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Vesting

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ARTICLE

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Abstract. "The executive Power shall be vested in a President of the United States of America." The Executive Vesting Clause is one of three originalist pillars for the unitary executive theory, the idea that the President possesses executive powers like removal without congressional limitations (that is, the powers are indefeasible). An underlying assumption is that "vest" connotes a formalist approach to separation of powers rather than a more functional system of Madisonian checks and balances. Assumptions about "vesting" for official powers are likely the result of semantic drift from property rights and ahistoric projections back from the later Marshall Court doctrine of "vested rights."

This Article offers a close textual reading of the word "vesting" and an examination of its eighteenth-century usage and context, with the first survey of available dictionaries (from 1637 to 1846), colonial charters and state constitutions, the Constitutional Convention, and Ratification debates. Dictionaries defined "vest" in terms of basic landed property rights, without reference to exclusivity or indefeasibility, and rarely with any reference to offices or powers. Other legal documents and digital collections of the Founders' papers indicate a range of usage, from "fully vested" to "simply vested" to "partly vested," so that the word "vesting" by itself would signify less completeness. Meanwhile, words used in the Constitution or by the Framers to convey exclusivity or indefeasibility (for example, "all," "exclusive," "sole," "alone," or "indefeasible") are missing from the Executive Vesting Clause. The ordinary meaning of "vesting" was most likely a simple grant of powers without signifying the impermissibility of legislative conditions such as good-cause requirements for removals, undermining the unitary theory's originalist basis. On the other hand, the "all" in the Legislative Vesting Clause may be more legally meaningful for nondelegation.

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Introduction

"The executive Power shall be vested in a President of the United States of America."[1] This first sentence of Article II has carried much weight for theories of presidential power. Justices and scholars who adhere to the unitary theory of presidential power invest heavily in this clause as one of three originalist pillars, along with the Take Care/Faithful Execution Clause and the Decision of 1789. They expansively read the words "executive" and "vested" to establish that presidential powers are exclusive and legislatively indefeasible. Unitary theorists thus claim that Article II gives the President executive powers unlimited by Congress (such as the ability to remove officers), protection from interbranch oversight, and broad foreign policy power.

The Supreme Court's unitary executive precedents repeatedly made these textual interpretations—and anti-textualist additions—over the past century. In 2020, Chief Justice John Roberts justified expanding the removal power in *Seila Law LLC v. CFPB* by adding the word "all": "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[2] In his lone *Morrison v. Olson* dissent, Justice Scalia wrote of the Executive Vesting Clause: "[T]his does not mean *some of* the executive power, but *all of* the executive power."[3] And of Article II and vesting: "[T]he President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law."[4] All three of these emphases are original.[5]

Many scholars have added the words "all" and "complete" to the Executive Vesting Clause in articles and recent briefs, seemingly assuming that the word "vesting" has a special legal connotation that places official powers like removal beyond the reach of legislative conditions.[6] Formalist scholars

1. U.S. CONST. art. II, § 1, cl. 1.

2. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020) (first quoting U.S. CONST. art. II, § 1, cl. 1; and then quoting *id.* art. II, § 3).

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

4. *Id.* at 710 (stating further that "the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States").

5. *See also* Clinton v. Jones, 520 U.S. 681, 710 (1997) (Breyer, J., concurring in the judgment) (referring to "Article II's vesting of the entire 'executive Power'" (quoting U.S. CONST. art. II, § 1, cl. 1)).

6. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 568-69 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1203 n.244, 1204 (1992); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3-4, 35 (2008); Brief for Separation of Powers Scholars as Amici Curiae in Support of Petitioner at 5, 11, *Seila L.*, 140 S. Ct. 2183 (No. 19-7), 2019 WL 6910302 [hereinafter Brief for Separation of Powers Scholars]. Michael McConnell signed the *Seila Law* brief, but his recent book *The*

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sometimes emphasize the etymology of the word "vest" from "vestment" or "vestiture" for judges or clergy as a grant of power,[7] but it is unclear how this ceremonial or clerical origin would signify exclusivity, completeness, or indefeasibility, especially in American law. Sometimes they suggest a link to the "vested rights" doctrine limiting legislative power over property. Richard Epstein articulated this assumption about the Constitution's vesting clauses in 2020:

> The use of the term "vested" brings back images of vested rights in the law of property; that is, rights that are fully clothed and protected, which means, at the very least, that they cannot be undone by ordinary legislative action but remain fixed in the absence of some constitutional amendment.[8]

Given that assumption, it makes sense that unitary executive scholars (also called unitary scholars) commonly use the word "indefeasible"[9] to describe presidential powers in Article II, because the word "defeasible" is most commonly associated with vested interests in property law, even though vesting in that context does not mean immunity from legislative power.[10] Every law student encounters the old constitutional law doctrine of "vested rights" as legislatively inalterable,[11] so it seems plausible that "vested" powers might also be legislatively inalterable.

President Who Would Not Be King shifts his approach, backing away from the Vesting Clause as the basis of indefeasibility. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 258-62 (2020). McConnell relies more on the Take Care Clause and the Decision of 1789 for the indefeasibility for removal. *See id.* at 261-62. In *Faithful Execution and Article II*, my co-authors and I posited that the Take Care Clause has a text and context of duty imposition (fiduciary limitations, "care," and "faithful execution") that would cabin the President's removal power. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2134-36, 2188-90 (2019). In another article, I show that the Decision of 1789 in fact rejected the unitary position. *See* Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 48-50), https://perma.cc/JA5C-VXWQ.

7. Calabresi & Prakash, *supra* note 6, at 572-73; *see also* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1382 n.17 (1994).

8. RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 36 (2020).

9. *See, e.g.*, MCCONNELL, *supra* note 6, at 31; Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 817 [hereinafter Prakash, *Essential*]; *see also id.* at 709, 789; Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 225, 228, 257 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWERS (2005)) [hereinafter Prakash, *Regulating*]. For a critique of Prakash's argument, see Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1386-87 (2006).

10. *See infra* Part VII.

11. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 651 (1819); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 304 (1827).

The meaning of "vesting" for eighteenth-century English common law property (such as future versus vested interests), however, was not the same as the constitutional "vesting" of official powers. Moreover, the doctrine of "vested rights" as legislatively indefeasible did not emerge until the nineteenth century.[12] These claims are often a series of textual assertions or etymological assumptions without concrete eighteenth-century evidence to support the intuition that "vesting" connoted exclusivity or indefeasibility.[13] Some unitary theorists suggest that the overall structure of the Constitution and the absence of executive power being granted to anyone else indicate that the Executive Vesting Clause implies exclusivity and unconditionality.[14] From this context, one might borrow the terms "implicature,"[15] "impliciture,"[16] or "pragmatic enrichment"[17] from linguistics to explain the unitary theorists' insertions of "all," "alone," or "exclusively." But a closer study of the word "vest" as used in the eighteenth century and as defined in the era's dictionaries, as well as a close reading of the Constitution and other early charters, all suggest that the word "vest" and the Executive Vesting Clause did not imply indefeasibility or completeness.

This Article suggests that modern assumptions about "vesting" as indefeasible are likely the result of semantic drift, ahistoric projections back from the emerging nineteenth-century doctrine of "vested rights," and misplaced assumptions about eighteenth-century English and American political history. If "vesting" had such a connotation from an English tradition

12. *See* Gordon S. Wood, Lecture, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1442-44 (1999); *see also* George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 19-20 (1981) (citing Turpin v. Locket, 10 Va. (6 Call) 113, 156, 169-70 (1804)); James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 398-400 (1982); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 102 n.51 (1993).

13. Epstein offers no additional evidence to support this assumption. *See* EPSTEIN, *supra* note 8, at 36. Prakash's book review is an extended argument for the indefeasibility of presidential power, but he relies on textual implications and more historical assumptions rather than direct evidence about the Vesting Clause. *See* Prakash, *Regulating*, *supra* note 9, at 231-51.

14. *See, e.g.*, Prakash, *Regulating*, *supra* note 9, at 231-40.

15. PAUL GRICE, STUDIES IN THE WAY OF WORDS 24-26 (1989).

16. Kent Bach, *Conversational Impliciture*, 9 MIND & LANGUAGE 124, 124-26 (1994).

17. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 272 (2019); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 12 (2018); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV 453, 465 & n.47 (2013) (citing François Recanati, *Pragmatic Enrichment*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LANGUAGE 67 (Gillian Russell & Delia Graff Fara eds., 2012)).

relating to either property or official power, where is the evidence of such a doctrine? In the English tradition of limited monarchy and an unwritten constitution, the legislature curtailed royal powers like the pardon and abolished the royal suspension power.[18]

From this Article's study of dictionaries and eighteenth-century usage, it seems that the word "vest" started as a religious ceremonial installation ("vestments" and an "investiture," to clothe with power) and then took on a meaning for real property. By the eighteenth century, "vest" could describe the delegation of official power, but its legal ramifications were unclear.[19] The word "vest" was both ambiguous (it had different meanings in these different contexts) and vague (there were different degrees of "vesting").[20] Founding-era leaders tended to add words like "fully" and "all" to clarify a stronger form of vesting, often in the context of the people's rights, military command, and intriguingly, legislative powers. Contrast Article I's "all" for vesting legislative power with Article II's lack of "all."[21]

Following an "intratextual" method,[22] this Article focuses on the word "vest" and applies canons of interpretation to other words that might signal exclusivity throughout the Constitution. This Article also engages in an *inter*textual study of "vesting," comparing the word "vesting" in early colonial charters and early American constitutions.[23] The Article provides the first comprehensive survey of the use of "vesting" (1) at the Constitutional

18. *See infra* Part I.B.

19. For Senator William Johnson's confusion with respect to vesting land and money as opposed to official power in 1789, see note 309 and the accompanying text below.

20. *See* Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 97-98 (2010).

21. In *West Virginia v. EPA*, decided shortly before the publication of this Article, Justice Gorsuch's concurrence stressed the "all" in Article I's Legislative Vesting Clause when emphasizing the strict separation of powers for the nondelegation doctrine. 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) ("In Article I, 'the People' vested '[a]ll' federal 'legislative powers . . . in Congress.'" (alterations in original) (first quoting U.S. CONST. pmbl.; and then quoting *id.* art. I, § 1)). But the Roberts Court has ignored the conspicuous absence of "all" in Article II's Executive Vesting Clause. *See supra* notes 2-5 and accompanying text.

22. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). Amar quotes Justice Story's intratextual analysis of "vesting," arguing that the Vesting Clauses should be read together implicitly. *See id.* at 759-61, 802-07. But Amar's analysis accepts, arguendo, Justice Scalia's assumptions of entirety and "absolute language": "Justice Scalia points out that the Vesting Clause is written in absolute language calling for rule-like enforcement rather than mushy balancing: 'The executive power *shall be vested* in *a* President.'" *Id.* at 802 (quoting U.S. CONST. art. II, § 1, cl. 1). This Article extends Amar's method of intratextualism by reading for "vest" and other examples of "absolute" or exclusive language.

23. For a systematic approach, see Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, YALE L.J. (forthcoming) (manuscript at 1-3, 8-10), https://perma.cc/M8TV-KLPK.

Convention and in the Ratification debates; (2) in databases of Framers' letters and speeches; and (3) in over thirty English dictionaries from the pre-1787 era, as well as eighteen after 1787.

Most unitary theorists seem to assume that "vesting" signifies a special constitutional status, as they infer royal prerogatives[24] and irrevocable separation of powers, seemingly an inference from the later usage of the word. Using the originalists' methods, this Article finds that the word "vest" generally meant a simple grant of powers without the constitutional significance of exclusivity or indefeasibility that the unitary theorists have imputed to it. This Article is part of my series (with co-authors) on Article II and the unitary theory's three pillars: the Executive Vesting Clause,[25] the Take Care Clause,[26] and the Decision of 1789.[27] Taken together, these articles suggest that none of the three pillars can support the unitary theory's claims of indefeasible executive power.

Some unitary theorists suggest that exclusivity does not come directly from the Executive Vesting Clause itself, but rather is implied from the Constitution's absence of any grant of executive power to the other branches. This reasonable basis for separation of powers is a mix of structural argument and an implication from *expressio unius est exclusio alterius* (the canon meaning "the explicit mention of one is the exclusion of another"). No other clause vests (or grants, or gives) executive power to another branch; even if the word "vesting" is ambiguous on its own, the structure of the Articles with three separate power-grant clauses implies exclusivity.[28] "The executive power," in this light, is a "mass noun," not a "count noun," and thus one might infer that the President must hold the power.[29] But having power does not mean

24. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172-74 (2019) [hereinafter Mortenson, *Article II*]; Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1275-77 (2020) [hereinafter Mortenson, *Executive Power*]; *see also* MCCONNELL, *supra* note 6, at 251-55 (responding to Mortenson's view on executive power); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 133-37 (2020) (same).

25. *See* Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANS. 125, 143-50 (2022).

26. *See* Kent et al., *supra* note 6, at 2113-17.

27. *See* Shugerman, *supra* note 6 (manuscript at 2-10).

28. Scalia may have been so inferring in his *Morrison v. Olson* dissent, after quoting the Executive Vesting Clause: "[T]his does not mean *some of* the executive power, but *all of* the executive power." 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Thanks to Andrew Kent, Ben Zipursky, Ilan Wurman, and Will Baude for noting this point.

29. Henry Laycock, Mass Nouns, Count Nouns and Non-count Nouns: Philosophical Aspects 2 (May 31, 2004) (unpublished manuscript), https://perma.cc/4YH6-6ABC.

exercising that power absolutely or *indefeasibly*. Recent cases have refused to recognize this, turning on a general rule of legislative indefeasibility.[30]

However, the Constitution often uses the word "the" not as a mass noun, but as a formalism without more significance. Moreover, even if one assumes that the Constitution's structure implies exclusivity—or, arguendo, that "executive power" or "take care" implies removal and other powers—one could reasonably conclude that the other branches may not exercise executive power directly (for example, the Senate blocking removal in *Myers v. United States* or Congress exercising removal on its own in *Bowsher v. Synar*).[31] It still does not necessarily follow, however, that the executive power is "indefeasible," or beyond Congress's power to enact moderate checks and balances (like "good-cause" requirements or "neglect-of-duty" standards) while leaving the exercise of the power in the President's hands. In other words, even if one accepts an implied structural argument for exclusive separation, it would still coexist with an implied structure of checks and balances, and the word "vesting" (or the phrases "take care" and "faithfully execute") would not resolve these ambiguities in favor of *indefeasible* presidential power.

Furthermore, if the unitary theorists rely on a form of *expressio unius* and conspicuous absence to imply exclusivity and indefeasibility, they have an even more explicit textual problem of absence: the word "all" in Article I's Legislative Vesting Clause is missing in Articles II and III. There are other absences as well. The Framers frequently used other words to convey completeness and exclusivity: "all," "exclusive," "sole," "alone,"[32] and even the unitary theory's key word, "indefeasible."[33] Yet none were used in the Executive Vesting Clause. Many state constitutions had included an explicit separation-of-powers clause by 1787, but the Framers did not.[34] The Framers used "all" thirty times when they wanted to convey entirety—most significantly in Article I's Legislative Vesting Clause and again in the Necessary and Proper Clause, two places emphasizing Congress's power. Justices Thomas and Gorsuch have treated the "all" in Article I as textually significant in their

30. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197-200 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1783-84 (2021) (applying *Seila Law*'s holding that "Congress could not limit the President's power to remove the Director of [the CFPB] to instances of 'inefficiency, neglect, or malfeasance'" (quoting 140 S. Ct. at 2191)); *cf.* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 495, 500 & n. 6 (2010) (allowing some conditions to be placed on removal, but not "an added layer of tenure protection," and questionably relying on the First Congress for dicta against conditions).

31. *See* Myers v. United States, 272 U.S. 52, 161-65 (1926); Bowsher v. Synar, 478 U.S. 714, 721-27 (1986).

32. *See infra* Parts II.A-.C.

33. *See infra* Part II.D.

34. *See infra* Part IV.

nondelegation opinions.[35] Perhaps its absence in Article II is significant, too. This Article offers some explanations for why the Framers may have deliberately and pragmatically chosen "all" for legislative, but not executive, power.

Professor Victoria Nourse has called Justice Scalia's addition of the word "all" to the Executive Vesting Clause in *Morrison* a "pragmatic enrichment,"[36] but there is rich irony in the rewriting of texts by textualists (and in their disregard of textual absences). Justice Scalia instructed us to use "commonsensical" text-based canons like *expressio unius* throughout his career,[37] and the absence of the words "alone," "all," "exclusive," "fully," or "sole" in the Vesting Clause are important clues about the Founders' intent. The twist here is that if the word "vest" did not convey exclusivity, then the presence of "all" in the Legislative Vesting Clause becomes more textually significant.

Most early state constitutions and the Articles of Confederation adopted the word "vest," but often without a context of complete, centralized, and fixed powers.[38] In the word's first appearance in the 1787 Convention records (in Randolph and Madison's Virginia Plan),[39] in its last appearance on the final day of the Convention (in Washington's letter of transmission to the Continental Congress on September 17),[40] and often in between, the Convention's use of "vesting" reflected meanings that are inconsistent with unitary theory.[41]

The most novel contributions of this Article are two studies of the word "vest" in digital historical databases. The first is a study of all of the Founding era's dictionaries available in electronic databases on HeinOnline, the University of Toronto's Lexicons of Early Modern English (LEME),[42] and

35. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).

36. Nourse, *supra* note 17, at 3, 23-26; *see also* Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 247 (2019).

37. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25-26 (Amy Gutmann ed., 1997); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) (defining the negative-implication canon).

38. *See, e.g.*, *infra* Part IV; ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 1, 4; *id.* art. X; *see also* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 334-44 (2016).

39. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter 1 Farrand]; *see also infra* Part V.

40. Letter from George Washington to the President of Cong. (Sept. 17, 1787), *reprinted in* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/W3PF-47FV (archived June 18, 2022).

41. *See infra* Parts V, VI.A.

42. LEXICONS EARLY MOD. ENG., https://perma.cc/PF4E-FJS3 (archived June 18, 2022).

Georgetown University's library database,[43] yielding a total of fifty editions by thirty-one different main editors (seventeen from 1637 to 1787, fourteen from 1787 to 1846).[44] These sources generally defined "vest" in terms of individual property rights (most often landed property) without any reference to official powers. Some legal dictionaries referred in Latin to *plenum*, or full possession of land or estates, but this evidence is less relevant to ordinary public meaning and to political offices. No dictionary in this study offered a definition of exclusive or indefeasible powers. Of the nine most influential dictionaries of the era, two offered some kind of reference to the word (either as a secondary definition or describing other entries) with reference to offices, and one was a reference to "mix'd monarchy," signifying shared powers and legislative checks. Only two minor English dictionaries published before or around 1787 mentioned some version of "supreme powers."[45]

The second study draws on the University of Virginia's Rotunda database of Founders' sources and Ratification debates, yielding almost one thousand uses of the word "vest." Speakers used modifiers to specify stronger or weaker "vesting," such as "vesting all powers," "fully vesting," or "partly" vesting. Such modifiers suggest that by itself, "vest" was merely a basic delegation, but adding the word "all" in Article I may point to a more formal separation of legislative power than Article II's separation of executive power.

This research builds on recent historical work that questions similar assumptions.[46] Peter Shane has shown that state constitutions contained "vesting" and "faithful execution" clauses, but many of those states defied unitary assumptions as a matter of constitutional structure and legislative practice.[47] In his article also suggesting a narrower meaning of the Executive

43. *Legal Dictionaries*, GEO. L. LIBR., https://perma.cc/PP5Z-EV6E (archived June 18, 2022).

44. *See infra* Appendix B. Steven Calabresi offered definitions of "vest" from two late-twentieth-century dictionaries and one from the eighteenth century. Calabresi, *supra* note 7, at 1380 n.11, 1381 n.14. These totals also include two dictionaries, Ash (1775) and Entick (1776), that have been listed as among the most influential or prevalent dictionaries on the Founders' bookshelves, *see infra* note 227, but are not available on the three databases surveyed. I accessed these two sources via Google Books.

45. *See infra* Appendix B.

46. *See* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 182 (2021); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 25-34 (2021); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 3 (2020); 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, 262 (2009); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004).

47. Shane, *supra* note 38, at 344-52.

Vesting Clause, Julian Davis Mortenson discussed semantic drift in the unitary interpretation of the word "executive" as separation-of-powers doctrine developed.[48] Today, we assume that "executive" referred to both an executive power and a separate executive branch or office—an American innovation.[49] In this Article I suggest another kind of semantic drift on "vesting," projected backward from the Marshall Court's vested-rights doctrine.

As the British author L.P. Hartley famously wrote in 1953, "The past is a foreign country: they do things differently there."[50] Eighteenth-century England was quite literally a different country and had a fundamentally different structure of government: a limited monarchy balanced with an aristocracy, with no written constitution but with rising legislative supremacy. In a mixed monarchy and aristocracy, a broad royal removal power was not a given, and it had to be limited in order to protect the aristocracy's honors and offices. The classic example was peerages, but the practice extended to more active government offices with executive functions, as Daniel Birk, Jane Manners, and Lev Menand have shown recently.[51] Let us assume, arguendo, that the unitary executive theorists are right that Article II "executive power" implied removal, even though such a claim still lacks historical support and has led to numerous errors in their amicus briefs, articles, and books.[52] If the Framers often divided and reduced so many of the royal prerogative powers in such an explicit, enumerated approach,[53] why

48. Mortenson, *Article II*, *supra* note 24, at 1172-75; *see also* Mortenson, *Executive Power*, *supra* note 24, at 1271-72; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 49-52 (1994).

49. *See* Mortenson, *Article II*, *supra* note 24, at 1245.

50. L.P. HARTLEY, THE GO-BETWEEN 3 (1953).

51. Birk, *supra* note 46, at 182; Manners & Menand, *supra* note 46, at 28-37. For Aylmer's description of many seventeenth-century offices that were not removable, see note 79 below.

52. *See, e.g.*, MCCONNELL, *supra* note 6, at 30, 39, 68, 95, 99, 161-62, 166-67; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006); Brief for Separation of Powers Scholars, *supra* note 6; Wurman, *supra* note 24, at 142 n.205; Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 169, 171 n.59 (2020). For critiques, see Shugerman, *supra* note 25; Shugerman, *A Reply to the Unitary Executive Theorists on the Misuse of Historical Materials*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 21, 2022), https://perma.cc/NTC6-KFGW; Shugerman, *supra* note 6; and Jed Shugerman, *Originalism and the Seila Law Brief, Part II: Prerogative vs. Royalism, Blackstone vs. Schmitt, McConnell vs. Amicus*, SHUGERBLOG (Jan. 11, 2022), https://perma.cc/AR3Y-NDQK.

53. WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 420-29 (1953); MCCONNELL, *supra* note 7; SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 83 (2015); *see also* Shane, *supra* note 38, at 360-61; *infra* text accompanying notes 184-85.

would the Framers have given the President more power than the King when it came to merely implied powers?

This study emphasizes two observations about originalism. First is an emphasis on original *public* meaning. The dictionaries have a mix of definitions, some more general, some more lawyerly and technical (including in Latin). Neither set of definitions provides much support for the unitary theory, so not much turns on this distinction. Nevertheless, as discussed below, the more publicly accessible definitions have greater weight.[54] Second is the burden of proof. Legal scholars suggest a need for clarity to show original public meaning, with many originalists focusing on the problem of judicial overreach against democracy,[55] and some conceding a burden to show clarity to prevent the risk of judicial overreach.[56] The repercussions of such a broad interpretation of an indefeasible removal power over all executive officials would be sweeping, likely overturning established precedents like *Humphrey's Executor v. United States* and the independence of important institutions like

54. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 275-76 (2017); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60 (1999) (identifying the public ratification process as giving legal "effect and authority" to the Constitution, thus providing the text with "the meaning that was publicly understood"); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 872-75 (2009). *But see* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 753, 771-72, 784 n.116 (2009) (advocating for an interpretive approach to the Constitution according to original rules and methods, acknowledging that this approach may be more "legal," "lawyerly," or "elite" than one based in original public meaning).

55. SCALIA, *supra* note 37, at 41-47; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting) (warning of an activist "Court's threat to American democracy").

56. *See* John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 918 (2016) (making the originalist argument that courts must find "clear incompatibility between the Constitution and a statute before displacing the latter by the former"); Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1971 (2017) ("Some other controversial cases . . . may be best read as failing a high burden of proof."); Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143, 2150 (2017); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1111, 1120 (2017); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2025-28 (2011); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (stating, of constitutional protection beyond legislative power, that "[w]e must therefore 'exercise the utmost care whenever we are asked to break new ground in this field'" (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))).

the Federal Reserve. Heidi Kitrosser's invocation of "interpretive modesty" is appropriate here to avoid this outcome.[57]

Part I begins with historical context of early modern England and early America, including a summary of how the Convention and Founding era rejected the unitary model. Part II and Part III have a tight textual focus: the use of other words ("all," "the," "sole," "alone," "exclusive") in the Constitution, the nonuse of "indefeasible," and definitions of "vest" in the era's general and legal dictionaries. The rest of the Article focuses on usage: Part IV on colonial charters and early state constitutions; Part V on the 1787 Constitution and in the Convention debates; Part VI on the Ratification debates and the Framers' usage in digital collections of their papers; and Part VII on "vesting" in property law and defeasibility. The Article's conclusion suggests some doctrinal implications for the separation of powers.

I. The Problem: "Vesting" and Semantic Drift

A. *Seila Law* and *Collins*

The unitary executive theory has ascended in the last decade, and it appears primed to keep expanding in the Roberts Court. In 2010, *Free Enterprise Fund v. Public Co. Accounting Oversight Board* struck down a double-layer structure of insulation as a violation of the separation of powers, with Congress placing an impermissible limit on presidential power. (The U.S. Securities and Exchange Commission, or SEC, is by tradition if not explicitly by statute independent from presidential removal at will. And the Public Company Accounting Oversight Board, or PCAOB, was insulated from SEC removal.) In that same year, Congress created the Consumer Financial Protection Bureau (CFPB), limiting the President's removal power to cases of "inefficiency, neglect of duty, or malfeasance in office"[58] (the classic formulation for independent agencies[59]). In *Seila Law*, the Supreme Court struck down this provision, with a ruling limited to the single-head problem for agencies with "significant" regulatory power, and not extending it to the far more prevalent multimember-commission structure. In *Collins v. Yellen* in 2021, the Roberts Court extended this new rule to the single-headed Federal

57. Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 505-07 (2016) (discussing specifically the Vesting Clause); *see also* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1758 (2015).

58. 12 U.S.C. § 5491(c)(3).

59. Manners & Menand, *supra* note 46, at 4; *see also* 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, 145 (2015) (discussing the adoption of this classic formula for the first modern regulatory agency).

Housing Finance Agency (FHFA), even though the FHFA had less significant regulatory power than the CFPB.

The logic of these decisions appears to be headed even further. Their absolutist, formalistic language about Article II and "vesting" would leave no independent agency standing. Indeed, Justice Kavanaugh has signaled the overturning of *Humphrey's*,[60] and President Trump's Department of Justice invited the Supreme Court in *Seila Law* to "consider whether [*Humphrey's* and *Morrison*] should be overruled in part or in whole."[61] A 2019 memo from the Office of Legal Counsel endorsed more presidential control over "so-called 'independent' agencies" and relied on the Vesting Clause while adding the terms "all" and "alone," referring to "the executive power in the President *alone* . . . . Article II vests *all* of '[t]he executive Power' in the President and charges him alone with the responsibility to 'take Care . . . .'"[62] The leading unitary scholars have also added those same words in academic articles[63] and their recent amicus brief in *Seila Law* (for example, "*all* of the executive power"; "[the clause] vests '[t]he executive Power' in the President *alone*").[64]

In January 2021, a Ninth Circuit panel noted that *Seila Law* and *Free Enterprise* raised new questions about the constitutionality of the Federal Trade Commission (FTC)—the same independent agency sustained in *Humphrey's*.[65] In 2022, a Fifth Circuit decision and the Supreme Court's grants of certiorari indicate that the structure of both the FTC and the SEC are in jeopardy.[66] With the addition of Justice Barrett, will the Roberts Court now rely on the Vesting Clause to strike down other structures of agency independence, to expand *Zivotofsky ex rel. Zivotofsky v. Kerry* and presidential powers in foreign affairs,

60. Jed Shugerman, *Brett Kavanaugh's Legal Opinions Show He'd Give Donald Trump Unprecedented New Powers*, SLATE (July 19, 2018, 2:45 PM), https://perma.cc/ED7G-NY43.

61. Brief for the Respondent at 16 n.2, Seila L. LLC v. CFPB, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 4528136.

62. Extending Regul. Rev. Under Exec. Ord. 12866 to Indep. Regul. Agencies, 43 Op. O.L.C., slip op. at 1, 8 (Oct. 8, 2019) (second alteration in original) (emphasis added) (first quoting U.S. CONST. art. II, § 1, cl. 1; and then quoting *id.* art. II, § 3).

63. *See, e.g.*, Calabresi & Prakash, *supra* note 6, at 568-69; Calabresi & Rhodes, *supra* note 6, at 1203 n.244, 1204; CALABRESI & YOO, *supra* note 6, at 35.

64. Brief for Separation of Powers Scholars, *supra* note 6, at 5, 11 (second alteration in original) (emphasis added) (quoting U.S. CONST. art. II, § 1).

65. Axon Enter. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021), *cert. granted in part*, 142 S. Ct. 895 (2022).

66. Jarkesy v. SEC, 34 F.4th 466 (5th Cir. 2022). The Supreme Court granted certiorari on the threshold jurisdictional question in SEC v. Cochran, 20 F.4th 194 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022); and in *Axon*, 986 F.3d 1173.

and to shield presidents from congressional and judicial inquiry beyond *Trump v. Mazars USA, LLP*?[67]

Big questions of power seem to turn on a few short words: "all," "the," and "vest," as well as "take care." One reaction is to question whether formalist textualism has gone too far on such little text. Another reaction is to dig into the textual and historical usage of one of these words: "vest." It may be a good-faith error from reading nineteenth-century "vested-rights" decisions related to the indefeasibility of private property insulated from legislative alterations. This is the problem of semantic drift, and the solution is to question such assumptions by rereading the texts with a critical eye and by digging into eighteenth-century sources, especially general and legal dictionaries. But before turning to the databases of dictionaries and debates, we should first turn to a classic source often cited by the unitary theorists.

B. Limited Monarchy and Blackstone's Defeasible "Vesting"

Unitary scholars often assume that the English monarchy is a starting point for understanding Article II, and they turn to Blackstone as the leading authority on the English monarchy. Blackstone wrote that "[t]he supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen,"[68] a sentence cited by leading unitary scholars like Steven Calabresi,[69] Saikrishna Prakash,[70] and, most recently, Michael McConnell.[71] A section of Prakash's article *The Essential Meaning of Executive Power* is devoted to Blackstone, highlighting the sentence's use of "executive power," and twice calling its significance "obvious."[72] But there was a less obvious significance in this sentence that raises a serious problem for the unitary theory: The "vesting" of such supreme executive power did not mean indefeasibility, as Parliament sometimes defeated royal powers by mere legislation.

Unitary scholars often assume that the English monarchy or European monarchs are the primary model for presidential powers, and they assume that

67. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2096 (2015); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2035-36 (2020); *see* Trump v. Vance, 140 S. Ct. 2412, 2437-38 (2020) (Thomas, J., dissenting) (relying on *Myers v. United States*, 272 U.S. 52 (1926)).

68. 1 WILLIAM BLACKSTONE, COMMENTARIES *190. Thanks to Julian Davis Mortenson for our conversations about Blackstone and "executive power." *See* Mortenson, *Article II*, *supra* note 24, at 1223 n.211.

69. Calabresi & Prakash, *supra* note 6, at 607 n.261.

70. Prakash, *Essential*, *supra* note 9, at 749.

71. MCCONNELL, *supra* note 6, at 33.

72. Prakash, *Essential*, *supra* note 9, at 748-49.

the powers allocated to those monarchs are the model for Article II.[73] Let us set aside the obvious question of why a monarch—or Blackstone's account of English monarchy—would be the primary model for the Founders. Instead, this Article will focus on Blackstone's use of the word "vested" in the context of the English mixed monarchy after more than a century of rising legislative power to limit or even abolish traditional executive power, such as the pardon power and suspension of the law. This Article will not analyze Blackstone's structure of the English government in depth, but it is appropriate to address how Blackstone has been miscited and misinterpreted by unitary scholars.

Reliance on this key Blackstone sentence raises questions of the meaning of both "executive" *and* "vested." Blackstone would not have used the words "the" and "vested" to signify indefeasibility of executive power, because Parliament had dramatically limited the royal prerogative powers of pardon, suspension of laws, prorogue, and convening of Parliament after the Glorious Revolution of 1688-1689. The Bill of Rights of 1689 prohibited or curtailed the prerogative powers of suspending, dispensing, and spending.[74] Then, the Triennial Act of 1694 restricted the power of the Crown to call and dissolve or prorogue Parliament.[75] The Settlement Act of 1700 limited the pardon power: "That no Pardon under the Great Seal of England be pleadable to an Impeachment by the Commons in Parliament."[76] These events suggest that the default posture of the eighteenth-century English constitution was defeasibility, the imposition of legislative limits on royal powers, and the ushering in of parliamentary supremacy. Blackstone's discussion of the English administrative state reflects the fact that powers were thoroughly mixed. The significance of the terms "executive" and "vesting" were far from clear, and far from the formalistic separation of powers or the unitary theory. Thus, when Blackstone wrote that "[t]he supreme executive power of these kingdoms is

73. *See, e.g.*, PRAKASH, *supra* note 53, at 31 ("Because supreme executives in other countries had a similar basket of powers, it became common to speak of an 'executive power' that encompassed an array of powers commonly wielded by monarchs."); *id.* at 12-27; SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 23-42 (2020); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234, 266-71 (2001).

74. Bill of Rights 1688, 1 W. & M. c. 2 ("That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall. . . . That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall. . . . That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then [sic] the same is or shall be granted is Illegall.").

75. Meeting of Parliament Act 1694, 6 & 7 W. & M. c. 2, § 2; *see also* IAN LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS: A CRITICAL INTRODUCTION 91 (5th ed. 2009).

76. Act of Settlement 1700, 12 & 13 Will. 3, c. 2, § 3.

vested by our laws in a single person, the king or queen," he was using the word "vest" as a generic, alterable, and defeasible grant of power.[77]

Blackstone creates other problems for the unitary scholars. They cite Blackstone as a source for the idea of removal as a traditional royal executive power, but the evidence does not support their claims.[78] Many English administrative offices were life-tenure positions and even inheritable, as Blackstone himself noted.[79]

When Parliament created an office with tenure during a limited term of years, it curtailed or blocked royal removal, as Jane Manners and Lev Menand

77. 1 BLACKSTONE, *supra* note 68, at *190.

78. Unitary scholars often cite Blackstone for the claim that English kings had a general "at-pleasure" removal power, but those citations do not bear out, and the unitary scholars missed Blackstone's general view of legislative power to limit or abolish royal powers. Their cites to Blackstone do not refer to any general royal power to "remove" or any synonym of removal. *See* Brief for Separation of Powers Scholars, *supra* note 6, at 3, 7. On his list of royal prerogatives, Blackstone included the powers "of erecting and disposing of offices." 1 BLACKSTONE, *supra* note 68, at *272. However, general usage and context indicate that "disposing" means "at the King's disposal" for distributing offices to his subjects. It seems that Ilan Wurman, for example, mistook "dispose" for a modern "disposal" system of removal or dissolution. Blackstone often used "dispose" to mean "use" or "distribute." *See, e.g.*, *id.* at *219, *272, *274, *330; *see also* Wurman, *supra* note 24, at 139-40 (citing Blackstone, incorrectly, as supporting removal power). The *Seila Law* amicus brief also misunderstood Blackstone's chapter on subordinate magistrates, changing the placement of the word "not" to alter Blackstone's statement of *uncertainty* (that is, *not* making a claim) into an *affirmative* claim about royal removal powers. *Compare* Brief for Separation of Powers Scholars, *supra* note 6, at 8, *with* 1 BLACKSTONE, *supra* note 68, at *337. *See also* Wurman, *supra* note 24, at 142 n.205 (including the same misquote).

79. 2 WILLIAM BLACKSTONE, COMMENTARIES *36-37. Blackstone's category of inheritable property included "offices," including public magistrates, and rights to their employment, fees, and "emoluments." *Id.*; *see also* G.E. AYLMER, THE KING'S SERVANTS: THE CIVIL SERVICE OF CHARLES I 1625-1642, at 106-25 (1961) (describing the prevalence of tenure for life, heritable tenure, and tenure during good behavior in English administration); G.E. AYLMER, THE STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC 1649-1660, at 82 (Routledge & Kegan Paul 1973) (noting that "[u]nder the old system of royal administration, offices could be held on three main kinds of tenure: for life, during good behaviour, or during pleasure"); G.E. AYLMER, THE CROWN'S SERVANTS: GOVERNMENT AND CIVIL SERVICE UNDER CHARLES II, 1660-1685, at 93-94 (2002) (describing the continuing limits on the King's removal power, with a gradual and only incomplete shift toward tenure at pleasure); NORMAN CHESTER, THE ENGLISH ADMINISTRATIVE SYSTEM 1780-1870, at 14-23 (1981) (describing the legal rights of officers, including offices as property, inheritable offices, and offices for life). It is not a simple matter to assess whether these offices fit our modern definition of "executive" principal offices, but part of the point is that the English system is no clear model for Article II, and thus the unitary theory's reliance on royal powers and Blackstone is questionable both in general and in its specific focus on English removal traditions.

have shown,[80] and as Madison noted in 1789.[81] In this light, it makes sense that Blackstone never specified removal among the royal powers and prerogatives. More relevant to the word "vesting," Blackstone and others identified appointment as a royal prerogative and a core "executive power."[82] Madison wrote in *Federalist No. 47* that "the appointment to offices, particularly executive offices, is in its nature an executive function."[83] James Wilson "[o]bject[ed] to the mode of appointing, as blending a branch of the Legislature with the Executive."[84] If the Vesting Clause was supposed to vest all executive power, then it is hard to explain why the Framers shared the appointment power between the President and the Senate. The Constitution "grants some eighteenth-century executive powers—such as the powers over war and foreign commerce—to Congress."[85] Blackstone described war, peace, and treaty powers as core among the royal powers and prerogatives,[86] and yet the Constitution grants those powers to Congress and the Senate. Blackstone also discusses the power of the King to coin money,[87] but again, the Constitution allocates this power to Congress. Once Article II shared the appointment power, the war power, and the treaty power, the President did not have complete and exclusive executive power. If "vesting" had meant "complete and exclusive," then the Vesting Clause would have been contradicted by other parts of Article II.

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80. Manners & Menand, *supra* note 46, at 5-6, 19, 23, 27-29.

81. The Congressional Register (May 19, 1789) (stating that Congress could limit "the duration of the office, to a term of years" and that the office would not be removable), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, MARCH 4, 1789-MARCH 3, 1791, at 722, 734 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 2004) [hereinafter DOCUMENTARY HISTORY].

82. Mortenson, *Article II*, *supra* note 24, at 1223, 1226 n.230 (citing Blackstone, Bracton, Bagshaw, and Hale, among others).

83. THE FEDERALIST NO. 47, at 305 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 38 (James Madison), *supra*, at 236 (acknowledging that the Constitution allocates appointment power between the Senate and the President "instead of vesting this executive power in the Executive alone"). In the First Congress, Madison also named appointment as a core executive power "in its nature." The Congressional Register (May 19, 1789), *supra* note 81, at 926.

84. Mortenson, *Executive Power*, *supra* note 24, at 1326 n.304. Mortenson cites an attempt to address this problem by Tench Coxe, who called it "an 'evident' error to speak of 'the executive powers of the senate.'" *Id.* at 1328 (quoting Letter from an Am. to Richard Henry Lee, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 173, 175 (John P. Kaminski et al. eds., 1984)). Mortenson comments, "This was just vanilla formalism pulled straight from the dictionary. The Senate had no power to execute the law. Therefore, the Senate did not possess executive power. Case closed." *Id.* at 1329.

85. PRAKASH, *supra* note 53, at 83; *see also* Shane, *supra* note 38, at 360-61.

86. 1 BLACKSTONE, *supra* note 68, at *233, *243-45, *250-52.

87. *Id.* at *276-77.

The inverse of the "appointment–war–treaty problem" is the prorogue–dissolution problem. Even if we accept the shift to Mortenson's law-execution thesis from the royal prerogative, there is again the problem of whether the Vesting Clause still implicitly conveys all "law-execution" powers exclusively to the President. Blackstone, along with other English sources, highlights the executive power to convene, prorogue, and dissolve Parliament.[88] These powers may be royal prerogatives, but arguably they are also relevant to English law execution and the interplay between King, Parliament, and legislation. In order to shut down the legislative process in colonial assemblies, colonial governors frequently dissolved them—an exercise of power over the legislative process that was clearly noted by the American revolutionaries. Two of the dictionaries in this study—one by Bailey in eighteenth-century England and another by Wade in mid–nineteenth-century America—emphasize the power to prorogue and dissolve legislatures as an archetypal executive power, and Bailey referred to it as a check on legislative powers.[89] Future research will address the arguments to resolve this apparent contradiction, but the conclusion is the same: If "vesting" implicitly meant that the President held "all" traditional executive powers exclusively, it is complicated to explain why the President shared appointment, war, and treaty powers, and also why the President lacked the powers of prorogue and dissolution that the King traditionally had held.

This study suggests another kind of semantic drift, similar to the one Mortenson identified, about the connotations of "royal."[90] Many Americans

88. *Id.* at *186-88; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 155 (2d ed. 1998).

89. Bailey defined a "mix'd monarchy" as

> one that is tempered by the interposition of the estates or great men of the realm, both of the nobility and gentry; thus in England the executive power is vested in the king or monarch absolutely; but the *legislative power is invested in the parliament*; but it is to be noted, that the king has a negative power as to the laws proposed to be obligatory on the people, and also the *power of proroguing and dissolving parliaments*, but no power to raise money, but by laws consented to by the parliament. Monarchies by general custom are successive from father to son, &c. But some are elective as that of Poland, and there are also many instances of monarchies where the succession has not been hereditary.

NATHAN BAILEY, THE UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 3d ed. 1737) (emphasis added). John Wade's *Cabinet Lawyer* offers this example: "The power of proroguing and dissolving, as well as summoning parliament together, is vested in the crown." JOHN WADE, CABINET LAWYER: A POPULAR DIGEST OF THE LAWS OF ENGLAND 4 (London, 9th ed. 1835).

90. Mortenson, *Article II*, *supra* note 24, at 1245 ("By far the most important mistake of the Royal Residuum Thesis is its systematic conflation of two different things: (1) the Constitution's use of 'executive' to describe a particular power of government with (2) the historical sources' use of 'executive' as metonymy for the political entity that possesses both that particular power *and also many others*. It's hard to overstate the pervasiveness of this error.").

seem to conflate "royal" with "absolutism," and if kings were a model for a power, then that power was exclusive and plenary. But this is a misunderstanding of the English legal system and its mixed monarchy and landed aristocracy—perhaps a semantic drift from the rise of French and continental royal absolutism and what moderns imagine of a past royal system. In the century before the American Revolution and Founding, the English mixed monarchy was balanced with rising legislative power. Today, something gets lost in translation. The word "vest" has gotten lost in that confusion.

Perhaps an even more fundamental error of drift is the equation of "Crown" with "executive" and assumptions about the categories of "executive offices" or "executive removal" in a system without the separation of powers. The "Crown" represented much more than executive power, and thus kings are not analogous to presidents (for many reasons). Moreover, it is not merely difficult to identify "executive offices" in the English and colonial governments; it may be an anachronistic question. The Crown was head of all of the powers: executive, legislative, and judicial. Consider the traditional term "Crown-in-Parliament" (otherwise "King-in-Parliament" or "Queen-in-Parliament") to refer to the Crown's legislative capacity.

The legislative and judicial institutions were extensions of the Crown's sovereignty, and often without any concern for a distinction between legislative, executive, and judicial powers. Consider Parliament, which called itself "the High Court of Parliament."[91] The House of Lords was, of course, the high court as a well as a house of the legislature, as any first-year law student learns early in Torts and Contracts. Sir Edward Coke, famous for his role in establishing judicial power, "recognized the supremacy of parliamentary authority precisely because it was transcendent in its judicial capacity."[92] Each of the courts, like King's Bench, Chancery, and the common law courts, were mixed extensions of royal authority. The King's highest officers, like the Lord Chancellor, had overlapping legislative, executive, and judicial roles (for example, chancery and equity). The Privy Council and Exchequer had mixed executive and judicial functions, and many of these officers also doubled as members of the House of Lords.[93] The colonial assemblies similarly mixed

91. CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND 47-48, 71, 109, 119 (1910); *see also* J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 41-43 (1955); JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 220-21 (5th ed. 2019).

92. Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1382, 1469-70 (1998); *see also* GOUGH, *supra* note 91, at 41-43.

93. *See* BAKER, *supra* note 91, at 44-45, 102, 121-22; 1 BLACKSTONE, *supra* note 68, at *228.

legislative, executive, and judicial power.[94] In Virginia, the governor and his council sat together as the General Court, the colony's trial court.[95] Even today, the Massachusetts legislature is officially named "the General Court of Massachusetts."[96] The English and the colonies did not have a clear distinction between "executive offices" and other offices. The notion of relying on the deeply unseparated English administrative history to understand the Founders' executive branch is both feudal and futile.

C. Context: The Anti-unitary Founding

In addition to the Vesting Clause, the unitary theory relies on the Take Care Clause, which reads: "[The President] shall take Care that the Laws be *faithfully executed.*"[97] Reliance on this text is misplaced, however. Its primary historical function was to impose a duty, not to expand powers.[98] It would be incongruous to rely on a limitation on power in order to create an even greater power (from "faithful" limits to plenary power). The Constitution's double duty of faithful execution in the Take Care Clause[99] and the presidential oath[100] are themselves historical limits on presidential or executive powers,[101] similar to fiduciary duties.[102] Peter Strauss has focused on the limits of "faithful execution" to explain the President's role as a more remote "overseer," not a direct "decider."[103] Even as the Constitution "vests" powers in the President, it

94. WOOD, *supra* note 88, at 154-55; MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 14, 14-60 (Da Capo Press 1971) (1943); Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 261 (1967); Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 513-14 (1925); Desan, *supra* note 92, at 1495-1503.

95. W.H. Bryson, *The General Court of Virginia, 1619-1776*, *in* CENTRAL COURTS IN EARLY MODERN EUROPE AND THE AMERICAS 531, 532 (A.M. Godfrey & C.H. van Rhee eds., 2020).

96. MASS. CONST. pt. II, ch. I, § I, art. I; *id.* pt. II, ch. VI, art. VII.

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

98. Kent et al., *supra* note 6, at 2115.

99. U.S. CONST. art. II, § 3.

100. *Id.* art. II, § 1, cl. 8.

101. Jed Handelsman Shugerman & Ethan J. Leib, Fiduciary Constitutionalism, Corporate Defaults, and "Good Cause" Removal 3-12 (2021) (unpublished manuscript) (on file with author).

102. Kent et al., *supra* note 6, at 2119; Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-delegation*, 17 GEO. J.L. & PUB. POL'Y 463, 464-65, 467 (2019); *cf.* GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 4-5 (2017).

103. Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702-05 (2007). For a similar concept regarding the

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also sets faithfulness as a condition and places limits on those powers—which Congress could plausibly clarify.

Beyond the text, the Convention debates indicate no consensus around unqualified unilateral presidential powers. Prakash cites passages from the Convention raising concerns about Congress encroaching or usurping presidential power,[104] but regulations requiring something like "good faith" or "good cause" are far from usurping or swallowing up the presidency, especially when Article II's "faithful execution" clauses already doubly impose a duty of "good faith" in the text (while removal power is not textually specified, and appointment power is mixed between the President and the Senate). The Convention briefly touched on the tenure of department heads. Gouverneur Morris, seconded by Charles Pinckney, proposed an executive council made up of five department heads and the Chief Justice; the department heads would serve "during pleasure"—and yet the inclusion of the unremovable Chief Justice on the executive "Council of State" should raise doubts about Morris's notion of the separation of powers and of presidential removal powers.[105] The delegates collected a long slate of proposals, including this one, to be sorted out as the Convention began finalizing a draft. Morris's specific proposal for presidential tenure "during pleasure" seems not to have been debated,[106] and it did not reemerge from the Committee of Detail in late August, even though Morris himself was the committee's drafter and leading member. Twentieth-century scholar Charles Thach, who favored presidential power, viewed that omission as intentional, as Congress's "*pro tanto* . . . abandonment of the English scheme of executive organization."[107]

In the ensuing debates, Madison further clarified that he opposed implied presidential powers, and that he favored a limited approach by explicit enumeration, signified by his use of the phrase "*ex vi termini*"[108] (meaning from the force of the word or boundary). Madison explained that all executive powers had to be explicitly stated, and not implied. Article II would not "include the Rights of war & peace &c. but the powers [should] be confined

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parallelism of delegation and supervision, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994).

104. Prakash, *Regulating*, *supra* note 9, at 244 n.152.

105. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342-43 (Max Farrand ed., 1911) [hereinafter 2 Farrand].

106. *Id.* at 342-44. Farrand's three sources of these proceedings indicate that there was probably no debate and no vote on this proposal. *Id.* at 334-66.

107. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 125 (1922) (citing Morris's acknowledgement of its rejection at 2 Farrand, *supra* note 105, at 542).

108. 1 Farrand, *supra* note 39, at 70.

and defined—if large we shall have the Evils of elective Monarchies."[109] In the same debate, Madison warned against the dangers of allowing for implied powers, especially if the Convention chose a single executive officer. Instead, "it would be proper . . . to fix the extent of the Executive authority" and give "a definition of their extent [that] would assist the judgment in determining how far they might be safely entrusted to a single officer."[110] Madison echoed these statements in *Federalist No. 14* and *Federalist No. 45*.[111] Late in the Convention, as the final structures were being hammered out before handing the document off to the Committee of Style, Madison even voted for Mason's revised council proposal on September 7.[112]

In *The Federalist Papers*, Madison also explained that Congress could set conditions for limiting the power of removal. In *Federalist No. 39*, Madison wrote:

> The tenure by which the judges are to hold their places is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.[113]

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109. *Id.* In *Myers*, Justice McReynolds relied on the phrase *"ex vi termini"* to signify an interpretation of enumerated, as opposed to implied, powers. Myers v. United States, 272 U.S. 52, 205 (1926) (McReynolds, J., dissenting).

110. 1 Farrand, *supra* note 39, at 66-67.

111. THE FEDERALIST NO. 14 (James Madison), *supra* note 83, at 102 ("[I]t is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any."); THE FEDERALIST NO. 45 (James Madison), *supra* note 83, at 292 ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.").

112. 2 Farrand, *supra* note 105, at 542 (noting that "Mr. Madison was in favor" of Mason's executive-council proposal organized by regions of states); *see also* MCCONNELL, *supra* note 6, at 34-35, 34 n.49; THACH, *supra* note 107, at 82-83 (noting that Madison supported the New York model of a council of revision).

113. THE FEDERALIST NO. 39 (James Madison), *supra* note 83, at 242; *see also id.* at 241 (describing different kinds of tenure: "during pleasure for a limited period, or during good behavior"). Most official versions of *Federalist No. 39*, including those in the Library of Congress, Founders Online, and Yale's Avalon Project, include a comma in "during pleasure, for a limited period." *See, e.g.*, THE FEDERALIST NO. 39 (James Madison), *reprinted in Federalist Papers: Primary Documents in American History*, LIBR. CONG., https://perma.cc/3282-HAB7 (archived Oct. 2, 2022); THE FEDERALIST NO. 39 (James Madison), *reprinted in* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/276Z-Q47B (archived Oct. 2, 2022); THE FEDERALIST NO. 39 (James Madison), *reprinted in* AVALON PROJECT, https://perma.cc/72KJ-CCZ8 (archived Oct. 2, 2022). It seems that Clinton Rossiter may have chosen an idiosyncratic version, or misunderstood the

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The word "ministerial" may have a modern connotation as lesser or inferior roles that are rote, but this era associated the word with high offices and principal officers. For example, the full report of the legal arguments in *Marbury v. Madison* includes half a dozen uses of the phrase "ministerial officer" in referring to the Secretary of State.[114] The English commonly referred to their highest officers as "ministers." Madison was offering a dichotomy of judicial offices versus "ministerial" ones, likely comparing thus the highest officials of each branch. Madison was thus most likely including principal officers as "a subject of legal regulation" by Congress to set the conditions of tenure.

As a member of the First Congress, Madison continued to embrace congressional power over the terms of office. As Congress started debating the creation of the first departments, Madison said: "[I]t is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour, or during pleasure."[115] Madison also conceded that he, too, had initially favored the senatorial position[116]: Because the Senate had a constitutional role in consenting to appointments, it had a parallel role in consenting to removal. And in the debates about the Treasury in late June, he proposed good-behavior tenure for the comptroller.[117] Modern readers like Chief Justice Roberts assumed that when Madison referred to presidential removal, he must have meant tenure during pleasure, a sign that it is hard to read eighteenth-century debates separately from our twenty-first–century norms.[118] But in context, Madison and his colleagues understood that his proposal limited presidential removal power and would be "good-behavior" tenure or the equivalent. In short, Madison was consistently a congressionalist and rejected the "vesting" unitary thesis—except for a few days in mid-June 1789.

Hamilton, meanwhile, had been a senatorialist. In *Federalist No. 77*, Hamilton wrote: "The consent of [the Senate] would be necessary to displace as

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distinction between "during pleasure" and more protected tenure during a limited term of years, and erred by not including a comma.

114. 5 U.S. (1 Cranch) 137, 139, 141, 144, 149-50 (1803).

115. The Congressional Register (May 19, 1789), *supra* note 81, at 722, 729-30; *see also id.* at 734 (explaining Madison's view that Congress could grant offices during "a term of years," and that the only form of removal would be through impeachment, not by the President).

116. The Daily Advertiser (June 18, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 81, at 845, 846.

117. The Congressional Register (June 29, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 81, at 1080-82; *see also* Manners & Menand, *supra* note 46, at 21-23; Shugerman & Leib, *supra* note 101, at 13-20.

118. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2205 n.10 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 n.6 (2010).

well as to appoint."[119] This position was the most anti-unitary of the mainstream positions on removal. Hamilton had supported a strong executive, and yet he still thought the Senate could block the President from removing officers. Hamilton later announced that he had changed his mind,[120] but he was still no unitary theorist. In 1790, he established the Sinking Fund Commission, which was authorized to conduct open-market purchases of debt in the form of securities.[121] The Sinking Fund Commission was an early independent commission of sorts because it included the Chief Justice and the Vice President—both wielding executive power and both unremovable.

Many states had explicit separation-of-powers clauses: Maryland, North Carolina, and Virginia all included explicit provisions in 1776, followed by Massachusetts in 1780 and New Hampshire in 1792.[122] The 1776 Virginia Bill of Rights, for example, stated that "the legislative and executive powers of the State should be separate and distinct from the judicative."[123] The Framers, however, did not add a separation-of-powers provision to the 1787 Constitution. It seems possible that Madison and the Framers were so conscious of their structure of overlapping checks and balances (for example, appointment and Senate confirmation and veto, treaty, and war powers) that they deliberately omitted such a clause. Their structure separated but also mixed powers, and the absence of a separation-of-powers clause underscores its functionalism more than bright-line formalism. The First Congress proposed but rejected an explicit separation-of-powers amendment.[124] One reason was

119. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 83, at 459; *see also* Jeremy D. Bailey, Exchange, *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, 170-71 (2010). *But see* Seth Barrett Tillman, Exchange, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 149-54 (2010).

120. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 154-55 (2018).

121. Chabot, *supra* note 46, at 3-4.

122. MD. CONST. of 1776, art. VI, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1686 (Francis Newton Thorpe ed., Washington, 1909) [hereinafter Thorpe]; N.C. CONST. of 1776, art. IV, *reprinted in* 5 Thorpe, *supra*, at 2787; VA. CONST. of 1776, § 5, *reprinted in* 7 Thorpe, *supra*, at 3812; MASS. CONST. of 1780, pt. I, art. XXX, *reprinted in* 3 Thorpe, *supra*, at 1888; N.H. CONST. of 1792, pt. I, art. XXXVII, *reprinted in* 4 Thorpe, *supra*, at 2471. For further discussion, see Part IV below on early state constitutions.

123. VA. CONST. of 1776, § 5.

124. Madison Resolution (June 8, 1789), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 81, at 9, 11-12; House Resolution and Articles of Amendment (Aug. 24, 1789), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 81, at 35, 39; Additional Articles of Amendment (Sept. 8, 1789), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 81, at 40, 40-41; CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST

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that it would have been "subversive" of the Constitution, implicitly holding firm on its overall mixed structure.[125] A surprising detail is that some of the amendment's main supporters in the House nevertheless believed in congressional limits on presidential removal power—so apparently they did not think that even more explicit separation would yield presidential removal or unitary theory.[126]

In *The Federalist Papers*, the titles on Madison's main essays are consistent with a greater emphasis on overlapping checks and balances, rather than complete separation. The *New York Packet* published *Federalist No. 48* on February 1, 1788, with this title: "These Departments Should Not Be So Far Separated as to Have No Constitutional Control over Each Other."[127] For the branches to check each other, they cannot be strictly and completely separated. The President can veto, and Congress can regulate the executive branch with conditions on offices, as Madison explained in *Federalist No. 39*.[128] The title of *Federalist No. 51* was "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments."[129] The original titles emphasized checks and balances (reflecting the mixing of powers and functionalism) more than formal separation.

It is because the Constitution is silent on removal, and because the two clauses in Article II are so vague, that the unitary school of thought has to rely so heavily on "the Decision of 1789."[130] When one closely reads the First

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FEDERAL CONGRESS 33, 41 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

125. Gazette of the United States (Aug. 22, 1789) (quoting Representative Samuel Livermore), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 81, at 1295-96. Livermore had earlier argued that the Constitution required Senate approval to remove officers, *see* Shugerman, *supra* note 6 (manuscript at 60 tbl.D), so he likely meant that the separation-of-powers clause was "subversive" of the Constitution's appropriate mixing of powers.

126. For extended discussion of this idea, see Shugerman, *supra* note 6.

127. James Madison, *These Departments Should Not Be So Far Separated as to Have No Constitutional Control over Each Other*, N.Y. PACKET, Feb. 1, 1788, *reprinted in Federalist Papers: Primary Documents in American History*, LIBR. CONG., https://perma.cc/L7YR-X974 (archived June 18, 2022); *see also* THE FEDERALIST NO. 48 (James Madison), *supra* note 83, at 308.

128. THE FEDERALIST NO. 39 (James Madison), *supra* note 83, at 242.

129. James Madison, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, N.Y. PACKET, Feb. 8, 1788, *reprinted in Federalist Papers: Primary Documents in American History*, LIBR. CONG., https://perma.cc/H6YV-JB37 (archived June 18, 2022); *see also* THE FEDERALIST NO. 51 (James Madison), *supra* note 83, at 320.

130. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." (citing Myers v.

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Congress's debates and votes, however, only about one-third of the House supported the "presidentialist" view: that Article II implied that the President had a constitutionally fixed removal power.[131] Madison's "decision" gambit was actually a retreat to strategic ambiguity, a deliberately confusing switch from an explicit grant of power to a vague contingency clause because the "presidentialists" did not have sufficient votes in the House and Senate. A sizable majority of the House opposed the unitary interpretation of "vesting," and in many different votes and debates, the First Congress actually rejected the unitary assumptions, reflecting that the members of Congress did not think the Executive Vesting Clause implied presidential removal.[132]

II. The Text: "All," "The," "Exclusive," "Sole," and "Indefeasible"

Before we examine the historical context and compare the Constitution to colonial charters, early state constitutions, and other Anglo-American sources, let us start with the constitutional text, its own internal usage, and how it signified exclusivity. A close reading of the 1787 Constitution clarifies how it communicated exclusivity, and how it did not. The textual canon of *expressio unius est exclusio alterius* (expression of the one is exclusion of the other) is helpful here, even if such textualist canons should be taken with a grain of salt when applied to Constitution—which, as Chief Justice Marshall wisely noted, does not have "the prolixity of a legal code."[133] We must remember that it is a constitution that we are expounding—but as long as it is a written constitution with only hints about the separation of powers, these words matter, and we should attribute deliberateness to the choice of some words rather than others. We should also attribute significance to conspicuous absences of words.

This Part focuses on the use and absences of phrases used instead of "vesting" as a helpful starting point. The following Parts focus on the use of the word "vest" and how it, by contrast, did not signify exclusivity or completeness.

A. "All"

The word "all" appears in Article I's vesting clause ("All legislative Powers herein granted shall be vested in a Congress"), but not in Article II's vesting

United States, 272 U.S. 52, 114 (1926))); *see also* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2198 (2020) (quoting this passage from *Free Enterprise*).

131. Shugerman, *supra* note 6 (manuscript at 60 tbl.D).

132. *Id.*

133. SCALIA, *supra* note 37, at 25; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07 (1819).

clause, raising a textual question about executive exclusivity.[134] Article III's vesting clause does not include the word "all," but the word is used repeatedly in Article III, Section 2 to convey exclusive jurisdiction.[135] The drafters used "all" elsewhere to express exclusivity, expansiveness, and completeness: for example, in Article II's "all vacancies," Article I's decree that "[t]he Senate shall have the sole Power to try *all* Impeachments," and the 1787 drafting's description of Congress's power "[t]o exercise *exclusive* Legislation in *all* Cases whatsoever, over such [Capitol] District," as well as its use of "all Privileges and Immunities" and "all treaties." The 1787 draft contains twenty-four other examples of such language; I discuss these clauses further below.[136]

In fact, the word "all" is in the clause that would be the basis for Congress expanding or regulating removal powers, the Necessary and Proper Clause: "[t]o 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 in any Department or Officer thereof."[137] If unitarians find an implied "all" in the Executive Vesting Clause to establish expansive presidential power, how do they account for the single explicit use for the Legislative Vesting Clause and the double "all" for Necessary and Proper legislation? It may seem silly to rely too much on this counting of such small words, but at the risk of mixing constitutional metaphors of "Article II sword and Article I purse": Live by the sword, die by the sword; rely on the missing "herein granted," live with the missing "all."

Some have asked if the "all" in the Legislative Vesting Clause is simply a function of the "herein granted" reference to a list in Article I, rather than a more meaningful distinction.[138] The word "all" reinforces the formalist separation of enumerated legislative powers: Article I limits Congress to enumerated powers, but Congress also has "all" of those powers. Textually, this approach makes sense. Some unitary theorists argue, based on a similar textual logic, that the lack of "herein granted" in Article II opens a door to more

134. *See* U.S. CONST. art. I, § 1; THACH, *supra* note 107, at 138; Calabresi & Prakash, *supra* note 6, at 575; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 598 (1984); Calabresi & Rhodes, *supra* note 6, at 1185, 1193 n.204. For more discussion of "all," see Amar, *supra* note 22, at 762.

135. U.S. CONST. art. III, § 2, cls. 1-2; *see also* Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787-1792*, 89 FORDHAM L. REV. 1895, 1906 (2021) (comparing the grant of exclusive jurisdiction in Article III to Article IX of the Articles of Confederation).

136. *See infra* Part II.C (discussing other words communicating exclusivity); *infra* Appendix A (listing all examples of the word "all").

137. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

138. *See* Jenn Mascott (@jennmascott), TWITTER (Sept. 12, 2021, 2:23 PM), https://perma.cc/4JJM-U247 (archived June 18, 2022) (commenting on an earlier draft of this Article).

implied powers that were not enumerated or listed.[139] Removal could be one such implied power. This argument has textual merit, even if it is historically contestable as a matter of original public meaning.

The problem here is a second assumption: that all such implied powers must be complete and indefeasible. It is difficult enough to find clear evidence that the Founders agreed that even the explicitly enumerated Article II powers were beyond any congressional conditions or regulations. Perhaps such a rule for powers like the pardon or the veto is settled as a matter of liquidation or long-standing practice.[140] But it is far from obvious that unenumerated, unwritten powers would also be indefeasible. One might ask why, if the Framers wanted to make such powers so fixed and inalterable, did they not put them in writing? Nevertheless, some (but not all) unitary theorists assume a default rule: Unless the Constitution explicitly shares a traditionally executive power between Congress and the President (such as the treaty and war or appointment powers), implied executive powers are entirely the President's.[141]

Other scholars have already suggested that this unitary assumption does not fit Article II, given that it also lists traditional powers that were solely presidential (the pardon power, the Opinions Clause, and the Ambassadorial Clause).[142] If the Constitution sometimes lists mixed executive powers and sometimes lists presidential executive powers, there is no implied default rule about exclusivity. Article III's Judicial Vesting Clause is textually the same as Article's II and does not include anything like a "herein granted" signal of enumeration. Nevertheless, as Curtis Bradley and Martin Flaherty note, the courts and scholars interpret Article III's list as exclusive.[143]

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139. *See* MCCONNELL, *supra* note 6, at 8 (stating that the absence of "herein granted" "calls out for explanation"); *id.* at 84-85 (suggesting that the absence of "herein granted" implies unenumerated executive powers); *id.* at 239 (applying the canon of *expressio unius* to interpret Article II's absence of "herein granted" as an intended absence of "limiting language"); Calabresi & Rhodes, *supra* note 6, at 1175-77.

140. On liquidation, the concept of ambiguous or indeterminate constitutional provisions getting expounded, settled, constructed, or worked out by post-Ratification practice, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 6-8 (2019); on the indefeasibility of the pardon power, see Leib & Shugerman, *supra* note 102, at 469-70.

141. On indefeasibility, see, for example, Prakash, *Regulating*, *supra* note 9, at 225, 228, 257. For a contrasting view not assuming indefeasibility from the Executive Vesting Clause, but instead from powers implied by the Take Care Clause, see MCCONNELL, *supra* note 6, at 258-62. McConnell's shift relies on a claim that the Take Care Clause came from the royal prerogative or has the "hallmarks" of royal prerogative. *Id.* at 68, 165-66. We show that it did not. Kent et al., *supra* note 6, at 2134-36, 2188-90.

142. Bradley & Flaherty, *supra* note 46, at 556.

143. *See id.* at 557 ("As Alexander Hamilton notes in *Federalist No. 80*, after he recites Article III's list of cases and controversies, 'This constitutes the entire mass of the judicial authority of the Union.' If Articles II and III are to be treated the same, this may suggest that the powers referred to in Article II should be construed as exhaustive, not illustrative, of the President's authority." (quoting THE FEDERALIST NO. 80 (Alexander

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Moreover, the unitary theory does not account for the absence of the word "all" in Article II's vesting clause. It is not clear why "all" would be needed for legislative powers, but missing (yet implied) for executive powers.[144] Some informally wonder if the "all" in Article I is somehow triggered by the "herein granted," and is not necessary but implied by Article II's vesting clause. It is unclear why enumeration would necessitate a clarification about completeness, but the lack of enumeration would not. Enumeration and exclusivity are separate issues. Enumerated powers clearly can be shared (treaty, war, and appointment power) or exclusive (pardon power).

Michael McConnell concedes that the "all" is meaningful and reflects a more limited executive, but only in ways already reflected by the text: Article II does not have an "all" because the Constitution granted some traditionally executive powers to Congress (such as treaty, war, appointment, coining, letters of marque and reprisal, etc.).[145] Meanwhile, McConnell explains, the legislative powers granted to the President are only partial; neither proposing legislation nor the veto "amount to lawmaking."[146] To his credit, McConnell does not rely on the Executive Vesting Clause for removal power and does not claim it grants indefeasible powers, but his reliance on the Take Care Clause does not address our historical evidence to the contrary in other writings.[147]

Still, McConnell's interpretation of the "all" leaves open a number of questions or unresolved problems. First, it does not address the absence of "all" in Article III's Judicial Vesting Clause.[148] Second, if Congress must present a bill to the President for approval, the President has a role in "lawmaking." Other than "Bills for raising Revenue" having to originate in the House,[149] the Constitution leaves open the legislative drafting process, and thus, the textual

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Hamilton), *supra* note 83, at 479)); *id.* at 578 (responding to Calabresi & Rhodes, *supra* note 6, at 1176); Calabresi, *supra* note 7, at 1395, 1398; *see also* Kansas v. Colorado, 206 U.S. 46, 81-82 (1907). For further arguments against the unitary interpretation, see A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1352-53 (1994).

144. *See, e.g.*, Calabresi & Rhodes, *supra* note 6, at 1185, 1193 n.204.

145. MCCONNELL, *supra* note 6, at 108. The scholar who first offered the interpretation that the Framers were distributing Blackstone's set of prerogative royal powers was William Crosskey. CROSSKEY, *supra* note 53, at 415-43; *see also* GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 21 (1997); MCCONNELL, *supra* note 6, at 68.

146. MCCONNELL, *supra* note 6, at 108.

147. *See id.* at 166, 262 (relying on the Take Care Clause for presidential removal). *But see* Kent et al., *supra* note 6 (depicting the history of the "faithful execution" language in the Take Care clause as duty imposing, not power granting, and suggesting that it would be incongruous for such language to create a power greater than the duty).

148. U.S. CONST. art. III, § 1.

149. *Id.* art. I, § 7, cl. 1.

process of "legislative power" is the power of members voting and bicameral passage. Presidential approval or veto is a parallel lawmaking power.[150] Third, the traditionally executive powers granted to Congress are also incomplete: Congress shares power over appointment, war, and treaty with the President, and to the extent that Congress has some enumerated powers that had been royal prerogatives, the President shares power with Congress in those domains through approval and veto power. Thus, the "all" in Article I is likely not a reference to the enumeration of complete powers, and the absence of "all" in Article II is not likely a reference to the interbranch distribution of executive power. Perhaps "all power vested" reflected the degree of vestedness and delegation, whereas a lack of "all" signified less vestedness, permitting appropriate legislative conditions and defeasibility.

This Article's study of eighteenth-century documents indicates that "all" and enumeration signals had separate usages and independent meaning. State constitutions often used the word "all" in terms of vesting without any enumeration terminology,[151] and had enumeration language without adding "all." The South Carolina Constitution of 1778 had the following vesting clause: "That the executive authority be vested in the governor and commander-in-chief, in manner herein mentioned."[152] The use of "all" and "herein granted" were understandably correlated with Founding-era principles of separation of powers and limited powers, which were related but separate. The "all" had a recognizable and separate function based in eighteenth-century notions of popular sovereignty. In republican and Whig theory, it was important for the popularly elected legislature to be the source of all lawmaking.[153]

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150. *Id.* art. I, § 7, cl. 2.

151. *Infra* Part IV; *see, e.g.*, VA. CONST. of 1776, § 2 ("That all power is vested in, and consequently derived from, the people . . . ."), *reprinted in* 7 Thorpe, *supra* note 122, at 3812; MASS. CONST. of 1780, pt. II, ch. II, § 2, art. III ("[T]he Lieutenant-Governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the governor . . . ."), *reprinted in* 3 Thorpe, *supra* note 122, at 1888; *id.* pt. II, ch. V, § 1, art. III ("That the Governor, Lieutenant-Governor, Council and Senate of this Commonwealth, are . . . vested with all the powers and authority belonging . . . ."); *see also* U.S. CONST. art. I, § 8, cl. 18.

152. S.C. CONST. of 1778, art. XI, *reprinted in* 6 Thorpe, *supra* note 122, at 3248; *see also id.* arts. II, XXIII (vesting legislative authority in a general assembly and vesting the impeachment power in a house of representatives).

153. *See* WOOD, *supra* note 88, at 162-64, 172; *see also* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 101-06 (1988) (discussing the development of popular sovereignty in Whig political thought); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 200-02 (2017). On Blackstone's legislative supremacy, see Paul D. Halliday, *Blackstone's King*, *in* RE-INTERPRETING BLACKSTONE'S *COMMENTARIES*: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS 169, 179-81 (Wilfrid Prest ed., 2014); 1 BLACKSTONE, *supra* note 68, at *49 ("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

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The "all" in Congress's Vesting Clause can be attributed to a need for a central, complete, and supreme source of federal legislation, similar to the role of Article VI's Supremacy Clause.[154] "All" makes sense in Article I for nationally centralized federal lawmaking. But enforcement is a different story. Univocal or exclusively centralized execution was impractical in the early years, and it is unclear when executive departments would develop enough to be the singular source of enforcement, especially over the vast frontier.

Another kind of semantic drift—or perhaps just a modern assumption—is that "execution" must imply centralization and exclusivity. But in the pre-bureaucratic world of the eighteenth century, before the transportation and communication revolutions of the nineteenth century, execution had to be remote and decentralized. Much of the prosecution in England and America was by private litigants, not by public prosecutors, up through the nineteenth century, a fact that surprises most modern readers.[155] Many Founders foresaw that federal law would have to be executed and enforced by far-flung officials and by state governments. Article III is so open-ended because some Convention delegates thought lower federal courts might not be necessary.[156] State courts could enforce federal law, while the Supreme Court could be a sole federal forum for final appeals.[157]

While the Founders wanted more exclusivity for federal legislative power, they seem to have foreseen the necessity of administrative flexibility and

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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 constitution is at an end."); C.H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 63-64 (1939); and FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 81, 209-12 (1985) (citing 1 BLACKSTONE, *supra* note 68, at *48-52, *266-68).

154. *See* U.S. CONST. art. VI, § 2.

155. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 129-30 (2014); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 93 (Thomas A. Green ed., 1989); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995).

156. *See* 1 Farrand, *supra* note 39, at 124-25, 128; Lee, *supra* note 135, at 1907-08.

157. Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 967 (1947); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 70 (1924); 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 (1976).

coordinated federalism when it came to the execution of national law.[158] The use of "all" in Article I legislative vesting, but not in Article II executive vesting, reflects that difference. Semantic drift, however, leads us to assume that "execution" implies centralization, rather than federalism and flexibility. It is a puzzle that conservative originalists who otherwise see small government and federalism in the Founding are, in the Article II debate, so committed to seeing the Framers as centralizing power and locking in the exclusivity that became a path toward a large federal bureaucracy. Was it clear that the Framers wanted a complete, exclusive, and massive federal bureaucracy, either immediately or over the long term, rather than sharing enforcement with states and federal judges?

As noted above, at the Convention, Madison opposed expansive implied powers for the President, emphasizing only textually explicit powers, "*ex vi termini*," and explained that presidential powers should be "confined and defined—if large we shall have the Evils of elective Monarchies."[159] Thus, because removal was not "defined" or explicit, it should not be inferred from Article II.

Remarkably, when this "vesting" debate switches from Article II removal power to Article I nondelegation doctrine, conservative formalists appear to emphasize Article I's explicit use of the word "all." Justice Thomas added emphasis to the "all" to underscore nondelegation in his *Whitman v. American Trucking Ass'ns* concurrence: "[T]he Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.' I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power."[160] In his *Gundy v. United States* dissent and his *West Virginia v. EPA* concurrence, Justice Gorsuch also drew attention to the significance of "all" in Article I as a textual basis for reviving the nondelegation doctrine.[161]

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158. Shugerman, *supra* note 155, at 128-32; 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: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 83 (2012).

159. 1 Farrand, *supra* note 39, at 70.

160. 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (citation omitted) (quoting U.S. CONST. art. I, § 1).

161. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies."); West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) ("In Article

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Justices Thomas and Gorsuch focused on the "all" in Article I and its omission from Articles II and III (notice that Justice Gorsuch used "all" only once). As the next Part illustrates, Justice Gorsuch may be onto something as a matter of original usage circa 1787. "Vesting" needed additional qualifiers to clarify the scope of the power it was delegating, and the word "all" may have served this purpose. If formalists/originalists lean into the "all" for expanding the nondelegation doctrine, however, it seems that absence of "all" from Article II should be meaningful in the scope of executive power.

The bottom line is that the drafters frequently used the word "all": thirty times in the Constitution—including in the Legislative Vesting Clause, in other clauses that already used the word "vest," and seven times elsewhere in Article II. But the drafters distinctly did not use the word "all" in the Executive Vesting Clause. The absence of the word "all" at the beginning of Article II is conspicuous (*est exclusio alterius*)—and yet the unitarians insist on inserting it anyway.[162]

B. "The"

Some unitary arguments turn to the word "the" as a definite article. St. George Tucker, an influential legal commentator, suggested such weight in his lecture notes in 1791:

> [T]he word *the*, used in defining the powers of the executive, and of the judiciary, is with these [enumerated] exceptions, co-extensive in its signification with the word *all*: for all the powers granted by the constitution are either legislative, and executive, or judicial; to keep them for ever separate and distinct, except in the cases positively enumerated, has been uniformly the policy, and constitutes one of the fundamental principles of the American governments.[163]

Unitary scholars cited this passage in a brief in *Seila Law* for its interpretation of the word "the" and for "exclusive" separation—and then, in the very next sentence, building on these steps to call *Humphrey's* "indefensible."[164] Of course, Tucker had been describing the separation of powers, but he did not use the words "exclusive" or "indefeasible" in this section (though he did elsewhere with respect to the people's rights),[165] and it seems as if Tucker did not share

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I, 'the People' vested '[a]ll' federal 'legislative powers . . . in Congress.'" (alterations in original) (first quoting U.S. CONST. pmbl.; and then quoting *id.* art. I, § 1)).

162. *See, e.g.*, Calabresi & Rhodes, *supra* note 6, at 1165, 1173, 1176; *see also* Calabresi & Prakash, *supra* note 6, at 568-69.

163. ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 149 (Clyde N. Wilson ed., 1999).

164. Amicus Curiae Brief of the New Civil Liberties Alliance in Support of Petitioner at 9, Seila L., LLC v. CFPB, 140 S. Ct. 2183 (2019) (No. 19-7), 2019 WL 6910307.

165. *See, e.g.*, TUCKER, *supra* note 163, at 43 ("[W]hen any government shall be found inadequate, or contrary, to the purposes of its institution, a majority of the community

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such a broad, strict, and formal application. In this passage on the judiciary and due process, Tucker was more focused on the basics of separation, contrasting the American Constitution with England's mixed government and Parliament's judicial role. In the same section, just three pages later, Tucker wrote: "The president of the United States may be considered *sub modo* [subject to a condition or qualification], as one of the constituent parts of congress," because of presentment in the legislative process.[166] Even a commentator who thought the word "the" was meaningful still had a mixed and even a fuzzy description of the President's role and the separation of powers.

Unitary theorists sometimes italicize the word "the" to emphasize that the word contributes to a legislative indefeasibility rule.[167] This is a lot of interpretive weight to put on such a common word in the Constitution. It is not clear from other eighteenth-century sources or the Constitution itself, however, that the word "the," used in such constructions, generally signified such a formal and exclusive meaning. It is not how Blackstone used the word "the." In his *Commentaries*, Blackstone wrote: "The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen . . . ."[168] Blackstone was not using the words "the" and "vested" to refer to exclusivity and indefeasibility of executive power. First, some officers held executive powers and could not be removed if they held their offices for a term of years. Thus, they were even more protected from royal direction and removal than modern independent agencies. And Blackstone did not mean for "the" or "vest" to signify indefeasibility, because Parliament either eliminated or limited the royal prerogative powers of pardon, suspension of laws, prorogue, and convening of Parliament following the Glorious Revolution of 1688-1689.[169]

In fact, a reader skimming the Constitution with an eye on the word "the" would likely make a quick observation: The Framers conspicuously overused the word "the," but for no apparent substantive purpose. More likely, the Framers peppered the Constitution with an abundance of "the" as part of a formalist legal style, what I might label a "high constitutional style." When

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hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.").

166. *Id.* at 152.

167. Wurman, *supra* note 24, at 145 ("But '*the* executive power' to carry these laws into execution, and all that this executive power entails—appointments, removals, and, as we shall see presently, proclamations (executive orders)—is vested in the president. Congress cannot reduce this power . . . ." (quoting U.S. CONST. art. II, § 1)).

168. 1 BLACKSTONE, *supra* note 68, at *190.

169. *See* Shugerman, *supra* note 25, at 144 (citing English statutes 1 W. & M. c. 36 (1688), which curtailed the prerogative powers of suspending, dispensing, and spending; 6 & 7 W. & M. c. 2 (1694), which curtailed the Crown's power to call and dissolve or prorogue Parliament; and 12 & 13 Will. 3, c. 2 (1700), which curtailed the Crown's pardon power).

such arguments were raised about recess appointments and the word "the" in "the recess" in *NLRB v. Noel Canning*, the Supreme Court majority cautioned against reading "the" in such a formal way, and encouraged a more "generic[]" reading.[170] Even Justice Scalia's concurrence avoided relying on the word "the,"[171] and he in fact defended the lower court against the criticism that it had received.[172] Scalia instead emphasized the usage of the full phrase "the recess" and compared "recess" and "session" in Founding-era documents and debates.[173] None of Justices suggested that the word "the" had special textual significance. Instead, context matters more.

The Constitution often uses the word "the" in nonexclusive ways, and many people can share "the right" or "the power" to do something. The word "the" expresses a kind of formality in style, rather than completeness or exclusivity. For example, the First Amendment reads: "[T]he free exercise [of religion]; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble . . . ."[174] If a text recognizes that Americans have "the free exercise" or "the freedom of speech," the text is not saying other peoples do not, nor that such rights are conceptually unified or singular.

When one sits down and reads the Constitution for the word "the," the word suddenly appears everywhere, even when there are simpler ways to make the same reference without it. For example, when the Constitution refers to the qualification "attained to the Age of thirty Years,"[175] it could have instead stated "attained thirty years of age." The text refers repeatedly to "the Militia,"[176] though that militia was amorphous, decentralized, temporary, and protean, rather than a standing army and an established institution. The Constitution also refers to "*the* Absence of the Vice President,"[177] though it is any unplanned absence, as well as "Breach of *the* Peace,"[178] "Attendance at *the* Session,"[179] "To promote *the* Progress of Science and useful Arts,"[180] and

170. 573 U.S. 513, 527-28 (2014).

171. *See id.* at 569-615 (Scalia, J., concurring).

172. *Id.* at 587 n.6 ("The majority dismisses Knox's opinion as overly formalistic because it 'relied heavily upon the use of the word "the" in the phrase "the Recess."' . . . It did not. As the passage quoted above makes clear, Knox was relying on the common understanding of what 'the Recess' meant in the context of marking out legislative time." (quoting *id.* at 530 (majority opinion))).

173. *See id.* at 576-78.

174. U.S. CONST. amend. I.

175. U.S. CONST. art. I, § 3, cl. 3.

176. U.S. CONST. art. I, § 8, cls. 15-16; *id.* art. II, § 2, cl. 1; *id.* amend. V.

177. *Id.* art I, § 3, cl. 5 (emphasis added).

178. *Id.* art I, § 6, cl. 1 (emphasis added).

179. *Id.* (emphasis added).

180. *Id.* art I, § 8, cl. 8 (emphasis added).

"[U]nless . . . *the* public Safety may require it."[181] All of these are unnecessary formalisms. In the Republican Guarantee Clause, the federal government "shall protect" against invasion "on Application of *the* Legislature, or of *the* Executive (when the Legislature cannot be convened) against domestic Violence."[182] Does this mean only a single unitary or complete state executive? "No state shall . . . pass any . . . Law impairing *the* Obligation of Contracts . . . ."[183] No one thinks this means that a state can pass narrower bills that impair some obligations of some contracts, as long as the bills do not impair all obligations of all contracts.

The Framers' "high constitutional style" imbued each noun with a kind of formal and legalistic significance, granting apparent constitutional gravitas through the use of "the." But even if one imagines that the word "the" conveys a formalism and significance, it is quite a stretch to suggest that such a common word could be the basis of such a robust constitutional rule. While "the" may make a noun or paragraph sound more important, it does not necessarily make it exclusive or absolute.

If one suggests that the word "the" creates an implied completeness, the problem is that Article II itself does not follow such a meaning: It divides up the traditional executive powers of appointment, war, and treaty. Saikrishna Prakash conceded this nonexclusivity problem: "[T]he Constitution grants some eighteenth-century executive powers—such as the powers over war and foreign commerce—to Congress."[184] Peter Shane observed:

> At the very least, this implies that the Executive Power Vesting Clause needs to be read as follows: "Except as otherwise provided in this Constitution, the executive power shall be vested in a President of the United States of America." The implicit Exceptions Clause might itself be regarded as a repudiation of the hard version of unitary executive theory.[185]

This Exceptions Clause approach is a problem for those trying to shoehorn broad implications of completeness and exclusivity into either the word "the" or the word "vest," because the unitary shoe doesn't fit the overall structure of Article II. The Executive Vesting Clause does not really mean "complete," the unitary theorists concede; it means "complete, but with many clause-based exceptions." Once one opens the door to exceptions in other

181. *Id.* art I, § 9, cl. 2 (emphasis added).

182. *Id.* art IV, § 4 (emphasis added).

183. *Id.* art I, § 10, cl. 1 (emphasis added).

184. PRAKASH, *supra* note 53, at 83.

185. Shane, *supra* note 38, at 360-61. Shane noted from colloquial usage: "Yet even a moment's reflection reminds us that 'the' is often used in a manner that does not suggest singularity or exclusivity." *Id.* at 361. I expand on Shane's observations about ordinary usage of the word "the" to show that the word was often used in the Constitution itself without a connotation of singularity or exclusivity, but often as a stylistic tic.

clauses—like Senate advice and consent, treaty, and war powers—how does one close the door on the Necessary and Proper Clause or the "faithful execution" limits on presidential "at-pleasure" powers?

C. "Alone," "Exclusive," and "Sole"

If the drafters had intended to communicate exclusivity, they could have done so far more clearly with the words "alone," "sole," and even "exclusive" itself. In fact, the drafters of the Constitution did use the word "alone" in a vesting clause in Article II, but distinctly not in the Executive Vesting Clause: "[T]he Congress may by Law *vest* the Appointment of such inferior Officers, as they think proper, in the President *alone*, in the Courts of Law, or in the Heads of Departments."[186] If use of the word "vest" (or "the") already implied the complete and exclusive granting of a power, then why would the drafters of Article II have added "alone" to clarify?[187]

The drafters also added the word "*the*" to "Appointment of such inferior Officers," even though the context here is plainly the diversity of appointment choices for a wide range of inferior officers. If there were ever a place to avoid using "the" if it was thought to imply uniformity or completeness, this clause would have been it. And yet the Article II drafters threw "the" in anyway, likely in accordance with a formalist high constitutional style.

In the Articles of Confederation, the Framers used the phrase "sole and exclusive" when delegating such powers: "The united states, in congress assembled, shall have the *sole and exclusive right and power* of determining on peace and war . . . ."[188] And: "The united states, in congress assembled, shall also have the *sole and exclusive right and power* of regulating the alloy and value of coin struck by their own authority . . . ."[189] When the Articles of Confederation were foundering, a commission drafted an invitation to revise the Constitution in 1787, using the phrase "special and sole purpose" of "investigation" and "digesting a plan."[190]

Blake Emerson also noted the word "sole" in the 1787 Constitution: "The House of Representatives shall chuse their Speaker and other Officers; and shall have the *sole* Power of Impeachment. . . . The Senate shall have the *sole*

186. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

187. For Justice Gorsuch's similar textual analysis of the absence of "solely," see *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

188. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1 (emphasis added).

189. *Id.* art. IX, para. 4 (emphasis added).

190. Proceedings of Commissioners to Remedy Defects of the Federal Government (Sept. 11, 1786), *reprinted in* AVALON PROJECT, https://perma.cc/RFQ6-4XLG (archived June 18, 2022).

Power to try all Impeachments."[191] Emerson noted, "It seems that when the drafters wanted to make a grant of power exclusive, they knew how to say so."[192] I would add that the Convention's "Letter of Transmittal," dated September 17, 1787—the day the Constitution was signed and the basis for observing "Constitution Day" each year on September 17—also used the word "sole": "[T]he Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President . . . ."[193] Notably, in his definitive textualist decision in *Bostock v. Clayton County*, Justice Gorsuch made a similar kind of observation about the missing word "solely." In his analysis of "because of sex" in the Civil Rights Act, he wrote: "No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law."[194] Similarly, the drafters of Article II could have taken a more explicit approach to exclusivity. As they had in other clauses, they could have added "solely" (or "all" or "alone") to the Vesting Clause to indicate completeness.

Then there is the word "exclusive." Article I, Section 8 empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries."[195] Another example that the drafters knew when to use the word "exclusive" when they meant it: "To exercise exclusive Legislation in all Cases whatsoever, over such District . . . the Seat of the Government of the United States, and to exercise like Authority over all Places . . . ."[196]

At various points, both the drafters of the Articles of Confederation and the Philadelphia delegates wanted to clarify exclusivity. This Subpart has shown that they chose words like "alone," "sole," and "exclusive" a total of six times—but not for the Executive Vesting Clause.

D. The Absence of "Indefeasible"

Unitary theorists and separation-of-powers formalists repeatedly use the word "indefeasible" as shorthand for immunity from legislative limits. For example, Michael McConnell's recent book posits that Article II's executive

191. U.S. CONST. art I, § 2, cl. 5 (emphasis added); *id.* art I, § 3, cl. 6 (emphasis added).

192. Blake Emerson (@BlakeProf), TWITTER (Jan. 8, 2021, 4:38 PM), https://perma.cc/S2ZY-3U8K (archived June 27, 2022).

193. Letter from George Washington to the President of Cong., *supra* note 40.

194. Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020).

195. U.S. CONST. art I, § 8, cl. 8 (emphasis added).

196. *Id.* art I, § 8, cl. 17.

prerogatives are "are impervious to statutory abridgement *even if a particular president were to sign legislation purporting to give them up or cease to exercise them.* They are indefeasible."[197] Prakash claimed: "As everyone understood at the founding, the Constitution indefeasibly vested the power to execute the laws in the president."[198]

If "everyone understood at the founding" that something was "indefeasibly vested," and if the Founders often used the word "indefeasible" in other contexts, one might expect them to have used the word in the claimed context. The English used the word for the King.[199] Curiously, the American Founders did use the word "indefeasibility"—but in reference to individual rights, not presidential power. It appears that they did not use the word in reference to presidential powers in the Convention, Ratification, and the First Congress's debates. The Framers seem to have associated the word with individual rights, private property, and English kings, but not presidents and official powers in a republic.

The 1776 Virginia Constitution's Bill of Rights proclaimed: "[W]hen any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it . . . ."[200] Madison had participated in drafting this bill of rights, and in the First Congress, he drew on the same language for his draft of the First Amendment: "That the people have an *indubitable, unalienable,* and *indefeasible* right to reform or change their government . . . ."[201] Later in the debates over constitutional amendments, Roger Sherman discussed the people's "indefeasible" rights in reference to their "natural and inherent privilege[s]."[202] The Founding-era leaders seem to have used "indefeasibility" with reference to natural rights of "the people," who were the source of official powers. The people's rights are antecedent and foundational, so it seems incongruous that such natural-rights theorists would think of officials as having "inalienable" or "indefeasible" powers, as reflected in the Declaration of Independence ("Governments are instituted among Men, deriving their just

197. MCCONNELL, *supra* note 6, at 31.

198. Prakash, *Essential, supra* note 9, at 817; *see also id.* at 789 (concluding that "the president's executive power was not understood to be defeasible; the Constitution would indefeasibly vest it with him"); Prakash, *Regulating, supra* note 9, at 225, 228, 257 (making further claims about the indefeasibility of presidential powers).

199. *See* Henry Home, *Appendix Touching the Hereditary and Indefeasible Right of Kings, in* ESSAYS UPON SEVERAL SUBJECTS CONCERNING BRITISH ANTIQUITIES 192, 192 (Edinburgh, A. Kincaid 1747).

200. VA. CONST. of 1776, § 3.

201. Madison Resolution (June 8, 1789), *supra* note 124, at 9-10 (emphasis added).

202. The Congressional Register (Aug. 14, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 81, at 1240, 1242.

powers from the consent of the governed") and the Preamble of the Constitution ("We the People . . . .").[203] The Lockean and republican theory of government would be more consistent with this distinction: The people have indefeasible and inalienable rights; officials' powers are conditional upon the people; and "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government."[204]

This pattern emerged a year earlier in the Ratification debates, when state conventions used stronger vesting language when proposing such amendments to protect popular rights. Four state ratifying conventions (Virginia, New York, North Carolina, and Rhode Island) modified "vesting" with the word "all" with almost identical versions of the following resolution: "That *all* power is naturally vested in and consequently derived from the People."[205] When Madison used the term "indefeasible" for the people's rights in a republic, he seems to have been translating or channeling these state conventions and their emphasis on the phrase "*all* power is naturally vested." This stronger form of "vesting" had been used in Article I's legislative vesting, but not in Article II's executive vesting. Perhaps "all vested" might connote indefeasibility, whereas merely "vested" did not.

It is not clear why indefeasibility is implied by a structure of separation of powers, because the Constitution uses a structure of checks and balances through multiple overlapping powers. Overlapping powers are key to the constitutional machinery of Madison, Montesquieu, and the English.[206] Chief Justice Rehnquist, writing for a 7–1 majority in *Morrison v. Olson*, took a more functional approach to the separation of powers, acknowledging that some conditions, like requiring "good cause" for removing an independent counsel,

203. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. pmbl.

204. THE DECLARATION OF INDEPENDENCE para. 2; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 119-22 (1998). *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (London, A. Millar et al. 1689).

205. Amendments Proposed by the Virginia Convention (June 27, 1788) (emphasis added), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 81, at 15, 15; *see* Amendments Proposed by the New York Convention (July 26, 1788), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 81, at 12, 19; Ratification of the Constitution by the State of North Carolina (Nov. 21, 1789), *reprinted in* AVALON PROJECT, https://perma.cc/M5MD-4BHH (archived June 18, 2022); Ratification of the Constitution by the State of Rhode Island (May 29, 1790), *reprinted in* AVALON PROJECT, https://perma.cc/LB3R-MSMA (archived June 18, 2022).

206. MCDONALD, *supra* note 153, at 80-81, 209-12, 240-44; WOOD, *supra* note 88, at 152-55, 452-53.

did not "impermissibly burden[] the President's power to control or supervise."[207]

One unitary scholar (Prakash) argues that, because some Convention delegates worried about legislative "encroachment," their solution must have been to prohibit the "legislative regulation" of presidential powers (that is, indefeasibility): "[R]ather than extolling the possible benefits of legislative regulation of the executive, delegates worried about encroachment. Had legislative regulation somehow been authorized, there would have been no opportunity for encroachment."[208] For this proposition, Prakash cites remarks from three delegates: Madison, Gouverneur Morris, and James Wilson.[209] None of these remarks explicitly endorsed a formal substantive rule similar to indefeasibility or unconditional presidential power. Moreover, they showed that the delegates turned to other remedies against encroachment, some of which were adopted (for example, a presidential veto[210] and presidential eligibility to run for reelection[211]) while others were not.[212] One page Prakash cites was a debate more about judicial independence and impeachment of judges, and that debate was resolved in favor of congressional power to impeach.[213] If this is the evidence that the Convention supported a rule that Congress could not regulate presidential powers, it is notable how few members are cited, how they instead turned to other structural solutions (more functional checks and balances), and how the Convention did not adopt their more pro-presidential proposals.

To Prakash's credit, he concedes that the ostensible "Decision of 1789" in the First Congress did not address indefeasibility, or whether Congress could "modify or abridge" the removal power (that is, require "good cause").[214] But the First Congress did address indefeasibility—and rejected it. Madison argued on the House floor on June 16, 1789: "If the constitution has invested all

207. 487 U.S. 654, 692 (1988) ("[B]ecause the independent counsel may be terminated for 'good cause,' the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.").

208. Prakash, *Regulating*, *supra* note 9, at 244.

209. *Id.* at 244 n.152 (citing 2 Farrand, *supra* note 105, at 74, 299-300, 407, 429, 551).

210. 2 Farrand, *supra* note 105, at 71.

211. *Id.* at 407.

212. Wilson and Madison advocated for another kind of veto—a council of revision, combining the President and the judiciary to review legislation—but it was not adopted. 2 Farrand, *supra* note 105, at 73-80. Morris supported an absolute veto that Congress could not override, *id.* at 299-300, and he believed the House should be excluded from the impeachment process, *id.* at 551.

213. Prakash, *Regulating*, *supra* note 9, at 244 n.152 (citing 2 Farrand, *supra* note 105, at 429).

214. Prakash, *supra* note 52, at 1072-73.

executive power in the president, I venture to assert, that the legislature has no right to diminish or modify his executive authority."[215] But Madison failed to persuade his colleagues, and a majority rejected Madison's "invested" theory against legislative "modification." Moreover, it seems that even Madison did not believe this theory before or after mid-June 1789. Madison had previously endorsed conditions and modifications in *Federalist No. 39* and in May 1789, and by late June he endorsed conditions in the Treasury Department debates and his proposal of a "good-behavior" comptroller.[216]

The Convention similarly lacked support for indefeasibility. Instead, there is a consistent theme: The Framers in these debates generally turned to a mixed and functional approach of checks and balances (for example, veto and impeachment), rather than formal separation rules, not even adopting the separation-of-powers clauses in so many state constitutions.[217] Given the number of delegates who feared executive power and a single President as a "foetus of monarchy,"[218] one can imagine more support for functional compromises rather than unchecked presidential powers from an indefeasibility rule.

If unitary scholars claim the English system as a model for Article II, then eighteenth-century England's legislative defeasibility of royal powers is a problem for the unitary theory. If the unitary scholars claim that the Framers were borrowing from the English system but with a new indefeasibility rule, one would imagine the Framers might have said so explicitly. No one doubts that the Framers established a separation of powers with checks and balances. The question is where they drew the line for separation and for balancing. It seems telling that the unitary theorists leap to absolutist bright-line answers, even when the Framers themselves did not choose to use terms like "indefeasibility" for official powers.

III. "Vest" in Legal and General Dictionaries

In all the writing on "vesting," it seems that there has been little research on the word's eighteenth-century usage and definition.[219] Even during a pandemic, some archival research is accessible due to digitization projects over

215. The Congressional Register (June 16, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 81, at 860, 868.

216. *See* Shugerman, *supra* note 6 (manuscript at 13-15, 27, 39-44).

217. *See supra* Part I.C.

218. 1 Farrand, *supra* note 39, at 66.

219. Calabresi, *supra* note 7, at 1380-81. Calabresi cited only three dictionaries: *The American Heritage Dictionary* from 1991, *Black's Law Dictionary* from 1990, and only one dictionary from the eighteenth century: Samuel Johnson's *A Dictionary of the English Language* from 1755. *Id.* at 1380 n.11, 1381 n.14.

the past decade. I surveyed the searchable dictionaries on HeinOnline's Spinelli's Law Library Reference Shelf, Georgetown University's legal dictionary database, and the University of Toronto's LEME (Lexicons of Early Modern English) database, 1600 to 1800.[220] This search of fifty dictionaries—from seventeen different lead editors before 1787, and fourteen after 1787—revealed no eighteenth-century usage of "vesting" to mean "exclusive," "sole," "indefeasible," or "irrevocable." There were some references to "full possession" with respect to land and real estate as individual rights, but very few sources mentioned official powers of any kind. Only two dictionaries, neither on the list of major dictionaries of the era, had any reference to "absolute" powers, and even those dictionaries mixed them with simpler kinds of possession. (See Appendix B for a categorization of each dictionary.)

Some of these dictionaries added the Latin phrase "*plenam possessionem terrae vel praedii tradere*," which translates to "full possession of land or farm/estate handed down."[221] "Full" in this context is still limited to property rights, which in the common law tradition still would be defeasible, whether by the terms and conditions of the property or by government regulation.[222] This meaning does not appear to translate to offices or signify anything like exclusive, indefeasible powers. These Latin entries are first and foremost still limited to individual property rights, rather than the powers of offices—two fundamentally different contexts. The word "*plenam*" is the Latin origin of the word "plenary," but the Convention used this word only once,[223] and *The Federalist Papers* did not use it at all. "*Plenam*" for property rights is not a hint of plenary governmental powers. Moreover, the Latin entries are less relevant to the original *public* meaning. The dictionaries have a mix of definitions, some more general, some more lawyerly and technical (including the Latin terms). Neither set of definitions provides much support for the unitary theory, but as

220. LEXICONS EARLY MOD. ENG., *supra* note 42. John Mikhail and Gregory Maggs listed two additional dictionaries, Ash (1775) and Entick (1776), as among the most influential or prevalent dictionaries on the Founders' bookshelves, *see infra* note 227, but those two sources were absent from these databases and so were included using Google Books.

221. *See infra* Appendix B.

222. The doctrine of amortization allows local governments to order a property owner with a vested right but a nonconforming use to comply (and thus lose their vested status, generally without compensation). Patricia E. Salkin, *Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations*, 38 REAL EST. L.J. 486, 500-06 (2010); *see also* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulation*, 84 N.Y.U. L. REV. 1222, 1238-40 (2009); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1031 (2006) ("But *Marbury* perhaps illustrates some of the problems with use of the term vested. Statutory entitlements might be vested in the weak sense as against executive intrusion while not being vested in the strong sense against legislative termination; it is not clear in which sense Marshall meant the right was vested.").

223. 2 Farrand, *supra* note 105, at 634.

discussed below, the more publicly accessible definitions have greater weight. Because the Constitution became law through public ratification rather than drafting, originalists have generally shifted away from looking to "original intent" in favor of "original public meaning," that is, the understanding of the general public. Original public meaning would emphasize "public accessibility" unless the language was technical and legalistic (for example, "ex post facto Law").[224] Indeed, Saikrishna Prakash, one of the leading unitary scholars, suggested this default rule: "The Constitution's very creation indicates that there was an implicit background rule of construction, the same rule that underlies all laws and almost all forms of communication: construe words using their ordinary, original meanings (the 'Default Rule')."[225]

The understandings of both general lay audiences and expert audiences can be relevant given the broad range of meanings "vesting" took on in the eighteenth century, but this Article emphasizes the more publicly accessible definitions and the more commonly used dictionaries among that generation. The word's use in the key opening sentence of Article II, without a signal of technical or practical meaning, makes its ordinary and general meaning seem more relevant. Even if one relies more on the esoteric or technical definitions, the eighteenth-century dictionaries do not support a meaning of indefeasible official power. And even if one finds the dictionaries ambiguous and the audience question unclear, a next step for guidance on audience and semantic context is to focus on intratextualism (closely reading the Constitution's text as evidence of semantic meaning in a constitutional context of communication).[226] Similarly, other early constitutions like the Articles of Confederation are helpful evidence about the meaning of "vest" in constitutional contexts and the power of offices. See Parts III and IV below for such analysis.

There are four legal dictionaries and five general dictionaries that legal historians identify as the ones the Framers and the Founding generation relied upon the most, all of which are also available in the digital collections used in this study.[227] Of these nine sources, none offer a definition of "vest" like

224. Solum, *supra* note 54, at 276; *see also* WHITTINGTON, *supra* note 54, at 60; Paulsen, *supra* note 54, at 872-74. *But see* McGinnis & Rappaport, *supra* note 54, at 752-53; John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1325-26 (2018) (positing that constitutional interpretation should take a "language-of-the-law" approach rather than follow the ordinary-language approach).

225. Prakash, *supra* note 54, at 541.

226. *See* Amar, *supra* note 22, at 748.

227. John Mikhail, Lecture, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL. U. L. REV. 631, 656 (2019) (listing Johnson, Bailey, Dyche & Pardon, Ash, and Entick); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 390-93
footnote continued on next page

"exclusive" or "indefeasible" powers with respect to offices. Only two of the nine use the word "vest" in defining other words with respect to offices, and only one of those two has a reference to "full" powers with respect to property. Those two dictionaries offer hints that the word "vest" could take on a broader meaning in terms of official powers, but they provide no evidence that the clear original public meaning of "vest" had such an expansive or exclusive meaning.

The dictionaries generally undercut this formalist assumption, but the four legal dictionaries are especially strong counterevidence. Giles Jacob's editions have been described as "the most widely used English law dictionary" in the Founding-era United States.[228] Eleven editions of his *New Law Dictionary* were published in the eighteenth century, some posthumously edited. They consistently defined "vested" narrowly by giving an example of a future interest in real property: "If an Estate in Remainder is limited to a Child before born, when the Child is born the Estate in Remainder is *vested.*"[229] After Jacob's death in 1744, the seventh edition in 1756 added the word "vesture," defined as "Signifies a Garment; but in the Law it is metaphorically applied to a Possession or Seisin," followed by references to landed property.[230] The ninth edition in 1772 added the word "vest" as "to invest with, to make possession of, to place in possession," followed by the Latin maxim for land, "*plenam possessionem*

(2014) (listing general dictionaries Ash, Bailey, Barclay, Dyche & Pardon, Johnson, Perry, Sheridan, Walker, and Webster, and legal dictionaries Burn & Burn, Cunningham, Jacob, and Potts). Four of Maggs's general dictionaries (Barclay, Perry, Sheridan, and Walker) are not included in the three databases used in this study (HeinOnline, LEME, and Georgetown), and the Google links that Maggs provided no longer work for some of them (Sheridan, Walker), making them less accessible and perhaps indicating that they have been less widely recognized as influential. Maggs also identifies Webster's 1828 dictionary, and it is included in Appendix B below, but it so postdates other dictionaries that it is less relevant in this analysis. This leaves nine dictionaries that were relied upon by the Founders: Jacob, Burn & Burn, Cunningham, and Potts (legal dictionaries), and Ash, Bailey, Dyche & Pardon, Entick, and Johnson (general dictionaries). These dictionaries appear on the three databases surveyed with the exception of Ash (1775) and Entick (1776), which are available on Google Books. *See supra* note 44.

228. Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 CARDOZO L. REV. 821, 854 (1997); GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 172 (2010).

229. GILES JACOB, A NEW LAW-DICTIONARY 736 (n.p., E. & R. Nutt & R. Gosling 3d ed. 1736) [hereinafter JACOB 1736]; *see also* GILES JACOB, A NEW LAW-DICTIONARY 769 (n.p., E. & R. Nutt & R. Gosling 4th ed. 1739) [hereinafter JACOB 1739]; GILES JACOB, A NEW LAW-DICTIONARY 790 (n.p., Henry Lintot 5th ed. 1744) [hereinafter JACOB 1744]; GILES JACOB, A NEW LAW-DICTIONARY 800 (n.p., Henry Lintot 6th ed. 1750) [hereinafter JACOB 1750].

230. GILES JACOB, A NEW LAW-DICTIONARY 800 (7th ed. 1756); *see also* GILES JACOB, A NEW LAW-DICTIONARY 691 (London, H. Woodfall & W. Strahan 8th ed. 1762).

terrae."[231] None of Jacob's eighteenth-century editions suggest official powers. Of the other three major legal dictionaries, Cunningham and Burn & Burn were similar to Jacob's, and Potts had no entry for "vest."[232]

Three of the five most influential general dictionaries offer definitions of "vest" limited to the possession of property. Dyche and Pardon's 1773 dictionary defines "to vest" as "to authorize, or put a person into the possession of any thing."[233] John Ash's *New and Complete Dictionary* similarly defines "to vest" as "[t]o dress, to dress in long garments; to place in possession, to intrust with, to invest with."[234] John Entick's *New Spelling Dictionary* was pocket-sized, and thus "a primary means by which Americans communicated with one another in code during the founding era."[235] Entick's dictionary defined "vest" simply: "to dress, deck, invest."[236]

Only two of the nine most relied-upon dictionaries contain references to official powers. Nathan Bailey's series of dictionaries is mostly consistent with the other definitions of "vest," with an emphasis on clothing and real property, but with an unusual addition to "full possession of lands":

> 1. To dress, to deck, to enrobe. 2. To dress in a long garment. Generally used passively. 3. To invest, to make possessor of. 4. To bestow upon, to admit to the possession of; as, to *vest* a person with supreme authority. 5. To place in the possession of. 6. [In law] to infeoff, give seisin, or put into full possession of lands or tenements.[237]

"Full" is an important addition, but it is still only in the context of real property ("infeoff," "seisin," "lands"). The picture gets a little more complicated

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231. GILES JACOB, A NEW LAW DICTIONARY 926 (London, W. Strahan & M. Woodfall 9th ed. 1772) [hereinafter JACOB 1772]; GILES JACOB, A NEW LAW DICTIONARY 945 (London, W. Strahan & W. Woodfall 10th ed. 1782) [hereinafter JACOB 1782].

232. 1 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGEMENT OF THE LAW 739 (London, 3d ed. 1783); 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 405 (London, A. Strahan & W. Woodfall 1792); THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY 594 (London 1803).

233. THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY 848 (London, 14th ed. 1773).

234. 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 407 (London 1775) [hereinafter ASH 1775]; *see also* 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 383 (London, 2d ed. 1795) (containing the same definition two decades later).

235. Mikhail, *supra* note 227, at 17.

236. JOHN ENTICK, THE NEW SPELLING DICTIONARY 391 (Joseph Nicol Scott ed., London 1776).

237. NATHAN BAILEY, A NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Joseph Nicol Scott ed., London 1755) [hereinafter BAILEY 1755]; *see also* NATHAN BAILEY, A NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 3d ed. 1726) [hereinafter BAILEY 1726]; NATHAN BAILEY, A NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 22d ed. 1770).

because Nathan Bailey used "vest" in the definition of other words. In his 1737 edition, he defines a caliph as "the first ecclesiastical dignity among the *Saracens*, or the name of a soveraign [sic] dignity among the *Mahometans*, vested with absolute power over every every [sic] thing, relating both to religion and policy."[238] This use of "vested" has the first hint of absolutism. Then, he defined a "mix'd monarchy" as

> one that is tempered by the interposition of the estates or great men of the realm, both of the nobility and gentry; thus in England the executive power is vested in the king or monarch absolutely; but the legislative power is invested in the parliament; but it is to be noted, that the king has a negative power as to the laws proposed to be obligatory on the people, and also the power of proroguing and dissolving parliaments, but no power to raise money, but by laws consented to by the parliament.[239]

While Bailey used the word "vest" to convey great executive powers, it is significant that the definition appeared for "*mix'd* monarchy," which relates to defeasibility. The "mixed" means shared authority—in the English context, mixed with a legislative power that could reduce the monarchy's power—making it *defeasible*. Thus, Bailey's dictionary offers only limited evidence in favor of "absolute" powers, and on balance, from the specific entry on "vest" to the "mix'd" monarch, even one of the two best dictionaries for the unitary approach still gives a "mix'd" verdict.

Samuel Johnson's popular dictionary was consistent with the rest of the dictionaries of the era, emphasizing clothing or property: "1. To dress, to deck, to enrobe"; "2. To dress in a long garment"; "3. To make possessor of; to invest with"; "4. To place in possession."[240] Johnson added sample quotations from literature that perhaps hinted at broader official power, but was just as likely more a poetic flourish: "Had I been *vested with* the monarch's pow'r, Thou must have sigh'd, unlucky youth! in vain."[241] Johnson also added other quotations: one from Clarendon ("The militia[,] their commissions positively required to be entirely *vested in* the parliament."), and another from John Locke ("Empire and dominion was *vested in* him, for the good and behoof of others.").[242] "Entirely vested" is another example of modifying a vesting of military power

238. BAILEY, *supra* note 89.

239. *Id.* Joseph Nicol Scott's updated 1755 edition, *A New Universal Etymological English Dictionary*, contained the following definition: "MO'NARCH: . . . 1. One that governs alone, a governor in vested with absolute authority, a king. 2. One superior to the rest of the same kind. The monarch oak the patriarch of the trees. Dryden. 3. President. Come thou monarch of the vine. Shakespeare." BAILEY 1755, *supra* note 237.

240. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

241. *Id.*

242. *Id.*

to convey extra or complete vesting. Likely following Bailey, Johnson also defined other words using the word "vest" in a context of official powers. For example, he defined "ca'lif" and "comma'ndress" with references to "vested with absolute power" or "supreme authority," again suggesting that such adjectives were necessary to clarify an extraordinary degree of power beyond mere "vesting."[243] Johnson defined "Mona'rchical" as "[v]ested in a single ruler," which arguably conveys more absolute power.[244]

In addition to Johnson and Bailey, two less prominent dictionary authors gave secondary (or even lower-ranked) definitions for "vest" as "Supreme Power" or "supreme authority."[245] The first was John Kersey the Younger in 1702; the second was Joseph Nicol Scott in 1755 (Nathan Bailey was listed as co-author, but he had died in 1742).[246] Neither author's work is considered a major dictionary, and neither seems to have been influential. Dictionaries of the era would often adopt new entries from peer dictionaries if they were influential, but neither Kersey's nor Scott's appears on the lists of the most influential dictionaries, so it is unlikely that either was prominent enough to have inspired this sort of copying in other contemporary dictionaries.[247] Moreover, both dictionaries put simpler definitions relating to possession higher up in the hierarchy (with the caveat that eighteenth-century dictionaries sometimes organized entries from oldest meanings to more recent, rather than organizing from more prevalent meanings to less prevalent ones).

Beyond Bailey, Johnson, Kersey, and Scott, no other eighteenth-century dictionaries offered the context of offices or expansive official powers in their definitions of "vest." Many offered definitions for "vest" and "vesture" as giving "possession," "seisin" (as in real property) and/or "to invest with"[248] with the

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243. *Id.*

244. *Id.*

245. JOHN KERSEY, A NEW ENGLISH DICTIONARY 246 (London 1702); BAILEY 1755, *supra* note 237.

246. KERSEY, *supra* note 245, at 246; BAILEY 1755, *supra* note 237; 1 DICTIONARY OF NATIONAL BIOGRAPHY 881 (Leslie Stephen & Sidney Lee eds., London, Smith, Elder & Co. 1908).

247. *See* Mikhail, *supra* note 227.

248. JOHN COWELL & THOMAS MANLEY, THE INTERPRETER OF WORDS AND TERMS 323 (London 1701) ("vest" and "vesture"); JOHN COWELL, A LAW DICTIONARY: OR, THE INTERPRETER OF WORDS AND TERMS 323 (London 1708) [hereinafter COWELL 1708] ("vest" and "vesture"); JOHN COWELL, A LAW DICTIONARY: OR THE INTERPRETER OF WORDS AND TERMS (London, E. & R. Nutt & R. Gosling 1727) [hereinafter COWELL 1727] ("*plenam*" for real property); THOMAS BLOUNT & W. NELSON, A LAW-DICTIONARY AND GLOSSARY 309 (Eliz. Nutt & R. Gosling 3d ed. 1717); 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGEMENT OF THE LAW 732 (London 1765) [hereinafter CUNNINGHAM 1765]; 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR GENERAL ABRIDGEMENT OF THE LAW 736-37 (London, 2d ed. 1771) [hereinafter CUNNINGHAM 1771]; 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGEMENT OF THE LAW 739 (London,
footnote continued on next page

Latin "*plenam possessionem terrae*," and many offered no definition at all.[249] Overall, eighteenth-century dictionaries focused on traditional landed property law, sometimes adding references to vested estates, vested titles, remainders, and vested legacies—but with no mention of exclusivity or powers.[250]

By the early nineteenth century, a small number of dictionaries indicated a meaning of "fixed" power, but still only in terms of title and traditional property law, rather than as a reference to official or governmental powers. Webster's very first dictionary, *A Compendious Dictionary of the English Language* in 1806, offered the following definition: "to dress, deck, adorn, bestow, invest, take effect as a title or become fixed."[251]

Almost half a century later, two American dictionaries followed this addition of "fixed," still in the context of property rights. John Bouvier's *Law Dictionary, Adapted to the Constitution* characteristically put an emphasis on constitutional terms and provided long entries with citations and explanations, yet had this limited entry for "vest": "TO VEST: *estates*, is to give an immediate fixed right of present or future enjoyment; an estate is vested in possession, when there exists a right of present enjoyment; and an estate is vested in interest, when there is a present fixed right of future enjoyment."[252]

Citations follow, but the dictionary makes no reference to the Constitution. An 1851 American dictionary defined "vested" as referring to property "fixed in a person" and as conferring a "fixed right."[253] The notion of becoming "fixed" recalls Jonathan Gienapp's emphasis on the "fixing" of

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3d ed. 1783) [hereinafter CUNNINGHAM 1783]; 2 T.E. TOMLINS & GILES JACOB, THE LAW-DICTIONARY 814 (London, Andrew Strahan 1797) ("vest" and "vesture").

249. *See, e.g.*, 4 A NEW AND COMPLETE DICTIONARY OF ARTS AND SCIENCES 3282 (London 1755); 2 MALACHY POSTLETHWAYT, THE UNIVERSAL DICTIONARY OF TRADE AND COMMERCE 882 (London, 4th ed. 1774).

250. *See, e.g.*, 1 TOMLINS & JACOB, *supra* note 248, at 813 (containing references to "Estate," "Remainder," and "Vested Legacies").

251. NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 342 (New Haven, Sidney's Press 1806) [hereinafter WEBSTER 1806]. Webster's 1828 dictionary has more entries with additional references to power or authority, but these meanings still do not point toward indefeasibility. One of six different entries for variants of "vest" was: "*To vest in*, to put in possession of; to furnish with; to clothe with. The supreme executive power in England is *vested in* the king; in the United States, it is *vested in* the president." 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 853 (New York, S. Converse 1828) [hereinafter WEBSTER 1828]. The first entries related to property and clothing. The entry relating to offices refers to the King's executive powers—which were defeasible, as noted in Part I.B above.

252. 2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 605 (Philadelphia, T. & J.W. Johnson 2d ed. 1843).

253. 2 ALEXANDER M. BURRILL, A NEW LAW DICTIONARY AND GLOSSARY 1034 (New York, John S. Voorhies 1851).

meaning in the First Congress,[254] but the term still provides more of a property connotation (as in the conversion of a conditional or future interest to a "vested" fixed and present interest) than any reference to power or any implied exclusivity. But the nineteenth-century dictionaries (and an increasing number of American dictionaries) generally included no definition for "vest"[255] or continued the limited property meaning rather than including anything more grandiose and official.[256]

Interestingly, the first dictionary to provide a usage relating to constitutional powers that I found was John Wade's *The Cabinet Lawyer* of 1835, with this example: "The power of proroguing and dissolving, as well as summoning parliament together, is vested in the crown."[257] Again, it is worth noting that no one thought that Article II's "vesting" of "executive power" included anything as implicitly expansive as proroguing or dissolving,[258] which underscores the questions about why it would implicitly vest removal power.

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254. *See generally* GIENAPP, *supra* note 120.

255. *See* THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY 594 (London 1803) [hereinafter POTTS 1803]; 2 T.E. TOMLINS, THE LAW DICTIONARY 951 (London, C. & R. Baldwin 1810) [hereinafter TOMLINS 1810]; 2 THOMAS EDLYNE TOMLINS, THE LAW-DICTIONARY 742 (Thomas Colpitts Granger ed., London, 4th ed. 1835) [hereinafter TOMLINS 1835]; THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY 724 (London, B. & R. Crosby & Co. 1813) [hereinafter POTTS 1813]; JOHN HENRY ADLINGTON, THE CYCLOPEDIA OF LAW 622 (London, Thomas Kelly 1824); A GENTLEMAN OF THE BAR, EVERY MAN'S LAWYER 117 (Philadelphia, J. Royer 1830) (consisting of a short glossary rather than a full legal dictionary); 2 POLITICAL DICTIONARY; FORMING A WORK OF UNIVERSAL REFERENCE, BOTH CONSTITUTIONAL AND LEGAL 877 (London, Charles Knight & Co. 1846); WILLIAM CORFIELD, A LACONIC LAW DICTIONARY 44 (London, George Kingcombe 1856). In addition, influential nineteenth-century legal commentator Francis Lieber published a thirteen-volume *Encyclopedia Americana* that had some entries for prominent legal terms, but no entry for "vest." 12 ENCYCLOPEDIA AMERICANA: POPULAR DICTIONARY OF ARTS, SCIENCES, LITERATURE, HISTORY, POLITICS AND BIOGRAPHY 552 (Francis Lieber ed., Philadelphia, Carvey & Lea 1832) [hereinafter Lieber].

256. THOMAS WALTER WILLIAMS, A COMPENDIOUS AND COMPREHENSIVE LAW DICTIONARY 996 (London 1816); JAMES WHISHAW, A NEW LAW DICTIONARY 326 (London, J. & W.T. Clarke 1829), HENRY JAMES HOLTHOUSE, A NEW LAW DICTIONARY 376 (London, William Crofts 1839); 2 CHARLES RICHARDSON, A NEW DICTIONARY OF THE ENGLISH LANGUAGE 2013 (Philadelphia, E. H. Butler & Co. 1846).

257. WADE, *supra* note 89, at 4 (consisting of a combined digest and dictionary). Wade did not include the word "vested" or any similar word in the dictionary section. *See id.* at 653.

258. For more discussion of prorogue and dissolution and the text of Article II, Section 3, see Shugerman, *supra* note 25: "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." U.S. CONST. art. II, § 3.

IV. "Vesting" in Colonial Charters and Early State Constitutions

Colonial charters very rarely used the word "vest." Then, early in the revolution, some states began using "vest" in their new constitutions. Thus, it does not seem like the word "vest" had an established constitutional meaning for offices and powers as a background of original meaning. These charters and constitutions documents often had to add the words "all," "sole," "exclusive," or "complete" to convey a more robust legal meaning, as this Part and Part VI will show.

"Vested" powers appeared in only two seventeenth-century charters—the 1683 Constitution for "East New Jersey" (but only for the "power of pardoning" vested in twenty-four proprietors, and not other powers),[259] and in the 1696 Pennsylvania Frame of Government[260]—and in a 1702 New Jersey document.[261] The word "vest" or "invest" did not appear in the other charters for Virginia (1606, 1609, and 1611); New England (1620); Massachusetts Bay (1629 and 1669); New Haven (1639); Connecticut (1662); Carolina (1663, 1665, and 1669); Rhode Island (1663); West New Jersey (1676); the earlier Pennsylvania charter (1681); Delaware (1701); or Georgia (1732).

When the 1609 Virginia Charter addressed complete and absolute powers, it used such terms specifically: The Charter granted the governor "full and absolute Power and Authority to correct, punish, pardon, govern, and rule all such the Subjects of Us, our Heires, and Successors as shall from Time to Time adventure themselves."[262]

Of course, there is a significant passage of time between the last of the colonial charters (1732) and the American Revolution with new state constitutions. In the early stages of the Revolution, usage of "vesting" was mixed. In 1776, the New Hampshire and Delaware Constitutions did not mention the word "vest" for their governing structures, nor did that of Georgia in 1777.[263] South Carolina was the first state to use the term in its Declaration of Rights in 1776,[264] followed by Virginia, New Jersey, Maryland, Pennsylvania, and North Carolina, and then by New York and Vermont in

259. E.N.J. CONST. of 1638, art. X, *reprinted in* 5 Thorpe, *supra* note 122, at 2574.

260. PA. CONST. of 1696, §§ 2-3, *reprinted in* 5 Thorpe, *supra* note 122, at 3070.

261. Surrender from the Proprietors of East and West New Jersey, of Their Pretended Right of Government to Her Majesty (1702), *reprinted in* 5 Thorpe, *supra* note 122, at 2585.

262. VA. SECOND CHARTER of 1609, *reprinted in* 7 Thorpe, *supra* note 122, at 3790.

263. *See* N.H. CONST. of 1776, *reprinted in* 4 Thorpe, *supra* note 122, at 2451; DEL. CONST. of 1776, *reprinted in* 1 Thorpe, *supra* note 122, at 562; GA. CONST. of 1777, *reprinted in* 2 Thorpe, *supra* note 122, at 777.

264. S.C. CONST. of 1776, pmbl., *reprinted in* 6 Thorpe, *supra* note 122, at 3241; *id.* arts. VII, XXX.

1777, and again by South Carolina in 1778.[265] The Maryland Constitution stated "that the whole executive power of the government of this State shall be vested exclusively in the governor, subject, nevertheless, to the checks. Limitations and provisions hereinafter specified and mentioned."[266] The use of the phrases "whole executive power" and "vested exclusively" are additional clues that the phrase "vested power" by itself may not have communicated completeness, and the Founders sometimes added words to clarify or specify full vesting.

Many of these state constitutions had explicit "separation-of-powers" clauses,[267] but the federal Constitution of 1787 did not. Some state constitutions also added the word "supreme" to the powers in these vesting clauses,[268] perhaps borrowing from Blackstone: "The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen."[269] But again, the federal Constitution did not. This choice was perhaps a hint that the framers were de-emphasizing supremacy and royalisms.[270]

An even bigger clue is that when some of these states used such language in their constitutions, their executives were still far from the unitary model. For example, the New York Constitution of 1777 had an executive vesting clause with both the words "vest" and "supreme," and yet it also adopted one of the most anti–unitary executive structures regarding veto power, appointment, and removal. New York's vesting clause stated that "the *supreme* executive power and authority of this State *shall be vested in a governor.*"[271] Compare that

265. VA. CONST. of 1776, § 2, *reprinted in* 7 Thorpe, *supra* note 122, at 3812; N.J. CONST. of 1776, arts. I, II, *reprinted in* 5 Thorpe, *supra* note 122, at 2594; MD. CONST. of 1776, art. IV (using "invested"), *reprinted in* 3 Thorpe, *supra* note 122, at 1686; PA. CONST. of 1776, §§ 2-3, *reprinted in* 5 Thorpe, *supra* note 122, at 3084; N.C. CONST. of 1776, art. I, *reprinted in* 5 Thorpe, *supra* note 122, at 2787; N.Y. CONST. of 1777, arts. II, XVII, XXXIII, *reprinted in* 5 Thorpe, *supra* note 122, at 2623; VT. CONST. of 1777, ch. II, §§ 2-3, *reprinted in* 6 Thorpe, *supra* note 122, at 3737; S.C. CONST. of 1778, arts. II, XI, XXIII, *reprinted in* 6 Thorpe, *supra* note 122, at 3248.

266. MD. CONST. of 1776, art. XVII, § 13 (1837).

267. VA. CONST. of 1776, § 5; MASS. CONST. of 1780, pt. I, art. XXX, *reprinted in* 3 Thorpe, *supra* note 122, at 1888; N.C. CONST. of 1776, art. IV; MD. CONST. of 1776, art. VI.

268. PA. CONST. of 1776, § 3 ("The supreme executive power shall be vested in a president and council."); VT. CONST. of 1777, ch. II, §§ 2-3 ("The supreme executive power shall be vested in a Governor and Council."); N.Y. CONST. of 1777, art. XVII ("[T]he supreme executive power and authority of this State shall be vested in a governor . . . ."). Massachusetts referred to "the supreme executive magistrate," and New Hampshire followed in a post-1787 constitution. MASS. CONST. of 1780, pt. II, ch. II, § 1, art. I; N.H. CONST. of 1792, pt. II, § 41 ("There shall be a supreme executive magistrate, who shall be styled governor . . . ."), *reprinted in* 4 Thorpe, *supra* note 122, at 2471; *see also* Shane, *supra* note 38, at 339-40 (covering other structural analysis of state constitutions).

269. 1 BLACKSTONE, *supra* note 68, at *190.

270. *See* Shane, *supra* note 38, at 340-41.

271. N.Y. CONST. of 1777, art. XVII (emphasis added).

clause with its council of revision, composed of the governor, the chancellor, and the judges of the supreme court (similar to Madison's proposed council of revision, like a veto committee);[272] a council of appointment, composed of selected senators and the governor;[273] and the fact that, remarkably enough, executive officers served "during the pleasure of the council of appointment"[274]—that is, they were removable by the council of appointment, rather than the governor. It is worth noting that Hamilton and others at the Convention were aware of New York's constitution signaling removal power (even removal at pleasure),[275] and yet did not address it in the 1787 federal text.

The Massachusetts Constitution of 1780 used the word "vest" or "invest" eight times, and once in an unusual place if vesting was meant to reflect chief executive or "supreme" legislative and judicial powers: the shared governance of Harvard College (shared between the governor, lieutenant governor, magistrates, the college president, and the ministers of six surrounding towns).[276] In the same clause in the 1780 Massachusetts Constitution, a similar pattern of addition emerges: the addition of the word "all" to convey entirety. Those officials were "vested with *all* the powers and authority belonging, or in any way appertaining, to the overseers of Harvard College."[277] Another clause added the word "all" with respect to "vesting" a lieutenant governor with powers when the governor's office is vacant, in a context where completeness and entirety were necessary to convey.[278] Likewise, the constitutions of Virginia, Maryland, Pennsylvania, and North Carolina added the word "all" to emphasize the complete and indefeasible "vestedness" of popular sovereignty, the power of the people: "That all power is vested in, and consequently derived from, the people . . . ."[279]

Some constitutions and similar charters added the word "all" when emphasizing the completeness of legislative power. For example, the first sentence of the North Carolina Constitution declared that "all political power

272. *Id.* art. III.

273. *Id.* art. XXIII.

274. *Id.* art. XXVIII.

275. Hamilton (a prominent New York lawyer who detailed the New York Constitution in *The Federalist Papers*), Gouverneur Morris (a New York delegate for the Articles of Confederation and a prominent New Yorker until 1779), and others at the Convention surely were familiar with the New York Constitution and its removal clause, and yet they did not address this question in the 1787 federal text.

276. MASS. CONST. of 1780, pt. II, ch. V, § 1, art. III, *reprinted in* 3 Thorpe, *supra* note 122, at 1888.

277. *Id.*

278. *Id.* pt. II, ch. II, § 2, art. III.

279. VA. CONST. of 1776, § 2, *reprinted in* 7 Thorpe, *supra* note 122, at 3812.

is vested in and derived from the people only."[280] Article II of the New Jersey Constitution stated that its preexisting General Assembly "shall be and remain vested with all the powers and authority to be held by any future Legislative Council and Assembly of this Colony" until the new constitution established a new legislative body.[281] Legislation sometimes reflected similar additions of the word "full" to strengthen the word "vest": for example, "Congress assembled, be, and they hereby are *vested with full power and authority*, on the part and behalf of this State."[282]

These clauses used the word "all," but had no reference to the "herein granted." If one might presume that the "all" in the U.S. Constitution's Legislative Vesting Clause is merely due to the "herein granted" and enumeration in Article I, the usage here of "all" without enumeration is a counterexample. It seems that the Framers wanted to resolve the entire legislative power question in favor of the state, as opposed to the British Empire or any other lawmaking body. When the Founding-era drafters were certain that they wanted to communicate complete vesting—whether for legislative power, popular sovereignty, or complete corporate governance over a college—they used the word "all."

By contrast, "vested" appears in the Articles of Confederation in a remarkably temporary and explicitly revocable way:

> The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states, in congress assembled, by the consent of nine states, *shall, from time to time, think expedient to vest them with*; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states, in the congress of the united states assembled, is requisite.[283]

This was the Articles of Confederation's only use of the word "vest." Of course, this governmental framework included no executive branch, but it did have a congress with legislative power. The striking aspect of these clauses was that they used the phrase "have the sole and exclusive right and power," as noted in Part II.C above.

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280. N.C. CONST. of 1776, art. I, *reprinted in* 5 Thorpe, *supra* note 122, at 2787.

281. N.J. CONST. of 1776, art. II, *reprinted in* 5 Thorpe, *supra* note 122, at 2594.

282. Act of Dec. 28, 1786, 5 N.H. Laws 203, 203 (emphasis added); *see also* D.C. GOV'T of 1801, § 3 ("[J]udges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States."), *reprinted in* 1 Thorpe, *supra* note 122, at 638.

283. ARTICLES OF CONFEDERATION of 1781, art. X (emphasis added).

V. "Vesting" in the Constitutional Text and at the Convention

A. "Vesting" in the 1787 Text

Before turning to the Convention and Ratification, let us start with the constitutional text itself. Two additional uses of "vesting" beyond the Executive Vesting Clause shed light on the term's meaning, and "vesting" also appears in a surprising additional source from the Founding era.

As noted in the Introduction, Article II also used the word "vest" in terms of inferior officers' appointments and added the word "alone": "[B]ut the Congress may by Law *vest* the Appointment of such inferior Officers, as they think proper, in the President *alone*, in the Courts of Law, or in the Heads of Departments."[284] The addition of "alone" here was likely meant to distinguish the appointment of inferior officers from the appointment of principal officers earlier in the same clause (which required Senate advice and consent, and which did not use the word "vest").[285] If "vest in the President" already connoted exclusivity, there would have been no need to add the word "alone."

Recall how Justice Taft and others inserted the word "alone," in an assumption that it travels with the word "vest." But the drafters of the Constitution did not use the word "alone" in Article II's Executive Vesting Clause. Rather, they added it to the appointment powers of Section 2 when there was a question about exclusivity among alternative designs. Turning back to the Executive Vesting Clause, a student of Scalia would again say *expressio unius*: the absence of "alone" or a similar word like "all" in the Executive Vesting Clause is conspicuous. This wording suggests that "vesting" and "the" ("the Appointment," used in this clause as a word modifying a power) probably do not imply exclusivity and completeness, and thus the drafters felt a need to add "alone" without redundancy.

Now let us consider the use of the word "vest" for the appointment for inferior officers. If Congress could delegate exclusive powers to courts and department heads to appoint officers, then it might make sense that only Congress could later take those powers away. This use of "vesting," however, does not have the weight of constitutionalized fixed powers. The meaning of "vest" here is the legislative flexibility of granting powers, not an absolute or indefeasible assignment of powers. It is dubious that the Framers thought of possible constitutional amendments as having the same degree of flexibility as congressional revisions. Congress can giveth and Congress can taketh away, so the vesting here has a connotation of adaptation and change. Constitutions are not so easily changed.

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284. U.S. CONST. art. II, § 2, cl. 2.

285. *Id.*

Presumably, Congress could "vest" the appointment of specific officers in multiple judges or multiple department heads in ways that could be checked or shared by other actors. As a matter of common-sense reading, the word "vest" here seems to mean "to grant," "delegate," "give possession," or "enable," without a connotation of exclusivity or indefeasibility. Congress operates more in a function of delegating and then taking away, rather than the permanency of constitutional clauses. It would be odd to use "vest" in terms of congressional legislation, when constitutional structure contemplates a role for Congress to give and take away powers more fluidly and less fixedly than a constitution does.

The Necessary and Proper Clause offers a key clue against the unitary theory, as it uses the word "vest" with respect to "departments" and "officers": "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 in any Department or Officer thereof*."[286]

First, it is worth noting that this clause uses the word "all" twice in the context of legislative power—but the Executive Vesting Clause does not use it at "all" (so to speak). As noted above, the drafters often used the word "all" when they wanted to convey breadth and entirety. But this clause also suggests that the Constitution "vested" powers in "departments" and "officers." If the unitary theorists are right that "vesting" had a more formal meaning of granting complete, exclusive, or indefeasible power, the only officer who plausibly fit here would be the President. The question is why the drafters would refer to "officers," and not just the President, as being "vested" with power by the Constitution. No other officer was vested with exclusive and complete power, so this clause suggests that "vesting" did not convey indefeasible powers. It suggests that the meaning of the word "vest" was not so legally significant that the Framers would be more precise about the words "vested," "officers," and "department."[287]

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286. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

287. When the Necessary and Proper Clause refers to the vesting of powers in departments, were the Framers thinking that "department" referred to each branch? Or departments within the executive branch? On the one hand, in the Constitution, "department" is used only twice—both in Article II, Section 2, in the context of departments under the executive. But in the Convention debates, the delegates frequently used "department" to refer to both branch and executive departments. Some scholars conclude that "department" indeed means executive departments, but there is a difference of opinion. *Compare* Strauss, *supra* note 103, at 721-22 (discussing "department" as an executive department), *with* Calabresi & Prakash, *supra* note 6, at 587 (discussing "department" as referring to a branch), *and* Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 102-07, 107 nn.91-93, 117 nn.148-49 (2021) (discussing both possibilities). If "department" could mean executive departments, then the Framers seem to have contemplated vesting

footnote continued on next page

One surprising additional source sheds light on "vesting": the "Letter of Transmittal to the President of Congress in Convention," dated Monday, September 17, 1787, signed by George Washington, and likely drafted with some of the delegates.[288] This letter, as noted above, used the word "sole" when the writers wanted to convey exclusivity in the electoral college process. These same letter writers used the word "vested" only once, but they needed to add adverbs to it: "The Friends of our Country have long seen and desired that the Power of making War Peace and Treaties, that of levying Money *& regulating Commerce* and the correspondent executive and judicial Authorities should be *fully and effectually vested* in the general Government of the Union."[289]

Note the five powers discussed here: war, peace, treaties, levying and coining money, and regulating commerce. The Constitution they drafted allocated the first four powers exclusively to the federal Congress, and not the states. The fifth is a bit more complicated: "[R]egulating commerce" is obviously not exclusively federal, and even if the letter writers meant "foreign commerce" or "interstate commerce," they did not say so. Moreover, the dormant commerce clause doctrine had not yet emerged. Nevertheless, there appears to be no record of confusion or concern from the introductory letter—the first thing Congress would read about this proposed Constitution—that the Convention intended to "fully" and exclusively empower the new federal government to "regulate commerce," and that states would no longer regulate intrastate commerce.

The word "vest" in the Convention's letter gives us a few more clues: First, "vest" by itself did not convey fullness, but needed the adverb "fully." Second, even when they used the phrase "fully and effectually vested," the drafters were not worried that they could have mistakenly implied exclusive vesting over regulating commerce, and apparently the public (in the Continental Congress and the ratifying conventions) did not infer such a meaning, either.

This letter is a major problem for the unitarians' "original public meaning" claim regarding the word "vest." Even when modified with the word "fully," the term still did not convey exclusive, complete, or plenary power. The

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powers in executive departments and officers beneath the President. This raises some problems for the unitary theory. First, if the word "vest" meant fixed, indefeasible, and exclusive, then such officers and departments would have their own constitutional powers independent from the President. Or second, if the word "vest" did not have such an exclusive and indefeasible meaning in terms of offices and powers, but simply meant "to give," "possess" or "enable," then the Necessary and Proper Clause was simply recognizing that the Constitution was enabling the creation of such departments and officers with powers within legislative and presidential control. In either case, the Necessary and Proper Clause suggests that the meaning of the word "vest" did not carry legal significance or influence the Framers' choice of words.

288. Letter from George Washington to the President of Cong., *supra* note 40.

289. *Id.* (emphasis added).

Necessary and Proper Clause is also strong "intratextual" evidence against the unitary interpretation of the word "vest." The "vested" appointment powers over inferior officers confirm a less fixed meaning of the word as well, and also reveal with the addition of "alone" that by itself, "vest" did not connote exclusivity.

B. The Virginia Plan

After focusing narrowly on the word "vest" as used in the constitutional texts, we can take a step back and trace how the word was used in the Convention debates, following along the broader development of the separation of powers.

The Convention debates in Philadelphia frequently used the word "vest," often in contexts that showed defeasibility and nonexclusivity. The first uses of the word "vest" recorded in the Convention are found in the Virginia Plan of May 29, offered by Edmund Randolph and written by James Madison. With the caveat that the Virginia Plan was more of a sketch than a detailed final text, the Virginia Plan avoided any reference to a single executive officer and lacked the features of the unitary executive. Specifically, the veto would have been shared between the executive and the judiciary (Resolution No. 8), and the legislature, rather than the executive, would choose judges (Resolution No. 9). The Virginia Plan's Resolutions Nos. 6 and 7 used "vested" as part of a structure that seems confusing:

> 6. Resolved . . . that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation . . . .
>
> 7. Resd. that a National Executive be instituted; . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.[290]

It was no accident that the Virginia plan used the phrase "National Executive." Its author was ambivalent about a single chief executive, and its chief sponsor was stridently opposed. Of course, it is possible to delegate indefeasible power to a plural executive, so that a univocal executive council could exercise powers that the legislature could not take away. But it is striking how much weaker this executive branch would have been, relative to the final constitution. Moreover, the Virginia Plan's use of the word "vested" is part of a strange structure: The "Confederation" of states would "vest" executive and legislative powers in a national Congress (that is, a federal government), and then the national legislature would "enjoy" those legislative powers and the national executive would "enjoy the Executive rights." It is not clear what the scope of those rights would have been—perhaps the pardon and some

290. 1 Farrand, *supra* note 39, at 21.

prerogative powers, and yet not the veto (shared with the judiciary) nor judicial appointment (entirely the power of the legislature). The key point is that the "vesting" usage here does not fit a model of assigning full powers directly to an officer, but instead represents the establishment of general authority, which then distributes powers to branches for them to "enjoy." "Vesting" therefore seems to be a more general act of instituting a government.

Is it possible that such "vesting" still meant indefeasible and exclusive, that whatever powers the states granted could not be shared and partially retained by the states? Or was the word more reflective of a grant of power, to give possession and to establish an institution? Or was this Virginia Plan simply too much of a sketch to know either way?

It turns out that the views of the Plan's author and especially its sponsor give us more clarity about their vision of a relatively weak and potentially plural executive. Madison was skeptical of unitary structures and exclusive presidential powers throughout the spring and summer of 1787, and Randolph was one of the most vocal opponents of a strong executive. Randolph staunchly opposed a strong unitary presidency, famously saying in this Virginia Plan debate that "unity in the Executive magistracy" was "the foetus of monarchy."[291]

With less stridency, Madison endorsed legislative control over the executive in this debate in an anti-unitary proposal. Madison had conceived of the shared veto power on a Council of Revision, and he expressed openness to a proposal by Elbridge Gerry for a multimember executive council to advise the executive.[292] During the debate on the Virginia Plan, Madison submitted a revised plan that seems to clarify that he endorsed a weak executive subordinate to the legislature: "[The Executive would have] power to carry into execution the national laws, — to appoint to offices in cases not otherwise provided for; and to execute such powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature."[293]

"To execute such other powers as may from time to time be delegated by the national legislature." This vision of the executive is nothing resembling indefeasible. As Charles Thach, a historian sympathetic to the unitary theory, observed, "[W]e may say that the executive proposed by [the Virginia resolutions] was essentially subordinate to the legislature."[294] The word was thus introduced in the 1787 Convention by delegates who opposed presidential centralization and indefeasible powers.

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291. *Id.* at 66.

292. *Id.* at 70.

293. *Id.* at 63.

294. THACH, *supra* note 107, at 84.

Madison's consistent opposition to strong and implied executive powers in 1787 and 1788 should raise concerns about how the Supreme Court and unitary scholars so heavily rely on Madison's departure from his original views during one month of 1789 (May through June 24, 1789, during the Foreign Affairs debate in the First Congress and the ostensible "Decision of 1789"), before Madison flipped back against presidential power on June 30, 1789 and thereafter, including in the Neutrality Proclamation debate of 1793.[295] If skeptics of unitary power like Madison and Randolph were using the word "vest" in relation to executive powers, it seems unlikely that they thought the word had such maximalist and absolute connotations.

As the Convention progressed toward a draft, George Mason was increasingly critical and complained that appointment was "substantially vested in the [President] *alone*."[296] In the closing days he warned of Article II's appointment powers: He was "averse to vest so dangerous a power in the President *alone*."[297] In debate on funding origination in the House and Senate, James Wilson twice modified "vest" with the word "exclusive," and Madison, Rufus King, and Gouverneur Morris did so once.[298] If "vest" meant "exclusive," there would have been no reason to use it in this context of an origination rule (when implicitly, an origination rule already means one or the other, and no sharing). The delegates therefore seemed to understand that "vest" by itself did not signify "aloneness" or "exclusivity."

VI. "Vesting" Fully and Partly in English and Founding-Era Usage, 1775-1787

A. "Vesting" in Ratification Documents

Although dictionaries are helpful to understand usage of "vest" in the eighteenth century, the letters and writings of the era are even more probative of actual usage. This Part does not completely investigate the use of "fully vesting" in English sources. But it is notable that the English usage reflected a similar distinction between the use of "vesting" by itself and its use with the

295. Madison's essays as "Helvidius," answering Hamilton's "Pacificus" essays in 1793, argued for limited presidential powers and broad congressional powers in foreign affairs. *See generally* James Madison, Helvidius No. I (Aug. 24, 1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 55 (Morton J. Frisch ed., 2007) [hereinafter Frisch]; James Madison, Helvidius No. II (Aug. 31, 1793), *reprinted in* Frisch, *supra*, at 65; James Madison, Helvidius No. V (Sept. 18, 1793), *reprinted in* Frisch, *supra*, at 90.

296. 2 Farrand, *supra* note 105, at 83.

297. *Id.* at 537 (emphasis added).

298. *Id.* at 275-78, 514.

addition of words like "whole" or "solely" to convey more completeness.[299] This Part draws from Max Farrand's sources on the Convention and Ratification beyond the Convention debates, and shows a similar pattern of modifying "vesting" with words to clarify a more robust connotation. In a search of those sources, the word "vest" was used approximately 400 times, but sometimes the drafters felt the need to add the same modifiers to convey exclusivity or fullness.

For example, Pierce Butler emphasized the word "sole" modifying the powers vested: "It was at first proposed to *vest* the *sole* power of making peace or war in the Senate."[300] A May 11, 1787, letter from Rhode Island citizens to the Convention observed: "It is the general Opinion here and we believe of the well informed throughout this State, that *full power* for the Regulation of the Commerce of the United States, both Foreign & Domestick ought to be *vested* in the National Council."[301] Setting aside the letter drafters' inclusion of "full," could they really have meant by "vested fully and exclusive" that the states could not also regulate "domestick" commerce? This seems especially unlikely coming from citizens of Rhode Island, which so fiercely defended states' powers that it held out the longest from ratifying the federal Constitution.[302]

In *The Federalist Papers*, both Hamilton and Madison used the word "vest" repeatedly, and sometimes modified the word "vested" (or "invested") to add exclusivity. Hamilton in *Federalist No. 36*: "[W]here the right of imposing the tax is *exclusively vested* in the Union . . . ."[303] Hamilton in *No. 59*: "If the State legislatures were to be *invested* with an *exclusive* power of regulating these elections . . . ."[304] Madison in *No. 52*: "The first is, that the federal legislature will

299. *See, e.g.*, 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 624 (William Cobbett ed., London, R. Bagshaw 1809) ("The *sole executive power* is now vested in the king." (emphasis added)); JOHN SOMERS, JURA POPULI ANGLICANI: OR, THE SUBJECT'S RIGHT OF PETITIONING SET FORTH 23 (London 1701) ("The former are Officers appointed by the King, who is invested with the whole executive Power . . . ."); Thomas Salmon, *The Trial of Doctor Henry Sacheverell for High Crimes and Misdemeanors*, *in* A CRITICAL REVIEW OF THE STATE TRIALS 816, 840 (London, William Mears & J. Stone 1735) ("[T]he Executive Power should be *vested solely* in her Husband." (emphasis added)); 7 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 541 (William Cobbett ed., London, T.C. Hansard 1811) ("[T]he parliament vested a *sole* legislative power in the crown." (emphasis added)); THE ROYAL CHARTER FOR ESTABLISHING A CIVIL GOVERNMENT AT GIBRALTAR 14 n.† (London, J. Roberts 1742) ("This Power is *vested solely* in the Chief Judge." (emphasis added)).

300. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 250 (Max Farrand ed., 1911) [hereinafter 3 Farrand] (emphasis added).

301. 3 Farrand, *supra* note 300, at 18, 19 (emphasis added).

302. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 221-25, 253 (2011).

303. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 83, at 221 (emphasis added).

304. THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 83, at 365 (emphasis added).

possess a part only of that supreme legislative authority which is *vested completely* in the British Parliament . . . ."[305] Hamilton in *No. 75*: "[W]hence it happens that Congress, who now are *solely invested* with *all the powers* of the Union . . . ."[306]

One passage in *Federalist No. 70* on presidential power arguably points in opposite directions. Hamilton argued for the "unity" of the executive and used the word "vest": "This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the control and co-operation of others, in the capacity of counselors to him."[307] On the one hand, the substance of Hamilton's point was a strong endorsement of unitary presidential power. On the other hand, he complicates the unitary executive theory's reliance on the word "vest": How could the power be "ostensibly vested" but also subject to the control of others? Does the word "ostensible" signify that "true" vesting means not subject to the control of others? On balance, this passage suggests that real vesting, as opposed to ostensible vesting, is unconditional, beyond the control of others. But a few essays later, in *Federalist No. 77*, Hamilton also wrote that the power of removal would be shared between the President and the Senate.[308] Thus, even if Hamilton meant "vest" as exclusive or indefeasible, he apparently did not think removal was included in the Executive Vesting Clause at all. And taken together, *The Federalist Papers* offer a mix of meanings and uses pointing away from an "indefeasible" connotation of the word "vest."

In the First Congress during the ostensible "Decision of 1789" debates, Senator William Johnson questioned the presidentialists' reliance on the ambiguous words "executive" and "vesting." He contended that the Vesting Clause was no support, because the presidentialists were mistakenly stretching the word "vest" from land grants to the "vague" powers of offices: "It is not a Grant, but a Repartit[io]n of the Powers or if a Grant poss[esse]s nothing so Vague & Inde[finit]e."[309] Johnson repeated the language of the Executive Vesting Clause and mocked his colleagues for their vagueness and

305. THE FEDERALIST NO. 52 (James Madison), *supra* note 83, at 329 (emphasis added).

306. THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 83, at 454 (first emphasis added).

307. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 83, at 424.

308. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 83, at 459; *see* GIENAPP, *supra* note 120, at 154-55 (noting that Hamilton originally viewed *Federalist No. 77* to endorse the Senate's power over removal, but, post-ratification in June 1789, he announced that he had changed his mind).

309. William Samuel Johnson, Draft Speech for Debate on the Foreign Affairs Act [HR-8]: Can the President Remove Federal Officeholders? (July 14, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 81, at 465.

indefiniteness on "executive." Then he returned to "vested": "The Land shall be Vested—The Money shall be Vested[.] What a Grant! Nothing. My Colleag[ue's] Grant of 10 Acr[es]. 20 Acr[es, etc.] Right. [B]ut how unlike this."[310] Johnson used a Latin phrase to signify that the two contexts were totally different.[311]

Johnson observed that the word "vested" had a legal meaning for land and money, but unclear or no legal significance in the context of offices. Even Johnson was confused as the result of early semantic drift. From the dictionaries, it seems that the word "vest" started as a religious ceremonial installation (an "investiture," to clothe with power) and then took on a meaning for real property ("Land and Money"). By the eighteenth century it had been used for offices, but its legal ramifications were unclear. As we have moved from dictionaries to actual usage by the Founding generation, it is clear that the Framers grasped that the word "vest" was both ambiguous (from ceremonial to real property to property in offices to official powers) and vague (different degrees of "vesting"). Eighteenth-century writers knew to add modifiers to clarify the degree of vesting.

For example, as noted above, four state ratifying conventions added the modifier "all" to vesting "the people's" rights in their calls for a bill of rights: "That *all* power is naturally vested in and consequently derived from the people."[312] Madison seems to have channeled this sense of vesting into the term "indefeasible" in his proposed amendments—but only for the people's rights in a republic.[313] A pattern has emerged, and it will continue in Part VI.B: There was a semantic range of "vesting," from "partly vested" to "vested" to "fully vesting" or "all vested." The Framers used this stronger form of "vesting" in Article I's legislative vesting, but not in Article II's executive vesting.

B. The UVA Rotunda Founders Database: Fully Versus Partly Vesting, 1775-1788

The University of Virginia Rotunda database contains the complete papers of a number of Founders (Washington, Adams, Jefferson, Madison, Hamilton, and Jay) as well as the Ratification debates. A search for the words "vest," "vested," and "vesting" between 1775 and 1788 produces a total of 1,250 hits, of which about 1,080 are nonredundant. The entire database is available on SSRN.[314] Unlike in the dictionaries, the uses of the word "vest" in these sources

310. *Id.*

311. *Id.* at 465 n.1.

312. *See supra* note 205 and accompanying text.

313. Madison Resolution (June 8, 1789), *supra* note 124, at 9-10; *see also supra* Part II.D.

314. Jed Handelsman Shugerman, "Vesting" Uses in UVA Rotunda Founding Era Collection, 1776-1789 (Fordham L. Legal Stud. Rsch. Paper No. 3967728, 2021), https://perma.cc/3DAN-T2GT.

are predominantly about offices and powers, rather than clothing, property, or religious ceremonies—which is unsurprising given the correspondents and speakers and their timing. This usage of "vesting" in the political context produces some key insights about the word. The database confirms the same pattern described above: Most often, "vesting" was used by itself and not modified. But the database collection includes a significant number of more complete modifiers for stronger degrees of vesting, and it includes a smaller number of uses with modifiers for weaker degrees of vesting.

In George Washington's digital collection, there were 249 uses of the word "vest." Fifteen added the word "full," "fully vested," or vesting of "full powers," often in a military context.[315] Five added the word "sole" or "solely" to convey exclusivity.[316] Four more added the word "all" to the powers that were

315. Commission from the Continental Congress to George Washington (June 19, 1775), *reprinted in* PAPERS GEORGE WASHINGTON DIGIT. EDITION, https://perma.cc/QD7X-47SS (archived June 18, 2022) [hereinafter GW DIGIT.]; Letter from John Adams to George Washington (Jan. 6, 1776), *reprinted in* GW DIGIT., *supra*, https://perma.cc/CB4M-6CU8 (archived June 18, 2022); Letter from Abraham Yates, Jr. to George Washington (Aug. 13, 1776), *reprinted in* GW DIGIT., *supra*, https://perma.cc/2P3C-FSTR (archived June 18, 2022); Letter from George Washington to Lund Washington (Oct. 6, 1776) (vest "full powers"), *reprinted in* GW DIGIT., *supra*, https://perma.cc/3C6E-BMCE (archived June 18, 2022); Letter from George Washington to Joseph Reed (Feb. 23, 1777), *reprinted in* GW DIGIT., *supra*, https://perma.cc/F7VR-3PRP (archived June 18, 2022); Letter from George Washington to William Shippen, Jr. (Jan. 27, 1777), *reprinted in* GW DIGIT., *supra*, https://perma.cc/7WQP-93BY (archived June 18, 2022); Orders from George Washington to Lieutenant Colonel Robert Hanson Harrison (Mar. 4, 1777), *reprinted in* GW DIGIT., *supra*, https://perma.cc/V85X-DMUN (archived June 18, 2022); Letter from Brigadier General James Mitchell Varnum to George Washington (Nov. 6, 1777), *reprinted in* GW DIGIT., *supra*, https://perma.cc/3RD4-JYBK (archived June 18, 2022); Letter from George Washington to Brigadier Gen. Samuel Holden Parsons (Mar. 18, 1778), *reprinted in* GW DIGIT., *supra*, https://perma.cc/9BD8-XTTL (archived June 18, 2022); Letter from George Washington to the President of Cong. (Sept. 17, 1787), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/H6F3-SRN8 (archived June 18, 2022); Letter from George Washington to Thomas Lewis (Oct. 2, 1788), *reprinted in* GW DIGIT., *supra*, https://perma.cc/YJ2S-5HRH (archived June 18, 2022); Letter from George Washington to Thomas Green (Mar. 31, 1789), *reprinted in* GW DIGIT., *supra*, https://perma.cc/VNQ2-4PZX (archived June 18, 2022); George Washington, Diary Entry (Feb. 3, 1785) ("full & absolute possession is vested"), *reprinted in* GW DIGIT., *supra*, https://perma.cc/J8AS-8CMX (archived June 18, 2022); Letter from John Hancock to George Washington (Dec. 27, 1776), *reprinted in* GW DIGIT., *supra*, https://perma.cc/3TDP-8UAW (archived June 18, 2022); Letter from George Washington to Brigadier General William Smallwood (Dec. 19, 1777), *reprinted in* GW DIGIT., *supra*, https://perma.cc/PK3A-UCYB (archived June 18, 2022).

316. Letter from Colonel Thomas Church to George Washington (Oct. 12, 1775), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/Q5K6-GMA2 (archived June 18, 2022); Letter from Ebenezer Richmond to George Washington (Dec. 21, 1775), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/RJ6L-CSTF (archived June 18, 2022); Letter from George Washington to George Walton (June 2, 1777), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/MK39-6NKD (archived June 18, 2022); Letter

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vested.[317] One used the word "absolute";[318] one mentioned "vested with every power";[319] one modified "vest" with "independent,"[320] another with "ultimate,"[321] and another with "more extensive and adequate" vesting.[322] By contrast, vesting could also be more limited and partial. The editors of Washington's papers included a note referring to "vesting" only for "a limited period of time."[323]

The John Adams digital collection had 121 references to "vesting." Roughly one-tenth used the phrases "full" or "fully" vesting, and many of those were in the context of treaty, diplomatic, or ambassadorial roles.[324] Some referenced

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from Anthony Butler to George Washington (Mar. 9, 1778), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/43NM-C5EE (archived June 18, 2022); Letter from George Washington to a Bd. of Gen. Officers (May 29, 1778), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/9Q7S-R54B (archived June 18, 2022).

317. Letter from Abraham Yates, Jr. to George Washington (Aug. 13, 1776), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/2VL8-EKMW (archived Oct. 2, 2022); Letter from George Washington to Benjamin Harrison (Aug. 19, 1777), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/GRJ2-E95M (archived June 18, 2022); Letter from George Washington to James Duane (May 14, 1780), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/C2YK-7MXW (archived June 18, 2022); Letter from the Bd. of War to George Washington (Nov. 14, 1776), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/A7LP-E8C3 (archived June 18, 2022).

318. Letter from George Washington to Fielding Lewis (May 5, 1780), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/Q8JJ-E4ED (archived June 18, 2022).

319. George Washington, General Orders (Apr. 2, 1778), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/R4K2-YZEB (archived June 18, 2022).

320. Letter from the New York Council of Safety to George Washington (July 25, 1777), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/8F6R-YYRT (archived June 18, 2022).

321. Letter from George Washington to Lewis Morris (Aug. 4, 1775), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/427G-PASA (archived June 18, 2022).

322. Letter from George Washington to Benjamin Harrison (Jan. 18, 1784), *reprinted in* GW DIGIT., *supra* note 315, https://perma.cc/69R2-XUBL (archived June 18, 2022).

323. Letter from the Pennsylvania Council of Safety to George Washington (Oct. 26, 1777), *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, OCTOBER-DECEMBER 1777, at 20, 21 (Frank E. Grizzard, Jr. & David R. Hoth eds., 2002).

324. *See, e.g.*, Letter from John Adams to John Bondfield (Apr. 2, 1780), *reprinted in* ADAMS PAPERS DIGIT. EDITION, https://perma.cc/QFG5-MF7X (archived June 18, 2022) [hereinafter ADAMS DIGIT.]; Letter from John Adams to Jeremiah Allen (Apr. 2, 1780), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/U43V-XS9R (archived June 18, 2022); Letter from the Am. Comm'rs to the Baron von Thulemeier (Sept. 9, 1784), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/N5JD-QL42 (archived June 18, 2022); Letter from the Am. Comm'rs to the Duke of Dorset (Oct. 28, 1784), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/A2E5-GGNN (archived June 18, 2022); Letter from William Lee to John Adams (Jan. 28, 1781), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/BSU5-CFR5 (archived June 18, 2022); Letter from the American Commissioners to the Comte de Vergennes (Oct. 11, 1785), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/YD7U-CSCR (archived June 18, 2022); Thomas Barclay's Commission to Negotiate with Morocco (Oct. 11, 1785), *reprinted in* ADAMS DIGIT.,

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vesting "plenipotentiary" power in diplomatic and treaty contexts (that is, "full power").[325] In the context of legislative powers, Adams's papers used "full" vesting,[326] "absolute" vesting,[327] "solely" and "exclusively" vesting (in the context of the Articles of Confederation Congress's power of "making War and Peace"[328] and regulating foreign commerce),[329] and "full," "plenipotentiary" and "solely" vesting (in a military context).[330] Conversely, one reference was to vesting for "a limitted [t]ime," an incomplete vesting.[331]

Thomas Jefferson's collection had 143 hits for "vest" and "vested," some of which modified "vest" with "exclusively"[332] or "full"[333] related to treaties or

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supra note 324, https://perma.cc/CB8H-SPSX (archived June 18, 2022); Joint Commission to Negotiate a Treaty of Amity and Commerce with Great Britain (May 12, 1784), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/4CR7-KLQB (archived June 18, 2022); Joint Commission to Negotiate a Treaty of Amity and Commerce with Morocco (Mar. 11, 1785), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/TF7E-5SJN (archived June 18, 2022); Instructions to the Commissioners to Canada (Mar. 20, 1776), *reprinted in* ADAMS DIGIT., *supra*, https://perma.cc/PE6N-NM7Y (archived June 18, 2022).

325. Letter from John Adams to Edmund Jenings (Apr. 2, 1780) ("Minister plenipotentiary . . . vested with full Powers"), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/B6GQ-Q4M9 (archived June 18, 2022); Letter from John Adams to John Bondfield, *supra* note 324; Letter from John Adams to Jeremiah Allen, *supra* note 324.

326. Letter from John Adams to John Jay (May 8, 1785) ("unless Congress are vested with full Power, under the Limitations prescribed of 15 Years"), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/FZR4-GXNB (archived June 18, 2022).

327. Letter from Arthur Lee to John Adams (Mar. 6, 1785) ("It is certain that Congress could not remedy these evils but by possessing & exercising absolute powers, the exertion of which, were they vested in them . . . ."), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/B8ZQ-9JMP (archived June 18, 2022).

328. Letter from the Am. Peace Comm'rs to the Robert R. Livingston (Dec. 14, 1782), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/Q39X-PJEN (archived June 18, 2022).

329. Letter from Tristram Dalton to John Adams (Apr. 11, 1785), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/CS6B-V7F3 (archived June 18, 2022).

330. Letter from Joseph Hawley to John Adams (Nov. 14, 1775) ("Method of Appointing Military officers and *vest* our Council solely with that power" (emphasis added)), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/TPE6-UREX (archived Oct. 2, 2022); Letter from John Adams to George Washington (Jan. 6, 1776) ("and are *vested* with full Power and Authority to act" (emphasis added)), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/7GT7-MXNS (archived June 18, 2022).

331. Letter from Samuel Adams to John Adams (Jan. 9, 1777), *reprinted in* ADAMS DIGIT., *supra* note 324, https://perma.cc/6Q3V-JJVP (archived June 18, 2022).

332. *See, e.g.*, Letter from Robert Morris to the President of Cong. (Jan. 15, 1782), *reprinted in* PAPERS THOMAS JEFFERSON DIGIT. EDITION, https://perma.cc/J9H5-RNXZ (archived June 18, 2022) [hereinafter JEFFERSON DIGIT.].

333. Letter from John Langdon to Thomas Jefferson (Dec. 7, 1785) ("[A]ll the States of America will see the absolute necessity of vesting Congress with *full power* to regulate our Commerce . . . our trade is in its present situation; vesting Congress with *full*

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legislative power. Jefferson's papers often used the term vested "with full and sufficient powers" in the treaty and diplomacy context.[334] He referred to "vest[ing] Congress with the *absolute* power of regulating their commerce, only reserving all revenue arising from it to the state in which it is levied."[335]

The James Madison collection had 110 uses of "vest" with a range of modifiers. Eight were stronger forms of vesting: "vest[] with full power";[336] "vest[ing] an exclusive jurisdiction";[337] "vesting . . . alone";[338] "[v]esting . . . with full [a]uthority";[339] "compleat," "complete," or "completely" vesting;[340] vesting "absolute power,"[341] including legislative contexts for vesting "exclusively";[342] and another stronger vesting of legislative power over impost and taxes.[343] In *Federalist No. 41*, Madison used the phrase "vest in the existing Congress a power to legislate in *all cases whatsoever*."[344] One use referred to a

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powers." (emphasis added)), *reprinted in* JEFFERSON DIGIT., *supra* note 332, https://perma.cc/DML8-UJ9L (archived June 18, 2022).

334. Commission for Negotiating Treaties of Amity and Commerce (May 16, 1784), *reprinted in* JEFFERSON DIGIT., *supra* note 332, https://perma.cc/L4AR-YWB7 (archived June 18, 2022); Letter from the American Commissioners to Stael de Holstein (Sept. 28, 1784), *reprinted in* JEFFERSON DIGIT., *supra* note 332, https://perma.cc/C4SX-GX5G (archived June 18, 2022); Letter from the Am. Comm'rs to the Duke of Dorset (Oct. 28, 1784), *reprinted in* JEFFERSON DIGIT., *supra* note 332, https://perma.cc/NZ35-6HGN (archived June 18, 2022); Commission (Oct. 11, 1785), *reprinted in* JEFFERSON DIGIT., *supra* note 332, https://perma.cc/ZC5E-4V5Q (archived June 18, 2022).

335. Letter from Thomas Jefferson to G.K. van Hogendorp (Oct. 13, 1785) (emphasis added), *reprinted in* JEFFERSON DIGIT., *supra* note 332, https://perma.cc/D5BM-Y2TW (archived June 18, 2022).

336. *See* Letter from John Adams to John Jay (May 8, 1785), *reprinted in* SELECTED PAPERS JOHN JAY DIGIT. EDITION, https://perma.cc/7HRD-PUD4 (archived June 18, 2022) [hereinafter JAY DIGIT.].

337. Protest of Virginia Delegates (Oct. 10, 1781), *reprinted in* PAPERS JAMES MADISON DIGIT. EDITION, https://perma.cc/PP99-QB58 (archived June 18, 2022) [hereinafter MADISON DIGIT.].

338. THE FEDERALIST NO. 38 (James Madison), *supra* note 83, at 236.

339. Letter from the Virginia Dels. to Edmund Randolph (Apr. 2, 1787), *reprinted in* MADISON DIGIT., *supra* note 337, https://perma.cc/3CLE-YLMT (archived Oct. 2, 2022).

340. Letter from James Madison, Jr. to James Madison, Sr. (Dec. 12, 1786), *reprinted in* MADISON DIGIT., *supra* note 337, https://perma.cc/9DD4-4KXB (archived June 18, 2022); Weaknesses of the Confederation (June 7, 1788), *reprinted in* MADISON DIGIT., *supra* note 337, https://perma.cc/CL7H-27N2 (archived June 18, 2022); THE FEDERALIST NO. 52 (James Madison), *supra* note 83, at 329.

341. Letter from Alexander White to James Madison (Aug. 16, 1788), *reprinted in* MADISON DIGIT., *supra* note 337, https://perma.cc/7AX5-Q748 (archived June 18, 2022).

342. Power to Originate Money Bills in the Legislature (Aug. 13, 1787), *reprinted in* MADISON DIGIT., *supra* note 337, https://perma.cc/V2WQ-QXAT (archived June 18, 2022).

343. Motion on Impost (Feb. 3, 1781), *reprinted in* MADISON DIGIT., *supra* note 337, https://perma.cc/PP8R-HDG3 (archived June 18, 2022).

344. THE FEDERALIST NO. 41 (James Madison), *supra* note 83, at 264 (emphasis added).

weaker form of vesting, giving the recipients of certain powers "extensive limits."[345]

John Jay's database had forty-eight uses of "vest," including references to vesting "solely,"[346] with the "fullest power,"[347] and vesting "absolute Power."[348] In terms of treaties, Jay's papers refer to "sole and exclusive" vesting and vesting "exclusive [r]ight to make [p]eace."[349]

Alexander Hamilton's database had 131 uses of "vest" with fifteen modifiers that strengthened the delegation. Eight were in a legislative context (such as "all" or full taxing powers), including "[t]his council was vested, with the sole power of legislation,"[350] and "[a]ll internal taxation is to be vested, in our own legislatures."[351] Hamilton also wrote of taxing powers "exclusively vested"[352] and vesting "indefinite power."[353] Twice he wrote "vested with plenipotentiary" authority, with one use about ambassadorial power[354] and the other about the wartime urgency in 1780 of calling "a convention of all the states with full authority to conclude finally upon a general confederation."[355] His papers also include a reference to "partly" vesting.[356]

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345. Letter from William Grayson to James Madison (Oct. 14, 1785) ("recommending the vesting [of] the American Ministers with Consular Powers—& giving them extensive limits"), *reprinted in* MADISON DIGIT., *supra* note 337, https://perma.cc/QK6G-9K97 (archived June 18, 2022).

346. An Address to the People of the State of New-York (Apr. 12, 1788), *reprinted in* JAY DIGIT., *supra* note 336, https://perma.cc/C3K4-2NRY (archived June 18, 2022).

347. Letter from the New York Dels. to Alexander McDougall (Feb. 20, 1779), *reprinted in* JAY DIGIT., *supra* note 336, https://perma.cc/DZX7-3KWX (archived June 18, 2022).

348. Letter from John Jay to Robert Morris (Oct. 6, 1776), *reprinted in* JAY DIGIT., *supra* note 336, https://perma.cc/DHT5-KSBA (archived June 18, 2022).

349. Letter from John Jay to Vergennes (Sept. 11, 1782), *reprinted in* JAY DIGIT., *supra* note 336, https://perma.cc/7CJ6-PU7W (archived June 18, 2022).

350. The Farmer Refuted, &c. (Feb. 23, 1775), *reprinted in* PAPERS ALEXANDER HAMILTON DIGIT. EDITION, https://perma.cc/DPG2-F3PV (archived June 18, 2022) [hereinafter HAMILTON DIGIT.].

351. *Id.*

352. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 83, at 221.

353. Remarks on the Quebec Bill: Part One (June 15, 1775), *reprinted in* HAMILTON DIGIT., *supra* note 350, https://perma.cc/KRF7-53AK (archived June 18, 2022).

354. Letter from Alexander Hamilton to Lieutenant Colonel John Laurens (Aug. 15, 1782), *reprinted in* HAMILTON DIGIT., *supra* note 350, https://perma.cc/WH6P-7BYM (archived June 18, 2022).

355. *See, e.g.*, Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *reprinted in* HAMILTON DIGIT., *supra* note 350, https://perma.cc/E4EN-UBYK (archived June 18, 2022).

356. Letter from Alexander Hamilton to Gouverneur Morris (May 19, 1777), *reprinted in* HAMILTON DIGIT., *supra* note 350, https://perma.cc/53JD-HMLL (archived June 18, 2022).

The Documentary History of the Ratification database had 280 uses of "vest," and twenty-four included stronger modifiers.[357] Examples include references to Congress being vested with "all the vast powers,"[358] "the *sole* and *exclusive* power of regulating trade, of imposing port duties,"[359] "all the legislative power,"[360] and "full power to lay and collect, by their own authority, what *taxes, duties,* and *excises* they please,"[361] and, in a military context, vesting "full powers"[362] and "solely"[363] vesting over militia powers. The Convention debates referred to the war, peace, and legislative powers as "fully and effectually vested"[364] and proposed to "vest the sole power of making peace or war."[365] The essays published by the Anti-federalists likewise referred to vesting "sole power,"[366] "vested with all the powers,"[367] and vesting "plenary powers."[368]

Here are some general observations: Roughly 10% of the uses of the word "vest" have stronger modifiers and roughly 1% to 2% have modifiers that weaken or limit the vesting. Most of the uses that strengthen the "vesting" are in one of three contexts: legislative (especially taxing powers); diplomacy,

357. This collection had many duplicate entries, such as multiple publications of *The Federalist Papers* or direct quotations of the Constitution's vesting clauses.

358. Remarks on the Address of Sixteen Members (Oct. 18, 1787), *reprinted in* DOCUMENTARY HIST. RATIFICATION CONST. DIGIT. EDITION, https://perma.cc/3KNJ-YDNB (archived June 18, 2022) [hereinafter DHRC DIGIT.].

359. Letter in the *Philadelphia Freeman's Journal* (May 16, 1787) (emphasis added), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/2A74-TRQ2 (archived June 18, 2022).

360. Letter in the *Independent Gazetteer* (Oct. 5, 1788), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/2P2E-2NA4 (archived June 18, 2022).

361. Letter from Massachusetts (Oct. 17 & 24, 1787), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/HN7K-8HVF (archived June 18, 2022).

362. *Id.*

363. Debates at the Virginia Convention (June 14, 1788) ("Have we not found from experience, that while the power of arming and governing of the militia has been solely vested in the State Legislatures, they were neglected and rendered unfit for immediate service?"), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/TMD6-VVY9 (archived June 18, 2022).

364. Letter from George Washington to the President of Cong. (Sept. 17, 1787), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/5X2A-TLB8 (archived June 18, 2022).

365. House of Representatives Debates (Jan. 16, 1788), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/L5N9-FRYT (archived June 18, 2022).

366. Cincinnatus No. IV (Nov. 22, 1787), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/UM2V-MD76 (archived June 18, 2022).

367. Brutus No. VI (Dec. 27, 1787), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/7VAJ-36US (archived June 18, 2022).

368. *Id.*

ambassadorial, and treaty negotiation; and military contexts.[369] Legislative powers were often vested more "fully," especially the regulation of commerce and taxation powers. Only specific kinds of traditional executive powers were delegated more fully (war, peace, and foreign relations).

For example, Adams, Franklin, Jay, and Henry Laurens wrote the following about "exclusive[ly] vesting" war and peace in the Congress in 1782: "[I]t appertains solely to Congress, in whom exclusively are vested the Rights of making War and Peace . . . ."[370] *Federalist No. 24* was more specific about the president's military power: "[I]t vested in the EXECUTIVE the whole power of levying troops."[371] The phrase "vested with full powers" was often used with reference to "plentipotentiary" powers of ambassadors,[372] which makes sense etymologically: "plenipotentiary" means roughly "full power."

It is striking how many times these writers used full vesting for legislative taxing powers. In *Federalist No. 36*, for example, "the right of imposing the tax is exclusively vested in the Union."[373] *Federalist No. 52* also refers to the British parliament's authority as "vested completely."[374] Many of the references to "full" vesting and "full" powers were quintessentially legislative in other ways. For example: "[A]ll the States of America will see the absolute necessity of vesting Congress with full power to regulate our Commerce."[375] "[S]everal states have passed acts for vesting Congress with the whole regulation of their commerce."[376] "[I]t was particularly suggested as necessary to vest in Congress the further power of exclusively regulating the commerce of the United

369. *See, e.g.*, Commission for Negotiating Treaties of Amity and Commerce, *supra* note 334; Commission, *supra* note 334; Letter from the Am. Comm'rs to the Duke of Dorset, *supra* note 324; Thomas Barclay's Commission to Negotiate with Morocco, *supra* note 324; Joint Commission to Negotiate a Treaty of Amity and Commerce with Great Britain, *supra* note 324; Joint Commission to Negotiate a Treaty of Amity and Commerce with Morocco, *supra* note 324.

370. Letter from the Am. Peace Comm'rs to Robert R. Livingston, *supra* note 328.

371. THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 83, at 158.

372. *See, e.g.*, Letter from John Adams to Jeremiah Allen, *supra* note 324; Letter from John Adams to John Bondfield, *supra* note 324; Letter from John Adams to Edmund Jenings, *supra* note 325; Letter from Alexander Hamilton to James Duane, *supra* note 355.

373. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 83, at 221.

374. THE FEDERALIST NO. 52 (James Madison), *supra* note 83, at 391; *cf.* THE FEDERALIST NO. 41 (James Madison), *supra* note 83, at 264 ("[A]nd they vest in the existing Congress a power to legislate in all cases whatsoever . . . .").

375. Letter from John Langdon to Thomas Jefferson, *supra* note 333 ("[A]ll the States of America will see the absolute necessity of vesting Congress with *full power* to regulate our Commerce . . . our trade is in its present situation; vesting Congress with *full powers*" (emphasis added)).

376. Jefferson's Observations on Démeunier's Manuscript (June 22, 1786), *reprinted in* JEFFERSON DIGIT., *supra* note 332, https://perma.cc/JAB4-2VAR (archived June 18, 2022).

States."[377] "The United States in Congress assembled are vested with the sole and exclusive right and power among other things 'of regulating the trade.'"[378] There are many examples of "full," "complete," and "exclusive" vesting, and there seems to have been a special role in a republican era for the full vesting of legislative powers in the branch most reflective of popular sovereignty.[379]

Partial vesting was not used as frequently as was "complete" vesting, but it was used by key Framers, and it shows the broad range of "vesting" and its need for clarification. For example, Madison had this passage in *Federalist No. 39* contrasting "complete" and "partial" vesting: "Among a people consolidated into one nation, this supremacy is *completely* vested in the national legislature. Among communities united for particular purposes, it is vested *partly* in the general and *partly* in the municipal legislatures."[380]

Along these same lines, Madison's *Federalist No. 38* referred to the joint powers of appointment shared between the President and the Senate, "instead of vesting this executive power in the Executive alone."[381] In a similar contrast, Alexander Hamilton wrote to Gouverneur Morris in 1777 of "whole" versus "partial" vesting: "When the deliberative or judicial powers are vested wholly or partly in the collective body of the people."[382] William Grayson wrote to Madison of "vesting" consular powers with "extensive limits," a kind of partial vesting.[383] In the Ratification debates, one writer referred to the President as "transiently vested" by the people.[384]

These database uses suggest that the Founding generation understood "vesting" as a general term with vague and ambiguous meaning. The vast majority of the time, the Founders used the word "vest" without more specific modifiers, indicating a basic delegation. Sometimes they added words to strengthen the delegation more "fully," more "exclusively," more "solely," or more "completely," and generally these examples were for legislative powers or particular kinds of foreign relations powers. Given these patterns of uses, it seems more likely that the use of "all" in Article I and its absence in Article II were linguistically and constitutionally significant, pointing in opposite

377. Letter from a Fed. Republican (Mar. 5, 1788), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/39MD-Z4W8 (archived June 18, 2022).

378. Continental Congress Report on Peace with the Indians (Apr. 21, 1783), *reprinted in* HAMILTON DIGIT., *supra* note 350, https://perma.cc/JJS3-DTWA (archived June 18, 2022).

379. See note 153 above on Wood, Bailyn, McDonald, Morgan, and Blackstone.

380. THE FEDERALIST NO. 39 (James Madison), *supra* note 83, at 245 (emphasis added).

381. THE FEDERALIST NO. 38 (James Madison), *supra* note 83, at 270.

382. Letter from Alexander Hamilton to Gouverneur Morris, *supra* note 356.

383. Letter from William Grayson to James Madison, *supra* note 345.

384. On the Federal Government I (Sept. 26, 1787), *reprinted in* DHRC DIGIT., *supra* note 358, https://perma.cc/BXZ4-23PF (archived June 18, 2022).

directions: against Congress's flexibility to delegate legislative power, and against the unitary executive theory.

VII. "Vesting" in Property Law

In the dictionaries, the dominant use of "vest" was simply to bestow, possess, or take effect as title, and generally in terms of real estate. A handful of dictionaries added reference to offices. The dictionaries suggest that "vesting" emerged from a mix of clothing, ceremonial "investiture," and property law in land, and by extension, referred to offices as property and then official powers. If twenty-first–century formalists assume that "vesting" in the Constitution meant "legislatively indefeasible" because "vesting" meant legislatively indefeasible in eighteenth-century property law, this assumption does not bear out an examination of the common law of property.

Let us start with a case that seems to support such assumptions that "vesting" is related to "legislative indefeasibility": *Marbury v. Madison*. On the one hand, *Marbury* indicates limits on presidential removal power: Marbury, as a justice of the peace, was not removable from office by the President. On the other hand, its use of the word "vested" also raises some questions about the emerging notion of "vested rights." *Marbury v. Madison* cuts both ways because it shows us that Congress can limit the removal power of the President: "[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled . . . . But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him."[385]

One might wonder why Jefferson and Madison did not moot this entire case by removing Marbury, regardless of the dispute over his commission. Jefferson and Madison seem to have tried to get rid of the case by removal, and yet (apparently) no argument was made that the commission was irrelevant once Marbury had been fired.[386] Chief Justice Marshall simply concluded that the justice of the peace was "not removable" by the President.[387] Modern readers have been confused by this conclusion, because it had been unclear why

385. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803); *see* Birk, *supra* note 46, at 187 n.68; Manners & Menand, *supra* note 46, at 25-26.

386. Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199, 213-16 (2013). The arguments by counsel in *Marbury* are recorded in the *United States Reports*, and there is no record of this point being raised. *Marbury*, 5 U.S. (1 Cranch) at 138-54 (1803); *see* Myers v. United States, 272 U.S. 52, 141 (1926) ("The question whether the officer was removable was not argued to the [Marshall] Court by any counsel contending for that view.").

387. *Marbury*, 5 U.S. (1 Cranch) at 162; *see also id.* at 138, 156-57, 167, 172 (discussing removability "at . . . will").

Jefferson or Madison would have mooted this case by simply firing Marbury. A justice of the peace was clearly no Article III judge. A justice of the peace had only a five-year term, not life tenure. In *Myers v. United States*, Chief Justice Taft speculated "uncertainly" that Marbury's office as justice of the peace had special protection as a territorial office under congressional power over the District of Columbia[388] or as an inferior officer.[389] However, it was not clear why a territorial office would be more unremovable than other federal offices, and nothing in the statute suggested a specific protection for the inferior officer. Marbury's counsel Charles Lee hinted that the justice of the peace had a judicial nature, and perhaps more independence was implicit.[390] Nevertheless, it is not clear why an executive office would have been considered as independent as a judge.

Jane Manners and Lev Menand seem to have cracked this puzzle: Congress had established the office of justice of the peace as a term limited to five years, with no provision mentioning removal. Manners and Menand revealed the historical "inviolab[ility]" of offices held for a "term of years," if the statute did not add an explicit removal clause[391]: "Short of impeachment, their holders could not be removed before the end of their terms."[392] Impeachment thus meant that an office held for a term of years would be held during good behavior.

While modern readers assume that this wording would allow presidential removal, that assumption reflects our modern presidentialism rather than the English aristocratic tradition of offices as property. In early modern England, offices held for a term of years were property protected from removal, like the

388. *Myers*, 272 U.S. at 158 ("It cannot be certainly affirmed whether the conclusion there stated was based on a dissent from the legislative decision of 1789, or on the fact that the office was created under the special power of Congress exclusively to legislate for the District of Columbia, or on the fact that the office was a judicial one, or on the circumstance that it was an inferior office."); *see* C.B. Cross, *Removal Power of the President and the Test of Responsibility*, 40 CORNELL L.Q. 81, 83, 86 (1954).

389. *Myers*, 272 U.S. at 158; *id.* at 242-43 (Brandeis, J., dissenting) ("In *Marbury v. Madison*... it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding." (citation omitted)); *see also* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518-19 (2001).

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

391. Manners & Menand, *supra* note 46, at 6. The major English case *Harcourt v. Fox* turned on the notion of office as vested property, and *Marbury v. Madison*'s dicta also famously engaged this same rule. *Id.* at 19, 35-37.

392. *Id.* at 6.

many inheritable offices and life-tenure offices with strong job security.[393] Offices held for a term of years could be inherited after the officeholder died. Manners and Menand show that "term-of-years tenures in both England and America were understood to be inviolable: Without provisions to the contrary in a controlling statute, constitution, or grant of office, an officer serving for a term of years could not be removed mid-term short of impeachment or other extraordinary measure."[394] In short, an office held "for a term of years" with no removal language was not removable by the executive, only by the legislative process of impeachment or "address" by both houses. I believe that together, Manners, Menand, and I have established that even for traditionally executive offices, from 1787 through the First Congress and up to *Marbury*, a statutory term-of-years limit would sharply constrain removal and protect the officer.[395]

And yet *Marbury* raises a question about the word "vesting": "[Marbury's] appointment was not revocable; but vested in the officer legal rights which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right."[396] If Marbury could not be removed because his rights had "vested," did that also signify that the word "vested" meant inviolable or indefeasible for the constitutional meaning of officers' powers, too?

Even though *Marbury* is evidence that removal power was no fundamental given, it also raises the possibility that "vested" could mean irrevocable and indefeasible, exported from the "vested right" doctrine to the Constitution's "vested powers." Richard Epstein explicitly made this connection in 2020, and it helps to reread his observation here: "The use of the term 'vested' brings back images of vested rights in the law of property; that is, rights that are fully clothed and protected, which means, at the very least, that they cannot be undone by ordinary legislative action but remain fixed in the absence of some constitutional amendment."[397]

Perhaps Chief Justice Taft, Justice Scalia, Chief Justice Roberts, and others made this same assumption when they added the word "all" to the Executive Vesting Clause, because they thought "vesting" implied completeness and inviolability. Unitary scholars often emphasize the terms "exclusive" and

393. *Id.* at 5, 19-20.

394. *Id.* at 18-19.

395. *See id.* at 6, 25; Shugerman, *supra* note 6 (manuscript at 40-43); *see also* Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2090 (2021).

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

397. EPSTEIN, *supra* note 8, at 36.

"indefeasible" by legislation, phrases that seem to be borrowed from the vested-rights doctrine.

There are two main problems with this assumption: First, the different context of rights versus powers, and second, chronology. In *Marbury*, Chief Justice Marshall was translating this English context to Marbury as a protected officeholder: "Vesting" protected the officeholder *from* removal. The officeholder had the property right, and "vesting" limited the President's power. In this era, the context of "vesting" was the protection of property rights against political power, not the expansion of those powers over individual property rights. Some scholars suggest that the vested-rights doctrine arose during the American Revolution as part of the criticism of English interference with colonists' property rights.[398] The "vesting" part of *Marbury v. Madison* is about the property holder, not the power to take away the property, and its usage here of the word "vested" limits the power of the President. And if we turn to the question of separation of powers in this part of *Marbury*, "vesting" meant that Congress could protect an officeholder from the President. *Marbury* may have introduced judicial review of legislation at the end of its decision, but in the opening questions about property rights and "vesting," Chief Justice Marshall was first recognizing Marbury's protection from the President as an "office property holder," and second was recognizing congressional power to limit presidential removal. In the more salient decision of 1803, Chief Justice Marshall acquiesced to congressional powers to abolish the midnight judges' offices in *Stuart v. Laird*.[399]

The second problem is timing. Whereas Chief Justice Marshall's use of "vesting" embraced legislative power over the President (using wording in a statute to block presidential power), the vested-rights doctrine emerged as a constitutional limit on the legislature only in the next stage of the Marshall Court, and there is no evidence that it existed as a legal concept before 1787. Searching early state cases in legal databases produces zero references to "vested rights" or "vested powers" before 1787, and just eighty-two references to the word "vested" in any context before 1787.[400]

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398. *See* Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y 253, 258 (2018) ("The doctrine of vested private rights is generally viewed as an American phenomenon of largely historical interest. The concept of vested private rights as a check on legislative sovereignty came into full flower on American soil at the time of the Revolution."); Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1699-703 (2012); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780-82 (1936).

399. *See* 5 U.S. (1 Cranch) 299, 307-09 (1803).

400. To obtain these results, I searched for the phrases "vested right," "vested rights," "vested power," and "vested powers" on Westlaw and LexisNexis, filtering for the years before January 1, 1788 on each platform.

The phrases "vested right" and "vested interest" do not appear in Blackstone's *Commentaries*—only in the notes added in edited volumes published in the mid-nineteenth century. It appears that "vesting" simply did not develop into a more concrete doctrine until the nineteenth century. Blackstone did associate "vested" property with something similar to "indefeasibility" by events: "[A] vested remainder" is property "which nothing can defeat, or set aside."[401] The usage of the word "vested" in contrast to "defeat" raises the connotation of "indefeasibility," so one can understand why modern readers might assume that "vested" connotes "indefeasible" by events, and that "indefeasible" by events might also mean legislatively indefeasible.

But property law does not confirm such assumptions that "vesting" means indefeasible. Legal treatises on the "Founders' bookshelf"—those that many Founders owned and used—either did not mention "vesting" at all, used it only in terms of real property, or used it only in a limited way, similar to Blackstone.[402]

Gordon Wood identified that the vested-rights doctrine emerged in the post-Revolution early Republic and the Jeffersonian era.[403] James Kainen's study of the vested-rights doctrine also shows that it emerged in the early nineteenth century.[404] Over the next few decades, it appears that "vested rights" developed gradually to take on a new connotation of limiting legislative power. *Marbury* itself did not indicate that the phrase "vested rights" meant a limit on legislative power, but the Marshall Court used it that way in the next decade in *Fletcher v. Peck* (1810)[405] (considered the first time the

401. 2 BLACKSTONE, *supra* note 79, at *169.

402. On "the Founders' bookshelf," see Mortenson, *Article II*, *supra* note 24, at 1188-90 (focusing on "Madison's bookshelf"); David Lundberg & Henry F. May, *The Enlightened Reader in America*, 28 AM. Q. 262, 267-68 (1976); HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700-1799, at ix-xiv (1978); and H. TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 11-24 (Liberty Fund 1998) (1965) (surveying eighteenth-century library catalogs). I discuss Blackstone and other treatises on removal in more detail in two of my upcoming works. *See generally* Shugerman, *supra* note 25; JED HANDELSMAN SHUGERMAN, A FAITHFUL PRESIDENT: THE FOUNDERS VS. THE ROYALIST ORIGINALISTS (forthcoming 2024).

403. Gordon S. Wood, Lecture, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1444-45 (1999); *see also* Haskins, *supra* note 12, at 19-20.

404. *See* Kainen, *supra* note 12, at 381-83; *see also* Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1433-34 (2021) (identifying "vested rights" as a nineteenth-century doctrine, although not tracing an earlier history).

405. 10 U.S. (6 Cranch) 87, 132-35 (1810).

Supreme Court overturned a state statute), and then in *Trustees of Dartmouth College v. Woodward* (1819)[406] and *Ogden v. Saunders* (1827).[407]

A more specific use of the phrase "vested-rights doctrine" in constitutional law is the protection of rights recognized by a judicial decision from being overturned by the legislature. It appears that this particular meaning first appeared in a Supreme Court decision in 1898, more than a century after the Convention:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.[408]

This doctrine surely emerged from the earlier uses of "vested rights," but it is telling that it took almost a century to take on this particular articulation.

Even today, the word "vested" is vague and ambiguous in its legal connotations, and thus it needs modification to establish full property rights. Contemporary pensions and retirement plans use "vesting" for benefits with a connotation of complete and indefeasible, but many commentators note that the benefits have this special status only when "fully vested." They also contrast "fully vested" with "partially vested," so that even in today's legal usage, Richard Epstein is making flawed assumptions about private law as he attempts to borrow from it for constitutional law. "Vesting" continues to be ambiguous and needs to be modified and clarified by words like "full," "all," or "partly."[409]

The assumption that the term "vesting" had a special constitutional status is a kind of semantic drift. Unitary scholars might contend that while the unwritten English constitutional system permitted evolution, the Framers understood the Vesting Clause to take the circa-1787 powers of the Crown and lock them in place as a matter of fixed, written constitutionalism. I call this assumption "fixed written constitutional vesting." The problems with it are twofold: First, there is no textual or historical evidence to support such an interpretation, and second, "vesting" simply did not have a predetermined meaning before the era of written constitutionalism. It is ahistoric to project a fixed-written-constitutional-vesting meaning back onto the English word "vesting." The eighteenth-century usage of "vesting" could not have had such a

406. 17 U.S. (4 Wheat.) 518, 625, 712 (1819).

407. 25 U.S. (12 Wheat.) 213, 304 (1827) (Thompson, J., concurring in part and dissenting in part) (noting that retrospective laws undermining vested rights are "repugnant to those fundamental principles" underlying both the American and British legal systems).

408. McCullough v. Virginia, 172 U.S. 102, 123-24 (1898).

409. *See* Julia Kagan, *Fully Vested*, INVESTOPEDIA (updated Sept. 18, 2021), https://perma.cc/9T7R-264N.

loaded constitutional meaning before written constitutionalism had fully emerged as a system of concepts. We might call this assumption "magical vesting" because of its anachronism.

Conclusion: A Judicial Vortex of "Vesting"

If the Roberts Court is serious about "vesting" having such an absolutist meaning, many more shoes—and independent agencies—will drop. Justice Kavanaugh signaled this broader challenge to *Humphrey's Executor* and agency independence when he was on the D.C. Circuit,[410] and the Ninth Circuit raised a similar question in January 2021.[411] In May 2022, a Fifth Circuit panel invalidated the independence of the SEC's administrative law judges as an extension of *Free Enterprise* and *Seila Law*.[412] With the addition of Justice Barrett, a self-identified originalist, the unitary theory is poised to take down other independent agencies. A tenet of many originalists, however, is that the Constitution's meaning should prevail over subsequent judicial or institutional precedent.[413] In light of this evidence on "vesting" and the Executive Vesting Clause, along with revised understandings of the Take Care/Faithful Execution Clause and the Decision of 1789, originalists should pause and reconsider *Free Enterprise* and *Seila Law*.

This Article contributes more broadly to the controversies over the separation of powers beyond presidential removal. The assumption that "vesting" meant complete, total, exclusive, or indefeasible circa 1787 plays a significant role in the originalist, textualist, and formalist arguments beyond presidential removal: invalidating other reforms that would foster executive-branch independence, such as alternative forms of appointment and supervision of independent prosecutors, Department of Justice officials, and inspectors general;[414] limiting congressional oversight; expanding executive-

410. Shugerman, *supra* note 60.

411. Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021), *cert. granted in part*, 142 S. Ct. 895 (2022).

412. Jarkesy v. SEC, 34 F.4th 446, 464-66 (5th Cir. 2022).

413. *See* Randy E. Barnett, Lecture, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 9 (2006); Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism*, 48 PERSPS. ON POL. SCI. 7, 9 (2019); *cf.* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1942 (2017) (entertaining a "prudential" approach); SCALIA, *supra* note 37, at 41-43 (criticizing judicial overreach).

414. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 705, 709-10 (1988) (Scalia, J., dissenting); Edmond v. United States, 520 U.S. 651, 664-65 (1997) (limiting the power of inferior officers and describing removal without a good-cause requirement as "a powerful tool for control"); Lucia v. SEC, 138 S. Ct. 2044, 2052-53 (2018) (holding that an official who exercises "significant authority" is an "officer" subject to the Appointments Clause).

privilege claims;[415] and invalidating broad congressional delegations to executive agencies.[416]

In the nondelegation debate, this Article's findings lend support to both sides. Recent historical work on Founding-era legislative delegation shows, on balance, mixed context,[417] and thus text and structure may be appropriate, even if it may seem too heavy a burden to place on such small words like "vest" and "all." To those in favor of congressional delegations, this Article shows that "vesting" is more flexible than has been assumed, and "vesting" powers did not make them nondelegable or exclusive. To those opposed, if "vesting" by itself was more flexible, then adding the word "all" in Article I's vesting clause had intratextual significance, rather than a less meaningful redundancy. The Founders' usage appears to reflect more of an emphasis on "all" legislative power being vested, a completeness that lends more weight in favor of limits on delegation (for example, *Schechter Poultry*, the *Gundy* dissent, and *American Trucking*'s "intelligible principle" rule[418]) or, instead of judicial review based on Article I, judicial limits on agency action by stricter enforcement of the Administrative Procedure Act[419] or the major-questions doctrine.[420]

This Article's research has implications for interpreting Article III "vesting" as less formal or strict (in terms of jurisdiction and delegation) than the Court's formalists and originalists have assumed. For example, it seems that if Article III vesting is less exclusive, then adjudication by administrative agencies in the executive branch is unproblematic.

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415. *See* Trump v. Mazars, 140 S. Ct. 2019, 2037, 2439 (2020) (Thomas, J., dissenting); *id.* at 2048 (Alito, J., dissenting); Trump v. Vance, 140 S. Ct. 2412, 2433, 2437-38 (2020) (Thomas, J., dissenting).

416. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30, 541-42 (1935).

417. *Compare* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the colonial era, the Founding, and the First Congress provide little evidentiary support for the nondelegation doctrine), *with* Ilan Wurman, Feature, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing that the nondelegation doctrine is grounded in the Founding).

418. *See, e.g.*, *Schechter Poultry*, 295 U.S. at 529-30; Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

419. Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1910-15 (2020); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 662-63 (2022) (per curiam) (questioning the use of emergency rulemaking rather than notice and comment in the context of OSHA's vaccine mandate).

420. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667-70 (Gorsuch, J., concurring); *cf.* King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015) (limiting IRS's authority regarding a question of deep "economic and political significance" (quoting Util. Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); West Virginia v. EPA, 142 S. Ct. 2587, 2614-16 (2022) (invoking the major-questions doctrine to strike down EPA emissions regulations).

Returning to Article II, the Executive Vesting Clause did not have the original public meaning that unitary executive scholars and precedents have invested in it. Given the stakes and their methods, they do not meet the burden of proof to demonstrate *clear* meaning from contemporary sources. None of their originalist pillars support such a strong formalist claim: not the Vesting Clause, nor the Take Care Clause, nor the structural implications of separation of powers and checks and balances, nor the ostensible Decision of 1789.

It makes sense that such historical evidence is hard to find. It is unclear why the Framers would not have used the word "vest" to establish permanent powers for the President that would have been even greater than English royal powers. The English system of a limited monarchy, a landed aristocracy, and an unwritten constitutional tradition with a rising parliamentary power would be unlikely to recognize "indefeasibility." While the King had removal powers in some domains, there is little evidence that the English had a modern conceptual category of default broad "executive" removal power, considering the mixed system of protected nobility and no clear separation of powers. It would have been surprising to think the word "vest" could have dramatically changed this balance. Yet the unitary school incongruously assumes that the Framers would have given the President more power over removal compared to that of the King.

Can a default rule of presidential removal power be found anywhere else in the Constitution? Perhaps the Necessary and Proper Clause, which contains the word "vest" as evidence of its limited meaning, is the repository for unstated powers vital for filling in such details,[421] and thus this question is in Congress's domain. Alternatively, perhaps a default of executive removal is implied by the Take Care Clause, but limited by faithful execution. It makes sense that a duty-imposing clause would also reflect the powers to fulfill such a duty, but it is incongruous to suggest that it establishes absolute powers that exceed the duty. Arguably, if the President has a duty to take care that the laws be faithfully executed, he or she may need to remove officers who are not executing the laws faithfully. But the President also must have good-faith reasons to do so—and, closely related, "good cause." As I have argued, the original public meaning of "faithful execution" was a duty-imposing restriction of executive discretion, and would not imply "incongruous" absolute or unchecked powers, but instead, "may also restrict the President's power to dismiss officials.[422] Arguably, Article II itself imposes a good-faith (or good-cause) requirement for removals, and arguably, Congress could elaborate on

421. *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047 (2014).

422. Kent et al., *supra* note 6, at 2127-28, 2189-90.

this requirement by specifying good-cause protections.[423] However, as a matter of text and context, Article II does not vest an illimitable, indefeasible removal power at the President's pleasure.

The words "the," "executive power," and "vested"—or the absent word "all"—simply do not have the original meaning or intratextual meaning to give the President such a robust implied removal power. Nor do the words "take care" and "faithful execution" suggest indefeasible power, but rather a duty to be pursued with sufficient powers—powers consistent with good faith, and, if Congress so clarifies, perhaps requiring good cause. The picture that emerges from the text, context, and dictionaries is that "vesting" and "taking care" are more about functional checks and balances than the shibboleth siloes of strict separation.

One fair reading of "vesting" and the absence of "herein granted" is that the Vesting Clause implies some unlisted executive powers, but Congress has some degree of authority to share those powers, so long as it does not functionally interfere with or undermine the President's ability to take care that the laws be faithfully executed. Another fair reading of "vesting" and the absence of "herein granted," plus the implied exclusivity of structure, is that the Vesting Clause implies unlisted powers, and Congress cannot exercise executive powers itself (like the Senate blocking removal, the issue in *Myers*; or Congress exercising removal, as in *Bowsher*). But setting conditions (for example, good-cause requirements) does not rise to the level of "usurping" law execution into the "legislative vortex"; it is more the legislative tradition of making general rules, establishing necessary and proper offices, and building a faithful executive branch. These are functional checks and balances. One irony of the Roberts Court's separation-of-powers jurisprudence is that, on the one hand, it warns against Congress "usurping" other branches' powers, but on the other, it uses sentence fragments to encroach on Congress, despite the indeterminacy of "indefeasibility," in an ahistorical judicial vortex of "vesting."

423. Jed Handelsman Shugerman & Ethan J. Leib, Opinion, *Will the Supreme Court Hand Trump Even More Power?*, N.Y. TIMES (Oct. 8, 2019), https://perma.cc/Y6F5-BSAS.

Appendix A: Constitutional Clauses Illustrating the Use of "Vest," "All," "Exclusive," "Sole," and "Alone"

Article I

Section 1
All legislative Powers herein granted shall be *vested* in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, Clause 5
The House of Representatives . . . shall have the *sole* Power of Impeachment.

Section 3, Clause 6
The Senate shall have the *sole* Power to try all Impeachments.

Section 8
Clause 8: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries;

Clause 17: To exercise *exclusive* Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over *all* Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

Clause 18: 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 in any Department or Officer thereof.

Article II

Section 1
The executive Power shall be *vested* in a President of the United States of America.

Section 2
He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all* other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law *vest* the Appointment of such inferior Officers, as they think proper, in the President *alone*, in the Courts of Law, or in the Heads of Departments.

Article III

Section 1
The judicial Power of the United States, shall be *vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2
Clause 1: The judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to *all* Cases affecting Ambassadors, other public Ministers and Consuls;—to *all* Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Clause 2: In *all* Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In *all* the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Clause 3: The Trial of *all* Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Letter of Transmittal to the President of Congress in Convention, September 17, 1787

The friends of our country have long seen and desired that the power of making war, peace, and treaties, that of levying money, and regulating commerce, and the correspondent executive and judicial authorities, should be *fully and effectually vested* in the general Government of the Union.[424]

Appendix B: "Vest" and "Vested" in Dictionaries, 1637-1846

The following Appendix classifies seventeen dictionaries by editor from 1637-1787 (a total of thirty-three editions) and fourteen dictionaries by editor from 1787-1846 (a total of seventeen editions). A shaded line indicates the division between pre-1787 and post-1787 dictionaries. The four legal dictionaries and five general dictionaries most commonly used by the Founders[425] and the relevant definitions therein appear in the Appendix in bold text. These are Jacob, Burn & Burn, Cunningham, and Potts (legal dictionaries), and Ash, Bailey, Dyche & Pardon, Entick, and Johnson (general dictionaries).

If a dictionary has no entry for "vest" or "vested," but has an entry for "vesture," the Appendix includes the definition for "vesture" where indicated. A new edition from the same author appears in the same row as the earlier edition if the definition is substantially the same, but where the definition was substantially changed, the new edition appears in a new row based on the year of publication.

424. Letter from George Washington to the President of Cong., *supra* note 40 (capitalization altered).

425. *See supra* note 227 and accompanying text. These sources are available in the HeinOnline, LEME, and Georgetown University digital collections with two exceptions, as explained in note 220 above.

Table 1
Dictionary Use of "Vest" and "Vested"

Dictionary (Year)	**Entry for "Vest" or "Vested"**	**Reference to Offices?**
Cowell 1637[426]	"Vesture" only: "betoken a possession, or an admittance to a possession"	No
Holy-Oke 1640[427]	"Vesture" only: "garment"	No
Blount 1656[428]	"[T]o clothe, array, attire, adorn &c"	No
Blount 1670,[429] 1691[430]	*"Plenam possessionem terrae vel praedii tradere"* (only Latin)	No
Cowell & Manley 1672,[431] 1701[432]	*"Plenam possessionem terrae vel praedii tradere"* (only Latin)	No
Kersey 1702[433]	"To vest or invest one with supreme power"	Yes
Cowell 1708,[434] 1727[435]	*"Plenam possessionem terrae vel praedii tradere"* (only Latin)	No
Blount & Nelson 1717[436]	*"Plenam possessionem terrae vel praedii tradere"* (only Latin)	No

426. JOHN COWELL, THE INTERPRETER: OR BOOKE, CONTAINING THE SIGNIFICATION OF WORDS 554 (London 1637) (HeinOnline).

427. FRANCIS HOLY-OKE, RIDERS DICTIONARIE 360 (London, Felix Kingston 1640) (HeinOnline).

428. THOMAS BLOUNT, GLOSSOGRAPHIA OR A DICTIONARY 659 (London 1656) (LEME).

429. THOMAS BLOUNT, NOMO-LEXIKON: LAW DICTIONARY 261 (London 1670) (HeinOnline).

430. THOMAS BLOUNT, NOMO-LEXIKON: LAW DICTIONARY 296 (London, 2d ed. 1691) (HeinOnline).

431. JOHN COWELL & THOMAS MANLEY, NOMOTHETES: INTERPRETER OF WORDS AND TERMS 271 (London 1672) (HeinOnline).

432. COWELL & MANLEY, *supra* note 248, at 323 (London 1701) (HeinOnline).

433. KERSEY, *supra* note 245, at 246 (LEME).

434. COWELL 1708, *supra* note 248, at 323 (HeinOnline).

435. COWELL 1727, *supra* note 248 (HeinOnline).

436. BLOUNT & NELSON, *supra* note 248, at 309 (HeinOnline).

Dictionary (Year)	**Entry for "Vest" or "Vested"**	**Reference to Offices?**
Bailey 1726[437]	**1. "[T]o clothe" 2. "[T]o bestow upon, to admit to the Possession of" 3. [In law] "[T]o put in full possession of Lands and Tenements"**	**No**
Jacob 1729,[438] **1736,**[439] **1739,**[440] **1744,**[441] **1750**[442]	**"If an Estate in Remainder is limited to a Child before born, when a child is born the Estate in Remainder is *vested*"**	**No**
Bailey 1737[443]	**Only clothing In defining "[a] mix'd monarchy": "[I]n England the executive power is vested in the king or monarch absolutely"**	**"Mix'd monarchy" entry**
Bailey 1755[444]	1. To dress, to deck, to enrobe 2. Same 3. To invest, to make possessor of 4. To bestow upon, to admit to the possession of; as, to vest a person with the supreme authority 5. To place in the possession of 6. [In law] To in feoff, give seisin, or put into full possession of lands or tenements	As an example under "vest" and under "monarch"

437. BAILEY 1726, *supra* note 237, at 891 (HeinOnline).

438. GILES JACOB, NEW LAW-DICTIONARY 743 (n.p., E. & R. Nutt & R. Gosling 1729) (HeinOnline).

439. JACOB 1736, *supra* note 229, at 736 (HeinOnline).

440. JACOB 1739, *supra* note 229, at 769 (HeinOnline).

441. JACOB 1744, *supra* note 229, at 790 (HeinOnline).

442. JACOB 1750, *supra* note 229, at 800 (HeinOnline).

443. BAILEY, *supra* note 89, at 325, 804 (LEME).

444. BAILEY 1755, *supra* note 237 (LEME).

Dictionary (Year)	**Entry for "Vest" or "Vested"**	**Reference to Offices?**
A New and Complete Dictionary of Arts and Sciences 1755[445]	No separate entry for "vest"; "vesture" refers to entry for "investiture" Investiture: "giving livery of seisin or possession"	No
Johnson 1755,[446] 1785[447]	**1. "[T]o dress"** **2. Same** **3. "To make possessor of; to invest with"** **4. "To place in possession"**	**Examples of "vesting supreme authority"**
Cunningham 1765,[448] 1771,[449] 1783[450]	**1. "To invest with, to make possessor of, to place in possession"** **2. *"Plenam possessionem terrae vel praedii tradere"***	**No**
Bailey 1770[451]	**1. "[T]o bestow upon, to admit to possession of"** **2. "[T]o put in full possession of lands"** **3. [In law] "[T]o infeoff, to give title, to put in full possession of Lands"**	**No**

445. 4 A NEW AND COMPLETE DICTIONARY OF ARTS AND SCIENCES, *supra* note 249, at 3281-82 (HeinOnline); 2 A NEW AND COMPLETE DICTIONARY OF ARTS AND SCIENCES 1792 (London 1754) (HeinOnline).

446. JOHNSON, *supra* note 241 (LEME). This dictionary suggests a range of vesting. *See, e.g.*, *id.* (defining "Alkada'r" as "a sect among the Mahometans, who deny the doctrine of absolute decrees . . . [and] hold that man is *vested with a sufficient power* to do good or ill" (emphasis added)); *see also id.* (referring to "vested with supreme authority" in the context of "Ca'lif" and "Comma'ndress").

447. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 924 (London, 6th ed. 1785) (HeinOnline).

448. 2 CUNNINGHAM 1765, *supra* note 248, at 732 (HeinOnline).

449. 2 CUNNINGHAM 1771, *supra* note 248, at 736-37 (HeinOnline).

450. 2 CUNNINGHAM 1783, *supra* note 248, at 739 (HeinOnline).

451. BAILEY, *supra* note 237, at 863 (HeinOnline).

Dictionary (Year)	Entry for "Vest" or "Vested"	Reference to Offices?
Dyche & Pardon 1771[452]	**"[T]o authorize, or put a person into the possession of any thing; also to clothe"**	**No**
Jacob 1772,[453] **1782**[454]	**"[T]o invest with, to make possessor of, to place in possession; *Plenam possessionem terrae vel praedii tradere*"**	**No**
Postlethwayt 1774[455]	None	No
Ash 1775,[456] **1795**[457]	**Vest: "to dress in long garments, to place in possession, to intrust with, to invest with"**	**No**
Entick 1776[458]	**"To dress, deck, invest"**	**No**
After Ratification		
Burn & Burn 1792[459]	**Contains two paragraphs on the property concepts of "vested legacy" and "vested remainder," as distinguished from "a contingent remainder"** **No discussion of limited legislative powers**	**No**
Tomlins & Jacob 1797[460]	"[T]o invest with, to make possessor of, to place in possession. *Plenam possessionem terrae vel praedii tradere*" Vested: "Estates; See titles *Estate*; *Remainder*; *Vested Legacies*"	No

452. DYCHE & PARDON, *supra* note 233, at 848 (HeinOnline).
453. JACOB 1772, *supra* note 231, at 926 (HeinOnline).
454. JACOB 1782, *supra* note 231, at 945 (HeinOnline).
455. 2 POSTLETHWAYT, *supra* note 249, at 881-82 (HeinOnline).
456. 2 ASH 1775, *supra* note 234, at 407 (Google Books).
457. 2 ASH 1795, *supra* note 234, at 383 (HeinOnline).
458. ENTICK, *supra* note 236, at 391 (Google Books).
459. 2 BURN & BURN, *supra* note 232, at 405 (HeinOnline).
460. 2 TOMLINS & JACOB, *supra* note 248, at 814 (HeinOnline).

Dictionary (Year)	**Entry for "Vest" or "Vested"**	**Reference to Offices?**
Potts 1803,[461] 1813[462]	**No entry**	**No**
Webster 1806[463]	"[T]o dress, deck, adorn, bestow, invest, take effect as a title or become fixed"	No
Tomlins 1810[464]	No entry	No
Williams 1816[465]	"[T]o invest with, to make possessor of, to place in possession" "Vested" refers to entries for "remainder" and "legacy"	No
Adlington 1824[466]	No entry	No
Webster 1828[467]	"To *vest with*: to clothe; to furnish with; to invest with; as, to *vest* a man *with* authority; to *vest* a court *with* power to try cases of life and death; to *vest* one *with* the *right* of seizing slave-ships." "To *vest in*: to put in possession of; to furnish with; to clothe with. The Supreme executive power in England is *vested in* the king; in the United States, it is *vested in* the president." "To come or descend to; to be fixed; to take effect, as a title or a right." Also entries for "vested legacy" and "vested remainder"	Yes

461. POTTS 1803, *supra* note 255, at 594 (HeinOnline).
462. POTTS 1813, *supra* note 255, at 724 (HeinOnline).
463. WEBSTER 1806, *supra* note 251, at 342 (HeinOnline).
464. TOMLINS 1810, *supra* note 255, at 951 (HeinOnline).
465. WILLIAMS, *supra* note 256, at 996 (HeinOnline).
466. ADLINGTON, *supra* note 255, at 622 (HeinOnline).
467. 2 WEBSTER 1828, *supra* note 251, at 855 (HeinOnline).

Dictionary (Year)	**Entry for "Vest" or "Vested"**	**Reference to Offices?**
Whishaw 1829[468]	"[T]o invest with, to make possessor of, to place in possession" Also entries for "vested legacy" and "vested remainder"	No
Every Man's Lawyer 1830[469]	No entry	No
Lieber 1832[470]	No entry	No
Tomlins 1835[471]	"To invest with, to make possessor of, to place in possession" "*Plenam possessionem terrae vel praedii tradere*" "Vested Estates; See *Estate, Remainder*" "Vested Legacies: See *Legacy*"	No
Wade 1835[472]	No entry	"Proroguing and dissolving . . . parliament . . . is vested in the Crown"[473]
Holthouse 1839[474]	"To invest, to deliver possession, to give seisin, to enfeoff." Entry on "vested legacy." "Vested *Remainder*: *See title Remainder*"	No

468. WHISHAW, *supra* note 256, at 326 (HeinOnline).

469. A GENTLEMAN OF THE BAR, *supra* note 255, at 117 (Georgetown).

470. 12 Lieber, *supra* note 255, at 552 (HeinOnline).

471. TOMLINS 1835, *supra* note 255, at 742 (HeinOnline).

472. WADE, *supra* note 89, at 653 (HeinOnline).

473. *Id.* at 4.

474. HOLTHOUSE, *supra* note 256, at 376-77 (HeinOnline).

Dictionary (Year)	**Entry for "Vest" or "Vested"**	**Reference to Offices?**
Bouvier 1843[475]	"TO VEST: estates, is to give an immediate fixed right of present or future enjoyment; an estate is vested in possession, when there exists a right of present enjoyment; and an estate is vested in interest, when there is a present fixed right of future enjoyment"	No
Richardson 1846[476]	"To invest" "To put on; to put into occupation or possession of; to put or place in possession, or at the disposal; to give possession of"	No

475. 2 BOUVIER, *supra* note 252, at 605 (HeinOnline).

476. 2 RICHARDSON, *supra* note 256, at 2013 (HeinOnline).