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Amicus Brief in SEC v. Jarkesy on Original Public Meaning of Article II & Presidential Removal

Jed Handelsman Shugerman

No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

GEORGE R. JARKESY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICIUS CURIAE* PROFESSOR JED H. SHUGERMAN IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

Amicus Curiae Jed Shugerman is a Professor of Law at Boston University. He has a JD and a History PhD. He subscribes to the interpretation of the Constitution based on original public meaning (i.e., originalism) but has found many errors and misunderstandings in originalism-in-practice in the unitary executive theory. This brief offers new evidence about the original public meaning of Article II and critiques new claims by unitary theorists. His findings and analysis are contained in recent academic articles[2] and are part of a forthcoming book, *A Faithful President: The Founders vs. the Originalists*.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Jed. H. Shugerman, *Freehold Offices vs. 'Despotic Displacement': Why Article II 'Executive Power' Did Not Include Removal* (posted July 29, 2023) [hereafter *Freehold Offices*], https://ssrn.com/abstract=4521119; Jed H. Shugerman, *Movement on Removal: An Emerging Consensus on Unitary Theory and the First Congress* (forthcoming 2023) [hereafter *Movement on Removal*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4513324; Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Penn. L. Rev. 753 (2023) [hereafter *Indecisions*]; Jed H. Shugerman, *Vesting*, 74 Stanford L. Rev. 1479 (2022); Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 Yale J. L. & Humanities 125 (2022) [hereafter *Removal of Context*]; Jed H. Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 Fordham L. Rev. 2085 (2021) [hereafter *Presidential Removal*]; Andrew Kent, Ethan J. Leib, & Jed H. Shugerman, *Faithful Execution and Article II*, 132 Harvard L. Rev. 2111 (2019) [hereafter *Faithful Execution*].

SUMMARY OF ARGUMENT

In holding that the SEC's administrative law judges' protections against removal were unconstitutional, the Fifth Circuit extended *Free Enterprise Fund v. PCAOB*, 561 U.S. 447 (2010), and *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Those precedents were based on an incomplete historical record. Subsequent historical research shows that the Founding generation never understood Article II to grant the President an indefeasible removal power.

To be sure, this evidence does not suggest Congress should have unlimited power to protect any executive office or delegate removal to itself. Rather, the bottom line is that the evidence of original public meaning is so unclear and mixed that this Court has no sufficient originalist basis to overturn long-standing congressional statutes. While the SEC's arguments are sufficient to reverse the Fifth Circuit's ruling without reconsidering this Court's prior precedents on removal, it should consider doing so in light of the historical evidence.

First, this brief presents new research showing that the Executive Vesting Clause did not imply a removal power, because "executive power" did not imply removal in the eighteenth century. The English common law protected many offices as freehold property rights, meaning that the officers could not be removed without legal process and except in cases of misconduct. Many powerful British executive offices, especially in the Treasury and even in the royal cabinet, were unremovable in the eighteenth century. English and colonial administration was a hybrid of removable patronage offices and unremovable freehold offices. These protections have not been examined in

the Court's previous opinions about removal. This background explains why no English sources described removal as a royal prerogative, and why it has been so hard for unitary theorists to find any English or Ratification-era sources discussing removal as an "executive power." It also explains why Montesquieu's *The Spirit of the Laws* rejected removal at pleasure as "despotic," and why Chief Justice Marshall concluded that William Marbury's office was his unremovable property.

Second, this brief summarizes other new research on Article II, the law of offices, the Ratification Debates, and the First Congress, further undercutting the assumptions about presidential removal.

Third, at the broadest level, this case is a test for whether originalism is a reliable method in practice. Leading unitary executive scholars have tried to reconstruct their removal theories in response to this new evidence, but their theories contradict each other, are internally contradictory, introduce new errors, and repeat many old errors and misunderstandings without addressing the core critiques. These weak responses indicate that little evidence supports their claims about removal. The Founding era left the removal question unresolved. If this Court is committed to originalism as a check against judges voting their personal preference, it should conclude that the evidence is insufficient to overturn long-standing statutes.

Every scholar has biases and makes mistakes. To be sure, this *amicus* lives in a glass house.[3] But in this

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[3] Adam Liptak, *Lonely Scholar with Unusual Ideas Defends Trump, Igniting Legal Storm*, N.Y. Times, Sept. 25, 2017; *Jed Shugerman Apologizes to Tillman and Blackman*, Originalism

amicus role, serving as a friend to the Court, this brief is a defense of originalism against unitary theorists' ahistorical errors.

I. WHY ARTICLE II "EXECUTIVE POWER" DID NOT INCLUDE REMOVAL: THE LAW OF FREEHOLD OFFICES VS. "DESPOTIC" DISPLACEMENT

This Court has relied on the premise that Article II's "executive power" implied an indefeasible and nearly "unrestricted [presidential] removal power." *Seila Law*, 140 S. Ct. at 2197-98. In reaction to growing historical evidence against this theory, unitary executive theorists have fallen back on a claim of a "backdrop" or default removal rule from English and other European monarchies. However, unitary executive theorists have not provided support for these repeated assertions.

There is a good explanation why the defenders of the unitary executive theory have such difficulty in supporting this historical claim: because it is wrong. This Part offers a summary of the history of the sale of office and offices protected as freehold property against executive removal at will.

The sale of offices-as-property may seem strange and even corrupt to modern readers, but it was a long-lasting and practical foundation for the nation-state and colonial expansion—and a well-established administrative practice as the Founders were structuring the federal government. Legal scholars have described the sale of office in Anglo-American

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Blog (Sept. 25, 2017), https://originalismblog.typepad.com/the-originalism-blog/2017/09/jed-shugerman-apologizes-to-tillman-and-blackmanmichael-ramsey.html.

administration,[4] and archaic as it may seem, "the profit motive" in American offices persisted long past the Founding.[5] However, the pervasiveness of unremovable freehold offices up to the Founding era, including some with significant national executive power and even at the English cabinet level, has been overlooked in the removal debate.[6]

Many officeholders in European monarchies bought their offices as part of a mutual bargain, and in return for their investment, their office was protected as property—especially in England. European administration depended upon a flexible mix of removable patronage offices and unremovable offices for sale.[7] Legal scholarship has missed this history, but many European historians and economic

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[4] *See* James Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the 'Court of Law' Requirement*, 107 NW. L. REV. 1125, 1144 (2015); Kent, Leib & Shugerman, *Faithful Execution* at 2115-16, 2189-90; Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 Wm. & Mary L. Rev. 1297, 1308-09, 1321 (2021); Douglas W. Allen, *Compatible Incentives and the Purchase of Military Commissions*, 27 J. Legal Studies 45–66 (1998).

[5] Nicholas Parrillo, *Against the Profit Motive: The Salary Revolution in American Government*, 1780-1940 (2013) [hereafter *Against the Profit Motive*].

[6] In addition to these offices, Daniel D. Birk's *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175 (2021) offers many examples of Parliament protecting offices from removal. However, critics have observed that many of these examples were too early, too late, too judicial, too local and low-level, and too geographically remote from the American Founding to illuminate the meaning of "executive power" circa 1787-88. Ilan Wurman, *In Search of Prerogative*, 70 Duke L.J. 93, 142-43 n. 205 (2021).

[7] Douglas W. Allen, *The Institutional Revolution* 7, 12-17, 21 (2012).

historians have explained this widespread system of "venality." Montesquieu rejected "displacement" at will (*i.e.*, removal at pleasure) as a tool of "despotic government," then endorsed "*vénalité*" and its limits against removal as a practical system of family investment, incentives, checks, and balances in constitutional monarchies. Montesquieu, *Spirit of the Laws*, Book V, Ch. 19 (Thomas Nugent trans., Batoche Books 2001) (1748).

The Anglo-American system added an especially strong protection of these offices as freehold property.[8] Whereas *vénalité* had grown out of control in revolutionary-era France, the English had a more stable property law protecting officeholders' investment against "despotic" displacement. G.E. Aylmer, the leading historian of early modern English administration, observed that "[i]t is difficult to generalize about the security of tenure,"[9] but that, through the seventeenth century, English law protected many executive offices from removal more than it protected judicial offices.[10]

Under English law, many central officers and powerful Treasury officers were unremovable. The highest offices, like the "great offices," the privy council, and most (but not all) of the cabinet served at

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[8] *See* K. W. Swart, *The Sale of Offices in the 17th Century* 45-49; (The Hague, 1949); 1 William S. Holdsworth, *A History of English Law* 247–50 (1d ed. 1898); 10 William S. Holdsworth, *A History of English Law* 499-506, 509-16 (1st ed. 1938); Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* 172-74 (1997).

[9] G.E. Aylmer, *The King's Servants: The Civil Service of Charles I, 1625–1642*, at 110 (1961).

[10] *Id.* at 106, 109 (1961).

pleasure. However, William Holdsworth's classic *History of English Law* explained, the "inner ring" of the original royal "Council," which became "the committee" and the initial royal "cabinet" that defined modern English government, included the heads of household departments—who were unremovable. 10 Holdsworth 481-82; *Freehold Offices* at 6, 29-30. They were part of the cabinet until 1782. 10 Holdsworth 482. Of course, those household "department heads" did not look like today's Secretary of State, but in early modern England, they were significant "department heads" both in name and function—as unremovable cabinet members.

English historians also reveal that many of the officers who ran the British Treasury—the engine of the British empire, the "sinews of power"—were unremovable.[11] The English Crown executed policy despite these limitations on removal. When unremovable Treasury officers were uncooperative with the English monarch's policy goals, the Crown turned to alternate ways to "execute" and "take care" of execution: through systems of rotation and the creation of higher layers of offices.[12] Removal was neither necessary nor sufficient for law execution.

By the eighteenth century, Blackstone, Edmund Burke, and others documented a gradual legislative reform effort to curtail the sale of office and unremovability, but they also indicate that these changes were a departure from English tradition, that

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[11] *See* John Brewer, *The Sinews of Power: War, Money, and the English State, 1688–1783*, at 69-73 (1989); J.C. Sainty, 1 *Office-Holders in Modern Britain: Treasury Officials 1660–1870*, at 5-6, 16, 29, 34 (1972).

[12] *See Sinews of Power* at 69-73, 110*; Freehold Offices* at 32-35.

such reforms were limited, and that they were skeptical of these reforms undermining officers' job security.[13] The sale of office and its property protections robustly persisted through mid-nineteenth-century England.[14]

This history explains the silence on removal in the text of Article II and in the Convention and Ratification debates, and gives context to Hamilton and Madison rejecting presidential removal in the *Federalist Papers*.

The most potent counterargument is that many colonial Americans objected to the English sale of office, and the Constitution effectively banned the re-sale of office with the Appointments Clause. However, even if the Framers banned the sale of office, they continued the related traditions of "offices of profit" and offices-as-property long after. See *Against the Profit Motive*; *Indecisions* at 846-51; *Freehold Offices* at 47-50. This explains Chief Justice Marshall's recognition of Marbury's "property" in his office. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155, 162, 167, 172-73 (1803). And the phrase "Office … of Profit," which appears in the Constitution three times,[15] is a reminder that the Framers recognized the market

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[13] 1 Blackstone, *Commentaries on the Laws of England* 334-36 (3d ed. 1884) (1765); 3 Edmund Burke, *The Writings and Speeches of Edmund Burke: Party, Parliament, and the American War: 1774–1780* (Warren M. Elofson, John A. Woods, & William B. Todd, eds., 1996); 1 Edmund Burke, *The Works of Edmund Burke* 296 (1847); *Freehold Offices* at 35-37; *Removal of Context* at 157-64; *see also* Jeremy Bentham, *On the Sale of Offices*, The Rationale of Reward 182-86 (1825).

[14] *Institutional Revolution* at 12-17, 21.

[15] *See* U.S. Const., art. I, §§ 3, 9; *id.* art. II, § 1.

system of offices. Indeed, they memorialized it in the Constitution more explicitly than any removal power.

II. RECENT SCHOLARSHIP SHOWS THAT ARTICLE II DID NOT IMPLY A GENERAL PRESIDENTIAL REMOVAL POWER

A. Neither Federalists nor Anti-Federalists believed that Article II's Vesting and Take Care clauses implied a presidential removal power.

Recent research indicates that the Ratification debates were silent about whether Article II "executive power" or the Take Care Clause implied a presidential removal power. This silence throughout six volumes of Herbert Storing's *The Complete Anti-Federalist* speaks loudly. The Anti-Federalists had the strongest incentive to warn about implied presidential powers and even exaggerate such powers, but did not offer such an interpretation. *See* Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 64 Am. J. L. Hist. (forthcoming 2023); *Freehold Offices* at 40-52. The only instance of any discussion of removal is Luther Martin, who identified a limited power to remove military—not civil—officials, and cited only the Commander-in-Chief Clause, not the Vesting or Take Care clauses. *See infra* Section III.B.

This evidence confirms the *Federalist Papers*' rejection of an indefeasible presidential removal power. Without the benefit of recent research, this Court prematurely discounted Madison's *Federalist* No. 39 ("The tenure of the ministerial offices generally will be a subject of legal regulation … .") in *Seila Law*,

based on an earlier misunderstanding of Madison's 1789 comptroller proposal. *See* 140 S. Ct. at 2005. (citing *Free Enter. Fund*, 561 U.S. at 500 n.6). As discussed below, Madison's comptroller proposal was made against a default rule that term-of-years offices were unremovable, and he acknowledged that the removal provision he proposed was "rare" in that context. Jane Manners & Lev Menand, *Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, *121* Colum. L. Rev. 5, 20-21 (2021) [hereafter *Three Permissions*]; *Indecisions*, at 824-34. New research also catalogues how Madison spoke more consistently with congressionalism and *Federalist* No. 39 from the Convention through the summer of 1789. *Indecisions* at 771, 776-79, 803 n.264, 834-44.

Seila Law also erred in dismissing Hamilton's *Federalist* No. 77 ("The consent of [the Senate] would be necessary to displace as well as to appoint.") merely because Hamilton "later abandoned" its senatorial position. 140 S. Ct. at 2005.[16] New research shows that

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[16] Some have speculated that "displace" may not have meant "removal." Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 Harv. J. L. & Pub. Pol'y 149, 149-54 (2010). However, contemporary evidence disproves this theory, confirming Hamilton's original senatorial position. *See* Letter from William Smith to Edward Rutledge (June 21, 1789), reprinted in 16 *Documentary History of the First Federal Congress, 1789-1791* at 832-33 (Charlene Bangs Bickford et al. eds., 2004) [hereafter *Documentary History*]; *see also* Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era*, 154-55 (2018) [hereafter *Second Creation*]; *Indecisions* at 778; Forrest McDonald, *Alexander Hamilton*, 130-31 (1979); Jeremy D. Bailey, *The Traditional View of Hamilton's Federalist No. 77 and an*

both Madison and Hamilton had self-interested motivations to change their minds in the summer of 1789 and to promote President Washington's power: Madison as Washington's "Prime Minister," as historians have described him, *Indecisions* at 851-60; and Hamilton as a potential cabinet nominee, as his colleagues noted about his reversal on removal, *id.* at 778-79. *Federalist* No. 77's explanation to the Ratifying public is far more relevant to original public meaning than Hamilton's changed mind in 1789. This research confirms a crucial methodological point: Ratification evidence should be weighted more heavily than post-Ratification evidence. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2023)

B. The Take Care and Executive Vesting clauses did not signify indefeasible removal powers.

The history of "faithful execution" shows that the Take Care Clause (the president "shall take Care that the laws are faithfully executed") imposed a duty of good faith, loyalty, and care to follow the law, with limits on executive discretion. *See* Kent, Leib, & Shugerman, *Faithful Execution* at 2117-19. Even if one infers a removal power from this text, despite the eighteenth-century evidence to the contrary, there is no evidence from original public meaning that the Take Care Clause would imply *indefeasible* powers. It would be incongruous for a duty *limiting* the executive's powers in executive the laws to yield a power greater than Congress's ability to make those laws.

Unexpected Challenge: A Response to Seth Barrett Tillman, 33 Harv. J. L. & Pub. Pol'y 169, 184 (2010).

Some originalists have speculated that the word "vested" had a connotation of a special legal status limiting legislative alteration or delegation. To the contrary, research from two centuries of legal dictionaries, from colonial charters and early state constitutions, and Founders' usage from 1776 to 1789 indicate that the word "vesting" did not have a special legal status and did not signal an indefeasible power. *See Vesting* at 1521-27. This research could explain why the word "all" appears in Article I's Legislative Vesting Clause ("*All* legislative power shall be vested … .") but not the Executive Vesting Clause ("The executive power shall be vested … ."): to create a more robust assignment of power to Congress. *Id.* at 1505-06.

C. The First Congress made no "Decision of 1789" in favor of Article II presidential removal.

Contrary to the interpretations of a presidentialist "Decision of 1789" in *Myers*, *Free Enterprise Fund*, and *Seila Law*, the First Congress was sharply divided between three clashing removal theories throughout the summer of 1789, resulting in a series of compromises that deliberately left the constitutional debate unresolved.

The House was evenly divided between three blocs: "presidentialists" who thought Article II implied presidential removal; "senatorials" who thought Article II implied that removal mirrored the appointment process, both requiring Senate consent; and "congressionalists" who thought Article I delegated the removal question to congressional discretion, and supported presidential removal as a policy matter. *Indecisions* at 759, 863, 865. As

Jonathan Gienapp documents, these debates reveal that little thought was given to removal before the First Congress; House members treated it as an open question, rather than relying on claims about the Convention, Ratification, or even the positions taken in the Federalist Papers. *Second Creation* at Chapter 3.

Contrary to recent claims by unitary executive theorists (*see infra* Section III.B), these three divisions persisted throughout the summer of 1789. Senator William Maclay's diary described a Senate majority that was hostile to the removal clause and likely against unilateral presidential removal (under any theory) as the Senate debate started. *See Indecisions* at 809-19. The House presidentialist faction was aware of this problem and needed to find compromise through ambiguity. *Id.* That is why the final text was *deliberately* unclear. *Id.* at 783-96. Madison and the House presidentialists suddenly deleted an explicit removal clause, replaced it with an ambiguous clause, and repeatedly declined challenges to offer an explanatory or declaratory clause clarifying their interpretation of Article II. Madison's opponents mocked his retreat and criticized him for shifting back to such unclear language rather than forward with a "declarative act." *Id.* at 779-800, 834-40. One of the presidentialists, Rep. Vining, acknowledged this strategy of House-Senate compromise in the pivotal debate: The proposed ambiguous clause "was more likely to obtain the acquiescence of the [S]enate on a point of legislative construction on the constitution, than to a positive relinquishment of a power which they might otherwise think themselves in some degree [e]ntitled to." *Congressional Register* (June 22, 1789),

reprinted in 11 *Documentary History* at 1035-36; *Indecisions* at 762, 795-96.

Ultimately, there was no decision in the House, except for a decision to avoid clarity and to turn to "strategic ambiguity." Only sixteen members of the House could be considered "presidentialist" from their voting patterns (i.e., only about 30% of the House), and of those sixteen, seven never spoke or wrote explicitly endorsing an Article II interpretation and may have voted for "strategic ambiguity" rather than an interpretation of Article II.

The same compromise through ambiguity was reflected in breaking a removal impasse that bogged down the Treasury Bill for much of August 1789. The Senate refused to acquiesce on a proposal for a declaratory clause granting presidential removal explicitly, and then the various factions returned to the ambiguous compromise. *Id.* at 834-40. Thereafter, Madison and others in President Washington's insider circle tried to claim victory for their interpretation. *Id.* at 851-60. Chief Justice Marshall's *later* biography of Washington and Madison's *private* letters pushed this unitary interpretation, but this evidence reliably reflects neither *original* meaning nor *public* meaning. To the contrary, it shows how the strategy of ambiguity plays out: make a compromise over unclear language, so that each side can claim victory, and then each side argues the implications later. Two centuries later, the supporters of each side can find their friends in that victory party, but the more famous victors (Madison and Washington's allies) had an advantage in writing their version of the history.

D. Offices granted for a limited term of years without a specific removal provision were unremovable.

Through the Founding era, offices held for a "term of years" were property with limits on removal, unless the tenure specified removal or terms like "at pleasure." *See Three Permissions* at 5, 18-27. To be sure, other than the case of the justices of the peace in the Judiciary Act of 1801, it is difficult to find Congress using that term of art in the Founding era and the nineteenth century. *See* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756 (2023) [hereafter *Executive Power of Removal*]. Nevertheless, as a matter of original public meaning circa 1787-88, unremovability was the default rule in the "term of years" common law tradition. *Three Permissions*, at 18-27. This makes sense of a number of puzzles, such as Madison's comptroller proposal (which was misunderstood in *Free Enterprise Fund* and *Seila Law*, *see supra* Section II.A); and why Chief Justice Marshall concluded Marbury was unremovable ("not revocable") as a justice-of-the-peace, *Three Permissions* at 25; *Presidential Removal*; *Freehold Offices* at 47-51; *see infra* Section III.B.

E. Other early statutes reflect a congressional power to limit presidential removal and assign significant executive power to unremovable officers.

The First Congress's other statutes reflect a mix of congressional discretion to delegate power to unremovable officers and judicial control over removal conditions. With the Sinking Fund Commission, for example, the First Congress placed the Chief Justice

and Vice President, unremovable commissioners exercising significant executive power, as two out of the five votes on the commission. Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1, 35, 39-40 (2020). In many other statutes, early Congresses similarly delegated significant discretion over executive adjudication and enforcement to non-removable judges and private parties. *See* Christine Kexel Chabot, *Interring the Unitary Executive*, 98 Notre Dame L. Rev. 129 (2022); *Freehold Offices* at 47-50.

III. RECENT RESPONSES FROM UNITARY EXECUTIVE THEORISTS CONFIRM THE WEAKNESS OF THE ORIGINALIST CASE

Unitary executive theorists have attempted to respond to this evidence in articles and presumably will do so in *amicus* briefs. Their responses reflect an irony: the unitary executive theorists cannot agree on a unified theory of Article II or a historical basis for removal. Some, led by former Judge Michael McConnell, take an anti-royalist position, focusing on "prerogative" powers. But these did not include removal, and thus any removal power would be defeasible. Others, led by Ilan Wurman, Aditya Bamzai, and Saikrishna Bangalore Prakash, take an ahistorical royalist approach that goes against the spirit of the Founding. This approach is internally contradictory and relies on factual errors, misunderstandings, and sources taken out of context—revealing how difficult it is to find solid originalist evidence that Article II included a removal power.

A. Professor McConnell's prerogativist interpretation of Article II would mean, at most, a defeasible removal power, and his anti-royalist republican theory of Article II would reject the approaches of other unitary theorists.

1. McConnell's method would hold that Article II does not imply removal, because removal was not a royal prerogative.

In *The President Who Would Not Be King* (2020), McConnell offers a "prerogativist" thesis:[17] that the Framers drew upon a traditional list of the English Crown's prerogative powers, and this list is a more legitimate legalist and republican source than simply drawing from royal practices. *Id.* at 11, 24-31. The Framers assigned some to Congress (like declaring war), shared some with the Senate (like appointment and treaty), and assigned some to the president (e.g., commander-in-chief, pardon, veto). Remaining prerogative powers were implied by Article II, such as removal.

As discussed in the following sections, other unitary executive theorists rely on British royal practice as a "backdrop" for understanding Article II. *See Executive Power of Removal* at 1790; Amicus Br. of Ilan Wurman at 13-17 (Aug. 22, 2023) [hereafter "Wurman Amicus Br."]. McConnell rejects such reliance on royal practices as unreliable, vulnerable to selection bias,

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[17] *See also* William Crosskey, *The Reasons for the Enumeration of Congressional Powers: The Influence of the Royal Prerogative*, 1 Politics and the Constitution in the History of the United States 409-67 (1953).

and inconsistent with republicanism and the rule of law. This is the point of his book title: *The President Who Would Not Be King*. Royal practices were "undefined by law," and royalism opened a dangerous door to an *ultra vires* "Schmittian conception of sweeping emergency powers and an unchecked executive." *President Who Would Not Be King* at 28-29. By contrast, "legal prerogatives" were "defined and limited by law." *Id.* A fixed and established list of prerogatives provided legality, grounded in historical sources rather than unlimited assertions about necessity.[18]

McConnell originally claimed that English monarchs had a traditional prerogative power of removal. He relied on Blackstone and Joseph Chitty, *see id.* at 30, 99, 161-62, 368 n. 7, but neither included removal or anything like it on their lists of prerogative powers, and they did not even discuss removal as a general non-prerogative practice. *Removal of Context* at 156-60. No other sources have listed removal as a royal prerogative. *Freehold Offices* at 42-46. To his credit, McConnell recently has conceded that he was wrong about removal as a listed prerogative power.[19]

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[18] *President Who Would Not Be King* at 28. For alternative arguments about the royal prerogative and the Constitution, see Andrea Scoceria Katz & Noah Rosenblum, *Removal Rehashed*, 136 Harv. L. Rev. Forum 404, 409 (2023); Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 So. Cal. L. Rev. 45, 48 (2014); Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 Buff. L. Rev. 557, 566 (2018); Jack Rakove, *Taking the Prerogative Out of the Presidency: An Originalist Perspective*, 37 Presidential Stud. Q. 85 (2007).

[19] *Movement on Removal* at 21-22.

McConnell's book is a powerful critique of the royalism discussed *infra* Part III.B & C. McConnell's republican method should lead to the conclusion that "executive power" did not include removal, based on his recent acknowledgement that removal was never listed as a royal prerogative.

2. Even if one infers removal from Article II, it would be an implied (or "residual") power, and thus defeasible by Congress.

The Opinions in Writing Clause has always been a problem for those who claim an indefeasible removal power. If Article II already gave the president an absolute removal power, why would it need to specify a lesser power merely to ask for opinions? Refusal to give an opinion surely would be sufficient cause for removal. *See Federalist* No. 74.

McConnell's thesis explains this puzzle. The Opinions Clause has a specific function: without such an explicitly granted power, "nothing in the Constitution would have prevented Congress from using its Necessary and Proper authority to insulate officers from any such demands. … The Opinions in Writing Clause forecloses this kind of congressional interference." *President Who Would Not Be King*, at 244-45.[20] McConnell posits that the specific "prerogative powers" that the Framers spelled out in Article II, Section 2 (e.g., commander in chief, opinions, and pardons) are "indefeasible" because they are

[20] McConnell's other explanation militates against a removal power. *See President Who Would Not Be King*, at 244-45. If the Convention wanted to "negate" the council or "provide a textual anchor" for presidential power, it is notable that the delegates agreed only to add such a weak power (merely asking for opinions) and ignored removal. *Indecisions* at 772-73.

explicit, but an unenumerated "residual powers" (merely implied from the Executive Vesting Clause) are "defeasible" by Congress. *Id.* at 277-78. For example, if "executive power" implies foreign policy powers, the President can act unilaterally (e.g., the Neutrality Proclamation of 1793), but Congress retains a power to change the policy or set some conditions.

Even if one infers a removal power from Article II, it would be in the latter category: an implied and defeasible power. To argue that the Take Care Clause implies an indefeasible removal power is special pleading for removal, an exception for one implied power without historical support, inconsistent with the rest of McConnell's rule of law–based prerogative framework.

B. "The Executive Power of Removal" is strong evidence that Article II "executive power" did not include removal.

The most recent article positing an originalist basis for indefeasible presidential removal power is Aditya Bamzai and Saikrishna Prakash's *The Executive Power of Removal*, 136 Harv. L. Rev. 1756 (2023). If this article is considered the most thorough and up-to-date argument for this power, it is one of the strongest pieces of evidence that "executive power" did *not* include removal, because it offers so little evidence of original public meaning, and much of its evidence contradicts its conclusions.

The article has already been rebutted in several detailed papers—or, in some cases, pre-butted, as many of its claims had been made previously by its authors. As Andrea Scoceria Katz and Noah Rosenblum concluded in *Removal Rehashed*, 136 Harv. L. Rev. Forum 404, 406 (2023): "*The Executive*

Power of Removal fails to persuade on its own terms. It fails to seriously respond to critics of unitary theory. And it presents some of its sources in a way that could mislead less historically informed readers." "[I]t largely rehashes old arguments with old sources." *Id.* at 417. Section II.B, "Bamzai and Prakash's Handling of Sources Makes Us Worry That They Are Not Reliable Guides to Meaning in the Founding Era and Early Republic," concludes that one document on which they rely, a Pennsylvania Censor's report, "probably means nearly the opposite of what Bamzai and Prakash claim." *Id.* at 417. *See also Indecisions* and its Appendix II;[21] *Freehold Offices* at 9-12.

While this brief can do no more than summarize these detailed critiques, here are some main points:

1. The Executive Power of Removal claims to subscribe to originalist methodology, but the vast majority of the article is post-Ratification evidence, including two subsections on the mid-nineteenth century and another on the late-nineteenth century. *Executive Power of Removal* at 1814-21. They offer literally *no evidence* from English history, the Convention, or Ratification supporting their argument that the English Crown or other European monarchs had a general removal power, nor that Americans during ratification thought so.

The First Congress and other early post-Ratification evidence could be probative of original public meaning, but only with a large grain of salt

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[21] Jed Handelsman Shugerman, *The Indecisions of 1789: Appendices on the Misuse of Historical Sources in Unitary Executive Theory* (Feb. 27, 2023) (unpublished manuscript) [hereafter *Indecisions App'x II*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596

about the evolving self-interest of political actors. As the Court recently explained, "we must … guard against giving postenactment history more weight than it can rightly bear." *Bruen*, 142 S. Ct. at 2136. This is particularly true for mid- and late nineteenth-century evidence. The Court has repeatedly stated that post-Ratification events "do not provide as much insight into … original meaning as earlier sources." *Id.* at 2137 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)). Yet Bamzai and Prakash rely almost entirely on distant evidence, as none of their pre-Ratification evidence holds up to scrutiny. *See Removal Rehashed* at 407-08 (on their use of early state constitutions); *id.* at 422 (on their use of *Federalist* No. 66).

2. Even their post-Ratification evidence is weak and self-contradictory. *Freehold Offices* at 9-12, 46-51. Their only evidence of any American reference to a royal removal power, cited three separate times, is from *after* Ratification, a mere two sentences from a newspaper account of a speech by James Jackson, an obscure Georgia congressman, during the Foreign Affairs debates of 1789.[22] However, Jackson was an anti-presidentialist merely attributing this argument to the presidentialists to tar them as royalists. Jackson likely was exaggerating or inventing it, given that Bamzai and Prakash offer no evidence of presidentialists actually relying on royalist practice.

Moreover, Bamzai and Prakash pulled this fragment out of context: Jackson specifically said that an executive power to dismiss officers "might hold good in Europe, but it did not apply to our constitution, by

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[22] *Executive Power of Removal*, at 1769 n. 76, 1790 n. 249, & 1790 n.252 (internal quotations omitted).

which the President had not the executive powers exclusively."[23] Jackson then described a parade of monarchy's evils, including "the deadly influence of the crown in England, where offices were held during the pleasure of the king."[24] Jackson's speech is evidence against Bamzai and Prakash's assumption that Article II drew on royal traditions. If this is their best evidence, it confirms that most eighteenth-century Americans on either side of the removal debate understood that the Crown did *not* have a general removal power.

3. Bamzai and Prakash's presentation of the Constitutional Convention and the *Federalist Papers* is similarly insupportable. For example, they take Luther Martin's limited reference to removal during the Ratification debates out of context. *Executive Power of Removal* at 1772 n.10. As discussed above, *supra* Section II.A, Martin is the only instance in the entire six volumes of Herbert Storing's *The Complete Anti-Federalist* of an Anti-Federalist warning that the Constitution gave the president a removal power—and even that was limited to the military under the Commander-in-Chief Clause, not civil offices subject to other parts of Article II. This speech, in the context of silence otherwise, indicates that both the Constitution's proponents and opponents did not imagine that the Executive Vesting Clause or the Take Care Clause implied a removal power. *Freehold Offices* at 46.

Another glaring example of misreading the Ratification debates is their illogical misuse of

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[23] *The Daily Advertiser* (June 20, 1789), *reprinted in* 11 *Documentary History* at 889.

[24] *Id.* at 890 and nn. 12-13.

Hamilton's *Federalist* No. 66 to parry his senatorial No. 77. Hamilton simply referred to "*those who hold* offices during pleasure"; he was not asserting that *all* who hold offices hold them during pleasure. *Removal Rehashed* at 422.

4. Their analysis of the "Decision of 1789" is unresponsive to longstanding criticisms of their interpretation, most glaringly in ignoring contrary evidence from Senator William Maclay's diary, a widely cited and definitive resource for the first Senate's proceedings. The diary shows that presidentialism was likely a minority view among senators, and that the Senate was digging in for a fight with the House on multiple issues as the House was debating removal. *See Indecisions* at 779-83. The diary and other records from the First Congress reveal initial Senate opposition to the Foreign Affairs bill before a round of log-rolling lobbying, culminating in a 10-10 tie (broken by Vice President Adams) over the ultimate compromise bill. *Id.* at 779-83, 809-19. Instead of addressing this substantial contradictory evidence, Bamzai and Prakash cite Maclay's diary only to cherry-pick a convenient argument from a single presidentialist Senator. *Executive Power of Removal* at 1796.

Similarly, Bamzai and Prakash have repeatedly conflated presidentialists (whom they call "executive-power partisans") and congressionalists (whom they call "legislative-grant partisans"). *Id. at* 1793; *Indecisions at* 807-09 & App'x II. For example, they claim Theodore Sedgwick was "[a] one-time proponent of the legislative-grant theory" but converted to presidentialism. *Executive Power or Removal* at 1795-96. During the debates, Sedgwick gave speeches on

three separate occasions that were clearly congressionalist. *Indecisions* at 791, 847-48, 866. Their only evidence of a conversion on the road to Damascus is Sedgwick's statement at the time of his final vote that the "majority of the house had decided, that all officers concerned in executive business, should depend upon the will of the president, for their continuance in office." *Executive Power of Removal* at 1795-96. But Sedgwick did not explicitly specify a constitutional basis for this power, and his final statement is entirely compatible with his earlier statements: it may simply reflect his understanding that a majority, a combination of congressionalists and presidentialists, intended to apply the same textual compromise across the board to leading officers.

Bamzai and Prakash created two false dichotomies. First, on the scope of removal power, they assume presidentialists wanted a broad removal power, but congressionalists wanted a limited power. To the contrary, some presidentialists, including Madison, thought Article II implied a limited removal power, while some congressionalists supported granting a broader removal power. *Indecisions* at 834-41. The second is that if a member supported presidential removal but voted "no" on the new ambiguous clause (e.g., Sedgwick), *either* they were congressionalists *or* they found it too unclear and confusing. This is illogical and ahistorical. It makes sense that a congressionalist like Sedgwick who thought Article II was silent or unclear would be more likely to want a statute to clarify a removal power and would oppose deleting a clear statement in favor of perpetuating the textual ambiguity problem.

By conflating presidentialists and congressionalists, Bamzai and Prakash ignore the possibility that disparate supporters of the bill reached a loose compromise only about the *result*, rather than the constitutional basis for that result. They never address the "strategic ambiguity" thesis or explain why the presidentialists dodged the challenges to put their theory up for a vote in an explanatory clause.

5. Finally, their discussion of *Marbury*'s statement that justice of the peace appointments were "not revocable," *id.* at 1802-14 (quoting *Marbury*, 5 U.S. (1 Cranch) at 162), is no more persuasive. They offer two alternative explanations for Marshall's conclusion that Marbury was unremovable.[25] The first relies on a laconic fragmentary opinion by a fragmented court on a different question holding that justices of the peace were Article III judges, *id.* at 1810-14. This marginal position was ignored by Chief Justice Marshall. It would also make a mess of Article III life tenure, leading to bizarre results like Congress having the power to impose five-year term limits on Supreme Court Justices and federal judges.

Their second alternative, that justice of the peace was a territorial office, *id.* at 1803, 1811, does not explain why this would lead Marshall to declare the office unremovable. Bamzai and Prakash thus wind up implicitly conceding the main point: consistent

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[25] A third explanation is that President Jefferson believed he could remove the justices of the peace. Any such attempt was ignored legally, and Chief Justice Marshall obviously disagreed. *See Freehold Offices* at 50. Jefferson's views as president bear the same drawback as Hamilton's change of mind: personal political incentives and spin are especially problematic for relying on post-Ratification evidence.

with Founding-era evidence, Marshall understood that when an office was granted for a limited term of years, the default rule was that it was unremovable "property," following the long English tradition of offices-as-freehold property. *See Marbury*, 5 U.S. at 155, 175; *Three Permssions* at 5, 18-20; *Freehold Offices* at 46-50.

C. Wurman's Amicus Brief takes historical records out of context

1. Removal follows appointment, but only if the office is removable.

Wurman's amicus brief generously cited my work in *Indecisions of 1789* collecting examples of the maxims "[e]very obligation is dissolved by the same method with which it is created" and "whose right it is to institute, his right it is to abrogate." Wurman Amicus Br. at 17-19 (citing *Indecisions* at 820). In other words, the removal process follows the appointment process. This maxim was contemporaneously used to support the "senatorial" view—that "if the President and Senate together appointed, then both were necessary to remove"—rather than the unitary "presidentialist" view. *Indecisions* at 819-20. But Wurman tries to associate it with the presidentialists, too: "In short, in 1789 there was general agreement that the power to execute the laws included the power to appoint officers, and that power included the ability to remove. But one could draw two different conclusions: the 'senatorial' view or the 'presidentialist' view." Wurman Amicus Br. at 20.

First, this conclusion is a concession: Even if there was agreement on this legal concept at a high level of generality, Wurman acknowledges dissensus on the concrete question about presidential removal. It is like

pointing out agreement that Article II vested "executive power," but then minimizing the disagreement about what "executive power" included. As explained above, a majority of the House rejected "the 'presidentialist' view." *See Indecisions* at 802-09 & *App'x II*. Papering over dissensus is not a faithful application of originalism.

Second, Wurman overstates the meaning of the maxim. In context, the maxim is a default rule that removal follows appointment—*but only if an office is removable*. The maxim did not apply to freehold offices or offices held for a limited term of years without a removal clause. *See Three Permissions* at 5, 18-27; *Freehold Offices* at 16, 32, 47. If it did, Chief Justice Marshall surely would have applied this maxim in *Marbury* and would not have concluded Marbury was unremovable.

Third, Wurman mistakenly relies on an error by Bamzai and Prakash. The senatorial bloc frequently offered the maxim, but it was exceedingly rare for presidentialists to rely on it—presumably because Article II clearly distinguishes unilateral presidential "nominat[ion]" from "appoint[ment]" "with the Advice and Consent of the Senate," and the maxim turned on appointment. U.S. Const., art. II, § 2. Wurman relied on Bamzai and Prakash's erroneous categorization of John Laurance as a presidentialist, *see* Wurman Amicus Br. at 19, (citing *Executive Power of Removal*, at 1775), when he in fact believed that "the legislature had power to establish offices on what terms they pleased" and could impose some (though not limitless) tenure protections. *Indecisions* at 791-92, 829-830, 843, 847, 865 & *App'x II* at 8-10, 34; *see also* Edward

Corwin, *The President's Removal Power Under the Constitution* 12-13 n.22 (1927).

2. Wurman takes Giles Jacob out of context in several crucial ways.

Wurman relies heavily on British author Giles Jacob, *see* Wurman Amicus Br. at 16-17, but this too takes a snippet of evidence out of context in several fundamental ways, reaching conclusions that contradict the complete historical record.

As I explained in *Freehold Offices*, I canvassed the searchable "Founders' Bookshelf,"[26] the sources other scholars had identified as the Framers' main sources on English or European law, and I found nothing in those sources that identified removal as a royal "prerogative" power or even a general or default royal power. *Freehold Offices* at 40-42. I then searched additional legal dictionaries and law reference books of the era, and I again found no references to royal removal powers—except for Giles Jacob. *Id.* at 42-43. Jacob was an outlier, the sole exception I or any other researcher have found in the sources available to the Founders. Though his work was influential, it did not compare to Coke, Hale, the two Bacons, or Blackstone, none of which asserted such a proposition. *Id.* at 41-42. Wurman removed all of that vital historical context and presented an exception as representative.

Moreover, even Jacob the Outlier did not refer to this power as a royal prerogative, and even the power

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[26] For "the Founders' bookshelf," see, *e.g.*, David Lundberg & Henry F. May, *The Enlightened Reader in America*, 28 Am. Q. 262 (1976); Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019); *Freehold Offices* at 41-43.

he posited was far narrower than the power claimed in this case, limited to only a subset of the cabinet. *Id.* He said only that the king could remove "the great officers," which was a term of art typically referring to nine particular officers. *Id.* (collecting sources). Even on the broadest reading, "great officers" referred only to a subset of cabinet-level officers, a far cry from the modern category of "principal officers" or the legions of administrative law judges in dispute in this case. *Id.*

3. Wurman's reliance on English history to extend a presidential removal power over "principal officers" is quixotic, because the category of "principal officers" is a recent American neologism.

Even if one assumes that English royal practice is relevant for our republican Article II, and even if one draws on such an outlier as Giles Jacob, it is still unclear how the English Crown's power to remove "great officers" would translate to either "department heads" or the broader category, the American neologism "principal officers." *See* Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 Notre Dame L. Rev. 87, 135-36 (2019) (noting that the term "principal officer," in the context of presidential appointment, appears to have been a twentieth-century inference from the Opinions Clause and warning that, in their view, "the terminology is a mistake that has the potential badly to mislead"). Yet Wurman's brief uses the term "principal officer" fourteen times in an originalist brief arguing for extending a historical removal power to this neologism category, without acknowledging this basic problem.

CONCLUSION

The original public meaning of Article II was ambiguous. What is unambiguous is that the Convention, Ratification, and early Congresses did not resolve removal's constitutional basis or its scope. If proponents of an indefeasible presidential removal power can offer no evidence of that power from the Constitutional Convention or Ratification debates, that should end the debate. As a question of original public meaning, the Founding-era historical evidence is insufficient to overturn the act of Congress in this case.

This history does not suggest that the congressionalist or senatorial theories prevailed during the Founding. It does not mean that Congress could delegate removal to itself alone or, for example, grant the Treasury Secretary or the Defense Secretary life tenure. Nor does it mean that the Senate must consent to removing department heads, even if that was Hamilton's position in *Federalist* No. 77. The point is simply that the Founders did not decide the removal question, giving it little thought until after Ratification. Even then, they were intractably divided in three different directions with no resolution.

As Adrian Vermeule recently observed, the Court's removal jurisprudence is not originalist. "The majority's opinion [in *Seila Law*] is all but frankly Dworkinian; it rests on an effort to read the existing fabric of law in the best constructive light, by reference to considerations of political morality." Adrian Vermeule, *Common Good Constitutionalism* 101 (2022).

Those are the larger stakes in this case: whether originalism is a reliable method in practice, or

whether it enables judges to confirm their own prior assumptions of "political morality" and ideal governmental structure by finding their friends in a voluminous and ambiguous historical record. If the Court adopts the unitary theorists' account, presidents may win a greatly expanded removal power, but originalism's legitimacy will be the loser.

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