madison a belief that . . . the Comptroller[] could be made independent of the President. But Madison’s actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of “years, unless sooner removed by the President”; he would thus be “dependent upon the President, because he can be removed by him,” and also “dependent upon the Senate, because they must consent to his [reappointment] for every term of years.”” *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 499, 500 n. 6 (2010) (citation omitted) (quoting 1 Annals of Cong. 612).<sup>41</sup>

Chief Justice Roberts and unitary scholars<sup>42</sup> ignored the rest of the debate that clarified the goal of making the Comptroller independent and ignored the scholarship that explained that Madison’s “term of years” wording had an established meaning of limiting removal power. But apparently a Supreme Court decision written in 2010 is more authoritative about 1789 than the words of Madison and his colleagues from 1789.

Before we get to the specific problems with Roberts’s assumptions about “executive power” and removal, let’s briefly review the problems with Roberts’s assumptions about the Founding and the First Congress, which I have covered in more detail elsewhere.<sup>43</sup>

### *B. The Falling Pillars of the Unitary Theory*

The Constitution is silent on the removal of executive officers, beyond impeachment for high crimes and misdemeanors. When pieced together with other historical evidence as part of a series of articles, none of the three unitary theory’s originalist pillars (neither the Vesting Clause,<sup>44</sup> the Take Care Clause,<sup>45</sup> nor the Decision of 1789<sup>46</sup>) can support its claims of unchecked executive power. “Faithful execution” and the Necessary and

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41. *Seila Law v. CFPB*, 140 S.Ct. 2183, 2204 n.10. (2020).

42. Brief for Separation of Powers Scholars, *supra* note 19; MCCONNELL, *supra* note 8, at 166–67.

43. Kent, Leib & Shugerman, *supra* note 6; Shugerman, *supra* note 28; Shugerman, *Indecisions of 1789*.

44. Shugerman, *Vesting*.

45. See Kent, Leib & Shugerman, *supra* note 6.

46. See Shugerman, Amicus Brief in *Collins*, *supra* note 7.

Proper (or “Sweeping”) clause point in favor of moderate congressional powers to establish offices with conditions on removal.

The unitary theory relies on the Take Care clause, but it is vital to read the full clause and its historical context: “The President shall take care that the laws be *faithfully executed*.”<sup>47</sup> This phrase in the Take Care clause and the Oath is similar to a fiduciary duty (both historically and etymologically from faith, *bona fide* to fiduciary) that limits presidential discretion.<sup>48</sup> The word “faithfully” is a signal the framers used to limit the exercise of presidential powers to good faith reasons, *bona fide* purposes, and fidelity to the public interest. That signal is supported by six centuries of history leading up to the framers’ choice to add this duty in the Constitution.<sup>49</sup> The Framers chose language emblematic of the oath of high and mid-level ministers, and not the royal coronation oath, which contained nothing like “faithful” execution—indicative of a more circumscribed scope of executive power.<sup>50</sup> The “faithful execution” clauses thus indicate that the President is already bound to remove someone only for good faith reasons, in the public interest, similar to how Peter Strauss has relied on “faithful execution” to frame the President’s role as a limited “overseer,” rather than an overactive “decider.”<sup>51</sup>

Some judges and scholars assume that “vesting” connoted the granting of official powers above and beyond the other branches, invoking the “vesting rights” doctrine.<sup>52</sup> However, the “vested rights” constitutional doctrine first appeared in the early nineteenth century. In a separate article, I trace the word “vesting” as applied to the 1787 Constitution, building on Amar’s intratextualism,<sup>53</sup> and I also tracked intertextual usage: applying canons of interpretation and examining its internal 1787 use, the word’s use in colonial charters, early state constitutions, the Convention and ratification debates, collections of Founders’ writings, and the first survey of the era’s

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47. U.S. CONST. art II, §§ 2 & 3.

48. Jed Shugerman & Ethan Leib, *Fiduciary Constitutionalism, Corporate Defaults, and Good Cause Removal*, (forthcoming 2022).

49. Kent, Leib, Shugerman, *supra* note 6; Leib and Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL’Y 463 (2019). Cf. GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION 4 (2018).

50. Kent, Leib & Shugerman, *supra* note 6, at 2127-28, 2159 (2019).

51. Peter Strauss, *Overseer, or ‘The Decider’? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702-03 (2007); see also EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 80-81 (4th rev. ed. 1957); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CON. L. 324 (2016); Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175 (1993). For a similar concept of parallelism of delegation and supervision, see Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Abner Greene, *Discounting Accountability*, 65 FORDHAM L. REV. 1489 (1997).

52. RICHARD EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020). See, also Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1380-81 (1994).

53. Shugerman, *Vesting*; see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

English dictionaries.<sup>54</sup> The word “vest” generally conveyed a simple grant of powers, but not exclusive or indefeasible, constitutionally immune from legislative conditions. It turns out that both state constitutions and the Founders’ own usage reflect a range of vesting, from “fully vested” or “vesting all” to simple vesting to partial vesting. Article I reflects an eighteenth-century convention of full-vesting of legislative powers, consistent with Whig/republican theory (and Blackstone’s view of legislative supremacy and arguably his view of sovereignty). However, Article II reflects only simple vesting, against the unitary theorists’ assumptions of special protected status of indefeasibility.

In these articles and a forthcoming book, I offer more detail about the anti-unitary Founding and the anti-unitary first Congress. Here are some highlights relating more to the scope of executive power and the plausibility of implied powers.

Randolph’s and Madison’s Virginia Plan referred to an executive that would “execute such other powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature.”<sup>55</sup> This framing is much more of a thin execution model, with Congress filling in the scope of powers and with Congress empowered to un-delegate. Charles Thach, a historian favoring presidential removal and executive power, emphasized, “Considering the two sets of resolutions as a whole, we may say that the executive proposed by them was essentially subordinate to the legislature.”<sup>56</sup> Later in a debate with James Wilson, a pro-presidentialist delegate arguing for implied powers, Madison rejected the possibility of implied presidential powers. He emphasized the importance of explicit enumeration as a limit on inferring additional powers.<sup>57</sup> presidential power “should be confined and defined,” because otherwise, powers would become “large” and risk “the Evils of elective Monarchies.”<sup>58</sup> He said that if the Constitution established a single executive, then the potential inference of implied powers would be a threat to their balanced structure.<sup>59</sup>

presidentialists tried and failed to insert “at pleasure” tenure into the Constitution. Gouverneur Morris proposed that department heads would serve at the President’s “pleasure.”<sup>60</sup> It was apparently never debated and was dropped during the work of the Committee of Style in September, even

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54. Shugerman, *Vesting*.

55. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 63-64, 70 (Max Farrand ed., June 1, 1787) [hereinafter FARRAND].

56. CHARLES THACH, CREATION OF THE PRESIDENCY, 1775-1789 at 73 (2007).

57. 1 FARRAND 70 (June 1, 1787) (1911) (Madison invoking “*ex vi termini*,” i.e., “from the force of the word or boundary.”)

58. *Id.*

59. *Id.* at 66-67.

60. *Id.* at 342.

though Morris was the committee's drafter.<sup>61</sup> Charles Thach, a scholar who favored presidential power, regarded this omission as intentional, as Congress's "*pro tanto* an abandonment of the English scheme of executive organization."<sup>62</sup> However, Thach also suggested that Morris may have had the last laugh by inserting a vesting "joker" card into the deck. The draft produced by the Committee of Detail in late July and early August had retained three "vesting" clauses. The Committee of Style inherited them and changed them in subtle ways. Morris may have lost out on his "during pleasure" proposal, but he seems to have used his role behind the scenes to re-word the text to plant seeds (or cards) for increasing presidential power.<sup>63</sup> Among other changes, Morris apparently added the "herein granted" language to suggest the limited powers of enumeration for Congress, but he did not add it for the President. Thach observed that the Executive Vesting clause "was to prove a joker. That it was retained by Morris with full realization of its possibilities, the writer does not doubt."<sup>64</sup> In an open-minded concession by a unitary-leaning scholar, Thach said he "doubted" whether these moves were "intentional or not," and whether the interpretation was correct or not, but either way, the new wording had "far reaching" possibilities to expand presidential power.<sup>65</sup> The unitary executive theorists have been playing that joker card over the past few decades.

During the Ratification debates, Madison repeated these warnings and an emphasis on limited and "defined" powers in the *Federalist Papers* No. 14 and No. 45. In *Federalist* No. 39 (and throughout most of the first Congress, except for the Foreign Affairs debate in mid-June 1789), Madison recognized congressional control over removal,<sup>66</sup> and in *Federalist* No. 77, Hamilton endorsed Senate consent in order to "displace as well as to appoint" executive officers.<sup>67</sup> Moreover, the *Federalist Papers* generally emphasized the phrase "checks and balances" and the model of overlapping powers in order to exercise checks (e.g., veto, Senate confirmation,

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61. MADISON'S NOTES at 465 (Max Farrand ed., Aug. 20, 1787). Farrand's three sources of these proceedings indicate that there was probably no debate and no vote on this proposal. 2 FARRAND 334-66 (Aug. 20-21, 1787).

62. THACH, *supra* note 56, at 110.

63. William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 62 (2019).

64. THACH, *supra* note 56, at 122-23.

65. *Id.*

66. THE FEDERALIST NO. 39 (James Madison) (and see *infra* on Ratification debates).

67. THE FEDERALIST NO. 77 (Alexander Hamilton). See Jeremy D. Bailey, *The Traditional View of Hamilton's Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL'Y 169 (2010); but see Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, at 33 HARV. J.L. & PUB. POL'Y 149, 149-54 (2010). Hamilton announced that he had changed his mind during the first Congress's departmental debates, JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 154 (2018); Chabot, *supra* note 17.



spending, war, treaty) rather than sealed-off separation of powers—more functionalist than formalist.<sup>68</sup> Many states had included explicit separation-of-powers clauses in their Constitutions,<sup>69</sup> but the federal Convention did not. The evidence from the first Congress suggests that in both 1787 and 1789, the Founders understood that the Constitution was not a formal separation, but a mixed government of checks and balances.<sup>70</sup>

The Constitution's silence on removal and vagueness on executive power has left the unitary theorists awkwardly and erroneously relying on "the Decision of 1789."<sup>71</sup> Upon closer scrutiny of the first Congress's debates and votes, only about one third of the House favored the "presidentialist" view that Article II implied a presidential removal power. The House rejected the unitary theory by a significant margin, and the unitary scholars do not have evidence that the Senate endorsed their theory either. The Senate split ten to ten on the bill only after intense lobbying, and because the debate was so muddled, the theory behind the Senate vote is unclear. In other articles, I offer several overlooked moments from 1789 that dispel unitary assumptions, including the delegation of removal power to judges and juries.<sup>72</sup>

### C. *Seila Law* and a Syllogism

Akhil Amar's syllogism tracks the Roberts Court's simplistic logic and assumptions. Roberts wrote in *Seila Law*, "The entire 'executive Power' belongs to the President alone," and then assumed that removal was an executive power. Similarly, Amar (with original emphasis) wrote, soon after *Seila Law*, in his 2021 book *The Words That Made Us*, as noted above:

Aren't syllogisms lovely? All executive power, unless otherwise specified, is vested in the President." Major premise, undeniable as a textual matter. Overseeing executive underlings – those who execute the law – and sacking executive slackers is surely executive power. (Minor premise, functionally irrefutable or nearly so.) Therefore, the power to sack executive-branch slackers is vested in the President. QED.<sup>73</sup>

As Chief Justice John Marshall may have replied in *McCulloch* style: We

68. Shugerman, *Vesting*.

69. Shugerman, *Vesting*.

70. Shugerman, *Vesting*; Shugerman, *Indecisions of 1789*.

71. *Seila Law v. CFPB*, 140 S.Ct. 2183 (2020); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 483 (2010) (citing *Myers v. United States*, 272 U.S. 52 (1926)). *Bowsher v. Synar*, 478 U.S. 714, 723–724 (1986); *Myers v. United States*, 272 U.S. 52 (1926); *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

72. Shugerman *Indecisions of 1789*; See also Manners & Menand *supra* note 17; Chabot, *supra* note 17 (the First Congress adopted Hamilton's proposal for a commission for purchasing debt, the Sinking Fund, with the non-removable Vice President and Chief Justice exercising executive powers in finance).

73. AKHIL AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION* 358 (2021).

must never forget that it is a *constitution* we are expounding, not a syllogism. A syllogism, to contain an accurate detail or formalistic absolutism of which its great powers will admit, would partake either of the prolixity of a legal code or an unnecessary and improper oversimplification of history.<sup>74</sup>

Moreover, Amar's syllogism is loaded with modernist assumptions, especially focusing on the modern commander-in-chief. Note the use of "sack" and "slacker," more than just a near-rhyme, but also a deck-stacking of sacking of the slacking, rather than a framing of independent judgment and checks and balances against a hack, quack, corrupt kickback, paranoiac or a megalomaniac(al) President.

This passage from *The Words that Made Us* might be titled more accurately "The Words That We Added." It is odd to claim an interpretation is "undeniable as a textual matter" when one has to add words that are conspicuously missing but are used frequently elsewhere in the same text.

These insertions of missing words "all" by Amar (and "alone" by Taft and Roberts) cover up a textualist problem pointing in the opposite direction: *Expressio unius est exclusio alterius*, the canon meaning "the explicit mention of one is the exclusion of another." In "Vesting," I explain that other clauses, the Framers often used other words to convey exclusivity and completeness: "all," "exclusive," "sole," and "alone."<sup>75</sup> Professor Victoria Nourse has called Justice Scalia's insertion of the word "all" into the Executive Vesting Clause in *Morrison v. Olson* a "pragmatic enrichment,"<sup>76</sup> but the rich irony is textualists rewriting texts and ignoring the inferences from absences. Scalia taught us to use "commonsensical" text-based canons like *expressio unius* throughout his career.<sup>77</sup>

A problem with adding "all" by itself to the Executive Vesting Clause is not merely a problem by contrast with the text of the Legislative Vesting Clause, but also because it does not fit Article II. The Constitution shares traditional executive powers between the executive and the legislature: appointment (the Senate's advice and consent), war (to Congress), and peace (Senate ratification). The Framers had good reason not to claim that they had vested "all" executive power in the President. Thus, in addition to adding "all," Amar needed to add "unless otherwise specified," which assumes that the Executive Vesting Clause must have its own robust meaning of delegating powers, rather than a signification of a general

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74. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

75. U.S. CONST. art. II, § 2 (emphasis added). See Shugerman, *Vesting*; Cf. *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020) (Justice Gorsuch offering similar textual analysis of the absence of "solely" in the Civil Rights Act).

76. Victoria Nourse, *Reclaiming the Constitutional Text from Originalism*, 106 CAL. L. REV. 1, 3, 23-25 (2018); Peter Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 247 (2019).

77. ANTONIN SCALIA, A MATTER OF INTERPRETATION 25-26 (1998); ANTONIN SCALIA & BRYAN GARNER, *READING TEXTS: THE INTERPRETATION OF LEGAL TEXTS* (2012) ("The Negative-Implication Canon").

structure and the basic law-execution-of-legislation power (which is a plausible limited interpretation offered by recent scholarship).<sup>78</sup> Amar has to make a double addition to deal with the fact the clause does not actually imply “all” at all. As noted above, neither the structure of the Constitution nor the word “vest” imply the word “all.”

Amar then claims his “*minor premise*,” that executive power includes removal, is “*functionally irrefutable or nearly so*.” It is ironic for such a formalistic approach of a syllogism to rely on “functionalism,” when “functionally” a President could still fulfill such an executive power with minor conditions (like a requirement to show good faith or good cause). Amar cites one moment from Madison arguing for absolute removal power: “the Legislature has no right to diminish or modify his executive power.” Amar adds, “Congress has no discretion here.” Never mind that Madison before and after this debate rejected such a position.<sup>79</sup> It is not clear why executive power must be all or nothing. For a 7-1 majority in *Morrison v. Olson*, Chief Justice Rehnquist explained that “good cause” requirements did not interfere with the President’s functional executive powers.<sup>80</sup> If Amar thinks the purpose of the power is to “sack executive slackers,” that power seems consistent with Congress giving a President such power when the President can show “good cause,” “neglect of duty,” or “inefficiency.”

Amar makes a series of other assertions that do not hold up. He relies on the unitarian account of the Decision of 1789, despite voluminous evidence to the contrary. He cites one passage from Senator Maclay’s diary about the Senate debate, despite the fact that the diary shows initial Senate opposition and confusion, and shows that the presidentialists had to engage in intense lobbying, likely deal-making, and then obfuscation and retreat just to achieve a tie vote.<sup>81</sup> There was no consensus in either chamber for an Article II removal power, not even for the Secretary of War or Secretary of Foreign Affairs. Amar claims, “When the dust had settled, Congress enacted a series of statutes that embodied the Washington-Madison position—that all top executive officials, including the secretary of state and treasury secretary would serve at the President’s pleasure per the Constitution itself.”<sup>82</sup> He cites the statutes establishing the Departments of Foreign Affairs, War, and Treasury, but none of them have the phrase “at pleasure” or “at will” or anything like them. Even Prakash, the unitary scholar he cited, denied such an absolute claim, because Prakash acknowledged that the debates and the statutes did not address “tenure at pleasure.”<sup>83</sup>

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78. Mortenson, *supra* note 17.

79. See *supra* Section I.B, at 8; Shugerman, *Vesting*; Shugerman, *Indecisions of 1789*.

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

81. See Shugerman, *Indecisions of 1789*.

82. Amar, *supra* note 1, at 359.

83. Prakash, *supra* note 7, at 1072; see also *Seila Law v. CFPB*, 140 S.Ct. 2183, 2230 (2020) (Kagan, dissenting) (citing Manning, 124 *Harv. L. Rev.*, at 1965, n. 135; see *id.*, at 2030–2031).

Moreover, it is not historically “irrefutable” that executive power necessarily included a power to remove executive officers, even for cause. In this article, I summarize such historical evidence in my previous articles and those by others showing historical limits on removal and no consistent general rule over time.<sup>84</sup> But even at a more basic historical level of original public meaning circa 1787, it is not clear why executive powers would have been all-or-nothing, nor why they could not be modified by a legislature. The next Part will explain the history of these powers in England.

Likewise, each side of this historical debate can offer their own semi-textual syllogisms:

*Major premise:* Congress has the power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.

*Minor premise:* Creating departments and executive offices and establishing the terms of the tenure and conditions of removal is a necessary and proper law.

*Therefore,* Congress can require good cause for removing executive officers.

*Major premise:* The President shall take care that the laws be faithfully executed and takes an oath to faithfully execute the office.

*Minor premise:* Congress is vested with all legislative power, including the power to effectuate the constitutional duties of offices and clarify “faithful execution.”

*Therefore,* Congress has the necessary and proper power to clarify the standards for “good faith” removals, such as requiring good reasons or good cause for such removals.

*Major premise:* The Founders frequently cited a Latin maxim *unumquoque dissolvitur, eodem modo, quo ligatur* and *cujus est instituere ejus abrogate*, meaning roughly “Every obligation is dissolved by the same method with which it is created,” such that the process of removal follows method of appointment.

*Minor premise:* Officers are nominated by the President with Senate consent.

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84. See Birk, *supra* note 17; Manners & Menand, *supra* note 17; Shugerman, *supra* note 26.

*Therefore*, officers are removed by the President with Senate consent.

But we do not interpret the Constitution by syllogism. Let's focus instead on the original public meaning from the historical record.

## II. LIMITED MONARCHY AND DEFEASIBILITY

### *A. Defeasibility and Legislative Conditions on Royal Powers*

Unitary scholars look back to the powers of the king to identify “executive powers.”<sup>85</sup> And then the unitary theory assumes that if a power is “executive,” it must be exclusively and indefeasibly the President’s power, untouchable by Congress or the courts.

There are a number of problems here: the conflation of the “Crown” with “executive,” and the conflation of “royal” with absolute. In “Vesting,” I suggested that many Americans equate “royal” with “absolutism,” perhaps because we associate kings throughout ancient to early modern history (especially continental Europe) with complete power. However, the English had a limited monarchy, and Blackstone emphasized parliamentary supremacy over the Crown, including Parliament’s power to limit royal prerogatives:

Wherefore it is requisite to the very essence of law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other . . . [A]ll the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.<sup>86</sup>

Unitary scholars often assume that indefeasibility is the default rule for implied powers, but even if Article II implies additional unenumerated powers, it is unclear why such implied powers would be beyond congressional checks. The textual and historical basis for “indefeasibility” is unclear. The Founders knew how to use the word “indefeasible,” but they did not use it for official powers.<sup>87</sup> Their concerns about legislative overreach are not the same as an endorsement of plenary executive power within its sphere.<sup>88</sup>

If the English executive was their model, indefeasibility was not part of the English executive, as Blackstone makes clear. The English monarchs’ powers were famously defeasible and limited by Parliament and statute in the seventeenth and early eighteenth centuries. In the English mixed

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85. See, e.g., MCCONNELL, *supra* note 8; SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015); Wurman, *supra* note 19.

86. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*46-47, \*49.

87. Shugerman, *Vesting*, Part III.

88. See, e.g., Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 2015, 2025-50 (2005) (Book Review).

monarchy, core royal prerogatives were subject to legislative alterations, especially in the critical period after the Glorious Revolution so influential on the Founding era. For example, the Bill of Rights of 1689 prohibited or limited the prerogative powers of suspending, dispensing, and spending.<sup>89</sup> Then the Triennial Act of 1694 limited the Crown's power to call and dissolve or prorogue Parliament.<sup>90</sup> The Settlement Act of 1700 limited the pardon power (now a more famous limit given our recent debates over the pardon power): "[T]hat no pardon under the great seal of England [shall] be pleadable to an impeachment by the commons in parliament."<sup>91</sup> If anything, this evidence suggests the default rule of the eighteenth-century English constitution was defeasibility, increasing legislative limits on royal powers, and the rise of parliamentary supremacy.

Unitary scholars concede that the Philadelphia Constitution downgraded the President's powers from the king's exclusive powers of appointment, war, peace (treaty), and prorogue; but then they assume the Constitution increased the President's power of removal. An interpretation more consistent with the treatment of other executive powers, more coherent with republicanism over royalism in the 1770s-1780s, is that the Constitution gave the President less power than the English crown. Other scholars raise questions about whether the Vesting Clause implies the royal prerogative powers generally.<sup>92</sup> There is still a valid question about the significance of Article I Vesting Clause having "herein granted" as a signal of limited enumeration, which Article II Vesting does not.<sup>93</sup> Even if it was inserted behind the scenes by Gouverneur Morris, the public ratified it, and the absence of the phrase in Article II would hint at unenumerated implied powers. But even if Article II hints at implied powers, it is far from obvious that it implies all or most royal prerogative powers.<sup>94</sup>

As this Article indicates, even if executive power implies "thick" law

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89. 1 W. & M. c. 36 (1688) ("Article 1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal. Article 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal. Article 4: "levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.").

90. 6 & 7 W. & M. c. 2 (1694). Ian Loveland, *CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS: A CRITICAL INTRODUCTION* (5th ed. 2009).

91. 12 & 13 Will. 3, c. 2 (1700).

92. Reinstein, *supra* note 17; Mortenson, *supra* note 17.

93. Compare Richard Primus, *Herein of "Herein Granted"*, 35 *CONSTITUTIONAL COMMENTARY* 301 (2020) with MCCONNELL, *supra* note 8, at 8, 84-85, 108, 239-40; PRAKASH, *supra* note 7, at 68-70, 82-83; THACH, *supra* note 56, at 122-23; Saikrishna B. Prakash & Michael D. Ramsey, *Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 256-57 (2009); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 583-86, 597-98 (1984); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153, 1185, 1193 n.204 (1992); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 *HARV. L. REV.* 105 115 n.37 (1988); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *IOWA L. REV.* 1267, 1282 n. 75.

94. Steilen, *supra* note 17, at 557-668.

execution, it is not clear why the word “vesting” would make those implied powers more robust and indefeasible than the English Crown. The pardon and veto powers are explicitly granted, and thus they may be indefeasible, but removal was not explicitly in the Constitution (nor, moreover listed by Blackstone). Unitary scholars might argue that, whereas the English unwritten constitutional system permitted evolution, the Framers thought the Vesting Clause was taking whatever powers the Crown had circa 1787 and locked them in or froze them in place as a matter of fixed and written constitutionalism. The problem is that there is little textual or historical evidence to support such an interpretation (an argument by James Wilson in the Philadelphia Ratifying Convention relates to constitutionalism vs. legislative supremacy generally, not to the indefeasibility of implied/inferred powers).<sup>95</sup> Similarly to how I call the unitary theorists’ interpretation of “vesting” an assumption of “fixed-written-constitutional-vesting,” it is just as ahistoric to project a “fixed-written-constitutional-executive” meaning back onto the phrase “executive.” Written-constitutional separation-of-powers had not fully emerged as a system of concepts.

Unitary scholars also assume an all-or-nothing, a conflation of any removal conditions with “usurpation” or “legislative tyranny.” In a 2006 article, Prakash assumed that executive powers had to be unconditional and indefeasible, because the most pro-executive members of the Convention articulated a worry about legislative “encroachment” and the “usurpation” of executive power.<sup>96</sup> Prakash sought support from a handful of notes from the Convention debates attributed to Madison, Gouverneur Morris, and James Wilson, none of which endorsed unconditionality of presidential powers.<sup>97</sup> He cited only five passages from a five-month convention, generally warning against “legislative tyranny” “overturning” the President. All of their concerns were consistent with a functional balancing to preserve checks and balances, and none explicitly called for complete and unconditional separation. On the other side, just as many delegates warned against the single President as a “foetus of monarchy”<sup>98</sup> and a danger to the republic. The best reading of these debates is in favor of checks and balances, not absolute powers in separate domains.

#### *B. Drift of “Executive” as Centralized Administration*

The unitary theory assumes an odd reversal, a kind of chiasmic flip: Relative to the English king, the American Constitution decreased the chief

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95. Arguments by James Wilson, 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 432 (2d ed. 1863).

96. Prakash, *supra* note 7.

97. *Id.* at 244 n.152.

98. 1 FARRAND 66 (June 1, 1787).

executive's powers over appointment, war, and peace when those powers were named, but somehow, their version of Article II assumes that the Founders made implied powers like removal even stronger than the kings' powers. Their assumption that implied powers would be indefeasible is more a result of modernist assumptions and ahistoric confusion conflating all old European monarchies, an assumption that a unitary monarchy means centralization of power and a hierarchy of control. However, neither the English system or Blackstone's description of local magistracy reflect such centralization or absolutism.

The English royal power was not considered absolutist, but limited and balanced with legislative power, especially in the eighteenth century after the Glorious Revolution. The English system was a mixed monarchy/aristocracy with strong appointment power (to build a landed aristocracy with the grants of offices and powers) but also a limited removal power (to guarantee those nobles, peers, and some officers) that they would retain those powers unless they committed crime or high crimes. As I explained in "Vesting," the unitary theorists project the modern administrative state onto the eighteenth century, and they assume that "execution" must imply centralization and exclusivity. This seems to be another kind of semantic drift of "execution" as centralization.

In eighteenth-century America, with a vast frontier and few roads or canals and no railways, the Founders understood that law enforcement and execution would have to be remote and practically independent. Convention delegates understood that national legislation depended not only on distant federal officials, but also on private citizens, state executive officials, and state courts.<sup>99</sup> Up until the late nineteenth century, England and America relied on private parties to bring prosecutions, keeping the overhead low on criminal enforcement.<sup>100</sup> Thus, it makes sense that the Founders, with a republican theory about the significance of popular sovereignty for legislation, would want complete and exclusive vesting of national legislative power in Congress, and hence the use of "all" in Article I. It also makes sense of their practicality and federalism that they could not commit to complete and exclusive executive power in a hierarchical presidential administration. As I asked in "Vesting," given that many conservative

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99. See, e.g., 1 FARRAND (June 5, 1787, John Rutledge of South Carolina); Note, *Utilization of State Courts to Enforce Federal Penal Law*, 60 HARV. L. REV. 966 (1947); Charles Warren, *New Light on the History of The Federal Judiciary Act of 1789*, 37 HARV. L. REV. 39, 70 (1923); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975); Shugerman, *supra* note 99; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 281 (1989) ("Despite the executive branch's leading part, Congress, the courts, private citizens, and state officials have played significant supporting roles in federal criminal law enforcement."); see also JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 83 (2012).

100. Jed Shugerman, *The Creation of The Department of Justice*, 66 STAN L. REV. 121 (2014).



originalists otherwise assume a founding-era belief in small government and federalism, why do they flip in their interpretation of Article II to assume the Founders were quick to centralize executive power, lock in national exclusivity, and imagine a plan that would necessitate a large federal bureaucracy?<sup>101</sup>

### *C. The Appointment, War, and Peace Problems*

If the Vesting clause implicitly delegated “all” traditional executive powers solely to the President, it requires some gymnastics to explain the shared appointment, war, and treaty powers, and then the lack of prorogue and dissolution powers. When Amar added the word “all” to the Vesting Clause in the syllogism, he also had to add the phrase, “unless otherwise specified.” To his credit, he was being more transparent and aware of this problem than Chief Justice Roberts was. And yet it still is a textual twist of the clause, assuming that it was meant to delegate specific powers rather than a headline for a more general structural point.

This re-reading is something like, “Traditional executive powers shall be vested in a President of the United States, except for where they aren’t.” This interpretation runs against the general approach of limited and enumerated powers, with the risk of a President arrogating broad royal powers that were not assigned to Congress, with no evidence the Framers meant such a broad implied grant.

The Framers were not particularly troubled by mixing traditional executive powers. If they were comfortable mixing appointment with the Senate, why is it obvious that removal could not be mixed similarly? Blackstone and other English legal commentators categorized appointment as a core executive power and a royal prerogative, as noted above.<sup>102</sup> Madison had the same understanding. Making an argument for presidential removal that proves far too much, Madison said in the House on June 16, 1789: “If any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the law.”<sup>103</sup> Madison similarly wrote in the *Federalist* No. 47, “the appointment to offices, particularly executive offices, is in its nature an executive function . . . .”<sup>104</sup> Scalia, Roberts, and others have an appointment problem when they claim the Constitution vested “all” the executive power in the President. (Some Federalists argued that “advice and consent” still did not

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101. Shugerman, *Vesting*, at 74.

102. Julian Davis Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, at n. 188 (2019) (citing Blackstone, Bracton, Bagshaw, and Hale, among others).

103. CONGRESSIONAL REGISTER, June 17, 1789 in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 868 (Charlene Bangs Bickford et al. eds, 2004) [hereinafter DHFFC].

104. FEDERALIST NO. 47. See also FEDERALIST NO. 38.; Julian Davis Mortenson, *The Executive Power Clause*, 167 U. PA. L. REV 1326 (citing 2 FARRAND 538 (James Wilson)).

make the Senate “executive,” but even so, one cannot say that the President had exclusive, sole, complete appointment power, because the Senate could withhold consent, and thus the President was not “vested” with exclusive complete, sole executive power).

Sai Prakash, a unitary scholar, acknowledged an additional non-exclusivity problem: The Constitution “grants some eighteenth-century executive powers—such as the powers over war and foreign commerce—to Congress.”<sup>105</sup> Blackstone discussed war, peace, and treaty powers as core parts of the royal powers and prerogatives,<sup>106</sup> and yet the Constitution gives such powers to the Congress and the Senate, respectively. Blackstone also mentioned the king’s power to “coin money,” but again, the Constitution assigns this power to Congress.

Part of the conceptual problem is that the design of the Constitution was fundamentally about overlapping powers, not exclusive and siloed powers, in order to have overlapping checks and balances. The purposeful design of the Constitution reflects functional and competing overlapping powers, more than formal separation of powers. Madison himself emphasized checks and balances more than separation, which may be one reason that the federal Constitution included no textual “separation of powers” clause when many state constitutions did. More on this problem in the first Congress and the proposed amendments below.

If one assumes that the Executive Vesting Clause substantively granted traditional executive powers, one must do a lot of guessing and explaining which powers were implicitly granted, and if so, under what conditions. Surely explicit powers like pardon and veto were on more solid footing than any unclear unwritten powers.<sup>107</sup> More likely, the Vesting Clause does not implicitly refer to any additional executive powers, except for the ones enumerated. This approach makes even more sense when considering the English tradition of executive power to prorogue and dissolve legislatures, and then the problem of how the word “vested” was used in Founding-era charters and constitutions.

#### *D. The Prorogue and Dissolution Problem*

The mirror-image to the “appointment/war/treaty problem” is the prorogue/dissolution problem. Even once we accept the shift from the royal prerogative to Mortenson’s law-execution thesis, another problem persists: Does the Vesting Clause still implicitly convey all traditional “law-execution” powers? We already know that Article II shares the appointment power between the President and the Senate. One response may be that the

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105. PRAKASH, *supra* note 7 at 83; See also Peter Shane, *The Originalist Myth of the Unitary Executive* 19 U. PA. J. CONST. L. 323 (2016); Wurman, *supra* note 19.

106. 1 WILLIAM BLACKSTONE, COMMENTARIES 233, 243-45, 249-50 (chapter 7).

107. Prakash, *supra* note 7.

Vesting clause generally delegates law-execution powers to the President exclusively, until another text “derogates” from that exclusivity baseline.<sup>108</sup>

But even this answer may fail to address the problematic assumption of implied delegation of all law-execution-related powers. Blackstone and other English sources highlight the executive power to convene, prorogue, and dissolve Parliament. They may be included in a list of royal prerogatives, but they also arguably count in the narrower category of law-execution in the English tradition, as the interaction between King, Parliament, and legislation. When colonial governors wanted to shut down the legislative process in colonial assemblies, they frequently dissolved them—an exercise of power that was clearly very salient to the American revolutionaries and to the power over law-making and law-executing. Two of the dictionaries cited below, by Bailey in eighteenth-century England and Wade in mid-nineteenth-century America, highlight the power to prorogue and dissolve legislatures as a paradigmatic executive power, and Bailey used that example as a kind of check on legislative powers.<sup>109</sup>

In fact, executive suspension and dissolution powers were so salient that some early state constitutions explicitly permitted or limited them. Even though colonial governors had provoked colonists’ anger in the 1760s and 1770s by dissolving assemblies that stirred against new taxes, New York and Massachusetts continued this royal prerogative as executive powers. The New York Constitution of 1777 gave the governor the power to “prorogue.”<sup>110</sup> The Massachusetts Constitution of 1780 provided for a power to prorogue, dissolve, and convene, with limits if the legislature was in regular sessions.<sup>111</sup> Meanwhile, other state constitutions explicitly prohibited such prorogue and dissolution powers by the governor, and a smaller number were silent. Meanwhile, as the Philadelphia Convention was meeting in the summer of 1787, the Confederation Congress gave broad prorogue powers to territorial governors, even though a territorial governor had little democratic legitimacy as a presidential appointee, and with such liminal status below even a state governor, such territorial officials were even more distant from the rarified royal model. As Martin Flaherty observed, the Northwest Ordinance of 1787 “accorded the governor an absolute veto over legislation [and] the ‘power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.’”<sup>112</sup> The Northwest Ordinance was likely the most important

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108. Thanks to conversations with Julian Mortenson on this question.

109. In Bailey’s definition of “A mix’d monarchy” as: “the king has . . . the *power of proroguing and dissolving parliaments*.” John Wade’s *THE CABINET LAWYER* 3-4 (1835) offered this example: “Prorogue and dissolving Parliament is vested in the Crown.”

110. NEW YORK CONSTITUTION OF 1777, § XVIII.

111. MASSACHUSETTS CONSTITUTION OF 1780, § V.

112. Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1727, 1774 (2002) (citing the Northwest Territorial Government, 1 Stat. 50, at § 11 (1789)).

statute passed by the Articles of Confederation Congress after the war ended.

Thus, the American practice was an open question when the Philadelphia convention met in the summer of 1787, and they did not adopt clear language permitting or prohibiting such powers, other than a narrow permission in Article II, Section 3. Article I establishes a scheduled convening and an end to the session and recesses, and Article II, Section 3 mentions a narrowly limited role for the President in case the two Houses disagree about recess timing: The President “may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper.”<sup>113</sup> There is no explicit statement that a President cannot otherwise suspend Congress or delay their convening. And yet no one today suggests that the Executive Vesting Clause implies a presidential prorogue/dissolution power.

Now let’s compare the structure of this “no implied prorogue” conclusion to the assumption that the Vesting Clause implies a plenary removal power: The prorogue power is more clearly a traditional English prerogative power. Blackstone (among other legal commentators) cited it explicitly as part of the royal prerogative bundle, but he did not mention removal or anything like it in this discussion of prerogative. The Constitution is not silent on such related powers, as Article II, Section 3 allows the President to adjourn when there is disagreement; but so too the Constitution addresses removal of any executive official: through impeachment. It may not have been practical or persuasive, but there was a robust argument in the First Congress in May-June 1789 that impeachment was the one explicit removal process and thus the only removal process.<sup>114</sup> If this limited impeachment-as-removal argument was rejected, why not find an implied prorogue from the Vesting Clause? Because the Executive Vesting Clause does not imply broad traditional executive powers. To borrow from Mortenson, the Executive Vesting Clause vests executive power, not the royal prerogative.

Perhaps the unitary argument for removal can be revived, even after cabined by Mortenson’s law-execution/non-prerogative thesis: The Executive Vesting Clause still implicitly delegates all law-execution powers exclusively to the President, which includes removal. Ilan Wurman calls this a “thick law-execution” approach, because it includes a more robust executive power than merely implementing the substance of congressional legislation. But even “thick law-execution” does not preclude congressional conditions; in fact, it relies on congressional power to create the conditions and substance for execution. If Congress is the source of execution’s substance, surely it can set some conditions for good faith and

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113. U.S. CONST. art II, § 3.

114. Shugerman, *Indecisions of 1789*.

good cause removal. “Thick law-execution” does not mean absolute presidential power over execution, but a balance of congressional office-creation and presidential supervision—all consistent with some conditions on removal.

The unitary approach would reject this thin account in favor of a more robust “law-execution” understanding that implies removal power. But “thick law-execution” may still prove too much, because there are other traditional royal powers over the legislative process that no one infers from the Executive Vesting Clause. Convening, proroguing, and dissolving the legislature were partly legislative powers that one might include as “thick-law-execution powers” or at least law-execution-adjacent. Isn’t a convening and dissolving power an extension of traditional executive powers related to legislation? And yet no one argues that the Vesting Clause establishes an implied presidential power to prorogue and dissolve (or convene).<sup>115</sup>

One reason why is that the Convention debate, which contemplated a convene-and-prorogue power in the Committee of Detail in July,<sup>116</sup> but as James Wilson indicated in August, the Convention rejected these powers: “The Presidt. here could not like the Executive Magistrate in England interpose by a prorogation, or dissolution.”<sup>117</sup> And yet the Convention delegates found no need to specify that the President did not have such powers, because apparently they did not imagine the Vesting Clause could be “thickly” interpreted to imply prorogue. This debate reveals that the Philadelphia convention did not assume that silence meant that traditional executive powers were implied, but rather executive powers had to be enumerated in Article II or enacted by Congress.

### III. BLACKSTONE AND LIMITED MONARCHY

#### *A. The Blackstone and Parliamentary Supremacy*

The unitary scholars make a series of assumptions: 1) The appropriate model for the scope of “executive power” is the English Crown; 2) That power included the entire armory of prerogative powers of the English Crown, rather than the basic powers; and 3) The royal prerogatives were exclusive and infeasible.

Why is the English king the singular assumed model for a republican chief executive? The Founders, of course, mentioned the Crown often, but as one of many models. Hamilton compared and contrasted the future

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115. One might imagine that suspension might also be in the law-execution mix, but Parliament abolished suspension power in the early eighteenth century.

116. 2 FARRAND 159 (on Committee of Detail Notes in July 1787: “He shall have Power to convene the Legislature on extraordinary Occasions — to prorogue them, provided such Prorogation shall not exceed Days”).

117. 2 FARRAND 274-75 (Aug. 13).

President with both the English monarch and the governor of New York, with neither being a close fit. This first assumption is dubious among the republican founders, especially when one reads their debates and so many anti-royalist, anti-prerogative speeches.

There is scholarly debate about how much influence Blackstone had on the Founding generation.<sup>118</sup> Perhaps the fact that his intended audience was a general public and law students, rather than judges and elite lawyers, made his work even more relevant for ratification and original public meaning, but it also raises questions about how nuanced, precise, and detailed Blackstone intended to be.<sup>119</sup> Even if, *arguendo*, the English royal prerogative was the model for the republican Founding, and even if we assume Blackstone was the most influential expositor of these powers, the unitary scholars fundamentally misunderstand Blackstone's bottom line of legislative supremacy. These errors reflect a lack of attention to historical context beyond a convenient passage, and a mix of confirmation bias, belief preservation, and motivated reasoning. This Article is not the forum for an in-depth analysis of Blackstone's structure of English government, other treatise writers, or the underlying historical facts of the English system. It is appropriate to focus on how he has been mistakenly cited and misinterpreted by unitary scholars.

Some confusion about Blackstone is understandable, because his own politics cut in different directions in different contexts.<sup>120</sup> As Paul Halliday summarized, Blackstone "was a reformist and a reactionary," an enlightenment Anglican apologist, a Tory and a Whig. Halliday then observes, "Blackstone's king is as complex a figure as Blackstone himself, a figure who might, at first encounter, seem legible in contradictory ways."<sup>121</sup>

He could be mistaken for a royalist conservative because he was a Tory who had "no sympathy with the rebellious colonists" in America.<sup>122</sup> The rebellious colonists criticized Parliament's abuses of "the ancient rights of Englishmen," and Blackstone's political/legal theory of "Parliamentary omnipotence" was a prominent conservative counterpoint against the Revolution. Blackstone believed in Parliamentary sovereignty, while the American patriots believed in popular sovereignty, so Blackstone was no "democrat" or "republican" in any strict sense, but he was no royalist.

He may have affiliated with the late eighteenth-century Tories, but

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118. See, e.g., Ruth Paley, *Modern Blackstone: The King's Two Bodies, the Supreme Court and the President*, in RE-INTERPRETING BLACKSTONE'S COMMENTARIES 188-91 (Wilfrid Prest, ed., 2016).

119. *Id.* at 191-94.

120. Halliday, *supra* note 9, at 169.

121. *Id.* at 170.

122. David Lemmings, *Preface*, 1 OXFORD EDITION OF BLACKSTONE'S COMMENTARIES, at xiv (2016).

Blackstone had “hints of classical republicanism,”<sup>123</sup> and he was no royalist. His view of Parliamentary sovereignty was Old Whig ideology with a good measure of Lockeanism.<sup>124</sup> Halliday recognizes Blackstone’s mixed messages about mixed government, but he highlighted Blackstone’s recognition of limits on royal power: “Blackstone celebrated the fact that there was no ‘stronger proof of that genuine freedom’ that Britons enjoyed ‘than the power of discussing and examining, with decency and respect, the limits of the king’s prerogative.’”<sup>125</sup> And “Law is the actor, acting upon the king—or on what was left of him.”<sup>126</sup> Halliday concludes with a section titled “Blackstone’s Republican King,” and observes that republican ideology of the public good served as a limit—perhaps the limit of law—on royal prerogative, quoting Blackstone himself: “This obligation [to the people] justified use of the prerogative, which is ‘for the benefit of the people and therefore cannot be exerted to their prejudice.’”<sup>127</sup> This is not the language of plenary unchecked indefeasible power, but powers that can be limited by the community and by law.

Blackstone’s views on legislative supremacy and mixed government do not fit the modern unitary executive theory’s assumptions. Blackstone’s Parliamentary supremacy may have been anti-republican conservatism in the America circa 1776 context, but it played a more republican pro-legislative role when reappropriated and domesticated in America circa 1787-1788 context.

A key sentence from Blackstone is often cited but misunderstood by unitary scholars: “The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen.”<sup>128</sup> As I and others have noted elsewhere, Blackstone could not have been using “vest” or the rest of this sentence to describe indefeasibility or plenary power, because Blackstone knew how Parliament had curtailed royal prerogative powers over the past century.<sup>129</sup> In fact, when one looks for how Blackstone used the word “vest” and “indefeasible” with respect of property, he is even more candid about parliamentary supremacy. In Chapter Three, “On the King and His Title,” Blackstone reviewed the line of hereditary succession, “though subject to limitations by parliament.” Blackstone then focused on the Glorious Revolution and Parliament’s power to transfer the monarchy from the Stuarts to William and Mary. The key here is that Blackstone used the phrase “indefeasible,” similar to the property concept, and then explained

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123. *Id.*

124. *Id.*

125. Halliday, *supra* note 9, at 176.

126. *Id.* at 179.

127. *Id.* at 186.

128. 1 WILLIAM BLACKSTONE, COMMENTARIES at \*190.

129. Shugerman, *Vesting*. Mortenson has also made a similar observation from Blackstone’s sentence.

how legislative supremacy prevailed over “indefeasible” property:

And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary; and the inheritance *indefeasible unless by parliament*: else it had been needless to prefer such a bill. 2. That the parliament had a power to have *defeated the inheritance*: else such a bill had been ineffectual.<sup>130</sup>

Blackstone indicates that in the eighteenth century, “indefeasible” did not mean “beyond legislative control,” and a property right was not protected from parliamentary supremacy. He earlier explained that “The doctrine of hereditary right does by no means imply an indefeasible right to the throne . . . It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right.”<sup>131</sup>

One of the most overlooked passages is early in his *Commentaries*:

For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.<sup>132</sup>

Blackstone continued in this line of parliamentary supremacy for another paragraph, and picks up again on the next page:

[T]here is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found . . .<sup>133</sup>

By the sovereign power, as was before observed, is meant the making of laws, for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the

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130. 1 BLACKSTONE, COMMENTARIES, at \*210 (emphasis added).

131. *Id.* at \*195.

132. 1 WILLIAM BLACKSTONE, COMMENTARIES \*46. *See also* FOREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985), 209; WILLIAM BLACKSTONE, THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND (Garreth Jones ed., 1973).

133. 1 WILLIAM BLACKSTONE, COMMENTARIES \*48-49.



constitution is at an end.<sup>134</sup>

Bernard Bailyn used these passages as his example for how the “Whig conception of a sovereign Parliament had hardened into orthodoxy” by the mid-eighteenth century.<sup>135</sup> Blackstone was ideologically a Whig, even if his party was Tory. McIlwaine concluded, “For the Whigs the only real sovereign must be the Parliament, that is all.”<sup>136</sup>

In his classic book *Novus Ordo Seclorum*, Forest McDonald, a relatively conservative constitutional historian, highlighted Blackstone’s understanding of the “thoroughly mixed” government, that the union of Crown, Lords, and Commons was “King-in-Parliament supreme,” and not just the Crown. Parliament was the sovereign center, the apex. Blackstone explained that the executive was the extension of Parliament and below Parliament, while the judiciary was an extension of the executive, also below it.<sup>137</sup> McDonald underscored that the Crown no longer used the veto in the eighteenth century, but instead turned to patronage to influence Parliament—a system abandoning the separation of powers in embracing the mixing and even the entangling of powers and political interests.<sup>138</sup>

The equation of “Crown” with “executive” is another kind of drift, similar to the one that Mortenson observed.<sup>139</sup> The “Crown” included more than executive power, as reflected in the term “Crown-in-Parliament” for the legislative power. Parliament was also mixed, known as “the High Court of Parliament,”<sup>140</sup> and the House of Lords was a high court itself. The Lord Chancellor, the Privy Council, the Treasury, and Exchequer had a combination of executive and judicial functions, and sometimes legislative

134. 1 WILLIAM BLACKSTONE, COMMENTARIES \*49.

135. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 201-202 (1967).

136. MCILWAINE, CONSTITUTIONALISM AND THE CHANGING WORLD 63-64.

137. McDONALD, *supra* note 132, at 81, 188, 209-12 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES, 48-52, 266-68); MICHAEL MENDLE, DANGEROUS POSITIONS: MIXED GOVERNMENT, THE ESTATES OF THE REALM (1985). Blackstone’s understanding was more of mixed and overlapping checks and balances than separation.

138. McDONALD, *supra* note 132, at 83 (citing J.H. PLUMB, ENGLAND IN THE EIGHTEENTH CENTURY (1950); J. H. PLUMB, THE ORIGINS OF POLITICAL STABILITY IN ENGLAND, 1675-1725 (1969); LEWIS NAMIER, MONARCHY AND THE PARTY SYSTEM (1952); HARVEY MANSFIELD, STATESMANSHIP AND PARTY GOVERNMENT (1965); David Hume, *Of the Independence of Parliament*, in 3 THE PHILOSOPHICAL WORKS OF DAVID HUME 42 (1828)). McDonald also turned to Thomas Paine’s legislative supremacy as an even more anti-Crown critique of the English system. McDONALD, *supra* note 132, at 83-84 (citing THOMAS PAINE: COLLECTED WRITINGS, 6,7, 16). McDonald wrote that Convention delegates drew on Blackstone for their legislative supremacy arguments and for skepticism about the separation of powers. McDONALD, *supra* note 132, at 83 (citing Roger Sherman, at FARRAND, June 1, 1 FARRAND 65; Gouverneur Morris, July 2, 6, 1 FARRAND 511-514, 545, Aug. 15, 2 FARRAND 299; Bedford on June 4, 30, 1 FARRAND 100, 490-91).

139. Mortenson, *supra* note 102, at 1245.

140. CHARLES H. MCILWAINE, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 47-48, 71, 109, 119 (1910); J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 41-47 (1955); JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 180 (2d. ed. 1979).

roles, too.<sup>141</sup> Colonial governments also mixed legislative, executive, and judicial power.<sup>142</sup> Historians have contrasted the thoroughly mixed and unseparated powers in the Anglo-American system up through the Revolution (and as reflected in Blackstone) with the more formal separation of Montesquieu's system.<sup>143</sup> The 1787 Constitution was a mix of the mixed English practice and the separated French Enlightenment theory, but the precise balance of functional overlap vs. formal division was not worked out or explicit. This mix explains the structural separation but also the shared powers over legislation (and veto), treaty, war, and appointment. This flexible and mixed functional structure may also help explain why the Framers did not include a separation of powers clause in the federal Constitution and rejected it when it was proposed as an amendment as part of the Bill of Rights in 1789.<sup>144</sup>

*B. Blackstone Did Not List "Removal" as a Royal Prerogative, for Good Reason*

Unitary scholars rely heavily on Blackstone, but Blackstone did not list removal in his of list of royal prerogatives or apparently anywhere else as a general royal power. Blackstone was describing a mixed regime of monarchy, aristocracy, and democracy without a formal separation of powers, but with parliamentary supremacy. In an unwritten constitution of evolving mixed powers, the English Crown had to balance its power with a landed aristocracy and legislative power. The powers ebbed and flowed, but by the eighteenth century, Parliament dictated the terms. Kings could grant nobility and create offices and peerage, but then those peerages needed to be protected from royal rollbacks, from kings' capriciousness. Moreover, the English did not have a robust separation of powers or our modern categories sharply distinguishing between legislative, executive, and judicial. Given this mix of roles and given this patchwork of mixed monarchy politics, the category of "executive removal" is a modern notion that does not seem to have been on Blackstone's map of the monarchy. Office creation was salient; removal was not.

Michael McConnell's thesis in his 2020 book *The President Who Would Not Be King* turns on Blackstone's "list of prerogative powers." It may seem odd for a book with such a title to rely on royal powers as the Framers'

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141. See BAKER, *supra* note 140, at 17; GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 154-55 (1998).

142. Mary Patterson Clarke, *The Assembly as a Court*, in PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES (1943); Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 261 (1967); Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1495-1503 (1998).

143. McDONALD, *supra* note 132; see also WOOD, *supra* note 141 chapter 33; BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175-77, 201-02 (1969); JACK RAKOVE, ORIGINAL MEANINGS 245-49 (1996).

144. See Shugerman, *Vesting*.

starting point, but McConnell thesis is that the Framers used Blackstone's list to unbundle royal power, to distribute the Crown's powers to the different branches or not distribute them at all. McConnell laid out his book's main argument for a President who would be much less than the king: "A principal conclusion is that the framers self-consciously analyzed each of the prerogative powers of the British monarch as listed in Blackstone's *Commentaries*, but did not vest all (or even most) of them in the American executive."<sup>145</sup> Blackstone's version of the Crown may seem esoteric and irrelevant, and even antithetical to the consideration for American republicanism. However, McConnell relies on Blackstone's established and enumerated list to distinguish the rule of law and the Framers' republicanism from royalism or modern "Schmittian" authoritarianism.<sup>146</sup> By recognizing the traditional limits of *ultra vires*, McConnell wisely acknowledged the limited scope of executive power. He also relied on Matthew Steilen's excellent work<sup>147</sup> on the Framers' more limited use of "legal" prerogative as "defined and limited by law," as opposed to "unbounded" royalism.<sup>148</sup>

However, McConnell does not follow Blackstone's list or even cite to a list, erroneously claiming that Blackstone listed "removal" as a royal prerogative power<sup>149</sup> and erroneously suggesting the same about the Take Care clause.<sup>150</sup> McConnell also claimed to rely on other sources in a general footnote, but those sources do not appear to support his claims. His specific assertions about removal and Take Care have no footnotes (and thus no pincites to Blackstone or Chitty). The book was not following the rule-of-law method he claimed, but instead appears to be cherry-picking from the history of the English Crown. Thus, his approach is more like the royalism that he had rejected, rather than republican.<sup>151</sup>

Once one steps into the English world of a mixed monarchy/aristocratic system, it makes sense that Blackstone did not list removal as a general

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145. MCCONNELL, *supra* note 8, at 11.

146. *Id.* at 28.

147. Steilen, *supra* note 17.

148. MCCONNELL, *supra* note 8, at 28-29.

149. *Id.* at 30, 99, 161-62. *See also id.* at 39, 95 (implicitly referring to removal as a listed prerogative power). There are no footnotes that support these assertions, either to Blackstone or the other source he claimed to use, JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN (1820).

150. *Id.* at 68 (a chart that lists the duty to "Take Care That Laws Be Faithfully Executed" as a "Prerogative Power of the King"); *see also id.* at 166 (a claim based on "Take Care" that removal as indefeasible, "The Take Care Clause, which is a duty that implies the power to supervise all officials engaged in execution of the law, has the hallmarks of prerogative.") McConnell provided no footnotes for either assertion.

151. A forthcoming book review will detail this critique. This blogpost specifies how McConnell's citations to Blackstone do not support the key claims on removal and Take Care made in his book. Shugerman, "Originalism and the *Seila Law* Brief, Part II: Prerogative vs. Royalism, Blackstone vs. Schmitt, McConnell vs. Amicus," at <https://shugerblogcom.wordpress.com/2022/01/11/originalism-and-the-seila-law-brief-part-ii-prerogative-vs-royalism-blackstone-vs-schmitt-mcconnell-vs-amicus/>.

royal power. Limits on removal were a key to a pre-modern administrative system of long-term investment in a bureaucratic skill; an incentive system of fees rather than annual salary;<sup>152</sup> and an aristocratic system of offices-as-legal-property, often inheritable property or property for life. Blackstone himself recognized this legal arrangement in Book Two of his *Commentaries*. One of his categories of inheritable property was “offices,” with rights to exercise employment and “to take the fees and emoluments thereunto belonging as incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like . . . .” “For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only.”<sup>153</sup> Blackstone also went into detail about the rules for the sale of offices (such that it was apparent that even the appointment power could be outsourced privately for some offices, like property in land).

Blackstone’s Chapter Eight on Treasury fleshes out these distinctions as a narrative. Other scholars have described Treasury as a domain of many unremovable offices in the early modern period (through the seventeenth century).<sup>154</sup> Blackstone observes a shift in the eighteenth century in both Treasury and the military from offices-as-property to tenure at pleasure, and he was not supportive: “By an *unaccountable want of foresight*, established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation.”<sup>155</sup> In the same paragraph, Blackstone seemed to explain his misgivings that at-pleasure tenure surrendered too much independence for Treasury officials: offices “removable at pleasure . . . without any reason assigned . . . must give that power on which they depend for subsistence an influence most amazingly extensive.”<sup>156</sup> Blackstone continued to explain that this combination of changes and expanded power in Treasury had created a “natural” but “unforeseen” danger of corruption.<sup>157</sup> “All [these reforms] put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families.”<sup>158</sup> Blackstone seemed to be making a case for retaining more of the old regime of independence, and in context, he

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152. See NICHOLAS PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013).

153. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*36.

154. Hale 111-12; J.C. Sainty, *The Tenure of Offices in the Exchequer*, 80 *ENGLISH HISTORICAL REVIEW* 449 (1965). See also AYLMER, *supra* note 22.

155. 1 WILLIAM BLACKSTONE, *COMMENTARIES* 334.

156. *Id.* at 335-36.

157. *Id.*

158. *Id.*

suggested that such independence from removal was still a norm in other part of English administration. Again, the lesson here is that there was no general removal power, and if anything, tenure at pleasure as a rule in any domain (like Treasury and the military) was a novelty, not a tradition.

Two prominent scholars of the English administrative state echoed Blackstone, noting that offices-as-property-for-life and as inheritable persisted into the eighteenth century, even as tenure during pleasure became increasingly the norm.<sup>159</sup> Edmund Burke was not a defender of the office-as-inheritable-property status, but he begrudgingly acknowledged its legal principle in 1780. In his famous speech “Economical Reform,” Burke admitted that certain offices

have been given as provision for children; they have been the subject of family settlements; they have the security of creditors . . . What the law respects shall be sacred to me . . . If the discretion of power is once let loose on property, we can be at no loss to determine whose power, and what discretion it is, that will prevail at last.”<sup>160</sup> Burke was so aware that office-as-property was deeply entrenched a legal principle that it would be difficult to reform those legal rules without undoing other protections of property rights. These observations may be surprising, but they reflect that we should not make hasty assumptions about eighteenth-century England, its mixed regime of limited monarchy, parliamentary power, and its offices. The English administrative system was in many ways more aristocratic than modern executive.

A recent article by Daniel Birk shows a range of examples starting from the fourteenth-century of unremovable offices, indicated that the Crown did not have inherent removal power.<sup>161</sup> Birk observed that in these many centuries, the Crown itself imposed limits on removal of executive officers. He explains, “This may appear odd from a modern perspective, but in the political and socioeconomic world of England from the medieval era to the nineteenth century, tenure-protected government offices, with their attendant fees and other perquisites, were a valuable source of patronage for the King.”<sup>162</sup> Birk concluded, “[E]ven in the eighteenth century, many of the officers who executed the laws, both at the central and at the regional level, could not be removed by the King or his ministers, or could be

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159. CHESTER, *THE ENGLISH ADMINISTRATIVE SYSTEM, 1780-1870*, at 16-23 (1981); AYLMER, *supra* note 22; G.E. AYLMER, *STATE’S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC, 1649-1660* (1973); G. E. AYLMER, *THE CROWN’S SERVANTS: GOVERNMENT AND THE CIVIL SERVICE UNDER CHARLES II, 1660-1685* (2002). *See infra* text accompanying notes 190-97 on Prakash’s misuse of Aylmer.

160. 3 EDMUND BURKE, *THE WRITINGS AND SPEECHES OF EDMUND BURKE: PARTY, PARLIAMENT, AND THE AMERICAN WAR: 1774-1780* (Warren M. Elofson, John A. Woods, and William B. Todd, eds., 1996); 1 EDMUND BURKE, *THE WORKS OF EDMUND BURKE* 296 (1847).

161. Birk, *supra* note 17.

162. *Id.* at 204.

removed only for cause.”<sup>163</sup> Birk also details Parliament’s eighteenth-century innovations, creating its own commissions with executive powers.<sup>164</sup>

There are valid questions about whether most of these examples are too early, too late (1780s), or too quasi-judicial to tell us something definitive about original public meaning by the time of ratification.<sup>165</sup> Sometimes Birk relies on independence in practice, rather than explicit statutory protection, but even if tradition matters, this constitutional debate turns on evidence of explicit protections by statute. Thus, the work of Manners and Menand is especially significant, showing a long history in England and America of the term of years protecting offices from removal through the eighteenth and nineteenth centuries.<sup>166</sup>

### *C. Blackstone on Mixed Removal (and not “Disposal”)*

Blackstone identified appointment as a royal prerogative (and one that also fits the “executive power” that Mortenson more carefully identified), but Blackstone did not mention removal or anything like it on his list and discussions of the royal prerogative. Many unitary scholars cite Blackstone for the proposition that English kings had such a power, but those citations seem to be based on assumptions, stretches, and misunderstandings. In fact, the “separation of powers” scholars’ brief in *Seila Law* (with Wurman as lead author and signed by other leading unitary scholars like Calabresi, Prakash, and McConnell, among others) makes two remarkable claims, neither supported by the sources. In the brief’s introduction: “First, in eighteenth-century English law and practice the executive magistrate had the power to remove principal executive officers as part of the executive power to carry law into execution,” citing “1 William Blackstone, *Commentaries on the Laws of England* \*243, 261–62, 327 (1st ed. 1765–69) . . .”<sup>167</sup> A second claim: “The power to remove principal executive officers was one of the few royal powers not explicitly discussed [by

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163. *Id.* at 213.

164. *Id.* at 227–28.

165. Birk, *supra* note 17, at 206–10, 213, 225; see Wurman, *supra* note 19, at 142–43 n. 205. I have raised similar questions. See Shugerman, *supra* note 26. Unfortunately, Wurman misquotes Blackstone in reply to Birk. See Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. at 142 n. 205 (2021). Wurman’s answer also raises questions about the unitary theory’s consistency, observing that Birk’s findings do not undercut the unitary theory: “In the eighteenth century, most of Parliament’s relevant statutes converted life-tenured offices into offices removable at will.” It is worth noting here that Wurman’s summary of Birk acknowledges Parliament’s role in “regulating” tenure, a legislative domain. Moreover, Wurman acknowledges, first, a starting point in the English law of offices in which hereditary and lifetime tenure were common, and second, only partly reduced by the time of the Revolution. “Most” statutes are not the same as all, and Birk’s evidence of a range of tenure protections over time means that the unitary theorists do not have a clear and clean English tradition of “at pleasure” removal by the time of the Founding.

166. Manners and Menand, *supra* note 17.

167. See Separation of Powers Scholars’ Brief in *Seila Law v. CFPB*, *supra* note 19, at 3.

Blackstone], but the overwhelming weight of the evidence is that removal was part of the executive power, necessary to the President's role of law execution, and not assigned to Congress."<sup>168</sup>

They claimed the "overwhelming weight of the evidence," but it turns out that they have no evidence to support their claim that kings had a general and broad power of removal. The citations in the first sentence send a reader to Blackstone looking for evidence, but they simply do not support the "power to remove" claim.<sup>169</sup> The pages do not refer to any power to "remove" or any synonym of removal. Instead, the brief is relying on a misinterpretation of the word "dispose." Here are the three passages that they are citing. The first at \*243:

The king of England is therefore not only the chief, but properly the sole, magistrate. All others acting by commission from, and in due subordination to him: in like manner as, upon the great revolution in the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor.

This passage is followed by the Latin: "*In ejus unius persona veteris reipublice vis atque majestas per cumulas magistratuum potestates exprimebatur*," which translates as, "All the power and majesty of the old commonwealth were concentrated in the person of that one man by the united powers of the magistrates." This echoes a unitary structure, but nothing on this page refers to removal. "Due subordination" is a description of a royal system of subjects, but "due subordination" does not imply removal if the office were protected property or tenure during good behavior. "All others acting by commission" would include judges,<sup>170</sup> who might be understood as serving formally or symbolically in "due subordination" in a monarchy, but judges were insulated from removal. Thus, "due subordination" did not imply a royal removal power.

Their second passage from Blackstone at \*261-62: Blackstone included on his list of royal prerogatives the powers "of erecting and disposing of offices."<sup>171</sup> However, context and general usage indicate that "disposing" means "at his disposal" for distributing them to his subjects. It seems the amicus brief (and Wurman in an article) mistook "dispose" for a modern "disposal" system of removal or dissolution. Blackstone often used "dispose" to mean "use" or "distribute."<sup>172</sup> The rest of the passage indicates only one limit on the royal management of offices—no new fees—which seems to clarify that "dispose" meant distribute and not even to abolish the

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168. *Id.* at 7.

169. *Id.* at 3.

170. See *id.* at 268, 351; see also *id.* at 317, 334.

171. *Id.* at 261-62. See also Ilan Wurman, *supra* note 19, at 139-43 (citing this passage from Blackstone to support removal power).

172. See, e.g., *id.* at \*218, 271, 273, 331.

office. In the same section, Blackstone used the word “disposal” clearly in the context of distributions of honors and appointments, not removal:

For the same reason, therefore, that honours are in the disposal of the king, offices ought to be so likewise; and, as the king may create new titles, so may he create new offices but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be imposed but by act of parliament.<sup>173</sup>

In fact, Article IV of the Constitution itself uses “dispose” as a synonym for “give,” “establish” or “make”: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”<sup>174</sup> Even if, *arguendo*, the meaning of “dispose” was to abolish the office entirely, this power is not the same as removing and replacing the officer. Understood within the tradition of hereditary, life-time, or term-of-years property in offices that Blackstone discussed (“heritable property”) and that Birk, Manners, and Menand documented, the power to grant an office in the English system did not imply a power to remove an incumbent in order to grant it to someone new.

The third passage is from the beginning of Chapter Nine, page \*327. The brief elaborates, with the problematic misinterpretations or misquotes in bold:

In a section of his Commentaries entitled “Of Subordinate Magistrates,” Blackstone **described the principal officers**—namely, “the lord treasurer, lord chamberlain, the principal secretaries, [and] the like”—as “his majesty’s great officers of state” and **explained that these offices are not in any considerable degree the objects of our laws.** **Id. at \*327.** In other words, the principal officers of state were executive, not legislative, creatures.<sup>175</sup>

Wurman elaborated in a follow-up article, also quoting this same sentence out of context: “[H]is majesty’s great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like[, are not] . . . in that capacity in any considerable degree the objects of our laws . . . .”<sup>176</sup> Unfortunately, this is not an exact quote, and the selective edits and deletions change Blackstone’s meaning from uncertainty to certainty.

This is the full quote from Blackstone, from an introductory paragraph of

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173. *Id.* at \*271.

174. See U.S. CONST. art. IV, § 3, cl. 2.

175. Amicus Brief for Separation of Powers Scholars as *Amici Curiae* in Support of Petitioners, *supra* note 19, at 8.

176. Wurman, *supra* note 19, at 142 n. 205.



Chapter Nine, with the omission underlined and in italics:

*And herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them.*

Wurman's three deletions change the meaning, plus there is a fourth problem of context: the first two deletions change the meaning from a statement of uncertainty to a statement of fact. Blackstone was not asserting a claim about removal or any other power; he was saying explicitly "I do not know" X, and thus "we are not to investigate" or discuss X here. It was not part of the substance on subordinate magistrates, but rather, a prefatory or introductory sentence about what would *not* be covered in the chapter. It is odd to cite this as evidence. Blackstone's phrasing suggests or hints that they probably are not protected from removal and serve at the king's pleasure, but he is avoiding saying so and avoiding any specifics about which offices. In Chapter Five, Blackstone says the privy council serves at the king's pleasure, but one can infer here that Blackstone is unsure how far "at pleasure" control extends as a matter of law: the treasurer? Which principal secretaries? The next deletion of "or have any very important share of the magistracy conferred upon them" also changes the structural meaning, because the "or" is logically significant as an alternative explanation. Perhaps Blackstone meant that he is "not investigating" or discussing these offices in a chapter on "subordinate magistrates" because they are not magistrates, regardless of their status as "objects of law." Blackstone had defined magistracy as "the right of both *making* and *enforcing* the laws," which is a curious combination of legislative and executive power.<sup>177</sup> Apparently, Blackstone as a legal expert was more interested in investigating legal officers, and he may have been admitting less knowledge or less focus on non-magistrates with other administrative roles (such as in finance, foreign affairs, religion, etc.) Simply as a matter of either/or sentence structure, one simply cannot cite this sentence as a statement of historical fact about the Crown's power of removal.

But here is perhaps the most significant problem: The English "principal secretary" is not the equivalent of the U.S. Constitution's "principal officer." Blackstone's categories simply do not track our modern American categories, and we are still working through what defines a principal officer in confusing court opinions.<sup>178</sup> It helps to put Chapter Nine in context. Compare the word "secretary" elsewhere in the *Commentaries*, and then

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177. 1 WILLIAM BLACKSTONE, COMMENTARIES \*146.

178. See U.S. v. Arthrex, Inc. 141 S.Ct. 1970 (2021); Lucia v. SEC, 138 S.Ct. 2044 (2018).

read the full three paragraphs introducing this chapter on “subordinate magistrates.” Book One is titled “The Rights of Persons,” but the book starts more about the powers of government officials. Chapter Two is on Parliament, followed by Chapter Three on the King, reflecting Blackstone’s emphasis on parliamentary supremacy. After a chapter on the royal family, Chapter Five is “Of the Councils Belonging to the King,” followed by chapters on the king’s duties, prerogatives, and revenue. Picking up after Chapter Five on the councils is Chapter Eight on the more recent changes of “at pleasure” tenure in treasury and military, which Blackstone regarded ambivalently or regrettably as an unwise and limited departure from precedent (as discussed above). Then in Chapter Nine, “Of Subordinate Magistrates,” Blackstone addresses lower offices as complements to Chapter Five’s high offices. Chapter Five lists specific high councils and offices: Parliament, the aristocratic peers, the judges and courts of law, and then “the council,” or the Privy Council. Blackstone explained that the Privy Council had grown too large, so Charles II set it back to thirty in 1679, “whereof fifteen were to be the principal officers of state,” *ex officio*, “and the other fifteen were composed of ten lords and five commoners of the king’s choosing.” The number had increased since then, but apparently from the other descriptions in the *Commentaries*, this was due to the increase of additional appointments of lords and commoners, not an increase in secretaries.

First, Joseph Chitty, the commentator on the 1826 edition of the *Commentaries*, added a note to this paragraph on the Privy Council, describing its “offices of state” or “great officers” as limited to “the cabinet.” Chitty listed roughly fourteen officers, including “the lord-high chancellor,” “the first lord of the treasury,” and “the secretaries of state for the home department, colonies, and foreign affairs.”<sup>179</sup> This note suggests that there were only a handful of “high officers” or “principal secretaries.” Blackstone himself used the word “secretaries” in the context of the highest offices, the “secretaries of state” on the same level as the judges of King’s Bench and “the attorney and solicitor general.”<sup>180</sup> The evidence suggests that “great officers of the states” and “principal secretaries” were comparable to the American “department heads,” i.e., secretaries of departments and members of the cabinet. Even if Blackstone were claiming that the king had complete removal power over these “great officers,” it was not analogous to a removal power over any principal officer in an American context.

Speaking of context, it helps to read the other sentences around this single

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179. JOSEPH CHITTY, 1 COMMENTARIES ON THE LAWS OF ENGLAND (1893) [https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-1#lf1387-01\\_footnote\\_nt684](https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-1#lf1387-01_footnote_nt684).

180. 1 BLACKSTONE, COMMENTARIES \*168.

misinterpreted sentence to clarify who were the “great officers of state.” In the opening paragraph preceding the one we have been focusing on, Blackstone writes, “[We] are now to proceed to inquire into the rights and duties of the *principal subordinate magistrates*” (italics in the original). Did Blackstone mean “principal” in the sense of their power or in the sense of being the “main example” or “primary example”? This category of “principal subordinate” officers would include those with protections against removal. One cannot claim from these paragraphs that they establish a rule in favor of removal protections against the king, but nor can one claim they establish a rule in favor of royal removal over high-level officers below the cabinet level.

Blackstone wrapped up the introduction by listing the officers that will be investigated: “sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor.” And then he listed the topics of inquiry: “first, their antiquity and origin[]; next, the manner in which they are appointed and may be removed; and, lastly, their rights and duties.” Indeed, Blackstone focused on appointment and removal in this chapter, with different limits on removal. This leads to two observations. First, Blackstone reflects a range of removal rules and a lack of a default rule. Blackstone’s focus on the specific case-by-case circumstances of offices, tenure, and removal suggests that the removal power was just case-by-case. Second, if Blackstone was so specific about different removal rules as one of the five salient features of an office, it seems likely that removal was a big deal. It was salient enough for Blackstone to emphasize it, and he emphasized a mix of removability and unremovability. When the Founders left removal out of the text of the Constitution, it seems unlikely that they would have assumed it could be taken for granted. Blackstone indicated a lack of consensus or uniformity on removal. Recall that two Framers did propose a clause that may have been consistent with Blackstone’s summary of the “at pleasure” Privy Council or cabinet in his Chapter Five: Gouverneur Morris proposed tenure during the President’s pleasure for just the heads of departments at the end of August. But even though he was the drafter on the Committee of Detail and had power as an insider to add this proposal to the Constitution, he failed to do so.<sup>181</sup> The proposal and rejection of Morris’s “at pleasure” language indicates no consensus in favor of presidential removal. Thach, a pro-presidential power scholar, described the fading of Morris’s proposal as “a *pro tanto* [to a certain extent] abandonment of the English scheme of executive organization,” the cabinet model of at-pleasure tenure.<sup>182</sup>

To conclude, Blackstone’s discussions of the king’s powers and prerogatives included nothing like removal. Blackstone mentioned specific

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181. See THACH, *supra* note 56.

182. THACH, *supra* note 56, at 110 (citing Morris’s noting its rejection at 2 FARRAND 342).

removal powers or protections against those powers, but never implied a general removal power over executive officers. (The power to appoint to an office does not imply a power to remove and appoint a new person, as the Marbury puzzle confirmed. The power to appoint a judge does not imply a power to remove).

Of course, the king could remove some officers, but it was vital for the king's removal power to be limited—not only to protect the nobility's power (through inheritable peerages) and judicial independence, but also to protect other officers who invested in offices as part of a long-term commitment to administration and to insulate other officials with mixed roles. Birk, Manners, Menand,<sup>183</sup> and other scholars help us understand why Blackstone would not have described a general executive removal power, and similarly, why the Constitution says nothing about executive removal power.

#### *D. The Use, Misuse, and Selective Disuse of Blackstone*

There seem to be four categories of approaches by unitary executive theorists to Blackstone: “selective use,” “misuse,” “disuse,” and “selective disuse.”

“Selective use” is the largest category, with many scholars conveniently quoting short passages from Blackstone consistent with their prior assumptions about removal but not acknowledging that Blackstone has a broader interpretation of legislative supremacy and never mentions removal as a general royal power or prerogative.<sup>184</sup> To Michael McConnell's credit, he acknowledged Blackstone's views on “mixed” government and that England had been “approaching parliamentary supremacy.”<sup>185</sup> McConnell emphasized that although the Framers studied Blackstone's list of prerogatives, they “did not vest all (or even most) of them in the American executive,”<sup>186</sup> but instead vested some in Congress, and some of the powers vested in the President were still defeasible.<sup>187</sup> Also to his credit, he does not ground the Presidents' indefeasible removal power on the Vesting Clause, but rather on the Take Care clause, which is still problematic, but not the same problem of misinterpreting Blackstone on executive power. McConnell's approach reflects a deeper understanding of Blackstone's fundamental “mixed government” understanding, and a better grasp of how the framers used Blackstone, but when he turns to removal specifically, his discussion of Blackstone narrows to a small number of offices from a highly

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183. Jane Manners & Lev Menand, *supra* note 17.

184. MCCONNELL, *supra* note 8, 161-62; see also 26-27 (Quoting Blackstone, when exercising royal prerogative, “the king is, and ought to be absolute”), PRAKASH, *supra* note 7.

185. MCCONNELL, *supra* note 8, at 31-32, 35, 153.

186. *Id.* at 11.

187. See also *id.* at 20 (royal prerogative relatively weaker than colonial governors' power relative to colonial legislatures).

selective set of pages without acknowledging the broader problem: Blackstone never endorses removal as a royal power. Thus, even Michael McConnell resorts to “selective use.”

A second category, “misuse,” includes Wurman and others who have misread Blackstone to claim that he did suggest a general royal removal power.<sup>188</sup> Wurman’s misinterpretation of the word “dispose” and rewriting of Blackstone’s sentence on “principal secretaries” were misuse. His misinterpretation of Blackstone’s Chapter Nine on subordinate magistrates is something between selective use and misuse. Other unitary scholars seem to be unaware of Blackstone’s emphasis on Parliament’s power to defeat royal prerogatives, and they either misinterpret or selectively interpret in order to find support for presidential removal. Here is another unsupported claim in the *Seila Law* brief:

Other parts of Blackstone likewise indicate that the power to appoint, control, and remove officers was part of ‘the executive power.’ Blackstone wrote that the king had a right to erect a particular kind of office—courts—because it was ‘impossible’ for the king to exercise ‘the whole executive power of the laws’ on his own. Blackstone \*257.<sup>189</sup>

This paragraph actually proves the opposite point: Blackstone indicated that eighteenth-century English law did not distinguish between executive and judicial power. The second sentence contradicts the basic point that these scholars were making in their brief: because the king could not exercise “the whole *executive* power of the laws,” according to Blackstone, the king created *courts*. The implication is that the king created courts to help exercise *executive power*. The basic point is that the English did not have the clear distinction between executive and judicial power that the unitary scholars have assumed. Not only are these scholars having a hard time reading Blackstone correctly, it seems they are having difficulty writing or proof-reading their own sentences to be consistent with their ideological assumptions. It is astonishing.

Here is the full quotation from Blackstone, and indeed, it indicates that judges were considered part of the executive power and law execution, with four different references to “execution” as the power that the courts perform or assist, and yet, these judges were protected from removal at pleasure:

The original power of judicature, by the fundamental principles of society, is *lodged in the society at large*; but, as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more case

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188. Amicus Brief for Separation of Powers Scholars as *Amici Curiae* in Support of Petitioners, *supra* note 19.

189. *Id.* at 9.

and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is consequently necessary that courts should be erected to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.<sup>190</sup>

Somehow the unitary scholars thought this passage supported their point about executive power being subordinate under the king: "Other parts of Blackstone likewise indicate that the power to appoint, control, and remove officers was part of 'the executive power.'" If judges were part of their conception of executive power, then clearly the English king did not have the power to remove these "executive" magistrates and officers. If the point is that the American Constitution was also different from England's . . . well, that is precisely the point. The U.S. Constitution was a decisive break from monarchy and royal absolute powers.

At this point, it appears that the unitary scholars somehow got lost in both the forest and in the trees with Blackstone. Lost in the details of Blackstone, they repeatedly misread and misquoting his sentences. But what are they doing in the Blackstone rabbit hole in the first place? Why is the English king the obvious model for the Framers' view of executive power? If they think Blackstone shows a clear original public meaning of executive power, this passage contradicts them, because the English thought executive power included judicial power.

This Blackstone page was the only citation to support a sentence about "other parts of Blackstone" on "the power to . . . remove officers," and this section is entirely about judicial offices and the limitations on royal removal power, with no implication about other offices and a more robust removal power over them. It is unclear how the second sentence on courts relates to the first sentence on executive removal, nor is it clear why the brief cites this page at all. This confusion raises doubts about whether the amicus brief, in fact, could find other parts of Blackstone indicating a general power to remove officers. To the contrary, other parts of Blackstone indicate limits on royal removal power over executive offices.

In fact, Blackstone only twice mentions the tenure term *durante bene placito* (service at pleasure), the kind of tenure assumed by unitary theory.

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190. 1 WILLIAM BLACKSTONE, COMMENTARIES 266-67 (or 257 in other editions).

The first use was about the *rejection* of tenure during pleasure—in favor of tenure during good behavior for judges. The second use was for sheriffs. The English term “at the pleasure” appears only in reference to a church office and military offices,<sup>191</sup> while “during pleasure” does not appear at all in Blackstone. Royal removal power was not a given, and nor was tenure “during pleasure.”

Prakash does not cite Blackstone in his book’s section on removal, but he does cite him earlier and highly selectively to support George III’s claims of royal “primacy”: “Blackstone had stressed the Crown’s personal exercise of power, writing that the Crown was not only the ‘chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him.’”<sup>192</sup> Judges acted by commission from the king, but they were not removable, and thus, Blackstone’s use of the word “subordinate” did not imply removal power or command, but rather a more symbolic and not administrative primacy. It was either a misunderstanding or a misuse of Blackstone to suggest that he more generally supported royal “primacy” when Blackstone more thoroughly stressed parliamentary sovereignty and supremacy.

On the same page *Imperial from the Beginning*, Prakash cited G.E. Aylmer’s *The King’s Servants* for this proposition: “Because most executives served at pleasure, the Crown could remove most officers without cause.”<sup>193</sup> Unfortunately, the pages he cited either did not discuss tenure during pleasure or removal,<sup>194</sup> or the pages stated the opposite: life tenure and even more protection for many executive ministerial offices than that which judges held.<sup>195</sup> One page he cited states that “most of the great offices of state and the judgeships of King’s Bench and Common Pleas, were held during the King’s pleasure,” and later, Aylmer discusses how Secretaries of State served at pleasure.<sup>196</sup> However, “great offices of state” and the Secretaries of State are the equivalent of the cabinet and department heads, as discussed above; and if Aylmer wrote that only *most* of such cabinet level officers served at pleasure, he implied that some cabinet level secretaries had greater protection against removal. This passage would actually be strong evidence against an assumption in the brief that the king must have had the power to remove any “great office of state” cabinet level official at pleasure.

The same passages in Aylmer discussed high executive offices like Chancellorship of the Exchequer. In fact, the introductory sentence in this

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191. 1 Blackstone 387, 421.

192. PRAKASH, *supra* note 7, at 20.

193. *Id.* at 29. Prakash cites pages 106 to 110 of the 1974 edition, and the 1961 edition is the same.

194. AYLMER, *supra* note 22, at 69.

195. *Id.* at 106, 109.

196. *Id.* at 110.

passage stated, “It is difficult to generalize about the security of tenure”<sup>197</sup> in the middle of a discussion about the mix of life tenure with tenure during pleasure. Soon after, he observed that “ministerial officers, being the Crown’s executive agents . . . might properly hold for life.”<sup>198</sup> One of Aylmer’s most interesting findings is that seventeenth-century Stuart England offered more protection for many executive ministerial offices than that which judges held.<sup>199</sup> Aylmer’s other books on later eras reflect the same job security of executive officers against removal.<sup>200</sup> The rest of the chapter (pages 106 to 125) suggests that it was common for other executives below the cabinet level to have life tenure or good behavior tenure. I can find nothing in these pages supporting the broader claim made by Prakash on page 29 of his book. I am not making a positive claim of any general rule; I am noting that Aylmer states plainly that “it is difficult to generalize” and find a general rule. I do not understand how Prakash is able to generalize from Aylmer when Aylmer explicitly declined to do so in these pages. In fact, Aylmer’s section on tenure of office suggests, if anything, the opposite of the claims in the brief: the Crown had only limited removal power over executive offices. These mistakes rise to the level of misuse of both Blackstone and secondary historical materials.

A third category is judicial disuse: Chief Justices Taft and Roberts ignored Blackstone in *Myers*, *Free Enterprise*, and *Seila Law*, even as the dissenters cited Blackstone (albeit short passages and not the Blackstone big bottom line). Scalia also never cited Blackstone in *Morrison v. Olson*.

A fourth category of “selective disuse” applies to Justice Thomas and Amar. In a 2015 opinion on the separation of powers, Thomas quoted James Wilson distinguishing their new system from Blackstone and the English mixed system:

James Wilson explained the Constitution’s break with the legislative supremacy model at the Pennsylvania ratification convention:

Sir William Blackstone will tell you, that in Britain . . . the Parliament may alter the form of the government; and that its power is absolute, without control. The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. . . . “To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the

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197. *Id.* at 110.

198. *Id.* at 109.

199. *Id.* at 106, 109.

200. G. E. AYLMER, *THE STATE’S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC, 1649 – 1660* 82-96 (1973); G.E. AYLMER, *THE CROWN’S SERVANTS: GOVERNMENT AND CIVIL SERVICE UNDER CHARLES II, 1660-1685* at 93-94 (2002) (marking a shift toward tenure at pleasure, but only gradually and incompletely); see also DANIEL NORMAN CHESTER, *THE ENGLISH ADMINISTRATIVE SYSTEM, 1780-1870*, at 16-23 (1981).



American states.” . . . As an illustration of Blackstone’s contrasting model of sovereignty, Wilson cited the Act of Proclamations, by which Parliament had delegated legislative power to King Henry VIII.<sup>201</sup>

James Wilson and Justice Thomas here understood Blackstone’s core conception of legislative supremacy, and both moved on to reject it in favor of written constitutionalism. All of this is fair. The curiosity is that when it comes to presidential power and the unitary executive theory, Thomas, Scalia, and other originalists selectively rely on the eighteenth-century history, failing to recall that Blackstone’s eighteenth-century Whig republicans rejected royal absolutism and the indefeasibility of prerogative, and failing to take note that the Crown did not have a general removal power in the early modern era.

As for Amar, elsewhere in the same book, he rightly acknowledged Blackstone’s belief in legislative supremacy<sup>202</sup> and acknowledged Blackstone as a “runaway best-seller in eighteenth-century America,”<sup>203</sup> but he argued that the Founders were breaking away from the English model in 1787.<sup>204</sup> However, if Amar’s point was about discontinuity, that the Founders rejected the English structure, then how can he rely on other claims about the traditional English structure, even if it had included a power of “sacking”? At least Amar was aware of Blackstone’s general perspective of legislative supremacy and mixed government, and then elsewhere argued that the Founders were breaking from this tradition. When Amar turned to removal, he assumed continuity, not discontinuity, with English tradition. He also quoted selectively from the first Congress, removing these speeches and notes from their anti-unitary context, also a kind of selective use and disuse. Both Amar, Justice Thomas, and likely Chief Justice Roberts, compartmentalized and ignored Blackstone as they selectively misinterpreted American sources in order to find support for presidential removal.

Curiously, the dissenters against the unitary theory cited Blackstone, but only similarly fleeting passages without the big picture. In his anti-unitary dissent in *Myers v. U.S.*, Justice McReynolds cited a passage that seemed more pro-unitary royal power than against:

Blackstone affirms that “The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen,” and that there are certain branches of the royal prerogative which invest thus our sovereign lord, thus all-perfect and immortal in his kingly

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201. *U.S. Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225 (2015) (Thomas, J., concurring) (citing 2 J. Elliot, *Debates on the Federal Constitution* 432 (2d ed. 1863); see also 4 *id.*, at 63 (A. MacLaine)).

202. Amar, *supra* note 1, at 22, 37.

203. *Id.* at 439, see also *id.* at 566.

204. *Id.* at 22, 37.

capacity, with a number of authorities and powers in the execution whereof consists the executive part of government.” And he defines “prerogative,” as “consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good where the positive laws are silent.”<sup>205</sup>

In *Seila Law*, Justice Kagan cited a more neutral passage from Blackstone suggesting an equality of each branch:

Blackstone, whose work influenced the Framers on this subject as on others, observed that “every branch” of government “supports and is supported, regulates and is regulated, by the rest.” 1 W. Blackstone, *Commentaries on the Laws of England* 151 (1765).<sup>206</sup>

Despite so many passages in favor of legislative supremacy, those are the only citations to Blackstone in these core precedents from *Myers* to the present. It is a bipartisan dearth of understanding: disuse by both the anti-unitary and pro-unitary Justices.

Moving from the Justices to the scholars, the unitary theorists often cite Blackstone for his sentence, “The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen.”<sup>207</sup> This sentence, obviously a model for Article II’s Executive Vesting Clause, actually backfires on the unitary originalists. Such a citation begs the question as to what defined “executive” and what “vested” signified. But that is not even the biggest backfire. As noted above, Blackstone would not have used these words to signify indefeasibility of executive power because Parliament dramatically curtailed the royal prerogative powers of pardon, suspension of laws, prorogue, and convening of Parliament in the wake of the Glorious Revolution of 1688-89, a turning point in English constitutional history that framed the Founders’ understanding. Blackstone’s description of the English administrative state reflects thoroughly mixed powers, and the significance of these terms “executive” and “vesting” were far from clear and far from the modern context of separation of powers. Blackstone understood better than anyone that Parliament had imposed statutory limits on royal powers, especially in the century before Blackstone wrote his *Commentaries*.

#### CONCLUSION: COMMENTARIES ON THE LAWS OF SELECTIVE ORIGINALISM

Akhil Amar is right. Syllogisms are indeed lovely. But a syllogism depends upon its premises being accurate, and it depends on whether logical

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205. *Myers v. U.S.*, 272 U.S. 234 (1926).

206. slip op. at 5 (Kagan, dissenting).

207. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*190.

formalism is appropriate. So with some adjustments in the proper text and context:

*Major premise:* The executive power shall be vested in a President. (Article II, Section 1.) But as a “textual matter,” the clause does not say “all” or “indefeasibly” (or anything like it).

*Minor premise:* Removal was not an inherent executive power of the English Crown.

*Therefore,* Article II does not imply an indefeasible removal power over “executive underlings.”

This is true, whether the power is framed as “sacking slackers,” or firing experts making sensitive policy decisions on independent agencies, or removing prosecutors or FBI directors investigating crimes and corruption by a President or his or her family and friends.

The unitary executive theorists have been desperate to find historical support in the words “vest,” “executive power,” and “take care,” in a messy statutory text, an even messier legislative debate in the First Congress, and in Blackstone’s *Commentaries*. Reliance on Blackstone is puzzling. The unitary argument claims that if Blackstone identified a royal prerogative power, it was either explicitly granted to one or two branches, or it was implicitly granted to the President. However, Blackstone and others listed prorogue and dissolution as a prerogative power, and yet no one thinks Article II implies such powers. Moreover, Blackstone did not list removal power among the royal prerogative powers or anywhere else as a general executive power. Instead, Blackstone offered more evidence that offices could be protected from removal. And yet, the unitary theorists insist on finding Blackstone at their unitary party, to paraphrase the textualist metaphor for cherry-picking. But removal was the dog that did not bark: Removal was a significant enough power for Blackstone to dig into the case-by-case specifics for various executive offices, and yet the Framers did not address it in the Constitution. Blackstone (and Madison’s notes) suggest that this silence was not oversight but a lack of consensus mixed with opposition.

This article suggested four categories of abuses of Blackstone in the unitary scholarship and precedents: “selective use,” “misuse,” “disuse,” and “selective disuse.” If they are so insistent on searching Blackstone’s *Commentaries* for support and keep coming up with mistakes and misinterpretations instead of evidence, that probably tells us that the historical evidence for the unitary executive is weak. It is ironic that the textualists who favor removal wind up adding words to the Constitution and then deleting words from Blackstone quotations to get to their desired result. It is ironic that unitary theorists rely on a legislative supremacist like Blackstone, especially when Blackstone and the Framers did not recognize

a general removal power, and when the theorists do not have other sources for the executive indefeasibility claim. These stretches and strained efforts to find a general removal power in Blackstone, of all places—and still failing to find one—is an odd chapter in the unitary executive saga. Instead of relying on Blackstone's list of prerogatives, the unitary theorists instead have a growing list of serious errors and misuses of historical sources. Instead of reliable readings and quotations of Blackstone's *Commentaries* and its limited monarchy, this episode is a commentary on the unreliable royalism of the unitary theorists and the limits of originalism.