7-31-2023

Freehold Offices vs. 'Despotic Displacement': Why Article II 'Executive Power' Did Not Include Removal

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Abstract

*The Roberts Court has relied on an assertion that Article II's "executive power" implied an "indefeasible" or unconditional presidential removal power. In the wake of growing historical evidence against their 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 theorists have not provided support for these repeated assertions, while making a remarkable number of errors, especially in the recent "The Executive Power of Removal" (*Harvard L. Rev. *2023).*

This Article offers an explanation for the difficulty in supporting this historical claim: Because it is wrong. 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. Legal scholarship has missed this history, but many European historians and economic historians have explained this widespread system of "venality." Montesquieu's The Spirit of the Laws *rejected "displacement" at will (i.e., removal at pleasure) as a tool of "despotic government," then endorsed "vénalité" limits on removal as a practical system of family investment, incentives, checks, and balances in constitutional monarchies. 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, modern administration, and colonial expansion.*

Whereas vénalité had grown out of control in revolutionary-era France, the English had a more stable system of freehold property rights, a distinctive English protection of the officeholders' investment against "despotic" displacement. Many central officers and powerful Treasury officers were unremovable. This history explains the silence on removal in the text of Article II, in the Convention and Ratification debates, especially in the Anti-Federalists' speeches, and gives context to Hamilton and Madison rejecting presidential removal in the Federalist Papers. The sale of offices-as-property shaped colonial America, and it was the background for the Constitution's "offices of profit," for the First Congress's references to writs protections, and for early statutes requiring financial "sureties of office."

When unremovable 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. Removal was neither necessary nor sufficient for law execution. Unitary theorists' mistaken assumptions about "executive power" are not only a warning for the Roberts Court to exercise restraint in upcoming cases on presidential power and the administrative state, they also illustrate originalism's blindspots and biases in practice.

† Professor, Boston University School of Law. My special gratitude to Ethan Leib and Andrew Kent, together the "faithful trio," to Jane Manners and Lev Menand, the "three permissions" duo, and to Gary Lawson and David Seipp for extensive comments. Thanks to Jack Balkin, Jack Beermann, Mary Bilder, Marty Flaherty, Jonathan Gienapp, Christopher Havasy, Richard Kay, Andrea Scoseria Katz, Tom Lee, Joshua Macey, Michael McConnell, Gillian Metzger, Michael McConnell, Julian Mortenson, Farah Peterson Richard Primus, Jack Rakove, Noah Rosenblum, Jodi Short, and Larry Solum; to Mike Ramsey, Mike Rappaport, Ilan Wurman, and the Originalism Conference at the University of San Diego; to and the National Conference of Constitutional Law Scholars at the University of Arizona; to Annie Brodsky, Daniel Kweon, and Chloe Rigogne for research assistance; and to Danya Handelsman for her indefeasible support.

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Introduction

"…[I]n despotic states… the subjects [in office] must be placed or displaced in an instant by the prince."

-- Montesquieu, *The Spirit of the Laws* (1748) defending "venality," the sale of office, and protections against removal in constitutional monarchies.

Some assumptions about the past seem so obvious from our modern experience that Justices and legal scholars think they do not need footnotes and documentary support. The widespread assumption that removal was a traditional "executive power" is a cautionary tale not only about the Roberts Court's expansion of presidential power and its unitary executive theory. It is a cautionary tale about the practice of originalism and the projection of modern practices and ideologies onto the past. To paraphrase the British author L.P. Hartley, the Constitution's past is quite literally a strange foreign country: executive power was very different there.[1] From pre-modern England, the British empire, and continental Europe to twenty-first century America, so much has gotten lost in translation by originalist assumptions and confirmation bias.

In the Supreme Court's upcoming term to be argued in late 2023, *SEC v. Jarkesy* presents a question with deep and broad implications for the administrative state: "Whether

[1] L.P. HARTLEY, THE GO-BETWEEN 3 (1953).

Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection."[2]

Article II is silent on removal. To infer an unconditional (indefeasible) removal power from the Executive Vesting Clause ("The executive power shall be vested in a President…"[3]), the unitary theory has relied on four steps. First, the Crown (and other monarchies) had a general and traditional power to remove or displace officers. Second, Founding-era Americans were aware of or understood that royal tradition and practice. Third, Founding-era Americans understood Article II's "executive power" to implicitly delegate the English Crown's traditional powers (or European royal powers) to a republican president. Fourth, Article II powers, whether explicit or implied, are "indefeasible" (i.e., beyond congressional conditions like requiring "good cause"). This Article is the first to systematically disprove the first two assumptions: English and other European monarchs did not enjoy a general, default, or "backdrop" power to remove executive officials; and the protections against royal removal were well established in the sources relied upon by the Framers. This Article also adds more evidence against the third (that Article II imports royalist prerogatives and traditions).[4] Prior work has offered concrete evidence against the fourth (against "indefeasibility" of implied powers),[5] and has also critiqued the unitary theory's two other bases for removal, the Take Care ("faithful execution") clause and the First Congress's ostensible "Decision of 1789."[6]

Addressing the problem of Article II's textual silence, Chief Justice Roberts asserted in *Seila Law* (2020), "As we have explained many times before, the President's removal power stems from Article II's vesting of the 'executive Power' in the President," citing *Free Enterprise*.[7] In Free Enterprise, he had asserted, "The power to oversee executive officers through removal" was a 'traditional' component of the executive power."[8] Neither *Free Enterprise* nor *Seila Law* provided any historical sources for these claims, nor for its new "indefeasibility" rule.[9] In the foundational unitary executive case, *Myers v. U.S.*, Chief Justice Taft relied on the English Crown more explicitly: "In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive

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[2] Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022). October 2023 Term No. 22-859. Cert. granted. https://www.supremecourt.gov/DocketPDF/22/22-859/256566/20230308164750050_Jarkesy.pet%20Final.pdf

[3] U.S. CONST. Art II, § 1.

[4] See infra Part I. See also JACK RAKOVE, ORIGINAL MEANINGS ("Chapter 11, The Creation of the Presidency"); Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 PRESIDENTIAL STUD. Q. 85 (2007). Julian Davis Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, at n. 188 (2019); Julian Davis Mortenson, *The Executive Power Clause,* 167 U. PENN. L. REV 1326 (2020); Julian David 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); *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMAN. 125 (2022)

[5] The assumption that "vesting" means legislatively unconditional is ahistoric projection back from the Marshall Court's vested rights doctrine, without support in the eighteenth century. *Vesting*, 74 STAN. L. REV. 1479 (2022); *Removal of Context*, supra.

[6] *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2115-17, 2189-90 (2019); *The Indecisions of 1789*, 171 U. PA. L. REV. 753 (2023).

[7] *Seila Law* v. CFPB, 140 S.Ct. 2183, 2205 (2020) (citing *Free Enterprise Fund*, 561 U.S. 477, 483.

[8] Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010).

[9] Myers v. United States, 272 U.S. 52 (1926) discussed indefeasibility in *dicta*, but the statutory limit in question was a structural requirement for Senate consent to remove.

power' as including both."[10] Judges and prominent scholars, including Dean John Manning[11] and Akhil Amar,[12] recently made similar assumptions.[13] Even critics of the unitary theory sometimes have conceded this point – erroneously so.[14]

In the most recent effort to defend this interpretation, "The Executive Power of Removal" *Harvard Law Review* (May 2023), Aditya Bamzai and Saikrishna Prakash asserted: "As a matter of original meaning, the Roberts Court is right. The 'executive power' granted by Article II encompassed multiple strands, one of which was the power to remove executive officers."[15] They claimed that the Article II "executive power" referred to "a cluster of powers… *generally* through their association with the British Crown *and other executives*, both republican and monarchical." (original emphasis), which included "the common backdrop of at-pleasure removal," the British Crown's default power.[16] They, too, cited no pre-1789 American sources, English sources, or other European sources for this assertion. Their *sole* piece of evidence is two sentences from an obscure congressman post-Ratification, and his reference to European monarchs turns out to be strong counter-evidence to their thesis: He was trying to paint the supporters of presidential removal as monarchists, associating it with Mad King George III and other "despots" to show the dangers of their interpretation, and concluding that European monarchies were irrelevant for understanding the American "executive power."[17]

There is a simple reason it has been so hard to support these claims about Founding-Era Americans associating "executive power" with European monarchies' removal powers: because they are wrong.

English and other European monarchs did not have such a default power, and during the drafting and ratifying of the Constitution, there is no record of Americans claiming they did. Relying on many European historians and economic historians, this Article is the first to introduce to legal scholarship and to this pressing constitutional debate the history of the necessary bargains for pre-modern state-building: the sale of office ("venality") and the office as unremovable property (freehold property in England). It is a history that should alter the direction of the Roberts Court as it considers *Jarkesy* this fall, and it is also a history that should alter how we think about the development and traditional values of administrative law. We have assumed that administrative law has a default rule of officer accountability, but the administrative state developed from a more complicated and necessary mix of removable patronage offices and of independent unremovable offices. A handful of cabinet-level officers and the privy council served at pleasure of the king, but some cabinet-level offices

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[10] Myers v. United States, 272 U.S. 52, 118 (1926) (citing *Ex Parte Grossman*).
[11] John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power,* 128 HARV. L. REV. 1, 45 n.268 (2014) (the Framers understood the Crown to have "limitless power to remove subordinates."); Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 2011, 2027 (2011) (referring to "the Crown's unfettered power to remove"); *see also Seila Law v. CFPB,* 140 S.Ct. 2205 (citing *Free Enterprise Fund* , 561 U.S. at 483; See also Free Enterprise, 561 U.S. 477, 484 (2010)). Scalia's lone dissent in *Morrison v. Olson* also assumed that removal "at will" had been implied by Article II.
[12] AKHIL AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION 358 (2021). (""Sacking executive slackers is surely executive power… *Therefore, the power to sack executive-branch slackers is vested in the president. QED."*) For more, see *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMAN. 125 (2022).
[13] PHH Corp. v. CFPB, 881 F.3d 75, 141 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting).
[14] Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 265-66 (2009).
[15] Bamzai and Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1762 (2023).
[16] Id. at 1790.
[17] Id. at 1768-69 n.76, 1791 n.249, 1791 n.262 (all citing Daily Advertiser (N.Y.C.), June 20, 1789, *reprinted in* 11 Documentary History of the First Federal Congress, at 889).

were unremovable freeholds in the eighteenth century.[18] Many significant executive offices were patronage at pleasure, and many were bought and sold as unremovable freehold property. There was no general or "backdrop"[19] default removal rule.

This background explains why so many core eighteenth-century sources rejected such an assumption that "executive power" implied removal. Both Hamilton and Madison in the *Federalist Papers* (No. 77 and No. 39) rejected the unitary theory of presidential removal. In surveying the established "Founders' bookshelf" of sources, I found none that suggested that the Crown had a removal or displacement power. Going beyond that established "bookshelf," I found only one Founding-era legal resource referring to the Crown's removal power, and even there, it limited such a power to remove "the great officers," a term associated with just a subset of cabinet ministers.[20]

In a critical passage overlooked by legal scholars, Montesquieu explained that removal at will was "despotic."[21] He then endorsed the "vénalité" of office, the sale of offices that were protected from removal as personal property, as a positive and practical feature of constitutional monarchies. Montesquieu's *Spirit of the Laws* was one of the Founders' most influential sources, and Montesquieu is the most associated with the formal separation of powers, the foundation of the unitary executive theory.[22] Yet even Montesquieu rejected both the descriptive claim that "executive power" included removal and a normative claim that chief executives should be able to remove officers at will.

"Vénalité," the sale of office, and offices-as-profitable-personal-property was entrenched in English law and practice, and it shaped the American colonial experience, state constitutions, and even the federal Constitution's text ("offices of profit"). While the Founders' bookshelves lacked references to removal, they had ample support for the law of offices-as-property and limits on removal. Blackstone's legal categories reflect this flexible mix: protected offices (inheritable property, for life, for a term of years); and others "during pleasure only,"[23] but specifying only a small number of offices with "during pleasure" tenure.[24] The legal and administrative backstory of venality explains the anti-unitary passages by Hamilton and Madison in *The Federalist* (in *No. 66*, *No. 77*, and *No. 39*) that have been misunderstood or dismissed by unitary theorists.[25] In fact, the First Congress not only rejected presidential removal,[26] but also debated the English tradition of "purchase of office,"

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[18] See infra Section III.D.

[19] Bamzai & Prakash at 1790-93 (Part II.A, "The British Backdrop"). Their background section on "executive power" in Part I.A offered only examples of removable offices, but no evidence of a general removal power.

[20] GILES JACOB, EVERY MAN HIS OWN LAWYER, *infra* Part IV.

[21] MONTESQUIEU, SPIRIT OF THE LAWS, Book V, Ch. 19. See infra Part II for more on Montesquieu.

[22] JACK RAKOVE, ORIGINAL MEANINGS; FORREST MCDONALD, NOVUS ORDO SECLORUM, 199-201; Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHICAGO-KENT L. REV. 103, 147-48 ("Montesquieu's theory of the separation of powers exerted enormous influence over American thinking, as evidenced by the formulaic restatement of the theory found in the early state constitutions and declarations of rights"); Jack Rakove, "James Madison's Political Thought: The Ideas of an Acting Politician" (2012); Jack Rakove, *The Madisonian Moment,* 55 U. CHI. L. REV. 473, 489-90 (1988). John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1995 n. 282 (2011) (citing GERHARD CASPER, SEPARATING POWER 8 (1997); William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32, 37 (1928) ("The writings of Montesquieu were accepted at Philadelphia as political gospel."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 488 (1989) (observing that "the idea of a government structured by the separation of powers came to the Americans principally through the writings of Montesquieu").

[23] 2 WILLIAM BLACKSTONE, COMMENTARIES *20, 35-36.

[24] *Removal of Context.*

[25] See infra Part II.

[26] *Indecisions of 1789.*

the resulting "property in office" as a protection against removal, and the English writ system that provided due process against removal. The First Congress also passed a series of statutes that reflected "property in offices" the need for civil due process to allege "high misdemeanors" and remove officers, especially high Treasury officers.[27]

This Article builds on excellent recent historical research on removal,[28] and synthesizes their examples and observations into a broader historical context, the opposite of the unitary assumption: The Founding era debates did not discuss removal because unremovability was so pervasive. The sale of office and the related unremovability of office were not merely episodic, but they were systematic; they reached vertically from low offices to significant offices with a national (or central metropole) portfolio; and they reached out geographically to the American colonies as a tool of empire. The historiography credits the tandem systems of venality and patronage for the rise of the nation-state and the administrative state before it became a modern bureaucracy. This Article also builds on Nicholas Parrillo's outstanding *Against the Profit Motive*, which powerfully explained that English and American officers were often paid not by a regular salary, but by profits from fees and bounties.[29] This Article reveals a basic background for Parrillo's study of officers doing their jobs for profit: Monarchs, the central treasury, and other officers *also* profited from selling off profitable offices, and this bargain often offered job security through a freehold property right.

Meanwhile, European historians have an emerging school of "Corruption Studies" which has focused on the venality of office in England and continental Europe,[30] and economic historians have explained the surprising efficiencies of this system (signals of skill and commitment, incentives to maximize the investment) to overcome the remoteness of

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[27] See infra Section V.E.

[28] JONATHAN GIENAPP, SECOND CREATION, discussed infra; Jonathan Gienapp, 'Removal and the Changing Debate over Executive Power at the Founding' (2023) *Am. J. L. Hist.* (forthcoming); Jane Manners & Lev Menand, "Removal Permissions and Tenure of a Term of Years," *Colum. Law Rev.* (2021); Christine Kexel Chabot, "Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies" NOTRE DAME L. REV. (2020); Chabot, *Interring the Unitary Executive Theory*, NOTRE DAME L. REV. (2022); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, STAN. L. REV. (2020); Katz and Rosenblum, Removal Rehashed, HARV. L. REV. FORUM (2023); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016). See also *The Indecisions of 1789*, supra; *Vesting*, STAN. L. REV. (2022); *The Marbury Problem and the Madison Solutions,* FORD. L. REV (2022); *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUMANITIES (2022); Amicus Brief, *Collins v. Yellin* (2021).

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

[30] MARK KNIGHTS, TRUST AND DISTRUST : CORRUPTION IN OFFICE IN BRITAIN AND ITS EMPIRE, 1600-1850, at 345 (2021); STEPHEN MILLER, FEUDALISM, VENALITY, AND REVOLUTION: PROVINCIAL ASSEMBLIES IN LATE OLD REGIME FRANCE (2020); WILLIAM DOYLE, VENALITY: THE SALE OF OFFICES IN 18TH-CENTURY FRANCE (1996); K. W. SWART, THE SALE OF OFFICES IN THE 17TH CENTURY (The Hague, 1949); L. L. PECK, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND (1993); THE GOOD CAUSE: THEORETICAL PERSPECTIVES ON CORRUPTION (G. de Graaf, P. von Maravic´ and P. Wagenaar, eds.) (Farmington Hills, Mich., 2010); A. P. C. BRUCE, THE PURCHASE SYSTEM IN THE BRITISH ARMY, 1660–1871 (1980); R. O. Bucholz, *Venality at Court: Some Preliminary Thoughts on the Sale of Household Office, 1660–1800*, 91 INSTITUTE FOR HISTORICAL RESEARCH 61 (2018); J. H. Parry, *The patent offices in the British West Indies*, 69 ENG. HIST. REV. 200–25 (1954); M. J. Knights, 'Parliament, print and corruption in later Stuart Britain', 26 PARLIAMENTARY HIST. 49–61 (2007); W. Doyle, 'Changing notions of public corruption, c.1770–c.1850', in CORRUPT HISTORIES (E. Kreike and W. C. Jordan, eds.) (N.Y., 2004),

early modern Europe.[31] Historians of Britain recognize the sale of offices-as-property was a foundation for the rise and dominance of the British global military-financial empire.[32]

Venality is a surprising story of the market-oriented origins of the modern administrative state. Only a small number of legal scholars have discussed the sale of office in England.[33] Neither "venality of office" nor Montesquieu's rejection of "instant displacement" and his defense of unremovability have been discussed in legal scholarship on the removal power or the administrative state. Venality and freehold offices may seem corrupt and surprising, but the core bargain is familiar: Lawyers who become judges or law professors are often trading away their opportunity to make more money in favor of more job security. Many athletes make the same deal when they negotiate long contract extensions rather than testing free agency. In a tight labor market where literacy was in high demand and low supply, the elite could bargain for job security, and as Montesquieu confirmed, they bargained for long-term inheritable property for their family's future lucrative employment.

Our assumptions drawing from our modern *Imperial Presidency*[34] and from our imagination about unchecked medieval kings, Machiavellian princes, and later absolute monarchs lead us to assume they had an unconditional removal power. But we also know from English and European history that building a modern nation-state required new revenue and many bargains and compromises with feudal lords, local elites, and a rising educated bourgeoise. Venality was one such legal bargain.

We also make assumptions about modern technology, rapid transportation, instant communication, and reliable systems of measurement in our era of the *Imperial Presidency*. Medieval and early modern governance required more indirect, low-cost forms of incentives and revenue streams. Many colonial Americans experienced this system, and though many protested its abuses, it persisted out of practical necessity.

The leading historian of early modern English administration observed, "It is difficult to generalize about the security of tenure."[35] Aylmer then offered a surprising conclusion: Through the seventeenth-century, English law protected many executive offices from removal *more than it protected judicial offices*.[36] This arrangement is the reverse of our modern assumptions about "Article II" and "Article III." Eighteenth-century reformers incrementally reduced the sale of office and freehold tenures, but by the time of the Revolution, some English cabinet members and many powerful central executive officials, especially in Treasury, continued to hold their offices as freeholds for life.[37]

Some unitary scholars and judges argue that because the President has an Article II duty to "take Care that the laws be faithfully executed" and to supervise execution, a removal

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[31] DOUGLAS W. ALLEN, THE INSTITUTIONAL REVOLUTION: MEASUREMENT AND THE ECONOMIC EMERGENCE OF THE MODERN WORLD (2012); *see also* Gordon Tullock, *Corruption Theory and Practice*, 14 CONTEMP. ECON. POLICY 6 (1996).

[32] See infra Section III.A and III.C-D.

[33] See James Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the Court of Law Requirement*, 107 NW. L. REV. 1125, 1144 (2015); *Faithful Execution and Article II*, HARV. L. REV. 2115-16, 2189-90 (2019); Ethan J. Leib and Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 WM. & MARY L. REV. 1297 (2021); Douglas Allen, *Compatible Incentives and the Purchase of Military Commissions*, 27 J. LEGAL STUDIES 45–66 (1998) (law & economics study of incentives in the English military, not about administration).

[34] ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY (1974)

35. AYLMER at 110.

36. AYLMER, KING'S SERVANTS; G.E. AYLMER, STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC, 1649-1660, at 106, 109 (1973) (emphasis added).

[37] See Part III and IV below. For the sudden adoption of judicial job security, see the Act of Settlement of 1700/1701. See 10 HOLDSWORTH, HISTORY OF ENGLISH LAW 480-82; 498-516.

power is necessary to fulfill such a duty.[38] Originalists might call this "pragmatic enrichment."[39] English historians have shown how removal was not necessary: When high executive officers were uncooperative and unremovable, the English Crown had other ways of executing their policy preferences: they geographically rotated officers, and if necessary, they created new offices and assigned the duties to other officers.[40]

A conclusion addresses the legal implications as the Court decides *SEC v. Jarkesy*[41] and then likely challenges to the Federal Trade Commission and the Securities & Exchange Commission.[42] Some readers have asked whether this historical account would "prove too much." Could Congress and executive officers put offices up for sale? Make those offices inheritable, or make the Defense Secretary or Treasury Secretary unremovable or an office for life? Such extremes are not the logical consequence of this research. To be clear, this Article does not make an overly broad historical claim on the opposite side of the unitary theory. This Article simply disproves the historical claims at the foundation of the removal precedents, and it concludes in favor of judicial restraint in light of this history. The Court might leave earlier removal precedents in place. *Myers* arguably relied on structural or theoretical claims, not just on historical errors, but it should be applied narrowly. Reasonable people can disagree about whether the Take Care clause implies some form of a removal power based on structure, theory, and common-law constitutionalism. But the Roberts Court's new "indefeasibility" was always a conjectural leap, and it should be reconsidered in light of this evidence. Then the conclusion makes two broader points: this history weighs in favor of a more functionalist, flexible separation-of-powers jurisprudence, over formalism, and it is a warning about the reliability of originalist methods.

Part I briefly reviews some of the mistakes that unitary theorists have made in search of a historical basis for a removal power. Part II returns to Montesquieu's discussion of despotic despotism, venality, and unremovability to re-set the framework that is the alternative to the unitary executive assumptions. It then shows how Hamilton and Madison in the *Federalist Papers* are consistent with Montesquieu's views. Part III drills down from these abstract ideas down to European practice of venality and sale of office, a practical bargain of profits and unremovability between monarchs and educated elites. Part IV focuses on England's Treasury, the driving force of its imperial expansion, and its powerful and unremovable officers, and then on the American colonial experience of the sale of offices and of powerful unremovable offices (a feature of proprietary colonial government). Part V uses this background European and Anglo-American history to explain the puzzle of silence on removal on the "Framers' Bookshelf," in the text of Article II, and in the Convention and Ratification Debates. Early state constitutions also show a flexible mix of tenures for offices exercising what we would identify as "executive power." The First Congress's statutes and debates also are consistent with the law of offices-as-property. A conclusion counsels judicial restraint in upcoming cases and suggests more skepticism about separation-of-powers formalism and about the practice of originalism.

I. UNITARY EXECUTIVE, MULTIPLYING PROBLEMS

[38] See, e.g., MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014). But see Gary Lawson Lawson, "Command and Control," FORDHAM L. REV. (forthcoming 2023); Manners, "Beyond Removal," FORDHAM L. REV (forthcoming 2023).

[39] Lawrence Solum, *The Public Meaning Thesis*, 101 B.U. L.REV. 1953 (2021).

[40] See infra Part IV on the English Treasury; JOHN BREWER, SINEWS OF POWER.

[41] Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022).

[42] SEC v. Cochran & Axon Enter. v. Fed. Trade Comm'n, 598 U.S. __ (2023).

This Part summarizes some of the main recent arguments about Article II and removal, highlighting errors and the lack of evidence by unitary theorists, but at the same time, pointing out the gaps and shortcomings in the evidence so far offered by their critics. This Part offers some striking examples of scholars only partly quoting Founding-era sources, taking them out of context. When one goes back to read the full passage in context, it turns out that the passage is actually strong counterevidence: 1) the only references to European monarchs' powers of removal were from an *opponent* of presidential removal who was discrediting the unitary side as royalist/monarchist, to associate their argument with Mad King George III and with European "despots"; 2) unitary scholarship claimed leading English legal sources listed removal as a royal prerogative power, but it turns out that removal was conspicuously absent from those lists, while those sources confirm the unremovability of many offices; 3) passages from the Constitutional Convention cited to support the claim that the presidents' powers are based on English royal powers actually say the opposite. On the other hand, the critics of the unitary theory have focused on examples that arguably were too early, too late, too remote, too esoteric, too quasi-judicial, or too low-level to reflect the original public meaning about removal of significant executive offices. This Article fills those gaps with the widespread history of the sale of office and freehold offices from the medieval period into the nineteenth century, for powerful executive offices -- including cabinet-level "department head" offices, high Treasury officials, and American colonial proprietary governance.

A. Unitary Executive, Multiplying Problems

The problem of evidentiary silence has been lurking in these debates since the rise of a unitary theory in *Myers*. After asserting the royal removal power without support, Chief Justice Taft spent more time on the First Congress, the Decisions of 1789, and the historical record thereafter. The unitary theory went into exile after *Humphrey's Executor* and the New Deal. In the 1980s, Justice Scalia (in a solo dissent in *Morrison*) and a wave of unitary scholars revived it, establishing a scholarly patina of credibility for *Free Enterprise Fund*, *Seila Law*, *Collins*, the Fifth Circuit opinion in *Jarkesy*. This year, Supreme Court will entertain pushing the unitary executive theory further to strike down more federal statutory provisions in *SEC v. Jarkesy*,[43] and Justice Thomas and other judges have invited unitary-theory challenges to private rights to action.[44]

Many legal historians have recently demonstrated that an indefeasible presidential power of removal is not supported by the original public meaning of the Take Care Clause[45] nor by an ostensible "Decision of 1789" in the First Congress,[46] unitary scholars have fallen

[43] *See, e.g.*, Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022) (holding that removal protections for SEC administrative law judges are unconstitutional); *cf.* SEC v. Cochran; Axon Enter. v. Fed. Trade Comm'n.
[44] *U.S. ex rel. Polansky v. Executive Health Resources, Inc.* (June 2023) (Thomas, J., dissenting); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1136-37 (11th Cir. 2021) (Newsom, J., concurring) (arguing that standing should be denied when Congress attempts to vest executive power in private plaintiffs by "providing a right to sue on behalf of the community and seek a remedy that accrues to the public").
[45] *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2115-17, 2189-90 (2019); Manners and Menand, supra.
[46] *Indecisions of 1789: Strategic Ambiguity and Inconstant Originalism*, PENN L. REV. (March 2023); Kexel Chabot, *Interring the Unitary Executive*; Gienapp, *Removal*, supra.

back on a historical claim that the English Crown had a "backdrop" general removal power, and "executive power" implied removal.[47]

The American presidency may be "unitary" in the obvious sense, but the unitary theorists' problems are plural and multiplying. The gaps and errors in this recent unitary scholarship and their amicus briefs are so widespread that they indicate how they have struggled to find solid evidence, especially for the core claim that "executive power" included or implied a removal power over executive officials.[48] In separate pieces, legal historians and have focused on the evidentiary errors by unitary theorists,[49] and another fact-checking of "Executive Power of Removal" is forthcoming. This Article presents a more affirmative and independent historical argument, a positive historical account to replace the unitary myths.

But before getting to that affirmative argument, it is important to highlight the big-picture problems and gaps in the recent pro-unitary theory defenses. For example, the most recent attempt to rescue the unitary removal theory, Bamzai and Prakash's "The Executive Power of Removal," relies heavily on post-1788 evidence, and it has no documentary evidence to support its assertions of a general removal power of the English Crown or of other European monarchs, and no support that Americans during ratification understood the English Crown to have such a power.[50] ("British Backdrop," Section II.A). As noted in the introduction, their only evidence, which they cited three separate times for this assertion, is from after Ratification: two sentences from a newspaper account of a speech James Jackson, an obscure Georgia congressman, during the congressional debate known as the "Decision of 1789."[51] The problem is that Jackson opposed the unitary theory that Article II implied a removal power, and he was actually attributing this argument to the presidentialists (or maybe even inventing it) to undermine them. Here is the full passage:

> Mr. Jackson conceived this to be altogether a constitutional question. He was convinced of the necessity of energy in the executive, but he was sure the liberties of the people deserved equal attention and care. Of two evils, it was proper to chuse the last. It had been mentioned, that in all governments the executive necessarily had the power of dismissing officers under him. That might hold good in Europe, but it did not apply to our constitution, by which the president had not the executive powers exclusively.[52]

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[47] Bamzai and Prakash, "The Executive Power of Removal," 136 *Harv. L. Rev.* 1756 (2023); MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2021).

[48] "The Indecisions of 1789: Appendices," (Feb. 27, 2023) (unpublished manuscript) [hereinafter Appendix II], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [https://perma.cc/V6GA-NZJP].

[49] Katz and Rosenblum, *Removal Rehashed*, HARV. L. REV. Forum (2023) "The Indecisions of 1789: Appendices" (Feb. 27, 2023) (unpublished manuscript) [hereinafter Appendix II], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [https://perma.cc/V6GA-NZJP].

[50] Their single citation for their claim is to one isolated sentence by a member of the First Congress in 1789, and no sources from the Ratification period of 1787-1788 or earlier. Id. at 1769 n. 76; id. at. 1791 (tan 252).

[51] Id. at 1768-69 (citing Daily Advertiser (N.Y.C.), June 20, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, at 889) (supporting their claim: "Despite Parliament's authority to strip away Crown powers, the British had created a vocabulary that deemed certain powers to be 'executive.' The shared definition meant that appointment and removal were understood to be part of the 'executive power.'") Id. at 1790 n.249 (supporting their claim: "Americans of the Founding generation believed that the Crown's "executive power" included removal authority"); and id. at 1790 n.252 (supporting their claim: "Because many offices were held at the Crown's pleasure, and because foreign executives had removal power as well, Americans saw removal as a power associated with the executive.")

[52] 11 DHFFC 889.

Jackson then described a parade of evils from monarchy, starting with King George III, against whom they had revolted, and describing the dangers of corruption, violence, military coups, and the "despotic" abuse of removal powers in Europe:

> We have already, he said, seen a King of Britain a lunatic... we might bid adieu to liberty, and all the blessings of genuine republicanism. [Jackson] begged gentlemen to consider the deadly influence of the crown in England, where offices were held during the pleasure of the king. Let gentlemen turn their eyes to Sweden, and behold the monarch [Gustavus III] shutting doors upon his Senate, and compelling them to submit to his despotic ordinances.[53]

Indeed, King Gustavus had conducted a miliary coup around that time, abolishing the council and the Swedish Riksdag's legislative power.

Jackson was not trying to describe European monarchy as a matter of historical accuracy; he was engaging in tendentious political argument, exaggerating the powers of European monarchs for rhetorical effect. Bamzai and Prakash did not provide evidence that the presidentialist (or unitary) members of the House actually "mentioned" European monarchy, and my research did not reveal such arguments in the records of the First Congress. In fact, Jackson was demonstrating the opposite of what Bamzai and Prakash were citing him for: an anti-royalism so pervasive that Jackson could undermine the presidentialists by portraying them as royalists, rather than republicans, and by linking the removal power to "deadly" European monarchs and despots. The fact that Bamzai and Prakash needed to rely on such a late, weak, and contradictory comment suggests that they could not actually find any evidence of original public meaning that Article II implied a removal power based on English and European practice.

Second, Jackson's rhetorical strategy to taint the presidentialist as monarchists only adds to the overwhelming evidence from the Convention, Ratification, and the First Congress that royal practice and royal prerogatives were irrelevant to Article II and the Constitution generally.[54] As part of one long exchange in the Convention, Wilson concluded a speech against monarchy by invoking Montesquieu.[55] We will read more from Montesquieu on removal soon. The point about the Founders' anti-monarchism has been made elsewhere,[56] but nevertheless the unitary theorists hold onto this misconception, apparently because of a lack of non-royalist evidence.[57] Rep. Jackson seems to have invented or exaggerated a royalist argument because he was painting the presidentialists as royalists or Anglophilic loyalists, with an unreliably broad brush. Jackson had plenty of company in anti-royalist rhetoric. It is hard to find any speeches actually claiming there was a general royal

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[53] Id. at 890 and n. 12-13.

[54] 1 Farrand Records of the Constitutional Convention 65 (June 1) (James Wilson *"repeated that he was not governed by the British Model which was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it."); 1 id. at 65 (James Wilson "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers*. Some of these prerogatives were of a Legislative nature. Among others that of war & peace, etc. The only powers he conceived strictly Executive were those of executing the laws."; id. at 71 (Madison endorsed limited, "confined and defined" executive powers "*ex vi termini,*"; id. at 70-71. Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), in Founders Online. For anti-Crown prerogatives and anti-monarchy in the First Congress, see "Indecisions of 1789" at 822-42.

[55] 1 FARRAND 70-71 (Rufus King's notes, June 1, 1787).

[56] JACK RAKOVE, ORIGINAL MEANINGS 249-50, 257; *Indecisions of 1789*, *Removal of Context*, *Movement on Removal*; Mortenson, supra; Gienapp, supra

[57] Bamzai and Prakash, supra; MCCONNELL; see also ERIC NELSON, THE ROYALIST REVOLUTION at 1.

power of removal and then relying, but many members of the First Congress denounced royalism and the Crown prerogative.[58] And, contrary to the unitary interpretation of a "Decision of 1789," the First Congress rejected the interpretation that Article II "executive power" included removal.[59]

Third, in an example of a recurring "heads-I-win, tails-you-lose" originalism, unitary scholars try to flip the problem of silence from an obvious problem to evidence of a "backdrop" default rule. When unitary executive scholars offer examples of offices during pleasure or removal-at-will by kings and queens, they contend these examples show a general rule (head, I win).[60] When critics have demonstrated many examples of Parliament protecting offices from removal, their response is that these examples are not evidence but somehow they are counterevidence -- exceptions that prove a removal rule (tails, you lose).[61] In limited removal, Parliament had to explicitly state the protection, because otherwise, the background default rule of an "executive power" of removal would apply. "Indeed, parliamentary laws were necessary to nullify the common backdrop of at-pleasure removal."[62] (Again, no support for this assertion). According to the unitary theory, the American Constitution vested an executive power of removal, and once vested, the separation of powers would not allow legislation to nullify such a constitutionally vested executive power. Their argument selectively suggests that the Framers adopted one English model ("executive power") but not another English model (parliamentary supremacy). The problem is that the opposite assumptions are just as logical: the Framers understood English "legislative power" to include the creation of offices and setting their pay and tenure, and it was vested in Congress through the Necessary and Proper clause; and the Framers rejected the other English model (royalism). Without evidence, why should the unitary theory be able to choose one "power" argument over the other, and one English model (royalism) over another (parliamentary supremacy)? In a battle of examples,

Fourth, it is striking how much the unitary executive scholarship has focused on 1789 and after.[63] Bamzai and Prakash rely heavily on post-Ratification evidence: 13 pages cover English history, the early states, the Constitutional Convention, and Ratification, including their unsupported assertions about England and misinterpretations of the Federalist Papers;[64] by contrast, 41 pages cover post-Ratification events and debates,[65] including roughly 18 pages on events after 1800. Even more stark an imbalance is Steven Calabresi and Christopher Yoo's book *The Unitary Executive*, with only six pages covering 1787-88 or earlier, and over 400 pages after 1788.[66]

B. Removal*: The Power That Could Not Be Found*

In *The President Who Would Not Be King*, Michael McConnell thesis was 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.

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[58] *Indecisions of 1789*, at 822-23.
[59] Id.
[60] See MCCONNELL; Bamzai & Prakash, "Executive Power of Removal" (Sections I.A.1 & 2, II.A); Unitary scholars' Seila Law amicus brief.
[61] Bamzai & Prakash, Section II.A (British Backdrop).
[62] Bamzai and Prakash, 136 Harv. L. Rev. at 1790.
[63] *Free Enterprise* at 492, 498, 500, 501; *Seila Law, Myers* passim.
[64] "Executive Power of Removal" at 1764-73; 1790-93.
[65] Id. at 1773-82; 1793-1824
[66] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008).

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.

McConnell's "prerogativist" thesis[67] is a fundamental problem for the royalist cherry-picking approach of Chief Justices Taft and Roberts and of other unitary theorists. Whereas Bamzai and Prakash (as well as Taft) based their argument on royal practice, McConnell rejected that approach as unreliable and inconsistent with the rule of law. He rightly critiqued a royalist approach of relying on royal practices (even in his book title itself, "The President Who Would Not Be King"). Royal practices were "undefined by law."[68] Instead, McConnell emphasized "legal prerogatives" as "defined and limited by law," and contrasted this method with the extra-legal "Schmittian conception of sweeping emergency powers and an unchecked executive."[69] A fixed and established list of prerogatives provided legality, grounded in historical sources rather than unlimited assertions about necessity.

McConnell's argument for presidential removal starts with the claim that English monarchs had a traditional prerogative power of removal.[70] As previously documented, these claims do not stand up to scrutiny.[71] He cited Blackstone and Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* as his two "principal sources for the law of prerogative,"[72] and he cited them for lists that included removal.[73] However, neither included removal or anything like it on their lists of prerogative powers, and they did not even discuss it as a general non-prerogative practice. In fact, the absence of a removal power from these lists is evidence it was no default power.[74]

To his credit, McConnell recently has conceded that he was wrong about removal as a listed prerogative power.[75] But instead, he has a fallback to a different source: the Take Care clause. Without removal, he says, the president could not take Care that the laws be faithfully executed. As this Article shows in Part IV, English historians have shown how removal was necessary for execution. It is also unclear why a removal power would need to be unconditional, if the Take Care clause sets its own condition of "faithful execution," i.e., good faith, comparable to requiring good cause, and a condition that apparently would invite a congressional clarification.[76] It would be incongruous for a duty give rise to a power more

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[67] 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 409-467 (1953). ERIC NELSON, THE ROYALIST REVOLUTION

[68] MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 28-29 (2020)

[69] *Id.* at 28.

[70] MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2021).

[71] *Removal of Context*.

[72] Id. at 368 n. 7.

[73] MCCONNELL at 30, 99, 161-62.

[74] Several passages in Blackstone that suggest the opposite: Not only was removal not a royal prerogative; it was not a general traditional norm. See *Removal of Context,* 33 YALE J. L. & HUMANITIES at 156-60. Neither Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (McConnell's second most important source), nor Sir Matthew Hale's, *The Prerogatives of the King* (a seventeenth-century treatise cited by McConnell and the amicus) mention a removal power. CHITTY 80-85; HALE, THE PREROGATIVES OF THE KING, 111-12.

[75] *Movement on Removal*, AM. J. L. HIST. (forthcoming 2023).
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4513324

[76] *Faithful Execution and Article II*, 132 HARV. L. REV. at 2115-16; 2189-90. McConnell cites Matthew Steilen's historical argument that presidential prerogatives are defeasible by Congress under the Necessary and Proper Clause, but does not elaborate on his critique of it. See Steilen, supra n. 4; MCCONNELL 26-27, 359 n.37

expansive than the duty. As Chief Justice Rehnquist wrote for a 7-1 majority in *Morrison v. Olson*, a "good cause" requirement does not interfere with the president's duty to take care.[77]

McConnell's thesis actually undercuts the Roberts Court's new indefeasibility rule: Article II's explicitly enumerated powers are indefeasible, but its implied powers are defeasible. This explains why the President would have default powers in foreign policy and negotiations, as in the Neutrality debates during the Napoleonic Wars, but Congress could have overridden them. This distinction makes sense of the Opinions Clause. If the President had unitary control over officers, why would the Founders need to add a power for the president to seek opinions for them? If the president had a supervisory power plus a removal power, why would Article II need to add the far lesser power to ask for an opinion? A coherent answer is that the reason to spend time and ink explicitly specifying an executive power was to make it indefeasible. The Framers were protecting the president's power to ask for opinions from any attempt by Congress to limit or condition that power, much as Congress cannot limit the pardon power or the veto power. The Framers did not invest that time in specifying removal. Even if removal had been implied by Article II (*arguendo*), then it should be defeasible and limitable by Congress.

C. The Anti-Unitary Scholars' Gaps

The unitary executive scholars rely too heavily on English episodes and anecdotes as evidence of original public meaning in America. It is highly convenient and quintessential goalpost-moving when they dismiss their critics for going back to English history to disprove the unitary scholars' claims and show the lack of unitary practice in England. Nevertheless, it is a valid question: Which English traditions and practices are probative of original public meaning in eighteenth century America?

First, to give credit where credit is due, Birk, Manners & Menand, Chabot, and Gienapp have raised sufficient doubts to undermine the unitary assumptions. Nevertheless, unitary executive scholars have raised valid questions. Manners and Menand offer a powerful example of office-as-property with clear continuity through the Founding era: Offices held for a "term of years" were property with limits on removal, unless the tenure specified terms like "at pleasure."[78] Another article offers many intriguing examples of protected offices throughout early modern English history,[79] but critics have rightly 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.[80] The unitary executive theorists dismiss these findings as marginal and these examples as too low-level, the exceptions that somehow prove a default rule about significant executive offices.

Daniel Birk first identified the errors by unitary executive scholars.[81] Birk observed that in these many centuries, the Crown itself and Parliament often imposed limits on removal of executive officers (as part of patronage, rather than identifying the history of venality or the sale of office). [82] Birk concluded, "[E]ven in the eighteenth century, many of

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[77] Morrison v. Olson, 487 U.S. 692-93 (1988).

[78] Manners & Menand, *Three Permissions*, supra, at 5, 25.

[79] Birk, *Interrogating*, supra.

[80] Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 142-43 n.205 (2000). See infra Part I.B for more of Wurman's insightful and generally persuasive critique. My additional critique is many examples are too late and too remote. See *Removal of Context*, at 36 n. 165

81. Birk, *Interrogating*.

82. *Id.* at 204. Birk discusses the law of offices as property, but does not mention "freehold" in the text, only in three short parenthetical quotations in footnotes. Id. at 203, n.173, 207 n.196.

the officers who executed the laws, both at the central and at the regional level, could not be removed by the King or his ministers, or could be removed only for cause."[83] Birk also details Parliament's late-eighteenth-century innovations, creating its own commissions with executive powers.[84]

But to give due credit to the unitary response, Ilan Wurman's insightful critique raised some valid questions about the relevance of Birk's findings as a matter of original public meaning for the American founding and significant executive offices.[85] First, many of his examples are arguably too early for late-eighteenth century Americans' public understanding (the fourteenth century through the seventeenth century), and he wonders how much this tradition survived into the late eighteenth century. Second, Parliament was moving in the opposite direction in the eighteenth century, "convert[ing] life-tenured offices into offices removable at will." Third, Wurman is right that many of Birk's examples are offices exercising "judicial, ministerial, or municipal functions, [b]ut arguably none of these functions is, strictly speaking, part of 'the executive power' to execute law. Fourth, Birk's late-eighteenth century "independent commissions appear to be exercising not executive power, but rather Parliament's historic inquisitorial power."[86] In addition to Wurman's point that many of these offices were too early to be probative of the eighteenth century, it is also worth noting that many examples that were too late to be relevant to post-Revolution Americans, like the independent commissions of the mid-1780s. Americans were likely unaware of any English institutional changes after 1776 or 1781, and if they had been aware, it is likely they would not have cared much and may even have viewed them as anti-models. Moreover, many of these details about particular statutes and local offices were too minor and too remote, not just in time, but in space. The question is not as much about the finer specifics of English practices from the fourteenth century to the late eighteenth-century, but more about what the Americans – the colonials and the Founders – experienced and understood of the law of offices, and especially what they read, what they said, and what they did not say.

Manners and Menand show a long history in England and America of offices held for "a term of years" (and with statutory silence about removal) as property protected from removal through the eighteenth and nineteenth centuries.[87] They offer the best interpretation for why Chief Justice Marshall and the Supreme Court concluded Marbury was unremovable at will as a justice-of-the-peace if he held a commission "for a terms of five years."[88] (See infra Part VI). Bamzai and Prakash point out that, other than the case of the justices of the peace in the Judiciary Act of 1801, leading to the *Marbury* dispute, it is difficult to find Congress using that term of art in the Founding era and the nineteenth century.[89] It is also important to acknowledge another problem: A justice of the peace could be comparable to an administrative law judge, but it is too low-level, local, and mixed executive-judicial to be probative of the kind of executive power at stake in most of today's removal cases. We have

83. *Id.* at 213.

84. *Id.* at 227-28.

85 Wurman, *In Search of Prerogative* 142-43 n. 205. Wurman has offered a different critique in panel discussions of this Article and of Manners/Menand: He suggests that our evidence (including Julian Mortenson) shows a default rule: removal follows appointment, and if a president appoints, the president removes. First, this argument misses the core argument that many offices were unremovable. The default rule applied only if an office were removable, and not a freehold. Second, this was the argument of senatorials: Senate consent was necessary for appointment, and given Article II's silence, the default rule is that Senate consent would be necessary for removal.

86. Birk, at 206-10, 213, 225; *see* Wurman, *In Search of Prerogative* 142-43 n. 205. I have raised similar questions. *See Removal of Context.*

87. Manners and Menand, *The Three Permissions, supra* at 5 (2021)

88 Id. at 25; *Marbury Problem and Madison Solutions*, FORD. L. REV. (2021).

89 Bamzai Prakash 1823.

only identified the term coming up in other debates for significant officers (the Comptroller), but thus far, no statutes applying a limited term of years (and silence on removal) to a significant executive office.

Manners and Menand also concluded, "In Revolutionary America, the idea of offices as property was roundly rejected," with an unclear citation to a page of debate in the First Congress.[90] In fact, the evidence from the First Congress show the persistence of offices-as-property. Section V.E will briefly explain why *Marbury* remains important evidence, and why the First Congress's debates and statutes reflect the continuity of "property in offices."

Parts III, IV, and V.C also addresses the concern that prior examples had been too remote, too early, too late, too low-level, and/or quasi-judicial. The venality/freehold office system was persistent and pervasive in England and colonial America, and it reached some of the highest executive offices (the cabinet, the Treasury, the military, and an equivalent system of proprietary colonial government. Even if there was a trend away from venality, the system persisted widely in parallel to the emerging modern bureaucracy deep into the nineteenth century.

II. MONTESQUIEU, HAMILTON, MADISON, AND "DESPOTIC DISPLACEMENT"

In *Federalist No. 47*, Madison called Montesquieu "[t]he oracle who is always consulted and cited on this subject" of separation of powers.[91] Montesquieu's *Spirit of the Laws* was one of the most influential Enlightenment sources among the Founders,[92] if not the most influential.[93] Montesquieu remains the thinker most associated with the formal separation of legislative, executive, and judicial powers. And yet even Montesquieu, in a passage overlooked in modern legal debates, rejected the executive power of removal and strict separationism in the law of offices.

It is rare to find much discussion of removal power on the Founders' bookshelf, but Montesquieu did discuss it – and rejected removal at will, while naming venality and endorsing its property rules of unremovability, and associated those rules with monarchy. He described "instant" displacement (i.e., tenure during pleasure or at will) as a feature of "despotic states," and second, his practical defense of offices-as-property in contrast to instant removal (i.e., a system of unremovable offices of profit). It turns out that both Hamilton and Madison are consistent with Montesquieu's approach. Hamilton shared his concerns about tenure during pleasure, and Madison endorsed a mixed approach based on legislative discretion and pragmatism.

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[90] Manners and Menand at 20 (citing 1 Annals of Congress 480 (1789), without a quotation). They added "But see id. at 458 (presenting an argument from South Carolina's Mr. Smith that officers have a property in their office that they cannot be deprived of except by impeachment for a criminal conviction." Part VI of this Article will elaborate.

[91] *The Federalist No. 47* (James Madison) at 298

[92] JACK RAKOVE, ORIGINAL MEANINGS; FORREST MCDONALD, NOVUS ORDO SECLORUM, 199-201; Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHICAGO-KENT L. REV. 103, 147-48 ("Montesquieu's theory of the separation of powers exerted enormous influence over American thinking, as evidenced by the formulaic restatement of the theory found in the early state constitutions and declarations of rights"); Jack Rakove, "James Madison's Political Thought: The Ideas of an Acting Politician" (2012); Jack Rakove*, The Madisonian Moment,* 55 U. CHI. L. REV. 473, 489-90 (1988).

[93] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1995 n. 282 (2011) (citing GERHARD CASPER, SEPARATING POWER 8 (1997); William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32, 37 (1928) ("The writings of Montesquieu were accepted at Philadelphia as political gospel."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 488 (1989) (observing that "the idea of a government structured by the separation of powers came to the Americans principally through the writings of Montesquieu").

Let's return to Montesquieu and read the full passage on "despotic" displacement, vénalité, and virtue.

> QUATRIEME QUESTION. Convient-il que les charges soient vénales ? Elles ne doivent pas l'être dans les états despotiques, où il faut que les sujets soient placés ou déplacés dans un instant par le prince.
>
> Cette vénalité est bonne dans les états monarchiques ; parce qu'elle fait faire, comme un métier de famille, ce qu'on ne voudroit pas entreprendre pour la vertu ; qu'elle destine chacun à son devoir, & rend les ordres de l'état plus permanens. *Suidas* dit très-bien qu'Anastase avoit fait de l'empire une espece d'aristocratie, en vendant toutes les magistratures.
>
> *Platon* ne peut souffrir cette vénalité. « C'est *dit-il*, comme si, dans un navire, on faisoit quelqu'un pilote ou matelot pour son argent. Seroit-il possible que la regle fût mauvaise dans quelque autre emploi que ce fût de la vie, & bonne seulement pour conduire une république? » Mais Platon parle d'une république fondée sur la vertu, & nous parlons d'une monarchie. Or, dans une monarchie, où, quand les charges ne se vendroient pas par un réglement public, l'indigence & l'avidité des courtisans les vendroient tout de même, le hasard donnera de meilleurs sujets que le choix du prince. Enfin, la maniere de s'avancer par les richesses inspire & entretient l'industrie; chose dont cette espece de gouvernement a grand besoin.[94]
>
> Translation :
>
> *Fourth Question*. When should public offices be venal [bought and sold as property]? They would not be in despotic states, where the subjects must be placed or displaced in an instant by the prince.
>
> This venality is good in monarchic states, because it is good as an employment for family, as it would not be undertaken from a motive of virtue; it gives each one his duty, and it renders the order of the state more permanent. Suidas very well observes that Anastasius had changed the empire into a kind of aristocracy, by selling all public employments.
>
> Plato cannot bear this venality: "This is (says he) as if a person were to be made a pilot or mariner of a ship for his money. Is it possible that this rule should be bad in every other employment of life and good only in the conduct of a republic?" But Plato speaks of a republic founded on virtue, and we of a monarchy. Now, in monarchies, (where, even when offices are not sold by public regulation/regularity [i.e., where the sale is an unregulated free market], the indigence and avidity of the courtiers would be buyers/engage in buying all the same), chance would produce better subjects than the choice of the prince. In short, the manner of advancing through riches inspires and cherishes industry, a thing greatly wanting in this kind of government."

Montesquieu also added a footnote to put a finer point on it: "*Paresse de l'Espagne; on y donne tous les emplois*."[95] "[Nota bene] the laziness of Spain, [where] one gives away all employment," instead of selling offices to the highest bidder. [96]

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[94] MONTESQUIEU, SPIRIT OF THE LAWS, Book V, Ch. 19.
[95] MONTESQUIEU, SPIRIT OF THE LAWS, 101 n. 10.
[96] 2 id. (citing Plato, *Republic*, Book VIII).

A few notes of explanation. Montesquieu is offering a free market defense of venality: The avid buyer is more likely to be a better officer than the prince's choice. Montesquieu justified "venality" as a practical necessity: "[T]he method of attaining honors through riches inspires and cherishes industry, a thing extremely wanting in this kind of government."[97]

Whereas instant "displacement" served the despot, "vénalité" and security of office produced stability and efficiency in a balanced enlightened monarchy: An unregulated market of offices-as-protected-property would yield better officers than "the choice of a prince."[98] Taken together with their other legal authorities and the Ratification debates, it indicates an original public meaning circa 1787 that "executive power" did not include removal.[99] According to Montesquieu, the sale of offices offered relatively efficient administration, but only if such property was secure, and not if it could be "displaced in an instant."

If Montesquieu wrote it, the Framers read it. And the historical record of venality, the buying and selling of offices, and offices-as-property is even more robust as a matter of original public meaning. The Founding generation as colonists, as members of the British military, and as lawyers reading the books on their own shelves, were well aware of this system.

Here is Hamilton's *Federalist* No. 66:

> A THIRD objection to the Senate as a court of impeachments, is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose official creation they had participated. The principle of this objection would condemn a practice, which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering *those who hold offices during pleasure*, *dependent on the pleasure of those who appoint them*.[100]

First, this passage does not indicate a general removal standard, but "during pleasure" is just one form among others -- and Hamilton presents it as a negative, a *problem.* Again, it is widely understood that "during pleasure" co-existed with other more protected executive offices. Hamilton is simply noting that, among other kinds of officers, some hold offices during pleasure, and those who do are dependent on the pleasure of those who appoint them." Second, Hamilton is acknowledging a general concern that dependence "at pleasure" is a *problem, a bad thing*, to illustrate the converse objection that the Senate might be too pleased with the officers it confirmed to use impeachment as a real check. If anything, this passage is Hamilton criticizing "at pleasure" tenure as a problematic option on a menu of more secure tenure forms. Third, it is worth noting that *Federalist* No. 66 never specified presidential removal. It identified that they served at pleasure of "those who appoint them." This logic was actually the Latin formula cited by those who argued for a Senate check on removals,

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[97] 2 id. at 101.

[98] MONTESQUIEU, SPIRIT OF THE LAWS, Book V, Ch. 19.

[99] In "Against Political Theory in Constitutional Interpretation," *Vand. L. Rev.* (forthcoming 2023), Christopher Havasy, Joshua Macey, and Brian Richardson caution against assuming that the political theory of Montesquieu and other European writers would explain the American constitution, absent specific evidence of citation or reliance on such a passage. This Article mostly relies on Montesquieu as historical evidence of original public meaning -- about the historical fact and widespread awareness of non-removability as a feature of eighteenth century European administration. The aspect of Montesquieu's political theory is the most general connection of removal and non-removal to his well-known tripartite scheme of despotism, monarchy, and republic.

[100] *Federalist No. 66* (Hamilton) (emphasis added).

because the president and Senate together appointed, and thus they both had to agree to remove. Indeed, Hamilton himself endorsed this senatorial position in *Federalist* No. 77, as the removal would follow the appointment of president-and-Senate together. "It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint."[101]

This parallelism was precisely the argument of the senatorials in 1789, as well as a senatorial meaning that Hamilton himself confirmed, according to a letter in June 1789.[102] *Federalist* No. 66 offers a simple English version of the Latin phrases cited repeatedly by the senatorialists in the First Congress, discussed in depth in my article as the most common legal authority and background rule: "*Unumquoque dissolvitur, eodem modo, quo ligatur,*"[103] and *"Cujus est instituere ejus abrogate,*"[104] meaning roughly "Every obligation is dissolved by the same method with which it is created,"[105] and "whose right it is to institute, his right is to abrogate," respectively.[106] It is not evidence of a unitary rule. And a Senate check on presidential removal could be a job security reflective of Montesquieu's account of balanced monarchies; and it seems consistent with Montesquieu's third category of republican offices (albeit a vague category), certainly in distinct opposition to the despotic category of instant displacement.

If one were looking for uses of the phrase "during pleasure" as evidence of a background rule, it turns out that one of the only references to it in the *Federalist Papers* shows that a) it was one kind of tenure among others, and b) Hamilton disapproved of it or found it problematic.

Madison's *Federalist No. 39* is concise and to the point, consistent with Montesquieu's pragmatism: "The tenure of the ministerial officers generally will be a subject of legal regulation."[107] He also listed three categories, as noted above, the last two of which sharply limited removal: tenure during pleasure, for a term of years, and for life.[108] As my forthcoming article "Indecisions of 1789" explains, Madison was more consistently a congressionalist, except for a more limited focus on department heads in the Foreign Affairs

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[101] *Federalist No. 77* (Hamilton).

[102] Letter from William Smith to Edward Rutledge (June 21, 1789), reprinted in 16 DHFFC 832-33. Many scholars agree that Hamilton meant in No. 77 that the Senate consent was necessary for removals, according to a letter during the "Decision of 1789" debates. GIENAPP, SECOND CREATION at 154. See also Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. (forthcoming 2023); Jeremy D. Bailey, 'The Traditional View of Hamilton's Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman' (2010) 33 *Harvard Journal of Law* and Public Policy 169 (2010); *but see* Seth Barrett Tillman, "The Puzzle of Hamilton's Federalist No. 77," at 33 *Harv. J.L. & Pub. Pol'y* 149, 149-54 (2010), see also FORREST MCDONALD, ALEXANDER HAMILTON 125-26, 130-31 (1982); If one doubts the reliability of this letter, then one has to doubt the unitary claim of the "Decision of 1789," which relies heavily on private letters to fill in gaps and address overwhelming math problems; and the rest of the First Congress, Convention, and Ratification debates should also be taken with similar skepticism, because the recorders and journalists were summarizing and paraphrasing what they could hear – and historians show that it was often hard to hear. PAULINE MAIER, RATIFICATION.

[103] "15 or 16 July 1789, Notes of John Adams," 9 DHFFC 448 (quoting Sen. Johnson); "Debate on the Foreign Affairs Act [HR-8] Can the president remove federal officeholders? [14 July 1789], "Notes of William Samuel Johnson," 9 DHFFC at 466.

[104] Id. at 449 (quoting Sen. Izard).

[105] Id. at 448 n. 6; id. at 466 n. 2; 22 DHFFC 1681 (June 18, 1789) (Gazette of the United States, July 17, 1789) (Sedgwick attributing to the other side the claim, "That the power which gives, is the only power to take away)".

[106] 9 DHFFC 449 n.7.

[107] THE FEDERALIST NO. 39, at 194 (Ian Shapiro ed., 2009)

[108] Id. at 193

debate and after. Madison rejected a "presidentialist" unitary interpretation in May 1789, again expressing that tenure conditions are at "the discretion of the legislature."[109] Madison also rejected presidentialism during the Treasury debate, proposing an independent Comptroller.[110]

In fact, Montesquieu was in many ways a stricter theorist of separation than Madison and the Framers, and as Jack Rakove has observed, "Nothing better illustrates the pragmatic cast of Madison's mind than his efforts to modify the strict theory of the separation of powers that so many Americans had seemingly imbibed from their reading of 'the celebrated Montesquieu.'"[111] If Montesquieu-the-strict-separationist thought that removal was not an executive power, then Madison-the-mixer would be even less likely to assign this power to the executive, and it turns out, his *Federalist* No. 39 explicitly discussed congressional regulation of the tenure of office, and despite the denials of the unitary theorists, he proposed congressional regulation (an independent comptroller) in the First Congress.

This is a reminder that Madison framed his approach in the *Federalist Papers* as "Checks and Balances," a term implying overlapping powers more than separation of powers. The *Federalist Papers* put the phrase "checks and balances" in essay titles, not separation of powers, and it also makes more sense as a description of the Constitution's structure of overlapping powers in legislation, execution, and judging (e.g., veto; office creation, appointment, Senate confirmation, mixed appointment of inferior officers; spending, war, treaty; the exceptions and regulations in Article III) rather than sealed-off separation of powers – more functionalist than formalist.[112] Many states had included explicit separation-of-powers clauses in their Constitutions,[113] but the federal Convention did not.

At the same time, the rest of this paper addresses Rakove's surprise that Hamilton would have endorsed a Senate check on presidential removal, "*Federalist 77* remains puzzling. It is difficult to imagine how a new president saddled with holdovers from the prior administration could provide the robust leadership Hamilton already favored… Perhaps in the hurried and harried circumstances of 1788, Hamilton simply did not think through the implications of this statement – or perhaps this position better fit the rhetorical demands of the moment."[114]

Those two explanations are possible. But the more likely explanation is that Hamilton read the same authorities that the First Congress would later cite, in Latin, for this proposition that officers are removed the reverse of the way they received the office; and the tradition of venality and freehold offices explains why Hamilton and others did not assume each President started with a clean slate for each administration.

III. VENALITY AND OFFICE-AS-PROPERTY IN EUROPE AND ENGLAND

A. How did Vénalité and Sale of Office Work?

In order for a "venality market" to work – *i.e.*, in order for literate members of the local elite to invest a significant amount of their wealth in offices as part of a growing

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[109] *See* The Congressional Register (May 17, 1789), *reprinted in* 10 DOCUMENTARY HISTORY, at 730.
[110] "Indecisions of 1789," Part VI.
[111] Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 489-90 (1988)
[112] See titles of *Federalist No.* 48 ("These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other."); *Federalist No. 51* ("The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.").
[113] *Vesting*
[114] RAKOVE, ORIGINAL MEANINGS 284.

centralized bureaucracy – their investment in offices had to be protected legally. This bargain functioned as a coherent system of offices as legal property. The Anglo-American system relied less on the sale of offices and official privileges than the French, who took the system to an extreme, but part of the limit on English venality was that English law offered the strongest legal protections to office-holders: Offices-as-freehold-property.

This paper takes on this challenge to show more than examples of unremovable offices. This paper shows that in eighteenth-century English law, unremovable offices were not merely episodic, but systematic – not merely anecdotal and local, but central, even if not modal. Historians have documented that many of these unremovable offices had significant power in the central English state, and they were not isolated to lesser local offices.[115] Not only does this evidence refute the core assumptions of the unitary theory, but it is sufficient to establish the opposite proposition: the Founding generation understood that the Crown did not have a general removal power and that the term "executive power" did not imply removal. To the extent that some unitary executive scholars ask for evidence of "national executive power,"[116] the English central Treasury had many unremovable offices with significant executive power. [117] Even though eighteenth-century Parliamentary reforms reduced their number, Treasury continued to have unremovable offices into the eighteenth century. As discussed below, historians have concluded that the venality/sale-of-office system substantially limited the Crown's control over key military personnel, and proprietors had hereditary offices giving them vast unchecked executive powers over entire proprietary colonies – a formative colonial experience of protected offices.[118]

I am not suggesting that most significant executive offices were unremovable in the eighteenth century. The highest offices like the cabinet and privy council served at pleasure. Indeed, the venality system was in gradual decline in the eighteenth century, relative to its fellow traditional system of (removable) patronage and a growing mixed system of meritocracy. By the eighteenth century, Blackstone, Edmund Burke, and others documented a reform effort in Parliament to curtail inheritable and life offices, especially in the military and treasury, but they also indicate that these changes were a departure from longstanding English tradition, and they also indicate that such reforms were limited. [119] Historians document that venality and the institution of freehold offices robustly persisted into the mid-nineteenth century.[120]

This system may seem archaic and corrupt. Even its supporters used the term "venality," conceding just as much while defending its necessity. Indeed, even after modern reformist sensibilities attacked the sale of office, venality had a pre-modern logic and efficiency that persisted long into the nineteenth century. At the end of the medieval period, the Crown had a household of offices in its court and capitol, but little administrative control

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[115] *See* J.C. Sainty, *The Tenure of Offices in the Exchequer,* supra, (1965); CHESTER, THE ENGLISH ADMINISTRATIVE SYSTEM, 1780-1870, at 16-23 (1981); AYLMER, KING'S SERVANTS; G.E. AYLMER, STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC, 1649-1660 (1973); G. E. AYLMER, THE CROWN'S SERVANTS: GOVERNMENT AND THE CIVIL SERVICE UNDER CHARLES II, 1660-1685 (2002).

[116] Wurman, *In Search of Prerogative*, 142-43 n. 205.

[117] See Hale, *Prerogatives of the King* 111-12; J.C. Sainty, *The Tenure of Offices in the Exchequer*, supra, on the important offices of chancellors and chamberlains. See also Aylmer for other national executive offices; see infra Section II.B.

[118] See infra Section III.B, especially the example of Maryland and the hereditary Lords Baltimore.

[119] 1 BLACKSTONE, COMMENTARIES at 335-36 (Chapter Eight on Treasury); 3 EDMUND BURKE, THE WRITINGS AND SPEECHES OF EDMUND BURKE: PARTY, PARLIAMENT, AND THE AMERICAN WAR: 1774-1780 (Warren M. Elofson, John A. Woods, and William B. Todd, eds., 1996); 1 EDMUND BURKE, THE WORKS OF EDMUND BURKE 296 (1847). See also Birk, *Interrogating* (2021); *Removal of Context*.

[120] DOUGLAS W. ALLEN, THE INSTITUTIONAL REVOLUTION (2012).

in the "country," where feudal lords ruled. In order to build a centralized nation-state-size administration, the "Court & Capitol" needed to entice literate elites to leave their fiefdoms and become officers in the Capitol or throughout the country. Feudal aristocratic families had a mix of local power, literacy, skills, and wealth. To lure some from these landed gentry – likely the non-first-born sons of feudal elites -- to give up their traditional local sources of power and wealth, the Crown had to offer job security: legally protected tenure. Legal academics and judges surely understand this bargain well: Giving up a lucrative private practice in exchange for the security of tenure, among other benefits (this may be its own legal fiction with respect to legal historians forgoing a lucrative market, but maybe less so with the Roberts Court's reliance on originalism). Unlike professorships or modern judges, these offices came with a monopolistic system of fees, patronage, and the power to sell additional offices under them ("under their gift"). Thus, the Crown could charge for such lucrative powers -- using the sale of office as a source of Crown revenue and as a proxy for skill, investment, and incentives to fulfill the office's duties.

For the buying and selling of offices to work as a market, and to reassure the buyers of a stable good, the office had to be protected legal property. Even though many reformers regarded the buying and selling of offices as inefficient and corrupting, the system of "venality" survived as a necessary bargain, even a necessary evil, in order to build the modern state and modern empires. Though buying and selling offices offends our modern sensibilities, historians have identified how the venality system was relatively efficient, fair, and rational. After acknowledging how a system of patronage and venality sounds strange and corrupt to modern ears, Douglas Allen gave the clearest account of why these systems were necessary: Centralized management, measurement, and merit systems were impractical from the medieval through the early modern period in an era of limited transportation and communication. Early modern state formation depended on decentralized systems of local incentives, local supervision, and market proxies for skill and investment. The problem of a vast American republic was on the Framers' minds, as Madison's *Federalist No. 10* attests. The practicality of decentralized administration over a sprawling frontier was highly salient and challenging. Only during and after other revolutions – a scientific revolution, an industrial revolution, a transportation and communications revolution – was an "institutional revolution" in centralized administration possible. As Douglas Allen summarized, "[B]etween roughly 1780 and 1850, the word experienced what can only be called an 'Institutional Revolution.' … I mean that there was a distinct change, especially in the sector of the economy we call the 'public service.'"[121] Incremental reform efforts had begun in fits and starts in the seventeenth and eighteenth centuries, but the more significant reforms were too late to have coalesced as original public meaning in 1787.

Historians have identified how the English Crown exercised control over executive administration even without full removal powers: The king still created new offices and delegated new powers to them, especially in the domain of treasury and finance, while keeping the old officers in place in their sinecures. This approach seems to have resulted from a mix of *realpolitik* and legal constraint. John Brewer told this story in his famous book *The Sinews of Power: War, Money, and the English State, 1688-1783*, and other historians have given a similar account.[122] Chief Justice Roberts frequently quotes Madison saying in the First Congress that "if any power whatsoever is in its nature Executive, it is the power of

[121] DOUGLAS W. ALLEN, THE INSTITUTIONAL REVOLUTION xii.

[122] JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688-1783*, at 69-73 (1988). See also* JOSEPH STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE 100-106 (1970), DOUGLAS ALLEN, INSTITUTIONAL REVOLUTION; THOMAS EMTMAN, BIRTH OF THE LEVIATHAN (1993).

appointing, overseeing, and controlling those who execute the laws."[123] Madison then asserted that "control" implied removal, but first, it turns out he lost that debate in the First Congress, as shown in a separate article, and second, control did not imply removal in the eighteenth century. The English Crown did not rely upon removal to control executive policy, but instead, kings and queens relied upon creating new offices and then appointing new officers to execute the new policy and build a new bureaucracy on top of the old one.

This system of venality and the sale of office had six steps or components as a key to building (or indeed, buying) the modern state and modern European empires over wide geographic areas before the communication revolution:

1. Flexible office creation by the Crown (a royal prerogative) and by Parliament
2. Flexible royal appointment
3. Officials sold many offices, and many of those offices could be re-sold.
4. In addition to buying offices, many officers had to put up significant deposits as security (known as "sureties") for their faithful performance of those offices.
5. Many offices were based on a highly profitable system of fees and bounties, as a return on their investment (whether the purchase or the surety deposit).
6. As a "security" on the other side of the transaction, offices were protected legal property (freehold and heritable), designed to be unremovable except by impeachment, misbehavior, or other judicial due process.

This last step was the most relevant to our present debates: *Executive removal was not an assumed power, because it would have undermined the core system of exchange of offices-as-profitable-property, of offices-of-investment, whether by sale or surety.* And this vénalité system, the selling of offices-as-property, was not merely an understanding in the old world of Europe or in the distant past. It was part of the American colonial system, documented in colonial records, sitting on the Framers' bookshelves, hinted in the Declaration of Independence,[124] and reflected even in the constitutional text itself.

The 1787 Framers changed two (and a half) of these six steps and powers, but they left others untouched and in place -- even with several references to "offices of profit" as continuity of the offices-as-property tradition. First, they delegated office-creation to Congress through the Necessary and Proper Clause. Second, the Framers divided up and shared the appointment power between president and Senate. And the additional half step: Principal office-holders could not re-sell or bequeath the offices, because that exchange would violate the Article II Appointments clause (one needs to be appointed to the office, rather than buying it). However, nothing in the Constitution's text ended the sale of office by the government as part of an appointment process; and nothing limited the sale or re-sale of inferior offices, if Congress want to allow such fees for higher officers. The early Congresses did not create offices with a sale price on top of the appointment process, but they frequently required financial bonds called sureties.

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[123] *Free Enterprise* at 492 (citing 1 Annals of Cong. 463 (1789) (Madison)). See also id. at 501 on control.

[124] DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776). ("He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance.") See James Pfander, "The Chief Justice, the Appointment of Inferior Officers, and the Court of Law Requirement," 107 NW. L. REV. 1125, 1144 (2015) citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 212 (1998 ed.) (quoting William Henry Drayton speaking of placemen as "strangers destitute of property and natural alliance in the Colonies" who create laws for a country "in which they have no interest but their commissions"); see also Pfander at 9 (discussing colonial anger at officeholders who did little work to justify the fees they collected).

Judicial offices held during good behaviour (for life) fit into the English system of offices-as-protected-property; and nothing in the text precluded other kinds of offices from having similar legal property protections (again, see William Marbury of *Marbury v. Madison*). The phrase "office of profit or trust" or a similar formulation appears three times: Article I, Sec. 3, clause 7 on impeachable offices; Article I, Sec. 9, clause 8, the foreign emoluments clause; and Article II, Sec. 1, clause 2, on who may not be a member of the Electoral College. A word that never appears in the text: "removal." Nor does its legal synonym "displace." And for good reason, in light of this venality system of return-on-investment.

As historians have explained, the "office of profit," the sale of office, and offices-as-property were not a coincidence of independent practices, but rather were an interconnected early modern system of incentives, checks, and balances.

When the Founders created a president without the Crown's flexibility to unilaterally create offices or unilaterally appoint officers, they consciously created a chief executive with less power and control over officers relative the British monarch. If one thinks presidents should have more control, these reduced powers would be a problem. But if the Founders were continuing the British path of increasing legislative control over offices[125] and giving one legislative body more of a mixed executive role over appointments and treaties, then this reduced power was a feature, not a bug. As we shall see, there is little to no evidence that they thought that the president's lost executive powers over office-creation and appointment was silently or implicitly balanced by an invention of a general executive removal power. The historical evidence indicates that the Framers had assumed the old rules for removal were still in place, and that they did not work out solutions until the era starting in the first Congress, through the early Republic up to the Jacksonian period. This is some mix of liquidation, construction, common law constitutionalism, and living constitutionalism, but crucially, not original public meaning circa 1787-88.

The presidentialists in the First Congress claimed Article II had resolved this issue, but the senatorials actually had the traditional rule correct (the power to remove follows the power to appoint – and confirm). The congressionalists were actually closest to the emerging trends in the nineteenth century: legislative reformers granting executive removal as a policy choice, as this essay will explain below. The 1787 Convention coincided with a few states starting reforms of the sale of office, but it would take several decades for public meaning to shift in the Anglo-American world from (some or many) offices as property to offices as removable public service. Douglas Allen focuses on the gradual demise of venality and sale of offices during the rise of modern bureaucracy – mostly in the decades after the Founding. What he calls "the institutional revolution" was complete only by around 1850, long after the Founding.[126]

B. Vénalité in France

The English and European law of offices was a complicated mix of public and private, of buying and selling offices for prestige, power, profits, and taxation privileges (by the eighteenth century known as "the venality of office"). A general "removal" power would have undermined the investments and depreciated each office's value, potentially toppling the royal treasury's house of cards. England may have been the first in medieval Europe to

[125] ALLEN 27-28; BREWER 89-92; H. ROSEVEARE, THE TREASURY: THE EVOLUTION OF A BRITISH INSTITUTION (1969).
[126] Id. at 5, 7, 13-21

develop a systematic sale of office ("brocage"),[127] but France took this system to spectacular imperial heights until it crashed in 1789. French success invited copying throughout continental Europe, until the French Revolution abolished the sale of office and began a gradual phasing out of venality throughout Europe.

The term "venality" seems pejorative, but its defenders embraced the term, acknowledging the realpolitik of incentives. Montesquieu and later writers used it to describe a long-standing practice of buying-and-selling offices. Montesquieu did not use the term as pejoratively, but writers closer to French Revolution used the term to sharpen their critique of the ancien regime.[128]

"Venality of office" was one of the underappreciated background causes of the French Revolution. In his classic study *Venality*: *The Sale of Offices in Eighteenth Century France*, William Doyle traces the rise and rise of the sale of office until its collapse on the eve of the French Revolution. His core argument is about its persistence and practical importance, despite many critics who rightly saw its dangers in shortsightedly raising short-term revenue while reducing the tax base in the long-term, as well as a French crisis of corruption. In *ancien régime* France, most public officers had bought or inherited their positions.[129] Over three centuries of financing imperial expansion, French kings sold offices as property, and for an additional fee, the officeholders could buy the right to sell their offices or bequeath them. According to Doyle, the number of royal offices in France from 1515 to 1600 tripled from roughly 4000 or 5000 to 15,000, and over the next 40 years (by 1640), tripled again to 45,780, just as France was emerging as an early centralized nation-state.[130] By the eighteenth century, the French monarchs had created 70,000 such offices, including most military officers, most treasury officers, and the entire judiciary.[131]

France's dramatic growth of offices-for-sale coincided with the centralized imperial administration in Paris over a vast French nation-state, the rise of the House of Bourbon as the European superpower, and the expansion of the "Sun King's" global empire, eclipsing Spain, Portugal, and the Dutch empires. National financial administration was at the center of this seventeenth-century powerhouse, just as it would be in Britain as it would surpass France over the eighteenth century. Doyle explains, "Among the most reliable [sources of revenue] was the sale and manipulation of offices. Office holders could be certain that if the war was prolonged the king would seek to extract money from them through a whole range of all-too-familiar expedients."[132] Buying an office was a way for a father to buy the prestige of nobility for himself, his family, and his descendants for an extra fee.[133] However, these offices also came with the costs of additional tax burdens. In the early eighteenth century, Louis XIV's regime came up with a new market of offices to raise revenue: sell "offices" that gave the holder no new powers, fees, or commissions, but that came with long-term inheritable immunity from taxes. These "offices" were much like selling Treasury bonds for an immediate infusion of cash into the royal treasury in exchange for larger future payments

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127 SWART, THE SALE OF OFFICE 46-48

128 LATROSNE, DE L'ADMINISTRATION PROVENCIALE ET DE LA REFORME DE L'Impot (1779) cited by STEPHEN MILLER, FEUDALISM, VENALITY, AND REVOLUTION: PROVINCIAL ASSEMBLIES IN LATE-OLD REGIME FRANCE (2020)

129 WILLIAM DOYLE, VENALITY: THE SALE OF OFFICES IN EIGHTEENTH-CENTURY FRANCE (1997); J. H. M. SALMON, VENALITY OF OFFICE AND POPULAR SEDITION IN SEVENTEENTH-CENTURY FRANCE: A REVIEW OF A CONTROVERSY.

130 DOYLE 11

131 DOYLE 35.

132 DOYLE 27.

133 DOYLE 201; Allen, *Purchase*, 62.

to the buyer. As such an investment in property, "nobody imagined that those who had invested in offices could ever be bought out."[134]

Louis XIV and XV used these revenue infusions like war bonds to finance the global wars and colonial expansion that catapulted France into the superpower of the eighteenth century, until the inevitable fiscal crisis. By the mid-1780s, the French fiscal system of venality collapsed under its top-heavy weight. Wealthy non-nobility families had bought so many "offices" as inheritable tax breaks that by the late eighteenth century, there were few wealthy or even upper-middle-class families left to tax. If you ever wondered in your high school or college classes, "Why did the French government foolishly put such a high tax burden on the poor?," the long-term effects of venality are a clear explanation. This fiscal crisis and the resulting French Revolution occurred largely after or too remotely from the Convention. In fact, the French assistance of the American Revolution drew on venal revenues and also contributed to France's fiscal overreach and collapse.

But before the 1780s, the French debated venality, and even its critics conceded its practical advantages. One of the most fascinating aspects of Doyle's study is how renowned French Enlightenment thinkers would initially attack venality of office, but over time, they grasped its pragmatic benefits and either softened their critique or reversed themselves. Voltaire famously criticized venality in his best-selling *Siècle de Louis XIV* in 1751. The famous school of French Physiocrats initially joined in on the critique, but by the 1750s and 1760s, these more "economic" and practical thinkers adopted a more balanced view in favor of incremental reform, recognizing the practicality of the sale of office.[135] In his seminal *Encyclopedie* in the 1750s, Denis Diderot initially recorded Montesquieu's positive view of venality, quoting his *Spirit of the Laws*. In the 1760s editions, Diderot pivoted to a more critical stance.[136] The basic point is that even Enlightenment thinkers sympathetic to reform still saw the merits of the sale of office, along with its demerits.

The French Revolution was a turning point for venality. While many reforms during the French Revolution did not survive, the revolutionaries' abolition of venal office-holding did hold on, and the reforms spread more slowly but more successfully than Napoleon's army:

> The sale of public office was phased out in all European countries during the 19th century. In this context, abandonment itself of the sale of offices in France was part of a wider reappraisal of the duties and responsibilities of modern states. By the late nineteenth century [the reform of venality] had largely triumphed in the European world.[137]

One of the most famous studies of European "venality of office" is K.W. Swart's *The Sale of Offices in the Seventeenth Century*. First, he showed that the system was pervasive throughout Europe, and thus giving more context to Montesquieu's *Spirit of the Laws*, as well as to Blackstone's *Commentaries*, elaborated below. Swart shows that venality was so fundamental throughout Europe – and not just in the seventeenth century, but long before and long after, that is would be obvious to contemporary lawyers and even the general public that offices-as-property was a common practice – and a common-sense practice -- throughout Europe and their colonies. Second, Swart found that the English had started the

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[134] DOYLE, VENALITY

[135] DOYLE at 254-55.

[136] Id. at 256

[137] DOYLE at 323; see also Douglas Allen, *Purchase, Patronage, and Professions: Incentives and the Evolution of Public Office in Pre-Modern Britain*, 161 J. OF INSTITUTIONAL AND THEORETICAL ECONOMICS 57, 62 (2005). .

practice of buying and selling of offices earlier than other continental powers, but over time, other European powers relied more heavily on venality to increase revenue, to build a nation-state, and to expand an empire.[138] A major part of Swart's explanation for why England relied on the practice less than those other powers is that the English gave the strongest legal protections to those bought-and-sold offices, including them in the category of "freehold" – and thus they were protected from removal. Given those strong legal protections, these offices limited the Crown's administrative flexibility, so the English grew to be more careful about creating too many of the offices. Even if the English relied on venality less than other European powers, the bottom line is that the American Founders read and experienced more widely than just the English system, and from Montesquieu to real-world experience, the colonists lived in a world of imperial powers, governed by a robust mix of removable and unremovable officers.

C. Sale of Office and Freehold Property in England

Historians and economists have worked backward from the infamous French disaster to understand the origins of venality and its institutional logic, tracing similar practices in the rest of Europe and specifically in England. The English story is classic England: older, more stable and incremental, more economically rational, more rule-of-law norms focused on private property, less revolutionary, and generally positive fiscal consequences with innovative and precise bookkeeping. By the seventeenth century, English kings and queens did not sell the offices themselves, but their appointees did, and many of those offices were recognized as unremovable freehold property. By the eighteenth century, English reforms gradually shifted more executive power to removable offices, but unremovable officers continued to wield significant executive power, and English administration continued as a complicated mix of patronage and offices-as-property, with no general rule either way.

Aylmer, the leading historian of early modern English administration, summarizes the seventeenth-century system with six characteristics, emphasizing property rights:

> "i) entry into office was by purchase or patronage;
> ii) tenure was for life or during pleasure;
> iii) office holders were considered to have normal property rights to the office;
> iv) office holders could be absent and hire deputies to do the work;
> v) remuneration was by fees, shares in revenues, gratuities and perquisites, rather than salaries;
> and vi) an office was a private interest, not a public service."[139]

As economic historian Douglas Allen observed, "Until the 19th century, however with one exception, public offices were either sold outright or granted through acts of patronage. Most notable was that merit, at least in the way we currently think of it, was not a consideration in the appointment to public office."[140] The exception was the English tax farms, the parallel to eighteenth-century France's venal-offices-as-tax-shelter. Unlike the French, the English had the good sense to phase out these tax farms in the 1670s-80s, during the Stuart Restoration and soon before its own Revolution (known as Glorious in part because it was so non-violent relative to the English and French ones before and after).

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[138] K.W. SWART'S THE SALE OF OFFICES IN THE SEVENTEENTH CENTURY 45 (1949).
[139] Aylmer, *From Office-Holding to Civil Service*, 30 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 92 (1980); Allen, *Purchase*, 4.
[140] Douglas Allen, "Purchase, Patronage, and Professions," at 59.

Even though the English Parliament had been reforming the law of offices by phasing out tax farms first, and then inheritable offices and life-tenure executive offices (in contrast to judges), these property rights in offices remained robust throughout the eighteenth century. In fact, historians have observed that for much of early modern English history, many executive offices had more job security than judges did.

The sale of office originated in the early Norman period as offices were recognized as a form of feudal property. The classic multi-volume study of English law by William Holdsworth traces this origin and its continuity through the modern period.[141]

In *Birth of the Leviathan*, Thomas Ertman's chapter "Bureaucratic Constitutionalism in Britain" traces the distinctly English legal move of converting offices to the protected status of freehold land – and inheritable – in the 1200s.[142] "The real starting point for the English law of offices that was to hold sway for the next 500 years was a clause in the Second Statute of Westminster issued in 1285… In the statute of 1285, the logic [of freehold property law from real estate] was extended to certain kinds of offices but with a distinctly English twist."[143] Initially, these property rules applied only to inheritable offices, at a time when a higher percentage of offices were inheritable. As inheritable offices declined as a share of the English state, the property rules nevertheless extended to the rising forms of office, such as the many offices for life.[144]

Once an office was sold, it became a relatively flexible commodity with a fluid market. Allen summarized, "Generally speaking, once an office had been granted, it could be mortgaged, sold privately or through public auction, and bequeathed to heirs upon death."[145] Swart similarly observed, "Offices could be disposed of as if they were cattle or real estate. They could be bought, inherited, and divided between different persons. The proprietary rights extended to the fees attached to the offices and not even the king could deprive the officials of these benefits without proper indemnification."[146] It is striking to re-read the Fifth Amendment and the Takings clause in this context: offices were property that could be taken only with just compensation.

For some offices, the holders could sell only with the approval of the king, but in practice, the king delegated approval to subordinates, and permission was given flexibly. Many of the "great offices" of the Crown included the rights to sell subordinate offices and collect those payments.[147] These offices were often inheritable. They often had significant executive powers, even if they were not cabinet level or analogous to a department head.

Many offices were not inheritable, but it was a patchwork, rather than a coherent system. Otherwise, property in offices was like land in that it was legally protected from removal (or disseisin), and this legal foundation was reinforced in the famous case of *Harcourt v. Fox* (1692), an English case that was widely cited in favor judicial independence in the Founding Era and the early republic, especially in the fight over the courts between the Federalists and the Jeffersonians.[148]

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141 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 246-51 (7th ed. rev. 1956); 10 HOLDSWORTH 499-506, 509-510.
142 THOMAS ERTMAN, BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE 173 (1997) (citing Pollock and Maitland).
143 ERTMAN 173.
144 Id.
145 Allen, "Purchase," 60.
146 Swart 47.
147 Allen, "Purchase," 60-61
148 THE PEOPLE'S COURTS (2012) (see chapter 2).

Allen provides remarkable examples, this one from 1660: Samuel Pepys was a major executive and legislative officer: administrator of the English Royal Navy and a member of Parliament, famous for keeping a detailed diary during a tumultuous era (the Restoration, wars, the Great London Fire, the Great Plague of London, etc.). He recorded a free-wheeling market of bidding for offices in an entry from 1660.[149] Another example was the Restoration of the Stuart Monarchy after English Civil War and the demise of the Cromwell Protectorate. Instead of using removal to wipe the slate of office clean and installing his own favorites, Charles II bought back offices at a huge public expense in 1663.[150] Charles II made sure to clarify that in his Restoration, the newly purchased offices would remain freeholds and were not removable.[151] Some of these highest royal court offices that were bought and were unremovable were known as "department heads." The three main "departments" were the "chamber," headed by the lord chamberlain; the "household" headed by the lord steward and board of greencloth; and the "stables," headed by the master of the horse."[152] They were largely ceremonial or functional support staff, not analogous to the American Constitution's "department head," and yet they had powerful status in the royal court. These department heads supervised roughly 1,000 to 1,400 employees, a significant number of the entire national administration, and a vital part of constructing a magisterial Crown to promote the nation-state of England.[153] These offices were high status, culturally and economically powerful, and they were directly involved in building and centralizing executive power.

Unitary theorists have objected that these household "department heads" were ceremonial and nothing like executive offices exercising executive power. To the contrary, William Holdsworth's classic *History of English Law* explained that the "inner ring" of the original royal "Council," which became "the committee" and the initial royal "cabinet" that defined modern English government, "always comprised some of the most important officials of the state, the church, and the royal household."[154] As a more amorphous "Council" or "committee" developed into the smaller modern institutional "cabinet," it still included "the chief officials of the King's household" through the eighteenth century."[155] Holdsworth observes that only in 1782 was the "cabinet" restricted to heads of the "departments of state" (law, army, navy, revenue, home, and foreign affairs), excluding the household departments as it took the form that is more familiar to twentieth and twenty-first century readers.[156]

Of course, these "department heads" do not look like today's Secretary of State or Secretary of Interior, but in the eighteenth century world, they were significant "department heads" both in name and function. If one wants to see evidence of more recognizably national executive powers with unremovable officers, keep reading the next part on the English Treasury and its long history of unremovable officers (Part IV at p. 34 below).

Holdsworth then provided a long description of how offices as freehold property were so persistent, even into the nineteenth century.[157] In an uncharacteristically candid passage with editorializing against venality, Holdsworth wrote:

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[149] 1 THE DIARY OF SAMUEL PEPYS 177–216 (ed. 1970).
[150] Bucholz, *Venality of Court*, 69.
[151] Id. at 71-72
[152] R.O. Bucholz, *Venality at Court*, at 65.
[153] Id. (Bucholz at 65).
[154] 10 HOLDSWORTH 481. See also 1 E.R. TURNER, THE CABINET COUNCIL, 16-17; 2 E.R. TURNER, THE PRIVY COUNCIL 220-27; 265-74.
[155] 10 HOLDSWORTH 482.
[156] Id.; 2 E.R. TURNER, THE PRIVY COUNCIL 227.
[157] 10 Holdsworth 499-506, 509-16.

> "An office was granted to a person, as if it was a piece of property… [I]t was impossible to get rid of them. Since the right to the office was in many cases a freehold, which gave the holder a vote for the election of Parliament, it could not be abolished… In all parts of the machinery of central government we can see the results of these medieval ideas. They are present not only in the older offices and departments of government, but also in some of the more recent; for these ideas were infectious. They infected all parts of the machinery of government."[158]

Holdsworth then documented the pervasiveness of such freehold offices and sinecures in the powerful offices in the centralized departments of Exchequer and Treasury, with references to "great officers" with significant powers.[159]

Richard Kay's book on the Glorious Revolution offers an example of offices-as-property being difficult to remove. Ralph Montagu had bought the office of "master of the wardrobe," a significant "household office," from his cousin, the Earl of Sandwich, for 14,000 pounds (about 1.5 million pounds today), with an income of 3,000 pounds per year (about 350,000 pounds today).[160] A few years later, Montagu revealed to Parliament Charles II's secret deals with Louis XIV of France. In 1678, Charles II "attempted to strip Montagu of the position," but failed. It appears James II tried again and gave his office to a Stuart favorite, Preston, "but both the circumstances and the legality of the maneuver are unclear." In 1685, Lord Halifax revoked Montagu's "patent" by alleging "miscarriage" in the office, and gave the office to Preston.[161] After the Revolution, King William restored Montagu and regarded Montagu as never having lost his office. This dispute led to litigation and the necessity of showing the Preston had committed a "great misdemeanor" or misprision (i.e., "ersatz treason," a misuse of office, neglect of duty, or political misconduct, but none were a traditional crime).[162] Once the litigation over the office required an allegation of misconduct against Preston, the lawsuit escalated into a prosecution. Preston begged for pardon, the prosecution was dropped, but the litigation over the office continued. Montagu eventually won the suit, and Preston fled to France.[163] The point of the story is how difficult and burdensome it was to remove a bought office – even a household office when the holder had betrayed the king's trust and the king adamantly wanted to remove that officer. That is solid evidence that purchased offices were not removable except by serious quasi-criminal allegations and extreme litigation burdens.

Other scholars have described Treasury as a domain of many unremovable offices in the early modern period.[164] One of Aylmer's most interesting findings is that in the seventeenth-century, the Stuart English law of offices afforded *more protection for many executive offices than they did for judicial offices*.[165] One possibility is that this chiastic surprise reflected the path dependency of venality and sale of office: Treasury was the most pecuniary and financial of offices, and the opportunity costs were the greatest. If the financially adept to take the office instead of private sector opportunities, they needed to be enticed by the most job security protection. Law practice opportunities for judges were not of the same scale.

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158 Id. at 499-500.
159 Id. at 500-04.
160 RICHARD KAY, THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW 256 (2014).
161 Id. at 256-57; METZGER, RALPH, FIRST DUKE OF MONTAGU, 170.
162 Id. at 260-61
163 Id. at 262.
164 Matthew Hale 111-12; J.C. Sainty, *The Tenure of Offices in the Exchequer,* 80 ENGLISH HISTORICAL REVIEW 449 (1965).
165. *Id.* at 106, 109.

The rest of Aylmer's chapter (pages 106 to 125) suggests that it was common for other executive officers below the level of "great officer," a subset of the cabinet, to have life tenure or good behavior tenure. Aylmer's other books on later eras reflect that many executive officers with significant powers were also protected from removal.[166]

Aylmer describes tenure during pleasure as reserved for a small set of the highest officers – and even some high judges in the era before "good behavior" tenure was established in 1701. Such "at pleasure offices" included: "most of the great offices of state and the judgeships of King's Bench and Common Pleas."[167] In a sentence that should give the unitary theorists pause, Aylmer begins with a general observation: "It is difficult to generalize about the security of tenure."[168] Then he added, "ministerial officers, being the Crown's executive agents . . . might properly hold for life."[169] He did not clarify whether "ministerial" included high ministers, but it seems that would be the implication from his earlier distinctions.

As historian Mark Knights shows in a recent book, English reforms began in the seventeenth century, but they were reversed during Restoration. "The return of the monarchy in 1660 nevertheless brought the wholesale return of sales, which to some extent even became routinised in a continental manner to raise revenue. In 1684, a temporary order was made that 5 per cent of the purchase price of army commissions should be credited to the Royal Hospital, which cared for sick and wounded soldiers."[170]

Kings, queens, and Parliaments tried to curtail this system after the English Revolution of 1688-89, but English historians conclude that they failed.[171] Parliament discussed banning sales, but it backed away – likely for reasons of revenue and practicality.[172] Knights described a debate about the particular problems when "ministers and high officers" sold offices, and he pointed to high officers buying their own offices, like the governor of the East India Company, as well as buying offices in colonial America.[173]

Swart says this failure should be unsurprising: "The Revolution of 1688-89 had consolidated the position of that part of the nation which was primarily interested in the continuation of the sale of offices."[174] The Whig revolutionaries were, to oversimplify the class dynamics, more "new money" who wanted the ability to buy into increasing status, power, and prestige, and to buy their way past the Tories and aristocracy. They also surely were attracted to the profits from fees as a good financial investment, especially for life and family inheritance – government as an upwardly mobile family business.[175] In an era of political upheaval and jockeying for status, the investment in an office often required the protection of that property from removal at pleasure or at will. The sale price of the office would turn on whether it was protected as property, and the English regime had an interest

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

167. AYLMER at 110.

168. AYLMER at 110.

169. AYLMER at 109.

170 MARK KNIGHTS, TRUST AND DISTRUST : CORRUPTION IN OFFICE IN BRITAIN AND ITS EMPIRE, 1600-1850, at 350 (2021)

171 SWART 61; see also Bucholz, *Venality at Court*, at 86-89.

172 *Id.*

173 *Id.* at 355

174 SWART 61.

175 PARRILLO, AGAINST THE PROFIT MOTIVE.

in making that property more valuable at the time of sale. Swart's account is confirmed by more recent historical studies by Ertman, Hurstfield, Aylmer, Chester, and Grassby.[176]

Later, eighteenth-century English guides were published to publicize for a market how much offices cost and how profitable they were.[177] Knights observed, "Sale of office was reasonably routine and attempts to proscribe it failed repeatedly. Offices were even advertised in eighteenth- century newspapers."[178] He cited advertisements that clarified that "money, not merit, was the key consideration."[179] Knights concludes that reforms or bans on sale of office were limited in scope throughout this period, until an 1809 statute "curbed" most sales of administrative offices.[180]

In 1740, Matthew Bacon provided a list of office types, most of which were forms of protected property following the same categories of real property: "Offices in respect to their Duration and Continuance, are distinguished in those which are of Inheritance, or in Fee, or Fee-tail, those of Freehold or for Life, those for Years or a limited Time, and those which are at Will only. . . . "[181] An office for a term of years "would descend to the officer's heirs should the officer die in the middle of their term."[182] Bacon also indicated that some offices for a term of years may have been completely unremovable, even after crimes.[183] A few years later, Blackstone would confirm Bacon's account: tenure "for a limited term of years" was freehold property similar to the many inheritable offices and life-tenure offices, and thus not held at pleasure.[184]

The English Civil War sparked a short-lived reform effort,[185] but the Stuart Restoration not only restored the monarchy, it also restored patronage and the sale of office. Reform efforts failed in the early modern period, as numerous exceptions allowed plenty of loopholes to return to the venal status quo.[186]

Even after these reform efforts, historians have described the eighteenth-century administrative state as a complicated mixed regime of different layers of new bureaucracies built on old ones, with a complicated and even byzantine maze of property rules. Aylmer quipped, "in the eighteenth century, administrative anomaly was the norm… an extraordinary patchwork."[187]

IV. ENGLISH TREASURY AND UNREMOVABLE EXECUTIVE OFFICES

176 ERTMAN, BIRTH OF THE LEVIATHAN; RICHARD GRASSBY, THE BUSINESS COMMUNITY OF SEVENTEENTH-CENTURY ENGLAND 229-33; JOEL HURSTFIELD, FREEDOM, CORRUPTION AND GOVERNMENT IN ELIZABETHAN ENGLAND (1973). See Aylmer and Chester below.

177 MARK KNIGHTS, TRUST AND DISTRUST : CORRUPTION IN OFFICE IN BRITAIN AND ITS EMPIRE, 1600-1850, at 345 (2021) (citing RICHARD HAYES, AN ESTIMATE OF PLACES FOR LIFE: SHEWING HOW MANY YEARS PURCHASE A PLACE FOR LIFE IS WORTH (1728)).

178 *Id.* at 346.

179 *Id* at 346.

180 *Id.* at 343

181 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 732 (1740); see also 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 247–50 (3d ed. 1922) (listing offices held "in fee, in tail or for life," as forms of traditional property "came very naturally to the mediæval common law"); Manners and Menand at 19-20.

182 Manners and Menand at 19-20 (quoting Bacon: "offices 'of great Trust concerning the Administration of Justice' should not be granted for a term of years, because if the officeholder died before the expiration of the term, "it would go to Executors or Administrators," leaving the office "in suspense' until the will was probated, thereby injuring 'the Publick.'" 3 BACON, NEW ABRIDGEMENT 734 (1740)).

183 Id. (citing security even in case of "outlawry," BACON at 734, 745-46

184 2 BLACKSTONE 36; Manners & Menand at 5, 19-20.

185 G.E. AYLMER, THE KING'S SERVANTS: THE CIVIL SERVICE OF CHARLES I, 1625-1642, at 225-30 (rev. ed. 1974).

186 AYLMER at 228.

187 AYLMER, BREWER.

A. *Sinews of Power*: Treasury's Unremovable Offices

John Brewer's *Sinews of Power*: *War, Money, and the English State, 1688-1793* is famous study of the transformation of the English Treasury and its role in effective tax collecting and building in global military empire. Brewer described its mixed system of patronage and venality as a "labyrinth" of "drones, parasites, sharks, and harpies," and yet nevertheless, it persisted – and the English state was still "able to operate so successfully against its chief diplomatic and military rivals," becoming the global superpower in this period.[188] The numbers show the transformation: In the 1660s, England had a population of about 5.5 million, and the Crown struggled to raise £2.5 million. By 1763 and a population of about 8 million, the English government spent £20 million per year, and comfortably managed £130 million in debt.[189] English historians explain that this fiscal revolution "was an achievement which is not explicable purely in terms of economic growth, for it has been convincingly argued that the resources of mid-eighteenth century Britain had not grown in proportion to the demands being placed upon them."[190]

Douglas Allen's *Institutional Revolution* helps explain why: It was a bureaucratic revolution, but without a modern bureaucracy; it was a mixed administration of patronage and venality. A system of patronage and the sale of office enabled an efficient mix of incentives to overcome vast distances, reducing the need for communication and central control. Allen argued that patronage plus venality of office "maximized the value of the kingdom."[191] "The outright sale of office offered very strong incentive effects" to take advantage of a major investment and work harder to do the job and collect fees.[192] If an individual could pull together enough cash to buy the office, this price was a proxy for sufficient education, skill, and effort to perform the office effectively, or to re-sell it to someone else who would.[193]

British historian J.C. Sainty's thorough study *Office-Holders in Modern Britain: Treasury Officials 1660*-1870, documents how significant Treasury officers under the Secretary level had life tenure and were unremovable into the 1780s. Sainty provided this list, a simple hierarchical organization chart of Treasury's "basic structure" of its centralized leadership in London from at least the early eighteenth century up until the reforms of 1782:

1 Treasurer and 5 Commissioners of the Treasury[194]
1 Chancellor of the Exchequer
2 Secretaries
4 Chief Clerks
9 "Under Clerks" as of 1715, then 21 "Clerks" as of 1776[195]
3 Under Clerks for keeping accounts[196]

The Chief Clerks and Clerks (or Under Clerks) had "secure tenure," and Chief Clerks

[188] BREWER at 71, 73
[189] Allen, *Purchase* 62 (citing P.G.M. DICKSON, THE FINANCIAL REVOLUTION IN ENGLAND (1967))
[190] H. ROSEVEARE, THE TREASURY 2 (1991).
[191] ALLEN, INSTITUTIONAL REVOLUTION 15
[192] Id.
[193] Id. 15-16.
[194] Sainty at 16.
[195] Id. at 36
[196] J.C. Sainty, 'Introduction', in *Office-Holders in Modern Britain: Volume 1, Treasury Officials 1660-1870*, at 5-6 (London, 1972).

"generally remaining in office until death or voluntary resignation."[197] The name "clerk" may be misleading to modern readers. Chief clerks were authorized "to undertake any of the business of the office" when necessary, and they often did.[198] They were formally "the senior members of the permanent staff" under the Secretaries until 1805, when the office of Assistant Secretary was created. When Treasury was reorganized into five or six divisions, each Chief Clerk ran a division.[199] The chief clerks seem roughly comparable to the modern U.S. Treasury's under-secretaries or assistant secretaries, which require Senate confirmation.[200]

Even above the powerful level of the clerks, the heads of Treasury had a mix of permanent tenures for much of this era. The Treasurers and Commissioners of the Treasury held their offices at pleasure, but through the first half of the eighteenth century, the first secretaryship "tenure… was in practice permanent and unaffected by political changes,"[201] and this "permanent tenure" secretary took precedence over the second secretaryship, until 1752.[202] The Chancellor of the Exchequer was a life-tenure office until 1676, then held during pleasure thereafter.[203] But support for secure tenure in Treasury remained robust, even after late-eighteenth century reformers successfully reduced the number of life-tenure offices in the English government. In 1793, the Privy Council proposed that one of the Joint Secretaries should be placed on a permanent tenure.[204] Treasury rejected this proposal, but the debate indicated that life tenure for such significant executive offices, arguably the equivalent of a secretary or modern department head, was still a robust norm and a viable proposal with widespread support at the King's cabinet (and privy council) level, even after the U.S. Constitution was ratified.

Holdsworth also characterized the powerful departments of Exchequer and Treasury as captured by freehold unremovable offices throughout this era,[205] even into the nineteenth century.[206] He then provided a remarkable list of major offices in Treasury and other important offices that were unremovable sinecures, including the comptroller.[207] Hale also referred to "many great officers" in exchequer with significant powers who were unremovable, and he complained that many of them passed on their duties to deputies.[208] A century later, Burke made a similar observation about the important patent offices in the Exchequer department.[209]

To overcome the problem of incompetent or corrupt officers who could not be removed, the British Treasury relied on a practice known as "removal," but a completely

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[197] Id. at 7 and 7 n. 23

[198] Id. at 34 and 34 n.2 (citing Treasury Minutes, 31 July 1759 (T 29/33 pp. 218-19)). "Until 1805 the Chief Clerks ranked after the Joint Secretaries and in addition to their own particular responsibilities acted in a general advisory capacity to the Board." Id. at 34.

[199] Sainty at 34 (citing Treasury Minutes, 19 Aug. 1805 (T 29/85 p. 348)).

[200] See, e.g., offices designated as "PAS" (Presidential Appointment with Senate Confirmation) in the "United States Government Policy and Supporting Positions," commonly known as the Plum Book, at 128-132 at https://web.archive.org/web/20090807034324/http://www.gpoaccess.gov/plumbook/2008/2008_plum_book.pdf

[201] Sainty 29.

[202] Sainty 29.

[203] SAINTY at 26 (citing T 90/16 pp. 1-8; Thomas, *Notes of Materials*, 9-16; Baxter, *Treasury*, 32-6; Todd, *Parliamentary Government*, ii, 434-7); J.C. Sainty, *The Tenure of Offices in the Exchequer,* 80 ENGLISH HISTORICAL REVIEW 449 (1965).

[204] SAINTY at 13-14 (citing *15th Rept. on Finance*, 288-9)

[205] HOLDSWORTH 501-04.

[206] Id. at 500-04.

[207] Id. at 502-03.

[208] Id. at 501 (citing "Considerations Touching the Amendment of the Lawes," at 279).

[209] 10 HOLDSWORTH 501 (citing 2 BURKE, WORKS 100).

different kind of removal from displacement or firing. This kind of "removal" was geographic rotation, more moving than removing, as treasury officers regularly switched location. It was more like jurisdictional removal, or like removing a jury trial to a different forum. This "removal" rotation was a check against officers getting too comfortable, entwined with local interests, and colluding with merchants. Treasury officers were not allowed to serve in the location where they grew up, and this "removal" as geographic rotation was the same idea. Brewer finds that about 41% of officers were "removed" (rotated) in any given year.[210]

It seems rotation may have served a purpose like removal: The Crown could move officials around to get the wrong mix of officers out to the margins, and open up space for the right mix of officers in the right places. And this era from the Restoration through the Glorious Revolution and into the eighteenth century was a revolution in public finance and revenue. "What changed that allowed this financial revolution to happen? It is tempting to view the Glorious Revolution as the watershed moment," Allen observes. But instead, Allen concluded that the finance revolution was a long-term "secular" trend, regardless of who held the Crown: "it is best seen as part of a continuous transfer of power from the Restoration onwards from crown to Parliament."[211]

These rules of offices-as-freehold-property were already clear enough, and then the 1693 decision *Harcourt v. Fox*, decided by the King's Bench, confirmed that offices could be protected the same as other kinds of legal property. The court held that tenure during good behaviour (*quandiu tantam se bene gesserit*) was an estate for life, with the same legal status. As Chief Justice Holt wrote, "men should have places not to hold precariously or determinable upon will and pleasure, but to have a certain, durable estate, that they might act in them without fear of loosing them."[212]

In English law of the seventeenth and eighteenth centuries, good-behavior tenure could apply to "secretaries, clerks, hospital administrators, ministers, contractors, licensees, East Indian commissioners, members of corporate boards, employees, and Anglican bishops."[213]

B. Blackstone, Burke, and Bentham on Freehold Property in Offices

In addition to Brewer, other modern scholars have described Treasury as a special domain of many unremovable offices in the early modern period, even if the trend was moving towards more "at pleasure" tenure.[214]

This is not just historians' hindsight. Major eighteenth-century figures William Blackstone and Edmund Burke commented on the persistence of office-as-property, especially in Treasury, and on how reform efforts were only gradual.[215] In Chapter Eight on the Treasury and the military, Blackstone described a recent shift from offices-as-property to tenure at pleasure in the eighteenth century. Blackstone was sharply skeptical of these reforms, blaming them on "*an unaccountable want of foresight*." He protested that too much power over "in the hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of

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[210] BREWER, 110.

[211] ALLEN 28-29

[212] *Harcourt v. Fox*. See also Manners and Menand; "Marbury and Judicial Deference: Whittington v. Polk" (2002).

[213] Prakash and Smith at 100, & n. 114.

214. HALE, PREROGATIVE 111-12; J.C. Sainty, *The Tenure of Offices in the Exchequer,* 80 ENGLISH HIST. REV. 449 (1965); AYLMER.

[215] See Section II.B

government to every corner of the nation."[216] Blackstone blamed these reforms for turning Treasury into a nepotistic bastion for the Crown's cronies and undermining the independence so important for the Treasury.[217] Blackstone's points about removal were clear: tenure during pleasure was a significant departure from tradition in Treasury (and the army), where the general rule had been more job security against removal. Douglas Allen states that even after many reform efforts in the eighteenth century, the venality system in Treasury continued past the American revolutionary era.

Edmund Burke similarly commented on the limits of administrative reform. Burke recognized the flaw in freehold office system, but he also identified its advantages and its efficiencies. His famous speech "Economical Reform" in 1780, Burke described how many offices are bequeathed to children, as if they were landed estates, "the subject of family settlements; they have the security of creditors."[218] He warned that property rights, even if antiquated and obsolete, had to be protected for the sake of the rule of law. "If the discretion of power is once let loose on property, we can be at no loss to determine whose power, and what discretion it is, that will prevail at last."[219] Burke was not yet identifiable as the Burkean conservative we study today. In the 1770s and around this time of the speech, he was supportive of the American cause and sympathized with democratic reform. Even in that stage of his career and philosophy, he defended the system of offices-as-unremovable-property. Prominent scholars of the English administrative state have echoed Blackstone and Burke, noting that offices-as-property-for-life and as inheritable continued through the late-eighteenth century, even as tenure during pleasure became the norm for new offices.[220]

Nineteenth-century reformer Jeremy Bentham is also part of this story because the sale of office so widely persisted into the nineteenth century. In the eighteenth century, judges added to their compensation by fees and salaries by selling offices within their gift, which was "regarded as a species of property attached to the judicial office itself."[221] As judges sold offices, they would "bargain[] with the purchaser in the expectation that the appointment to a sinecure would provide an annuity for the life of the individual installed."[222] In 1790, the Lord Chancellor, the Master of the Rolls, the Chief Justice of King's Bench, and the Chief Justice of Common Pleas made over half of their income from patronage and the sale of office.[223] Reformers in Parliament investigated these arrangements, and they appointed Jeremy Bentham to spearhead reforms in the early nineteenth century. In 1818, royal commissions were appointed to study the sale of office in the judiciary, and then reforms were only incremental over the next few decades, deep into the nineteenth century.[224]

But even then, Bentham defended the sale of office in his book *The Rationale of Reward*

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216. BLACKSTONE 335-36.

217. Id.

218. 3 EDMUND BURKE, THE WRITINGS AND SPEECHES OF EDMUND BURKE: PARTY, PARLIAMENT, AND THE AMERICAN WAR: 1774-1780 (Warren M. Elofson, John A. Woods, and William B. Todd, eds., 1996); 1 EDMUND BURKE, THE WORKS OF EDMUND BURKE 296 (1847).

219 3 EDMUND BURKE, THE WRITINGS AND SPEECHES OF EDMUND BURKE: PARTY, PARLIAMENT, AND THE AMERICAN WAR: 1774-1780 (Warren M. Elofson, John A. Woods, and William B. Todd, eds.); 1 EDMUND BURKE, THE WORKS OF EDMUND BURKE 296 (1847).

220. 10 HOLDSWORTH 481-82; 499-520; CHESTER, THE ENGLISH ADMINISTRATIVE SYSTEM, 1780-1870, at 16-23 (1981); AYLMER, KING'S SERVANTS; G.E. AYLMER, STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC, 1649-1660 (1973); G. E. AYLMER, THE CROWN'S SERVANTS: GOVERNMENT AND THE CIVIL SERVICE UNDER CHARLES II, 1660-1685 (2002).

221 Pfander citing DANIEL DUMAN, THE JUDICIAL BENCH IN ENGLAND 1727-1875: THE RESHAPING OF A PROFESSIONAL ELITE at 111 (1982)

222 Pfander (citing DUMAN, at 116)

223 DUMAN at 105, 112-13 tbl.9

224 1 HOLDSWORTH at 248, 262-64; 10 HOLDSWORTH 500-16; ALLEN 6-7.

in 1825, and gave voice to the explanations that historians later inferred: "When a man purchases an office, it may be fairly presumed that he possesses appropriate aptitude for the discharge of its duties." Bentham wrote that there were no clear rules about when the sale of office was more or less appropriate: "the question can only be determined by an accurate account, exhibiting the balance of the sums paid and received" case by case. He even suggested than offices based on honor and not profit "would be a tax upon honor,"[225] and described the movement against the sale of office as "prejudice."[226] He ultimately embraced Montesquieu's reasoning:

> The circumstance which ought to recommend the system of venality to suspicious politicians is, that it diminishes the influence of the crown. The whole circle over which it extends is so much reclaimed from the influence of the crown. It may be called a corruption, but it serves as an antidote to a corruption more dreaded.[227]

Much like the French Enlightenment thinkers of the eighteenth century who started criticizing vénalité and then saw its advantages, so too did Bentham show the enduring pragmatism of a mixed system of incentives in the sale of office deep into the nineteenth century.

C. The British Military and American Experience

The story of the American revolution is a reminder of how the English military was built on such a system. The main reason George Washington could not move up in the British military in the 1750s was bias against the colonists and the privileges of the English, and he was also frustrated by a system of patronage and seniority.[228] The mix of a patronage system and the seniority related to purchase of commissions limited Washington's access to promotions, and if he had been promoted in the late 1750s, who knows how the American Revolution would have fared? And one reason some historians suggest how the Americans defeated the British was that the British system of buying and selling and inheriting military commissions produced a more mediocre set of mid-level officers.[229] One historian, in a book titled *The Men Who Lost America*, on the failures of the British military leadership during the Revolution, observed, "The [British] army abounded with officers in their teens," and it seems from his account and the accounts of others that these inexperienced, unreliable officers gained their place through a mix of class and family patronage.[230]

Purchasing officer commissions was the standard practice among cavalry and infantry officers in the British Army from 1683 until its abolition in 1871, after a series of more scandalous military failures. Historians estimate that about two-thirds of British Army commissions were held by purchase.[231] Consistent with the law of other offices, military commission were also protected by legal property rights, and even when the system was abolished in 1871, Parliament paid compensation in recognition of the taking of those property rights. Around 1787, however, the sale of military officer commissions and their property status were still entrenched legal practices.

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[225] Bentham, *On the Sale of Offices*, THE RATIONALE OF REWARD 182 (1825).
[226] *Id.* at 183.
[227] *Id.* at 186
[228] CHERNOW p. 67-73, 91-93; ALDEN, 50-51, 59; FLEXNER 221
[229] See Chernow; ANDREW JACKSON O'SHAUGHNESSY, THE MEN WHO LOST AMERICA: BRITISH LEADERSHIP, THE AMERICAN REVOLUTION, AND THE FATE OF THE EMPIRE (2014).
[230] O'Shaughnessy at 155-56; see also Men-At-Arms
[231] J.A. HOULDING, FIT FOR SERVICE: THE TRAINING OF THE BRITISH ARMY, 1715-1795, at 100 (1981)

Economic historian Douglas Allen observes, "The modern commercial connotation of the word 'company,' in part, reflects the commercial nature of these armies."[232] The "company" shared the "profits" of plunder and spoils of war. Military commissions came with significant financial benefits: the largest share of plunder and, at the end of a career, the sale of the commission to the next officer served as a sizable pension.[233] They also carried large financial costs: a duty to provide "company" expenses for uniforms, wages, equipment, and death benefits to widows.[234] Purchasing a commission was the dominant way to enter the officer corps. Then promotion turned on a mix of purchase, seniority, and patronage. Purchases formally required the Crown's approval of the crown, but the Crown paid attention only to higher ranks, and it created a "glass ceiling," or "class ceiling" preventing lower class officers from rising up the ranks to high military leadership. This system sharply limited the control of the Crown and Parliament over army staffing. Over the eighteenth century, Parliament attempted to regulate resale by listing appropriate prices, setting minimum ages, setting minimum time requirements before being eligible to buy a promotion, and setting other conditions. And yet, these regulations simply updated and reinforced the system of buying and selling military offices.

Those who purchased commission paid a cash bond (a surety) for an office held during for good behaviour, and the bond or surety would be forfeited if the officer were to be found guilty of gross misconduct, cowardice, or desertion. This system was effective for a long time, especially the bond or surety as an enforcement mechanism and an incentive system, a system for preserving the status of the wealthy and excluding the poor who were a perceived risk of looting, rioting, or engaging in a coup. The revenues from sales were also used as a pension fund for retiring officers.

D. The Colonial Experience with Proprietary Rule and Sale of Office

As James Pfander has pointed out, the Declaration of Independence listed among its many protestations and causes a denunciation of the King's patronage: "He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."[235] Pfander, in his study of judges selling offices, cites other scholars who conclude that the Declaration was protesting the Crown's "tendency to use offices as sinecures for the benefit of 'placemen."[236]

The American colonists had many experiences with the British sale of office and unremovable offices. "Good behaviour" tenure was extended beyond judges to other officials in colonial Massachusetts.[237] Swart documented a series of colonial complaints in Maryland, Virginia, North Carolina, and South Carolina about the sale of office as part of British colonial governance.[238] An 1894 article titled "The Causes of Discontent in Virginia"

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[232] Douglas Allen, *Compatible Incentives and the Purchase of Military Commissions*, at 48.

[233] ALLEN, INSTITUTIONAL REVOLUTION; Allen, *Compatible*.

[234] Allen, *Compatible* at 46-47.

[235] DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

[236] James Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the Court of Law Requirement,* 107 N'WESTERN L. REV. 1125, 1144 (2015) citing Gordon S. Wood, The Creation of the American Republic: 1776-1787, at 212 (1998 ed.) (quoting William Henry Drayton speaking of placemen as "strangers destitute of property and natural alliance in the Colonies" who create laws for a country "in which they have no interest but their commissions"); see also Pfander at 9 (discussing colonial anger at officeholders who did little work to justify the fees they collected).

[237] Smith and Prakash, at 105

[238] ALEXANDER SPOTSWOOD, THE OFFICIAL LETTERS [Virginia, 1710-1712]; CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1702 (London 1912), No. 305; 10 Colonial Records of

identified the British selling and buying of colonial offices and then the abuse of those offices and their fees as a significant background condition building up to the Revolution. The article quotes a Virginia Lower Assembly resolution at length:

> Whereas it was formerly a custom for Sheriffs to remaine in ther place but one year, now it is altered, for they doe find such a great benefit by it, that they will buy the office, and hold it two yeares soe that they predominate over the poor comentrie, whereas the sheriffs are allowed ten pound for evrie hundred that a hogshead containes besides his sellarie, he allowes us but thirtie the which wee desire he may be taken off from it or allow us as much.[239]

In *The Background of the Revolution in Maryland*, Charles A. Barker similarly traces a long fight between the lower house of the Assembly and the hereditary proprietors of Maryland, the five fathers and sons "Lord Baltimore" who inherited their offices and controlled the colony through most of the eighteenth century.[240]

Proprietary colonies like Maryland were a clear example of non-removable high offices. Seventeenth-century colonies were most often proprietary: Maryland, Pennsylvania, East and West Jersey, New Hampshire, New York, Delaware, the Carolinas, and Nova Scotia. Georgia was also established as a proprietary colony in 1733. The king granted a single proprietor an "estate of land," in the colony, a strong property legal protection, and it functioned like a fiefdom.[241] The proprietor governed and owned the colony alone, and it passed along like property "to his heirs and assigns," "an heritable fief," through primogeniture to the proprietor's eldest son.[242] The proprietor was not removable. The king had to use a different legal tool of "suspension" of the proprietorship, at which point the regime became a royal colony, not a removed and vacant office for a new proprietor.[243] When the Crown suspended a proprietorship, the proprietor reverted to a landlord with vast property but no political power.[244] The only other way to vacate the office was for the proprietor would have to resign.[245] The proprietary model of the individually-controlled fiefdom can be contrasted with the charter or corporate model of distributed powers to the legislative assembly and general court, like a corporate board.[246] The corporate colonial powers (Massachusetts, Virginia, Rhode Island, and Connecticut) were also not "removable," but instead, to change executive power, the corporate charter could be dissolved and a new one could be provided for a new corporation.

Proprietors usually divided their time between England and the colony, leaving a governor in place who served at the proprietor's pleasure. William Penn gave out offices to serve during "good behavior," so Pennsylvanians experienced multiple layers of unremovable offices.[247] William Penn also experienced suspension of the proprietorship in 1691, and then

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North Carolina 332-33 (WL Saunders, ed.); 3 STATUTES AT LARGE OF SOUTH CAROLINA 468-69, 471 (Cooper and McCord, eds.). See also Statute: 22 George III cap. 75

[239] *The Causes of Discontent in Virginia*, 2 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY, 387-88 (1894).

[240] CHARLES A. BARKER THE BACKGROUND OF THE REVOLUTION IN MARYLAND 119, 133, 142-44, 226-30, 238-39 (New Haven, 1940), 144, 226, 230.

[241] Herbert L. Osgood, *The Proprietary Province as a Form of Colonial Government, Part I*, 2 AM. HIST. REV. 644, 653-56 (1897).

[242] Osgood I, at 648

[243] Herbert L. Osgood, *The Proprietary Province as a Form of Colonial Government, Part II*, 3 AM. HIST. REV. 31, at 31 (1897).

[244] Id. at 31.

[245] Id. (Osgood, Part II)

[246] Id. at 31.

[247] Id. at 41

the king restored it to him in 1694.[248] The Lord Baltimore of 1690 lost his proprietorship, and it was restored in 1715.[249] Only Maryland, Pennsylvania, and Delaware remained proprietorships through the eighteenth century, as others were converted into royal colonies.

One of the consistent complaints was about British colonial officers buying their offices and using the offices to exploit fees and commissions from the colonists.[250] Though they often complained, the "office as property" was part of their legal architecture. In 1759, pro-judicial independence colonists in the New Jersey assembly battled the crown over a "good behaviour" judicial commission for Robert Hunter Morris. A judge ruled that the commission was valid, and moreover, it was a freehold property--the critical distinction for the writ of assize of novel disseisin.[251]

Many governors sold offices in their gift,[252] and some even stayed in England, because they sold the office to a deputy and kept some of the salary. Many customs officials also never moved to the colonies, selling their office instead.[253] Colonists criticized these practices. The lower house of the Maryland assembly criticized the governor:

> [W]e cannot omit mentioning . . . another practice lately crept in amongst us that of Buying and selling the Offices of the County Clerks and the very persons who receive the Profits of the Offices of Clerks & Registers Practising as Attorneys in the Courts to which these Offices belong[. T]hat such Sales are unlawful is too obvious to be denied…"[254]

Colonists in North Carolina and Massachusetts also protested these practices as corrupt.[255] Pfander observed that "Reform-minded Americans beat their English cousins to the punch; many of the post-revolutionary state constitutions had already attempted to regulate the collection of official fees and perquisites of office."[256] Yet there is no record of abolishing the sale of office or ending the office-as-property legal regime.

Swart provides additional examples from North Carolina and South Carolina of the colonists chafing under this system of venality, buying offices, and office of profit. This provides more context for the authors of the Declaration of Independence listing the excessive creation of offices among their complaints, reflecting the pervasiveness of the sale of colonial offices.[257]

V. SOUNDS OF SILENCE: NO REMOVAL RULES

Some unitary theorists try to explain the silence in Article II and in the Convention about removal by suggesting that it was so widely assumed, it could go unstated. The

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[248] Herbert L. Osgood, *The Proprietary Province as a Form of Colonial Government, Part III*, 3 AM. HIST. REV. 244, 261 (1898).
[249] Id. at 244 n. 1.
[250] CHARLES A. BARKER THE BACKGROUND OF THE REVOLUTION IN MARYLAND 119, 133, 142-44, 226-30, 238-39 (New Haven, 1940), 144, 226, 230.
[251] Joseph H. Smith, *An Independent Judiciary*, 124 U. PA. L. REV. 1104, 1154 (1976).
[252] Pfander at 1142 (citing 2 Records of North Carolina, supra note 94, at 159)
[253] Pfander at 1143.
[254] 40 ARCHIVES OF MARYLAND: 1737-1740, at 392-93 (Bernard Christian Steiner ed., 1921).
[255] 2 COLONIAL RECORDS OF NORTH CAROLINA: 1713-1728, at 159 (William L. Saunders ed., 1886) at 159
[256] Pfander, at 1142.
[257] DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776). ("He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance.") See James Pfander, "The Chief Justice, the Appointment of Inferior Officers, and the Court of Law Requirement," 107 NW. L. REV. 1125, 1144 (2015) citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 212 (1998 ed.)

unitary theorists make the same assumption about statutory drafting: if a statute is silent on removal, then the default rule is tenure during pleasure and removal at will – because removal is simply assumed.[258] However, once we have identified the English and continental European background rules on venality and the sale of offices-as-property, these silences sound very different: Removal was not stated or debated because there was no fixed set of rules, except a rule of flexibility. The loudest silence was during the Ratification debates, especially from the Anti-Federalists who would have had the strongest incentive to warn about, and even exaggerate, the potential implications of "executive power." One anti-Federalist seemed to suggest that the Commander-in-Chief clause would create a narrow power to remove military officers, but none suggested that "executive power" implied removal. The state constitutions also make sense in light of this context and indicate there was no background rule either way. On the other hand, the First Congress was not silent about "property in office": Both sides of the debate understood the English tradition of property law protecting offices from removal; they disagreed about whether it was relevant in America.

A. The Founders' Bookshelf

Historians have studied which tracts the Framers had on their shelves – what we might call a "Founders' bookshelf."[259] This Article presents research after canvassing these legal and political sources, showing that none of them listed removal as a general royal "prerogative" power. As a matter of general practice (as opposed to a named prerogative power), some referred to a royal removal power over the cabinet level and the "great officers" and "Ministers of State," but none of these sources suggest that the Crown had a general prerogative or practice of removal over executive officials below the cabinet level (i.e., beyond a dozen highest officers). To the contrary, these sources are more consistent with the prevalence of the sale of office, also known as "brokage" or "brocage," even if it was also controversial.

Here is a list of the books identified on the "Founders' Bookshelf" that are digitally searchable:

Grotius, *The Law of War and Peace* (1625)
Sir Edward Coke, *The Institutes of the Laws of England* (1628)
Baron von Pufendorf, *Of the Law of Nature and Nations* (1672)
Sir Matthew Hale, *Analysis of the Law* (1713)[260]
William Bohun, *Institutio Legalis* (1732)
Sir Francis Bacon, *Law Tracts* (1st ed. 1737; 2nd ed 1741)
Matthew Bacon, *A New Abridgement of the Law* (1740-66)
Lord Kames (Henry Home), *Essays upon Several Subjects concerning British antiquities* (1747)
Montesquieu, *The Spirit of the Laws* (1748-54)

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[258] Bamzai & Prakash, Section II.C "Implied Statutory Constraints" and at 1815-16.
[259] For "the Founders' bookshelf," see David Lundberg & Henry F. May, *The Enlightened Reader in America*, 28 Am. Q. 262 (1976); Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries* 1700–1799, at ix–xiv (1978); Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* 11–24 (Liberty Fund 1998) (1966) (surveying library catalogs during the eighteenth century); see also my forthcoming article on Blackstone and other treatises on removal. See also Julian Davis Mortenson's series on executive power; see also *Vesting*.
[260] Extensive discussion of the King's powers and prerogatives

Emmerich de Vattel, *The Law of Nations: or Principles of the law of Nature applied to the conduct and affairs of nations and sovereigns* (1758)
Sir John Comyns, *A Digest of the Laws of England* (1st ed. 1762-67)
Blackstone, *Commentaries* (1765-69)
Jean-Louis de Lolme, *The Constitution of England* (1771)
William Starke, *The Office and Authority of a Justice of the Peace* (Williamsburg, 1774)
John Mitford, Baron Redesdale, *A Treatise on the Pleadings in Suits in the Court of Chancery* (1780)
John Adams, *Defense of the Constitutions* (1787-88)

An instructive example is Jean-Louis de Lolme, one of the most influential writers on the Founders, frequently quoted by Federalists and Anti-Federalists is. In his most important work *The Constitution of England*, published in 1771, de Lolme has an entire chapter titled "Of the Executive Power." He discusses the King as "the fountain of honour, that is, the distributor of titles and dignities," and "disposes of the different offices, either in Courts of law, or elsewhere."[261] "Disposing" again clearly means appointment, especially because the reference to courts would be for appointment; there was no power to remove judges. But there was no reference to "removal," "displacement," or any similar power. Later, in a different chapter of the book, he refers to removal over "the Generals, the Ministers of State, and so," implying a removal power only over the highest cabinet level plus the generals.[262] But he does not list this power as a royal prerogative power, and this was the only reference to anything like a royal removal power in these books. Meanwhile, these volumes also have references to the law of offices as property and the sale of offices, consistent with venality and the unremovability of many executive offices.

Similarly, Sir Edward Coke's *Institutes* has a section "An Exposition upon the Statute of Offices" on offices as property, and while the specific rules are relatively inscrutable, it identifies categories of offices that are protected as property (with a catalogue of remedies and restitutio) and categories of other offices that were not protected.[263]

Beyond this list of "founders' bookshelf" books, I also looked into the English and American law dictionaries and law reference books of the era. Most have little detail on the royal prerogative. Of the few that do,[264] I found only one reference to royal removal comes up in Giles Jacob's *Every Man His Own Lawyer*, published in 1779, and which was also on many American bookshelves. Jacob wrote:

> The king is the fountain of honour, and has the sole power of confer[r]ing dignities and honourable titles; as to make dukes, earls, barons, knights of the garter, &c. And he names, creates, makes and removes the great officers of the government.[265]

[261] DELOLME, THE CONSTITUTION OF ENGLAND 61-62 (1771).
[262] De Lolme, 514. See also 504 for a more general reference.
[263] SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES, 688-94.
[264] E.g., John Wade, *Cabinet Lawyer: A Popular Digest of the Laws of England* 8-9 (1830) has a long introduction on the English Constitution, going into detail on the royal prerogative. It discussed the royal prerogative of appointment and distribution of honors, but no references to removal or displacement of officers. It was published decades after the Founding, but this timing indicates another layer of problems for original public meaning: Even at that later date, even as the Crown's removal powers over executive offices had been increasing in the early nineteenth century, it was still not regarded as a prerogative power. The prerogatives are based on traditional lists, and it seems likely that modern practices would change the traditional list.
[265] GILES JACOB, EVERY MAN HIS OWN LAWYER p. 234.

Jacob is borrowing some of Blackstone's language here, and in ways that may hint at or echo traditional prerogative powers, but conspicuously, Jacob did not explicitly call them prerogative powers. Moreover, the term "the great officers" was formally limited to nine traditional officers, some of whom had more a judicial or ceremonial role than an executive role: the lord high steward, the lord high chancellor, the lord high treasurer, the lord-president of the (privy) council, the lord (keeper of the) privy seal, the lord great chamberlain, the lord high constable, the earl marshal, and the lord high admiral.[266] Even a more informal interpretation of "great officers" would still be limited to only a small handful of cabinet-level principal ministers, such as the Secretaries of State.[267] In his classic volumes on English law, William Holdsworth equated the "great offices of the state" with "the cabinet," which emerged as a more established political institution in the 1710s-20s.[268] "Great officers" is, at most, a reference to a dozen or so officials, and not remotely the same as the broader American term of "principal officers," because this term was not an established English category. Unitary-theory originalists have conceded that the Framers were most likely referring to department heads only, and that American Framers had more or less created this category.[269] Major English legal sources like Blackstone never refer to "principal officers."[270] In any event, "great officers" would be far from comparable to the post-masters of *Myers*, the commissioners of *Humphrey's Executor*, the accounting board in *Free Enterprise Fund v. PCAOB*, the head of the CFPB or the FHFA in *Seila Law* and *Collins*, or, even more starkly, the legions of administrative law judges in dispute in *Jarkesy*.

Apart from the "great officers" of the King's cabinet, Jacob then discussed removal of other officers, some of which were limited to "just cause."[271] Jacob's specifying of "at pleasure" and "just cause" for executive officers indicated a mixed system and no general default rule.

B. Ratification Debates and Anti-Federalist Silence on "Executive Power"

When turning to the Ratification debates, it is crucial to start with a reminder that both Madison and Hamilton rejected presidential removal in the *Federalist Papers*, in essays No. 39 and No. 77 respectively, and none of their other essays suggest evidence to the contrary. Venality and property rules helps explain several puzzles: During ratification, why the anti-Federalists who raised concerns about Article II presidential powers did not worry about removal; and in the First Congress, why there was so few votes for presidential removal, little to no legal sources offered for presidential removal, and no claim that the

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[266] "Great Officers of State," 1911 Encyclopedia Britannica, Vol. 25; citing William Stubbs, *Constitutional History of England*, ch. xi. 260-74 (1874) https://archive.org/details/constitutionalh28stubgoog/page/n9/mode/2up; Edward Augustus Freeman, *Norman Conquest*, ch. xxiv.(1870); Rudolph Van Gneist, *History of the English Constitution of England,* ch. xvi., xxv. and liv. (1886).

[267] "Great Offices of State," National Archies, at http://nationalarchives.gov.uk/cabinetpapers/cabinet-gov/great-offices-of-state.htm.

[268] 10 HOLDSWORTH 472-73. Earlier, Holdsworth referred to "higher officials," rather than "great officials," indicating a similarly limited list relating to the cabinet, the Secretaries of States, and some heads of departments. 10 HOLDSWORTH 461-62.

[269] See, e.g., Separation of Powers Scholars amicus brief in Seila Law (2020) (Calabresi, McConnell, Prakash, Ramsey, Rappaport, Wurman).

[270] Blackstone examples include "principal secretaries," a smaller subset of cabinet officers, such as the two Secretaries of State.

[271] Jacob at 249, 260-61.

Framers had side-conversations or understandings about a presidential removal in the First Congress. Admittedly, there is no evidence yet of anyone in the Convention or Ratification debates citing the sale of office or office-as-property as an argument against removal at will, but this is unsurprising given that the Convention and Ratification debates did not put presidential removal on the table. When presidential removal was the topic in the First Congress during the ostensible Decision of 1789, many members – including Madison himself -- described aspects of such a system of offices-as-property, such as the writ system to establish or contest "good cause" or other judicial process as a check against removing one's property.

Few members of the First Congress even mentioned removal "at will" or "at pleasure" that there was little need to refute a marginal viewpoint. The one proposal similar to presidential removal at pleasure (a proposed mixed executive council from Gouverneur Morris and Charles Pinckney in late August 1787) was ignored without debate.[272] At the same time, the Declaration of Independence hinted at the problem of royal sinecures, and some early states addressed these problems, but the federal Convention draft and debates did not. Silence is a problem more for the unitary argument than the office-as-protected-property counterargument.

If the "executive vesting" clause signaled a capacious bundle of powers, one would have expected the Anti-Federalists – who often warned about an excessively powerful president -- to have identified this specific concern in the Ratification Convention records and in their voluminous writings. In a forthcoming article, Jonathan Gienapp shows that the Anti-Federalists were generally silent about such a possibility.[273] He quotes Patrick Henry about the Constitution "squint[ing] towards monarchy," and other Anti-Federalists warning of royal power and creating a king. And yet they did not point to the Executive Vesting Clause as the source of their concern. Instead, they focused on the enumerated powers of appointment, pardon, veto, and the commander-in-chief. To his credit, McConnell also acknowledges silence around this topic, and concedes that it is surprising. finds this silence surprising.[274]

One of Gienapp's most striking moments is from the North Carolina ratifying convention. As the delegates proceeded through the Constitution clause by clause, they arrived at Article II's vesting clause, and it was met with silence. William Davie, a Federalist, pressed the opposition for their concerns, remarked that the anti-Federalists had offered "the most virulent invectives, the most opprobrious epithets" about the Constitution and the presidency, but as they debated Article II "executive power," he was surprised by their "silence."[275] Gienapp observes that Davie "was quite right that Anti-Federalists had found much to complain about in Article II. They had not hidden their worries that the President was going to be too powerful—dangerously powerful—so much so that the nation's future

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[272] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 335-36, 342-43 (Max Farrand ed., 1911) (August 20, 1787) [hereinafter 2 Farrand]. See Vesting, Indecisions of 1789, and Removal of Context.

[273] Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, AM. J. LEGAL HIST. (forthcoming 2023). Jonathan Gienapp summarized four key points on removal: 1) the 1789 debate was a "surprise and unexpected; 2) the debate was treated as if it were "covering new ground" and no hint of any "prior discussions" 3) to the contrary, some announced that they had changed their minds (Madison and Hamilton); 4) and reiterating my points, there was no majority for presidentialism. He also added that the Anti-Federalists in 1787-88 offered many examples for their concerns that the president would become a monarch, but they focused on the enumerated presidential powers, not powers they inferred.

[274] MCCONNELL, PRESIDENT WHO WOULD NOT BE KING, 87-88, 92.

[275] Gienapp, *Removal* (forthcoming).

was monarchy. But those fears had nothing to do with the vesting of 'executive power.'" When the North Carolina convention focused on the "executive power" clause, Gienapp finds that the Anti-Federalists' silence speaks volumes: "Still steeped in the eighteenth-century debate over executive power and mixed constitutionalism, that feature of the Constitution raised no special concerns."[276]

Similarly, my search of the *Documentary History of the Ratification of the Constitution* found many references to "displace," but almost always in reference to the voters displacing elected officials, and not a single use that indicated a unilateral power of a president or another superior officer to remove lower officers.[277] Sometimes displacement was a synonym for impeachment and conviction.[278] One passage referred to a general principle of "displacing" but only in reference to state governments with respect to displacing the Articles of Confederation government.[279] And of course, there was Hamilton's *Federalist No. 77*, using the word "displace" as an argument for the necessity of the Senate to consent to a removal: "It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint."[280]

I also dug into Herbert Storing's six-volume *The Complete Anti-Federalist* to find passages warning of presidential powers and to see if any Anti-Federalist raised concerns about implied removal powers. Out of roughly thirty essays, speeches, or letters on the presidency from the Constitution's chief critics, only one, Luther Martin's long "Genuine Information Delivered to the Legislature of the State of Maryland," first printed in Maryland papers on Dec. 28, 1787, ambiguously hinted at a removal power, but not a general power over civil officers, but rather, implied from the Commander-in-Chief clause limited to military officers.

After raising concerns about the commander-in-chief clause and the pardon clause as dangerous "regal authority," he then criticized the president's control over the appointment to install his family and friends for a full paragraph. Martin returned to the topic of the military, adding this single sentence: "That the army and navy, which may be encreased without restraint as to numbers, the officers of which, from the highest to the lowest, are all to be appointed by him, and *dependent on his will and pleasure*, and commanded by him in person, will of course be subservient to his wishes, and ready to execute his commands…"[281] Apparently Martin was referring to the Commander-in-Chief clause as the source of a power to command "on his will and pleasure," language echoing a removal power.[282] Martin did not

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[276] *Id.*

[277] *Federalist No. 47* (Madison); George Mason, Ratification by the States, Volume X: Virginia, No. 3, p. 1365; *The Documentary History of the Ratification of the Constitution Digital Edition,* ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009. Canonic URL: https://rotunda-upress-virginia-edu.i.ezproxy.nypl.org/founders/RNCN-02-10-02-0002-0006-0001 [accessed 22 Jul 2022].

[278] Ratification by the States, Volume VIII: Virginia, No. 1; *DHRC Digital Edition,* Canonic URL: https://rotunda-upress-virginia-edu.i.ezproxy.nypl.org/founders/RNCN-02-08-03-0001 [accessed 22 Jul 2022].

[279] Ratification by the States, Volume XX: New York, No. 2; *DHRC Digital Edition,* Canonic URL: https://rotunda-upress-virginia-edu.i.ezproxy.nypl.org/founders/RNCN-02-20-02-0004-0119 [accessed 22 Jul 2022].

[280] *The Federalist No. 77* (Hamilton).

[281] Luther Martin, "Genuine Information Delivered to the Legislature of the State of Maryland," Dec. 28, 1787, in 2 HERBERT STORING, THE COMPETE ANTI-FEDERALIST 19, at 67-68 (2.4.85-86).

[282] This is evidence against Bamzai and Prakash's assertions about the meaning of the Commander-in-Chief clause. Bamzai Prakash at 1825.

use that language or anything like it about the president's power over non-military officers, even though most of the paragraph was about the appointment of civil officers.

Martin seemed to think that the only powers worth discussing were the specific enumerated powers, and it seems likely that he did not think "executive power" implied other powers, nor did he think that Article II implied a removal power beyond military officers. After focusing on the enumerated powers from the pardon, appointment, and commander-in-chief clauses, he warned that "these circumstances combined together will enable him, when he pleases, to become a *King in name*, as well as in *substance*." (emphasis in the original). Martin was not shy about warning of royalism. In a passage focusing on the president's power over civil and military officers, he conspicuously specified a removal power only over the military officers, and only after citing the Commander in Chief Clause. If Luther Martin thought Article II gave the president a general removal power over civil officers, he surely would have said so. This is a significant dog not barking.

Other Anti-Federalists (Cato and "A Farmer") warned that the Executive Vesting Clause was vague, but they did not suggest that the vagueness may have implied a removal power – or could be mistakenly inferred to include a removal power.[283]

I have not read the entire six-volume series page-for-page, but I have read all of the passages identified in the index about presidential or executive power. I cannot find any other passage in *The Complete Anti-Federalist* indicating an implied removal power over civil officers. I have also searched the digital online Documentary History of Ratification of the Constitution, and again, there are no suggestions of an implied presidential removal power, either from those who may have wanted more presidential power or from those who wanted to warn against all kinds of presidential powers – even as an exaggerated danger.

C. Early State Constitutions

Taking a step back in time from the Ratification debates and the Anti-Federalist writings and speeches (and the Federalist Papers' rejection of presidential removal), but with an understanding of that they were silent about presidential removal, the early state constitutions make even more sense.

An appendix at the end of this Article offers a series of examples from seven early state constitutions giving traditionally executive offices tenure during "good behaviour" or other protections against removal (underlined in a separate appendix). Attorneys general received such protected tenure in: Virginia,[284] Maryland,[285] Delaware,[286] North Carolina,[287] and an unratified version of the South Carolina constitution.[288] The state secretary was also protected by Virginia and Delaware, and other examples include sheriffs, registers of land and wills, and clerks.[289] Some state constitutions specified tenure "during pleasure" in only narrow categories, implicitly allowing the legislature to create more protections for other offices.

"Justices of the peace" are sometimes designated as "during pleasure," sometimes for

[283] Cato, "IV. To the Citizens of New York," 2 STORING 113-14 (2.6.25); "A Farmer," "II. 29 February 1788," 5 STORING 21-22 (5.1.31).
[284] Virginia Constitution of 1776, Art. III, S.1
[285] Maryland Constitution of 1776, Art. XL, XLVIII
[286] Delaware Constitution of 1776, Art. 12. See also Art. 16 ("the president may appoint, during pleasure, until otherwise directed by the legislature, all necessary civil officers not hereinbefore mentioned").
[287] North Carolina Constitution of 1776, Art. XIII.
[288] South Carolina Draft Constitution of 1776, Art. XIX, XXII
[289] Virginia Constitution of 1776, Art. III, S.1; Delaware Constitution of 1776, Art. 12

a limited term of years during good behavior (i.e., tenure protected),[290] and once (Vermont) for "good behavior" for an unlimited term (along with judges, "removable by the General Assembly upon proof of mal-administration").[291] Justices of the peace are understood to be a mixed executive/judicial office.[292] If one interprets justices of the peace as more judicial than executive, this conclusion would undercut Scalia's claim in his *Morrison v. Olson* dissent that "Governmental investigation and prosecution of crimes is a quintessentially executive function."[293] Justices of the peace regularly investigated and prosecuted. And if one interprets justices of the peace as more executive, then *Marbury v. Madison* is even more clearly evidence that Congress could make executive offices unremovable (because Chief Justice Marshall concluded that Marbury was not removable). If they were indeed mixed, then their mixed role from the state constitutions through early federal legislation is significant evidence against the unitary theory and the formal separation of powers.

D. The First Congress and the Early Republic

Unitary theorists might respond that silence is also a problem for this Article's thesis. It is true that the Convention did not discuss "property in office," but the simple answer for the Convention is that there was no debate about removal, and thus no occasion for opponents to give such reasons. However, the First Congress had a lengthy and vigorous debate about Article II. The First Congress's removal debates referred to "property in office, its relation to the purchase of office, and the writ system as protection of that property. Its statutes reflected the law of freehold property and converted the purchase system into a more republican system: officers had to provide financial "sureties" as bonds of faithful execution. Past articles have explained in detail, and a forthcoming article and book will explain further. The main points are summarized here.

First, during the "Decision of 1789" debate, arguments against presidential removal included references to "property in offices" protected from removal,[294] to the English writ system (*mandamus* and *scire facias*) as legal processes for officeholders as plaintiffs to defend their property,[295] or as a due-process requirement in order for superiors to go to court to remove protected officers.[296] A defender of presidential removal associated the doctrine with "purchase" of office and the English Crown, rejecting them as un-republican.[297] Unlike Bamzai and Prakash's reliance on Rep. Jackson, proponents on one side of a debate actually referred to English traditions, and opponents were not exaggerating for anti-royalist effect.

Second, the First Congress and early Congresses supplemented this writ tradition with a series of clauses providing a judicial process for removals, consistent with the

[290] Delaware Constitution of 1776, Art. 12

[291] Vermont Constitution of 1777, Art. XXVII.

[292] SCOTT INGRAM, CONSTITUTIONAL INQUISITORS, 23-26, and notes 29-31 (forthcoming 2023); JOHN LANGBEIN, ORIGINS OF THE ADVERSARIAL CRIMINAL TRIAL; STEINBERG, TRANSFORMATION OF CRIMINAL JUSTICE 39-41. Mark Goldie, *The Unacknowledged Republic: Officeholding in Early Modern England*, in THE POLITICS OF THE EXCLUDED, C. 1500-1850, (Tim Harris, ed.,) at 159-60; Spindel, "Administration of Criminal Justice," 144-45,

[293] Morrison v. Olson, 487 U.S. at 706 (Scalia, J., dissenting),

[294] 11 DHFFC 862, 1 Annals 476; 11 DHFFC 876-77, 1 Annals 489-90 (June 16) (Smith); 11 DHFFC 936, 1 Annals 530 ("property in his office"); see also 11 DHFFC 882; 1 Annals 495 (Ames acknowledging Smith's property argument); Alternate edition: 1 Annals of Congress 458.

[295] Indecisions of 1789, at 822-24, 847-49; 11 DHFFC 864, 866

[296] Indecisions of 1789, at 822-24.

[297] 1 Annals 499 (Hartley attributing the doctrine to English practice and opposing it in a republic).

protection of "property in offices."[298] The 1789 Treasury Act is one example of many statutes including provisions for civil removal for cause ("high misdemeanors" and the like) by judges and juries,[299] similar to bringing a writ to challenge an English officeholder's property right. Immediately before Madison proposed his independent Comptroller, Aedanus Burke of South Carolina offered an anti-corruption mechanism for prosecutors and judges to remove principal Treasury officers:

> [I]f any person shall offend against any of the prohibitions of this Act, he shall be deemed guilty of a high misdemeanor, and forfeit to the United States the penalty of three thousand dollars, and shall upon conviction be removed from Office, and forever thereafter incapable of holding any office under the United States. [300]

This act's prohibitions generally covered conflicts of interest and ethics rules, more than traditional criminal questions of bribery. Burke explained that this clause was "to prevent any of the persons appointed to execute the offices created by this bill, from being directly or indirectly concerned in commerce, or in speculating in the public funds under a high penalty, and being deemed guilty of a high crime or misdemeanor."[301] Madison appears to be describing this clause to Jefferson: "The business will be so arranged as to make the comptroller and the other officers checks on the Head of the Department."[302] This structure of accountability was not vertical, but horizontal – and judicial.

The first Congress passed a total of six clauses establishing removal by the judiciary: two for the Treasury department, three for customs and duties, and one for bribery.[303] Following the English law of offices, these statutes mirrored English writs to remove an officer (such as *mandamus*, *quo warranto*, and *scire facias*). The penalties were less like criminal fines, but more like the traditional financial penalties in the law of offices in the form of losing sureties and financial bonds. "High misdemeanor," the phrase used most often in these removal statutes, includes abuses of office, and not necessarily statutory crimes.

Congress in the 1790s added eight more removal-by-judiciary provisions on top of the six other clauses passed in the first Congress. Some of these clauses were in the most famous and salient statutes in the traditionally executive domains of foreign policy, war, peace, and immigration: the Neutrality Acts,[304] the Sedition Act of 1798,[305] the Logan Act of 1799,[306] and in the next decade, the Embargo Acts.[307] Congress extended removal-by-

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298 See Amicus Curiae In Support of the Court-Appointed Amicus Curiae at 21-24, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422) (long list of statutory clauses); Chabot, *Interring the Unitary Executive Theory*, at 176-84.

299 An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67; "Indecisions of 1789" at 850.

300 An Act to Establish a Treasury Department (Act of Sept. 2, 1789), ch. 12, § 8, 1 Stat. 65, 67 (emphasis added).

301 11 DHFFC 1080 (June 29, 1789).

302 Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 12 *Papers of James Madison*, at 271 (Charles Hobson and Robert Rutland, eds., 1979).

303 Act of July 31, 1789, § 12, 1 Stat. 29, 39; *id.* § 35, at 46; Act of April 30, 1790, § 21, 1 Stat. 112, 117; Act of March 3, 1791, § 49, 1 Stat. 199, 210; Act of March 3, 1791, § 1, 1 Stat. 215.

304 Neutrality Act, 1 Stat. 381 (1794)

305 Sec. 1, 1 Stat. 596, 596 (1798).

306 1 Stat. 613 (1799).

307 Embargo Act of Jan. 9, 1809, § 1, 2 Stat. 506

judiciary in at least 15 other statutes before 1820,[308] and more thereafter.[309] Congress, in other words, was empowering relatively independent prosecutors and judges to remove executive officials for ethics rules and misbehavior in office, even without the support of the President, even against the President's wishes, and without a felony conviction or the context of prison. This is further evidence that the first Congress and the following Congresses for decades rejected the notion that the President has exclusive removal power. The need for these clauses suggests that removal at pleasure was no accepted default rule. civil removal by the judiciary – which would either indicate that Congress thought that either: 1) many executive offices would be protected property interests against removal-at-will by anyone, and presidential "pleasure" would *not be sufficient*, so a civil process for removal would be needed; and/or 2) presidential removal was *not a necessary condition*, so that if a president was unwilling, unable, or unaware to remove a corrupt officer, other officers (prosecutors, judges, grand juries, and trial juries) could act independently of the president to remove such an officer.

"Offense" and "conviction" are criminal terms, but no prison is mentioned, and the penalty may be related to the surety or bond that officers had to put up for their office. Thus, removal is not clearly a criminal penalty, and certainly not an inevitable result of prison (again, prison was not an option under this clause).

The text suggests either that presidents needed cause to remove (in which case a president's mere will was *not sufficient*) or (more likely) an anti-presidential removal (in which case a president's mere will *was not necessary*). Burke's proposal, Madison's letter, and general use of this language before and after 1789 suggest the latter, making removal easier. The former, making removal more difficult, may have been the understanding of the members of Congress who were skeptical of presidential removal and supported "good cause" protections – and thus wanted to require a judicial process to show cause for removing Treasury officials. This interpretation would be consistent with Representative Page's successful motion to delete "at pleasure" from the Treasury Act.

One might wonder if these clauses were civil removal provisions like writs (and thus, part of property protections) or if they could be reconciled with the unitary executive as extensions of Congress's power to define offices to disqualify officers for crimes. First, the statutes commonly used the terminology "deemed guilty of a high misdemeanor" or "adjudged guilty of a high misdemeanor." As we have been reminded all too recently during impeachments, "*high* crimes and misdemeanors" are not necessarily crimes, but are flexible, including political abuses, corruption, violations of the fiduciary duties of office. The tradition of removal from propertied office from England required cause, notice, and hearing, and these statutes functioned similarly. Some of the triggers for removal were not criminal: The

[308] Act of May 8, 1794, ch. 23, § 11, 1 Stat. 354, 359; Act of June 5, 1794, ch. 49, § 14, 1 Stat. 378, 380; Act of Feb. 23, 1795, ch. 27, § 2, 1 Stat. 419; Act of Apr. 18, 1796, ch. 13, § 3, 1 Stat. 452, 453; Act of April 21, 1806, Ch. 49, § 3, 2 Stat. 404, 405; Act of Apr. 21, 1806, ch. 48, § 6, 2 Stat. 402, 403; An Act to Prohibit the Importation of Slaves, ch. 22, §§ 5, 7, 2 Stat. 426 (1807); Embargo Act of Jan. 9, 1809, § 1, 2 Stat. 506; Embargo Act of Dec. 17, 1813, 3 Stat. 88; Act of Apr. 20, 1818, § 4, 3 Stat. 447, 448; Act of April 25, 1812, § 10, 2 Stat. 716, 717; Act of Dec. 18, 1812, 2 Stat. 788.

[309] Act of May 7, 1822, ch. 107, § 17, 3 Stat. 693, 696; Act of July 4, 1836, ch. 352, § 14, 5 Stat. 112; Act of July 17, 1854, ch. 84, § 6, 10 Stat. 306; Act of June 11, 1864, ch. 119, 13 Stat. 123; Act of Mar. 3, 1869, ch. 125, § 3, 15 Stat. 321; Act of June 20, 1864, ch. 136, § 2, 13 Stat. 137, 139; Act of Feb. 12, 1873, ch. 131, § 1, 17 Stat. 424.

two Treasury statutes and the 1791 Spirits Act had no imprisonment provision, just an apparently civil bond/cash forfeiture provision.[310]

Third, the First Congress and early Congress did not revive sale of office, but it frequently required "sureties," an updated version of financial investments in office. Sureties of office as deposits on faithful performance date back to England in the sixteenth century,[311] they were part of American colonial administration,[312] and they continue today in many states. Like the sale of office, sureties also used wealth as a loose sorting function for ability and as an incentive/disincentive system. The First Congress required sureties for many offices: many Treasury offices, many offices created by the Judiciary Act, for custom collectors, naval officers, surveyors, and debt commissioners.[313]

In its first session, the First Congress enacted six statutory clauses for sureties of offices, mostly in Treasury, the Judiciary Act, and for customs. The First Congress included sureties for the Treasurer in the Treasury Act, one of the three department bills of the ostensible "Decision of 1789": The Treasurer shall "give bond, with sufficient sureties… in the sum of one hundred and fifty thousand dollars, payable to the United States, with condition for the faithful performance of the duties of his office, and for the fidelity of the persons to be by him employed which bond shall be lodged in the office of the Comptroller of the Treasury of the United States."[314]

In the Judiciary Act of 1789, Congress required clerks to "give bond, with sufficient sureties… in the sum of two thousand dollars, [to] faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."[315] The same statute required sureties for marshals, but they were removable at pleasure.[316] The Tonnage Act of 1790 also mandated sureties for many officers who held offices of profit: "That every collector, naval officer and surveyor… shall give bond with one or more sufficient sureties, to be approved of by the comptroller of the treasury of the United States, and payable to the said United States, conditioned for the true and faithful discharge of the duties of his office according to law…"[317] The First Congress required commissioners under the Public Debt Act of 1790 to provide sureties and "faithful execution of their trust," and large financial penalties for "their good behavior."[318] The second and third sessions enacted a several more clauses for duty-collectors, customs, officers engaged in trade with Native American tribes, and again in Treasury. Through the 1790s, Congress passed

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[310] A small number of clauses added forfeiture of office on top of prison but prison was less common a connection. See Sec. 39. "And be it further enacted, That if any supervisor or other officer of inspection, in any criminal prosecution against him, shall be convicted of oppression or extortion in the execution of his office, shall be fined not exceeding five hundred dollars, or imprisoned not ex- ceeding six months, or both, at the discretion of the court; and shall also forfeit his office."

[311] *Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency,* 81 A.L.R. 10 (1932); Sarah L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323; Arlington v. Merricke (1672) 2 Wms' Saund. 403, 411, 85 Eng. Reprint, 1215, 1221.

[312] Petition of Parr (Phila. Cty. Pa. Quarter Sess. Ct. Sept. 1767) (Philadelphia City Archives and digital photographs on file with authors); see WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735–1776, at 70 (2018); *Faithful Execution and Article II,* 132 HARV. L. REV. at 2171.

[313] Act of Sept. 2, 1789, ch. 12, § 4, 1 Stat. 65, 66 (1789). Judiciary Act, ch. 20, § 7, 1 Stat. 73, 76 (1789) Judiciary Act of 1789, Sec. 27. Act of Aug. 4, 1790, ch. 35, § 25, 1 Stat. 145, 171 (1790) Act of Aug. 4, 1790, ch. 34, § 12, 1 Stat. 138, 142 (1790).

[314] Act of Sept. 2, 1789, ch. 12, § 4, 1 Stat. 65, 66 (1789).

[315] Judiciary Act, ch. 20, § 7, 1 Stat. 73, 76 (1789)

[316] Judiciary Act of 1789, Sec. 27.

[317] Act of Aug. 4, 1790, ch. 35, § 25, 1 Stat. 145, 171 (1790)

[318] Act of Aug. 4, 1790, ch. 34, § 12, 1 Stat. 138, 142 (1790)

almost fifty more clauses establishing surety requirements. The practice indicates that sureties would be lost in cases of unfaithful performance, *i.e.,* only for cause.[319] This practice was an updating of the purchase of office as a protected investment.

Fourth, from the First Congress to *Marbury*, a "term of years" implied limits on removal. Madison's Comptroller proposal used a limited term of years as a means of independence, and he was widely understood in the debate to be proposing a protection from removal.[320] Bamzai and Prakash's reply on *Marbury* actually confirms the original public meaning of "a term of years," because there was no other statutory signal that explains what they concede: that the Marshall Court found the office unremovable.[321] Bamzai and Prakash offer three different answers to explain why Marbury does not contradict the unitary theory, based on three different (and apparently contradictory) interpretations of the status of Marbury's Justice of the Peace office. Those conflicting interpretations by themselves are evidence that there was no consensus about removal. But these interpretations actually contradict their own argument.

> Alternative #1: Marbury and the Justices of the Peace were actually removable, because Jefferson said they were and tried to remove them.[322]

One problem is that Jefferson was obviously a biased political actor looking for a politically expedient solution. A bigger problem is that, even with obvious motives to moot the case, he and his administration opted not to offer a mootness argument. Representing the Jefferson administration before the Supreme Court, Levi Lincoln referred to Jefferson's attempt to "supersede" the JPs, but this is actually counter-evidence: Lincoln obliquely and briefly summarized the facts, merely mentioning the attempt, yet he was not willing to argue that these were "removals" that mooted this case.[323] It seems Lincoln knew this argument was not even worth making.

> Alternative #2: JPs were territorial, not Article II officers, which would explain why Congress had more discretion to protect their tenure of office.[324]

This alternative would explain how Congress could have made the office unremovable without contradicting the unitary theory. However, this alternative would only explain why the office *could* have been unremovable; if it had been territorial, Congress also could have made them removable at pleasure. Nothing else in the statute would have signaled unremovability of a territorial office except the limited term of years. This alternative concedes the main point: the widely understood meaning of a "limited term of years" as unremovable, consistent with the "freehold property" thesis in this Article. When Congress created an office for "a limited term of years," regardless of the kind of office, and it was silent about a removal power, it was understood as unremovable. Thus, the "backdrop"

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[319] See Shugerman, Amicus Brief in *Collins v. Yellin*, at 25-28, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725105

[320] *Indecisions of 1789* at 824-34; Manners and Menand, *Three Permissions*, 21-22. *Marbury Problem and Madison Solutions*

[321] Bamzai and Prakash, 136 HARV. L. REV. at 1802-14.

[322] Bamzai and Prakash at 1805-09

[323] See Marbury, 5 U.S. at 145.

[324] Bamzai Prakash at 1811, 1812 and n.404. Thereafter, they rely on cases from the 1850s and 1897 for an extended four-page rebuttal to the "term of years" thesis, which suggests that their argument has to stray far past the Founding and original public meaning. Id. at 1814-17.

default rule was the opposite of what Bamzai and Prakash claimed.

Alternative #3: "[J]ustices of the peace were Article III judges."[325]

Bamzai and Prakash cite a brief D.C. Circuit opinion, *U.S. v. More*,[326] on a different question for this conclusion – a panel that divided on it, 2-1. The Marshall Court did not adopt this Article III explanation for Marbury's unremovability, and for good reason. First, a five-year term counter-indicated an Article III interpretation. If a JP was an "Article III" judge, how could Congress limit the JPs to five-year terms, and not life tenure during good behavior, as Article III requires? If Article III judicial officers can serve during "good behavior" but only for five years, it is remarkable that during the judicial term-limits debate over the past decade that such originalists did not indicate that such short judicial term limits were constitutional.

A second problem for the unitary theory, as discussed above: Justices of the Peace had a mixed role of investigation, prosecution, and adjudication for centuries.[327] If a JP was an "Article III judgeship," then Scalia in his *Morrison* dissent and Thomas in the *Polansky* concurrence are wrong about Article II exclusivity over prosecution and standing. If JPs were Article III judges, then this interpretation would actually contradict both the unitary theory's assumptions about prosecutorial power and originalists' interpretation of Article III and judicial independence.

Conclusion

In his classic book *The Imperial Presidency*, in the late stages of Vietnam but before the 1972 DNC break-in had become full-blown "Watergate," Arthur Schlesinger raised concerns about how the modern presidency had become so much more powerful than the Framers could have imagined or intended. He led with an introductory paragraph of Chapter 1, "What the Founders Intended" on some of the dangers of relying too much on original intent, reading too much into history, and reading too much formalism into the Constitution. In a scattered paragraph, seemingly the anxiety of a New Dealer ambivalent about his twentieth century, he quoted Chief Justice Marshall from *McCollough*, of course, as well as Woodrow Wilson, previewing living constitutionalism or common law constitutionalism by embracing Darwin and evolution of the Constitution as "a vehicle of life."[328] But then he quoted a historian of English kings and parliaments:

> "No single fault has been the source of so much bad history," C.H. McIlwaine reminds us, "as the reading back of later and sharper distinctions into earlier periods where they have no place."[329]

The American presidency was Schlesinger's example then, and it is again today. We have read back onto Article II our later and sharper distinction of modern presidential control, which was made possible by revolutions in politics, communication, transportation, information, and bureaucracy.

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[325] Bamzai Prakash at 1810-14.
[326] *U.S. v. More, recorded at 7 U.S. 161 (1805).*
[327] Ingram, Langbein, Steinfeld, Goldie. See supra.
[328] ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1.
[329] Id.

It seems to be a self-evident truth that kings and queens must have removed executive officers at will. It turns out that history is far more complicated. Without modern technology, centralized executive power in the early modern world could not build a modern state or monitor officers, so it had to find other models of decentralized incentives: one was patronage and removable offices; the other was venality – offices-for-profit, offices-for-sale, offices as unremovable property. The institution of venality and unremovable offices made so much sense to this era that Montesquieu, arguably the most influential figure on the Convention and the U.S. Constitution's basic structure of separation of powers, described executive removal as a feature of *despotism*, and held up offices-as-salable-property as a model for a balanced (constitutional) monarchy and the rule of law. The legal treatises on the colonial bookshelves, especially Blackstone, are consistent with this account. Their experiences with colonial government and with the British military are consistent with that account. And silence in the Constitution on removal but its triple reference to "offices of profit" is consistent with that account, as well as the rejections of presidential removal in the Convention proceedings, in Madison's *Federalist No. 39*, in Hamilton's *Federalist No. 77*, the silence in the Ratification Debates and the Anti-Federalists' writings (where one would most expect these warnings, even if stretches), and in the indecisions of 1789.

The bottom line is that the unitarians' assumption that "executive power" implied removal, either from European tradition or American original public meaning, is wrong. The Crown could not remove many significant executive officers, even some that wielded the most important powers in eighteenth-century England, and even some members of the King's cabinet. The many examples from earlier scholars already raised sufficient questions about those assumptions, but if those examples were not persuasive, the pervasive system of venality in Europe, England, and the colonies should remove these assumptions from the removal debate.

Some readers of this research ask whether it "proves too much," and cuts too far in the opposite direction. Surely Congress could not revive the sale of office, give the Defense Secretary life-tenure, make the Treasury Secretary an inheritable office. This Article's goal is not to offer a new "rule" from original public meaning (e.g., a rule of plenary congressional power over tenure under Article I). The goal is to refute the unitary theorists' claims of an indefeasible presidential removal power under Article II. This history counsels, first and foremost, for judicial restraint, to leave long-standing precedents like *Humphrey's Executor* in place, and to interpret *Myers* narrowly. The Supreme Court Justices have recently explained that when the original public meaning is unclear or contested, then it should leave its precedents in place.[330] Even if the Taft Court made incorrect historical claims in *Myers*, it is arguably sustainable as structural interpretation, common law constitutionalism, and living constitutionalism, creating a new removal rule as a response to the modern rise of the administrative state and its new regulatory powers. Reasonable people can come to different conclusions about whether the duty to "take care" leads to a presidential removal power as a matter of pragmatic enrichment, but such an interpretation is not supported by eighteenth-century sources and practices, which show removal was not necessary for execution.[331]

But the Roberts Court's creation of an "indefeasibility" removal rule was already dubious, even based on the defeasibility rule for implied powers offered by major unitary

[330] U.S. v. Gamble, 587 U.S. (2019) (Alito, J., for majority; Thomas, J., concurring).
[331] Supra Section IV.A.

scholarship.[332] It is even more unsustainable in light of this history about the pervasive independence and job security of high- and mid-level executive officials in the eighteenth century. *Jarkesy* should be an easy case to decide in favor of the ALJs' job protections. Even if one assumes that English monarchy was a model for Article II, *and* Article II would reflect the English Crown's removal power over "great officers" (i.e., cabinet ministers), such a history would be no basis for expanding presidential removal power over commissions and potentially thousands of inferior officers, such as administrative law judges. Such a rule would be based on modern political theory, not original public meaning.[333]

Perhaps with broader importance are two more general conclusions. First, this example of a pressing separation-of-powers debate illustrates some of the risks of hyper-formalism and some of the advantages of an alternative functional approach. Formalism may seem clear and simple as bright line rules, but then those bright lines become overly broad strokes, creating a mess of the law and a mess of the history. This case study of the flexible and functional law of offices suggests that "the separation of functions" framework and the "checks and balances" framework, as Peter Strauss articulated almost four decades ago,[334] are more historically grounded and prudent approaches. Functionalism could lead to similar results as the current doctrine: a balance of a removal power for paradigmatically executive offices (*Myers*) and powerful single-headed agencies (*Seila Law*) on the one side, and arguably an indefeasibility rule for many principal offices, for practical reasons; and protections for independent regulatory commissions (*Humphrey's*), special counsels (*Morrison*) and administrative law judges (reversing *Jarkesy*) on the other.

Second, this case study of removal and "executive power" assumptions is a warning about originalism in practice. Other legal scholars across the political spectrum have already observed that the Roberts Court decisions are political theory, not originalism. This Article has shown that even when the Roberts Court is attempting originalist history, its history is simply wrong. The mix of unsupported assumptions and historical errors shows that originalism in practice is just as vulnerable to confirmation bias, motivated reasoning, ideological preferences and cultural assumptions as the methods that originalists reject. The case of "the executive power of removal" suggests that originalism is no more objective or reliable than those other methods.

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332 MCCONNELL. See supra Section I.B; see also *Faithful Execution and Article II*, 132 HARV. L. REV. at 2115-16; 2189-90.

333 ADRIAN VERMEULE, COMMON LAW CONSTITUTIONALISM 101; Major Questions About Presidentialism (forthcoming).

334 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).