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Movement on Removal: An Emerging Consensus on the First Congress

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An Emerging Consensus about the First Congress and Presidential Power

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Abstract

What did the "Decision of 1789" decide about presidential removal power, if anything? It turns out that an emerging consensus of scholars agrees that First Congress reached little consensus about presidential power and Article II.

Two more questions follow: Is the "unitary executive theory" based on originalism, and if so, is originalism a reliable method of interpretation based on historical evidence?

The unitary executive theory posits that a president has exclusive and "indefeasible" executive powers (i.e., powers beyond congressional and judicial checks and balances). This panel was an opportunity for unitary executive theorists and their critics to debate recent historical research questioning the unitary theory's claims (e.g., Jonathan Gienapp's The Second Creation *and my article "The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity," since published in the* University of Pennsylvania Law Review*). Unitary theorists on the panel conceded some errors and problems with the claims of a "decision." Most pivoted away from the traditional account that, based on the legislative debates, a majority of the First Congress endorsed an interpretation that Article II established a presidential removal power. Instead, they shifted to emphasize statutory texts rather than legislative history (though the texts do not indicate an Article II removal power); that the endorsement of even a minority faction of roughly 30% of the House was still substantial; that it was the quality of the argument, not the quantity of supporters (though the "quality" is in the eye and the ideological priors of the beholder, and though it is unclear how original public meaning could be established by a defeated minority position); or perhaps it is the quality or historical importance of the speakers, like Washington, Hamilton, Madison, and Marshall, that counts (nevermind that Madison, Hamilton, and Marshall also contradicted the unitary theory). None of these pivots rescues the "Decision" myth.*

Perhaps most interesting was the unitary theorists' openness to turning to later evidence, of practices and debates further and further away from the Founding and Ratification. To their credit, they demonstrated a willingness to leave behind standard originalist methods of "original public meaning" during Ratification, and to engage in methods more consistent with common law constitutionalism and living constitutionalism. The challenge is whether they will acknowledge that they have to choose between originalism and the unitary theory.

† Professor, Boston University School of Law. Professor of Law, Boston University School of Law. I thank my fellow co-organizers of the "Histories of Presidential Power" Conference at the Constitutional Law Center at Stanford Law School, Michael McConnell and Morgan Weiland; my co-panelists Aditya Bamzai, Gerhardt Casper, Jonathan Gienapp, Jenn Mascott, Mike Ramsey, and Ilan Wurman; and to Andrea Scoseria Katz, Gary Lawson, Gillian Metzger, John Mikhail, Julian Mortenson, and Noah Rosenblum. My special gratitude to Ethan Leib and Andrew Kent, two thirds of the "faithful trio," and to Yvonne Pitts for editing this symposium issue. My indefeasible and unconditional thanks to Danya Handelsman.

Movement on Removal:

An Emerging Consensus about the First Congress and Presidential Power

The Supreme Court and unitary executive theorists have relied heavily on a debate during the First Congress, known as "the Decision of 1789." ostensibly as a decision that Article II of the Constitution implied a presidential power of removal over significant executive officers. The "unitary executive theory" on removal had been in exile since the New Deal, but Justice Scalia, the Roberts Court and conservative originalist scholars revived it. The theory posits that a president has exclusive and "indefeasible" executive powers (i.e., powers beyond congressional and judicial checks and balances).

Recent scholarship has presented a mountain of new evidence, asking, in effect: What did the First Congress actually decide, if anything? Two more questions follow: Is the "unitary executive theory" based on originalism, and if so, is originalism a reliable method of interpretation based on historical evidence?

It turns out that an emerging consensus of scholars across the ideological spectrum now agrees that the First Congress reflected little consensus about the meaning of Article II and presidential removal – that the "decision of 1789" was much less decisive than unitary scholars have claimed.

The panel was not only about a specific constitutional question and the minutiae of legislative debate in June of 1789. The panel was about originalism as a reliable and consistent historical method: how to write a "useable past" that reflects empirics about what constitutes "public meaning," interpretation grounded in the evidence, and not as susceptible to confirmation bias and selection bias. Is originalism responsive to new

evidence, and can it acknowledge conflict, contradictions, ambiguity, dissensus, and multiple public meanings?

This conference met in May 2022, soon after the Roberts Court had decided *Seila Law v. CFPB*[1] and *Collins v. Yellin*[2] in favor of broad indefeasibility powers over single-headed agencies with significant executive power, and roughly around the time that lower courts were expanding those decisions, setting up a new round of Supreme Court cases.[3] For this panel, I circulated a paper "The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity," since published in the *University of Pennsylvania Law Review.*[4] That article provides a more detailed explanation of the ostensible "decision," why it is a myth, and how insiders spun it into a myth. A concise summary of unitary myth about the "Decision of 1789" is that, when Congress created the first executive departments (Foreign Affairs, War, and Treasury), it adopted language that signaled a pre-existing presidential removal power, rather than a grant of removal power, in order to reflect an understanding that the Constitution was the source of this power, rather than Congress.[5] The unitary theorists acknowledge that there were four different camps: 1) a few who believed that impeachment was the only means of removal; 2) a "senatorial" camp who argued from a tradition of parallelism that an officer would be removed the way one was appointed (and because the Senate confirms appointments, the Senate must also share a power to confirm firings); 3) a "congressionalist" camp that contended the Constitution left this question open for Congress to decide case-by-case on policy grounds; and 4) a "presidentialist" camp that claimed the Constitution had already set a presidential removal power.

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[1] *Seila Law* v. CFPB, 140 S.Ct. 2183 (2020)
[2] Collins v. Yellen, 141 S. Ct. 1761 (2021)
[3] Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022);. SEC v. Cochran & Axon Enter. v. Fed. Trade Comm'n, 598 U.S. __ (2023).); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1136-37 (11th Cir. 2021)
[4] Jed H. Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity' (2023) 171 *U. Pa. L. Rev.* 753.
[5] Id. at 759-60.

According to the Roberts Court, the final language reflected the presidential position, evidence that the presidential position had prevailed, and thus "settled"[6] or "confirmed"[7] that the original understanding of Article II was a unitary executive with removal power.[8] The critique of this view is long-established: the debate was unclear, and it is not possible to discern a meaningful "decision" from such a confusing three-way split between the Article II presidentialists (the forerunner of today's unitary theorists), the Article I congressionalists (those who thought Congress had the discretion to grant – or not grant – a removal power case-by-case), and the senatorials (that Article II required Senate consent for removals).

My article "Indecisions of 1789" is the first to attempt to categorize the individual members of the House and Senate based on their speeches and letters. This count benefited by focusing on the clarifying day of debate over Madison's proposed changes, which forced the presidentialists and congressionalists to choose a side for the first time.[9] I found that only nine of the 53 members of the House who participated in the votes interpreted Article II itself to establish a presidential removal power, while roughly 23 were opposed entirely (mostly in favor of the Senate's role in advice and consent to removals); seven were explicitly congressional (Congress had legislative discretion to delegate a removal power); and fifteen others are difficult to categorize.[10] A majority of the Senate likely opposed this interpretation, too.

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[6] Free Enterprise Fund, 561 U.S. at 492. (2010).
[7] Brief for Respondent by Solicitor General, Seila Law LLC v. CFPB, https://www.supremecourt.gov/DocketPDF/19/19-7/116040/20190917144324154_19-7%20Seila%20Law.pdf.
[8] For the most sustained scholarship defending this interpretation, see Saikrishna Prakash, 'New Light on the Decision of 1789' (2006) 91 Cornell L. Rev. 1021; Aditya Bamzai & Saikrishna Prakash, 'The Executive Power of Removal' (2023) 136 *Harv. L. Rev.* 1756.
[9] Id. at 796-806.
[10] Shugerman, 'Indecisions of 1789,' (2023) 171 *U. Pa. L. Rev.* at 863-65 (Appendix I).

This entire debate is a problem for originalists in terms of contradictory methods and selection bias. Even if this account of the First Congress were correct, it would raise questions of selective methodologies and selective reliance of sources. Because the constitutional text, the Convention, the Ratification debates, and the background English sources offer so little evidence for the unitary theory, Justices and legal scholars have relied on post-Ratification debates among members of the House – which is not reliably the original public meaning of the Ratifiers, the public circa 1787-88. And because the text of the departmental bills were so vague, the unitary theorists have depended mostly upon cobbling together a claim of a majority from a selective legislative history (surprising for formalists who tend to be textualists rejecting legislative history) from a single chamber (also surprising for formalists who emphasize bicameralism), and then they otherwise rely heavily on private letters (surprising if originalism emphasizes original public meaning through public debate).

JThe core problem is not new. A century ago, in the key case *Myers v. United States,* Justice Louis Brandeis in dissent was more or less correct, and Chief Justice William Howard Taft's majority opinion was wrong: the House of Representatives and the Senate did not adopt the unitary theory of presidential removal power.[11] In fact, a majority of Congress rejected it. The "presidentialists" made up only about a third of the House, and that is why the debate was *deliberately* unclear:[12] the presidentialist faction in the First Congress knew they lacked a majority. Both Chief Justices then and now (Taft and

[11] Compare Myers v. United States [1926] 272 U.S. 52, 115 n.1(Taft, C.J.) *with* Myers v. United States [1926] 272 U.S. 52, 285 n.73, 286 n.75 (Brandeis, J., dissenting); *see also* Edward S. Corwin, *The President's Removal Power Under the Constitution* (1927) 12-23, 12 n.22; David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* (1997) 37-42; Curtis A. Bradley & Martin S. Flaherty, 'Executive Power Essentialism and Foreign Affairs' (2004) 102 *Mich. L. Rev.* 545, 662-63; Martin S. Flaherty, 'The Most Dangerous Branch,' (1996) 105 *Yale L.J.* 1725, 1810 n.446; Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (2018) 160-62.

12 Shugerman, 'Indecisions of 1789,' at 783-96.

Roberts) have relied heavily on Rep. James Madison, a central leaders and floor leader for that faction, but Madison and his pro-presidential allies had just experienced a clash with the Senate over other issues, and they had good reason to think they were going to keep having difficulty with the Senate, especially if they were about to ask the Senate to reject the senatorial theory of Article II and surrender power over executive officers and removal. My central argument is Madison and the presidentialists turned to "strategic ambiguity."

Notes from Senators confirm that the opposition had the upper hand before debates – and negotiations and alleged log-rolling – had begun. Chief Justice Taft and unitary theorists have cited Senator William Maclay's diary for the final Senate vote (because the first Senate did not keep a record of its debates),[13] but remarkably, Taft and the unitary executive theorists had overlooked Senator William Maclay's diary and other senators' notes – a problematic moment in originalists' selective approach to widely available sources. The Senators' diaries and notes confirmed that, in mid-June, just as the House was debating the Foreign Affairs department, the Senate was digging in against Madison's overall legislative agenda, and Madison likely would not have enough votes in the Senate for any explicit surrendering of the Senate's power over removals.[14]

Just before a House-Senate impasse, the House had already passed a clause explicitly establishing a presidential removal power, though that clause offered no clarity about whether this power came from Congress's policy choice or from Article II's implied executive powers. The best explanation for Madison and his allies switching from an explicit clause for presidential removal to only an ambiguous contingency clause merely hinting at such a power is that of "strategic ambiguity": When they knew they did not have

[13] Id at 763, 780 (citing Myers v. United States, 272 U.S. 52, 115 n.1 (1926); Prakash, "New Light," at 1032 n. 78; Stephen Calabresi & Christopher Yoo, 'The Unitary Executive During the First Half-Century,' (1997) 47 Case W. Reserve Law Review. 1451 at 1491 n.144.
[14] Id. at 781-83.

the votes for a clear delegation or any theory, a more ambiguous clause had a better chance to gain more votes through compromise and offering each side plausible interpretations. Madison's opponents mocked his retreat and criticized him for shifting back to such unclear language rather than forward with a "declarative act."[15] Madison's own allies acknowledged that they were trying to gain the "acquiescence of the Senate" with the new language, which would be odd if their motive was a permanent constitutionalization of the Senate's loss of power. Madison and his allies could have proposed an explanatory clause or preamble, as they had elsewhere in the First Congress.[16] After revealing a general conflict between the House and Senate emerging during the House's drafting of these clauses, Maclay's diary also described a Senate majority likely against presidential removal (under any theory) as their debate began Senate started, and he referred to log-rolling and lobbying to squeak out a 10-10 tie vote that was broken by Vice President Adams.[17] Other sources confirm that there were concerns or head-counts that a Senate majority opposed removal.[18] With a widespread understanding that the Senate would be hostile to presidential removal – and the more explicit the clause, the more hostile -- the House's presidentialists understandably shifted strategies to more ambiguity. Like Madison's House

[15] Id. at 796-802.

[16] Id. at 796-99. In my article, I quoted, for example, Maclay observing lobbying of undecided or opposed Senators: "more caballing and meeting of the [m]embers in knots this day, than I ever observed before"; a [g]eneral hunt and [b]ustle . . . it seems as if a Court party was forming." Paterson's notes also indicate that Senator Johnson made a similar remark about "caballing [s]pirit." These notes indicate that Senators -- whose views had been unknown or had been said to oppose the bill -- thereafter supported the bill. (Carrol and Paterson).327. See id. (citing The Diary of William Maclay (July 15, 1789), reprinted in 9 DOCUMENTARY HISTORY, at 113-14; Notes of William Paterson (July 16, 1789), reprinted in 9 DOCUMENTARY HISTORY, at 489.

[17] Shugerman, "Indecisions," at 803, 809-19 (citing Diary of William Maclay (July 16, 1789) (referring to Dalton, Bassett, and Paterson), reprinted in 9 DOCUMENTARY HISTORY, at 114-15; Letter from Benjamin Goodhue to Cotton Tufts (July 20, 1789), reprinted in 16 DOCUMENTARY HISTORY, at 1085 (lobbying Senator Dalton); Letter from William Smith (S.C.) to Edward Rutledge (July 5, 1789), reprinted in 16 DOCUMENTARY HISTORY, at 960 (identifying three Senators as opponents of the removal clause, who later voted for the Foreign Affairs bill: Dalton, Bassett, and Elmer).

[18] Id. at 795 (Vining on Senate's "acquiescence"); id. at 818 (citing Letter from William Smith (S.C.) to Edward Rutledge (July 5, 1789), reprinted in 16 *Documentary History of the First Federal Constitution* at 960) [hereinafter DHFFC].

opponents, the Senate opposition also mocked the bill's ambiguity as "deception," "so Quest[ionabl]e," and disingenuous, and they ridiculed the bill's supporters as "confused," even questioning their masculinity for being so evasive and lacking courage to put their hidden theory up for a vote.[19]

The defenders of the unitary "Decision of 1789" want the ambiguity both ways (and make contradictory arguments). One the one hand, when confronted with the math problem of so many "no" votes from apparent congressionalists and senatorials, unitarians have suggested that many of those "no" votes were opposition only to the clause's ambiguity and confusion, not opposition to the presidentialist interpretation of Article II.[20] On the other hand, when confronted by arguments that the clause debate was too widely confusing and ambiguous to establish a "decision" or consensus, unitarians turn around and claim that both the debate and the bill were sufficiently clear, selectively picking out evidence that contradicted their first argument.[21]

To the contrary, the ambiguity creates a problem for understanding the "yes/yes/yes" votes in favor of the Madison-Benson proposal for first, voting yes to add the more ambiguous contingency clause (a back-up plan in case of any vacancies, including a presidential removal, without formally endorsing such a power); and then voting "yes" to delete the formal establishment or endorsement of such a power. Were they voting "yes" for the presidential theory? Or were they voting "yes" for language fuzzy enough that it could keep the congressionalist and presidentialists together and then squeak through a hostile Senate? Tit could, but it could he "strategic ambiguity" explanation better fits the facts and the timeline, and it also raises doubts about whether one can assume that even

[19] Id. at 812-18.
[20] Saikrishna Prakash, 'New Light on the Decision of 1789' (2006) 91 *Cornell L. Rev.* 1021
[21] Aditya Bamzai & Saikrishna Prakash, 'The Executive Power of Removal' (2023) 136 *Harv. L. Rev.* 1756

the thirteen "yes/yes/yes" votes were all truly endorsements of the presidentialist or unitary theory or whether some were merely strategically ambiguous and pragmatic to pass a compromise.

The fact that, over the rest of the summer of 1789, the congressionalists continued to support this language in other bills, like the Treasury Bill, without renouncing or equivocating on their congressionalist views, indicates that they had accepted a compromise over ambiguity. The same compromise over strategic ambiguity was reflected in breaking an impasse over the Treasury Bill language, which had bogged down the bill for much of August 1789. The Senate refused to acquiesce on a proposal for a declaratory clause granting presidential removal explicitly, and then the various factions returned to the ambiguous compromise.[22]

Panelists were asked to address this new evidence and clarify their position on the First Congress and the "Decisions of 1789."[23] The panel was especially significant in revealing an emerging consensus that the evidence for a unitary theory of Article II from the Founding and the ostensible "Decision of 1789" is relatively weak or unreliable. The pro-unitary participants appeared to have retreated from the claim that the Foreign Affairs votes revealed or "decided" a presidentialist interpretation of Article II, and some of the unitary theorists retreated from original public meaning to more reliance on nineteenth-century practice and post-Ratification, post-1789 evidence. This argument is more

[22] Jed H. Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity,' (2003) 171 *U. Pa. L. Rev.* 753, 834-40 (Section VI.B: The Compromise of August 1789).
[23] I opened with a challenge: "I'd like to invite the members of this panel to directly acknowledge where they stand on the Decision of 1789." Gerhard Casper echoed the challenge: "The panel members should be warned, I will re-issue that invitation, to show why he's wrong." Panel 2 recording at 44:19, https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=7

consistent with "liquidation,"[24] but it appears the unitary theory is now more common law constitutionalism or even living constitutionalism than originalism.

This panel was rich with helpful and clarifying exchanges. We saw two kinds of movement: Some movement in terms of open-minded concessions about weaknesses or errors; and significant movement in terms of shifting the argument to untenable ground for originalist methods. If these exchanges are representative of the current state of unitary theory, it seems the theory does not rely much on the Foreign Affairs debates as a "Decision of 1789," but the unitary theory relies, first, on a series of assumptions about Article II and "executive power" that continue to lack historical support, and second, on developments that unfolded long after June 1789 – not the original public meaning of 1787-88, but later misunderstandings, historical evolution, and more "living constitutionalism" over the nineteenth and twentieth centuries. Part I identifies eight "cues" against the unitary executive theory, and suggests some "miscues" by the unitary theorists, indicative of the on-going evidentiary weakness of the unitary case and the faltering search for more support. I also summarize Jonathan Gienapp's four key observations about these debates. Part II highlights the concessions and open-minded balance demonstrated by both sides on this panel (the good news). Part III addresses the arguments made by the defenders of the unitary executive theory, and it finds a series of new errors and methodological inconsistencies (more living constitutionalism or illegitimate versions of originalism, rather than historical evidence of original public meaning), and a pervasive and stubborn absence of evidence from before 1789 (this is the bad news). In the end, I hopefully suggest that the conversation was two steps forward, one step back.

[24] *The Federalist* No. 37, at 182 (James Madison) (Ian Shapiro ed., 2009); William Baude, 'Constitutional Liquidation' (2019) 71 *Stan. L. Rev.* 1, 9 n.38.

I. Cues and Miscues

Here are eight cues that the Constitution did not grant a power of removal to the president, beyond the obvious problem that removal was not enumerated as a power, drawing from others' recent research[25] in addition to my own:

1) Hamilton's *Federalist* No. 77: After the Convention did not enumerate removal, both Madison and Hamilton rejected the presidential model in the *Federalist Papers*. In *Federalist* No. 77, Hamilton wrote: "The consent of [the Senate] would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices."[26] During the Foreign Affairs debate of June 1789, Hamilton clarified that he had staked out the senatorial position as Publius during the Ratification debates, but had since "changed his opinion."[27] The opposition

[25] Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (2018); Christine Kexel Chabot, 'Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies' (2020) 96 *Notre Dame L. Rev.* 1; Christine Kexel Chabot, 'Interring the Unitary Executive Theory' (2022) 98 *Notre Dame L. Rev.* 129; Jane Manners & Lev Menand, 'The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence' (2021) 121 *Colum. L. Rev.* 1; Julian Davis Mortenson, 'Article II Vests Executive Power, Not the Royal Prerogative' (2019) 119 *Colum. L. Rev.* 1169; Julian D. Mortenson, 'The Executive Power Clause' (2020) 168 *U. Pa. L. Rev.* 1269 (2020); Peter M. Shane, 'The Originalist Myth of the Unitary Executive' (2016) 19 *U. Pa. J. Const. L.* 323; Jed Handelsman Shugerman, 'Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism' (2022) 33 *Yale J. L. & Humanities* 125; Jed Handelsman Shugerman, 'Presidential Removal: The Marbury Problem and the Madison Solutions' (2021) 89 *Fordham L. Rev.* 2085; *see also* Daniel D. Birk, 'Interrogating the Historical Basis for a Unitary Executive' (2020) 73 *Stan. L. Rev.* 175.

[26] *Federalist* No. 77 (Alexander Hamilton). For an explanation that this senatorial position was Hamilton's sincere view, and not just a play to public opinion, see Forrest McDonald, *Alexander Hamilton* (1982) 125-26, 130-31; See 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).

[27] Gienapp, *Second Creation* at 154. Gienapp identified this letter from Rep. William Smith (SC) to Edward Rutledge, June 21, 1789: "In the course of my speech [on June 16 for the senatorial position], I quoted the *Federalist* as an authority on my side – the next day Benson [a leading presidentialist in the House] sent me a

suspected that Hamilton changed his view in June 1789 just as he was hoping for an appointment as Secretary of the Treasury Department that would soon be established out of these debates. For originalists, Hamilton's *Federalist Papers* position should be dispositive).

2) Madison's *Federalist* No. 39: Madison wrote that Congress had significant power to shape executive offices and removal. In, Madison discussed removal of executive offices in a remarkably pro-legislative open-ended way: "The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions."[28] The Founding era commonly used "ministerial" for principal officers, even heads of departments.[29]

3) There is almost no eighteenth-century evidence that "Executive Power" implied a removal power, and all the more so, no evidence that the consensus on tenure was during pleasure only.[30] The early state constitutions also reflect a lack of consensus about executive power and removal.[31] A forthcoming article will explain why "executive power" in England and western Europe did not include removal: the practice of "venality," the reliance on the sale of office and office-as-property to build a centralized administrative state. Consistent with this legal background, recent research shows that Americans understood that offices granted for a "limited term of years" were protected from removal,

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note across the house to this effect: that Publius {Hamilton} had informed him since the preceding day's debate, that upon more mature reflection he had changed his opinion & was now convinced that the Presidt. alone shod. have the power of removal at pleasure; He is a Candidate for the office of Secretary of Finance!" 16 *Documentary History of the First Federal Constitution* 832-33 (June 21, 1789)[hereinafter DHFFC].

[28] *Federalist* No. 39 (Madison).

[29] 5 U.S. at 138, 150.

[30] Jed Handelsman Shugerman, 'Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism,' (2022) 33 *Yale J. L. & Humanities* 125; Shugerman**,** 'Despotic Displacement and Venality: Why Article II "Executive Power" Did Not Imply Removal' (forthcoming 2023); see also Manners & Menand, 'Three Permissions'; Birk, 'Historical Basis'.

[31] Shane, 'Myth of Unitary Executive'

including Madison proposing an independent comptroller during the First Congress's Treasury department debate (a long set of exchanges often misunderstood by Chief Justice Roberts and unitary theorists).[32] Moreover, in *Marbury*, Chief Justice Marshall concluded that justices of the peace (executive officials who were not Article III judges) were not removable: "[A]s the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country."[33] Historians struggled to explain this conclusion, but Jane Manners and Lev Menand made a research breakthrough: executive offices held for "a term of years" without a specific removal provision were not removable.[34] In a follow-up article, I explained why this "term of office" rule was reflected in the understandings of the First Congress.[35]

4) Some unitary executive theorists assume from the Executive Vesting Clause ("The executive Power shall be vested in a President…") that the clause implied indefeasible powers, but research into dictionaries, legal texts, and written usage by the Framing generation shows that the word "vested" did not imply a grant of exclusive, indefeasible, unconditional power.[36]

5) The faithful execution clauses ("The president… shall take Care that the laws be faithfully executed," and the president takes an oath to "faithfully execute the office") originally imposed duties, rather than granted powers. It would be incongruous and

[32] Shugerman, 'Indecisions of 1789,' 171 *U. Pa. L. Rev.* at 824-34.
[33] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803); see also Birk, 'Historical Basis,' at 187 n.68; Manners & Menand, 'Three Permissions,' at 25.
[34] Jane Manners & Lev Menand, 'The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence' (2021) 121 *Colum. L. Rev.* 1.
[35] Shugerman, 'Presidential Removal: The Marbury Problem and the Madison Solutions,' (2021) 89 *Fordham L. Rev.* 2085.
[36] Shugerman, *'Vesting'* (2022) 74 *Stan. L. Rev.* 1479. Some formalist separation-of-powers scholars have assumed "vesting" implied strict and formal grants of power. Richard Epstein, *The Dubious Morality of Modern Administrative Law* (2020) 36.

ahistorical for "faithful execution" to impose duties but then create indefeasible, unconditional powers greater than those duties.[37])

6) In the Philadelphia Convention in early June 1787, the executive branch took shape in limited form from the Virginia Plan, and delegates established a narrow scope of executive power.[38] Madison clarified that executive powers had to be enumerated, not implied to avoid "the Evils of elective Monarchies."[39] Other supporters of a strong executive agreed. James Wilson, credited as one of the key architects of the "unitary executive," said he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."[40] 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, and appointing officers, not appertaining to and appointed by the Legislature."[41]

7) On August 20, 1787, two delegates for a moment raised the removal question before it was buried. On the same day that Madison voted in favor of Mason's anti-unitary executive council, Gouverneur Morris proposed a "Council of State," an executive council of six department who would serve "during pleasure."[42] Charles Pinckney seconded it. The

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[37] Kent, Leib, and Shugerman, 'Faithful Execution and Article II' (2019) 132 *Harv. L. Rev.* 2111; Leib & Shugerman, Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation, (2019) 17 *Geo. J.L. & Pub. Pol'y* 463. Some unitary theorists continue to rely on the "Take Care" language, assuming without evidence that its origins are from the royal prerogative. Michael McConnell, *The President Who Would Not Be King* 68, 161-69 (2020). "Originalism and the Seila Law Brief, Part II: Prerogative vs. Royalism, Blackstone vs. Schmitt, McConnell vs. Amicus."

38. 1 *Records of the Federal Convention of 1787* 63-64, 70 (Max Farrand ed., June 1, 1787) [hereinafter *Farrand*].

39. 1 *Farrand* 70 (June 1, 1787) (1911) (Madison invoking "*ex vi termini,*" i.e., "from the force of the word or boundary." Madison explained that presidential power "should be confined and defined," because otherwise, powers would become "large" and He said that if the Constitution established a single executive officer, then the possible inference of implied powers would be a threat to their balanced structure).

[40] 1 *Farrand* 65 (June 1).

[41] 1 *Farrand* 65. See also Farrand 66 (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.")

[42] 2 *Farrand* at 342.

records indicate no discussion of this proposal.[43] It was either rejected or ignored in committee.[44] One part of this ostensibly "unitary" proposal has been overlooked: Morris's proposal listed as its first and leading member of this "Council of State" the Chief Justice, who "shall be President of the Council in the absence of the President."[45] If somehow, a unitary theorist implausibly would claims that the proposal of "at pleasure" tenure was more significant than the proposal getting ignored, the proposal's inclusion of the Chief Justice blows up the unitary argument. The unitary argument cannot have it both ways. Even the most "unitary" of removal proposals in the Convention rejected removal as a necessary condition for executive power.

8) The First Congress rejected the unitary or presidential model in many ways. The "Decision of 1789" story has the decision backwards. For more detail, see my article "The Indecisions of 1789"[46] or the Appendix at the end of this article. The traditional account is that the House "presidentialists" prevailed in passing their language signaling or implying a constitutional power, in place of clause that would have granted the removal power to the president, implicitly as a congressional power. The main points are A) Madison and Benson more likely proposed replacing the explicit text with the cryptic text because they learned they did not have the votes in the Senate, as indicated by Senator Maclay's diary, others senators' notes, their House opponents, and even their own supporters, so the move

[43] The Convention Journal indicated at the beginning of the day's notes that the propositions "passed in the affirmative." *Farrand* at 334. From Farrand's collection of three sources, the context of this vote remains unclear, but it seems more likely that there was no debate and no vote on Morris's proposal. *Farrand* 334-66 (Aug. 20-21, 1787).

[44] 2 *Farrand* 342; *Madison's Notes* at 465 (Aug. 20, 1787). On the timing of the Committee of Detail, see John Vile, The Critical Role of Committees at the U.S. Constitutional Convention of 1787' (2006) 148 *Am. J. Leg. Hist.* 147, 165-66 (on the workings of the Committee of Detail from July through the end of August 1787). Charles Thach concluded that this proposal's demise was "*pro tanto* an abandonment of the English scheme of executive organization." Charles C. Thach, Jr., *The Creation of the Presidency 1775-1789: A Study in Constitutional History* (1922) 125

[45] 2 Farrand 342 (Aug. 20, 1787).

[46] Jed H. Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity' (2023) 171 U. Pa. L. Rev. 753.

reflected "strategic ambiguity" to win passage; B) Explanatory clauses and preambles were common in the First Congress, and Madison's critics mocked him for not proposing a declaratory act if he wanted to announce a constitutional theory; and yet he chose more ambiguity, not less; C) Only nine of 54 members endorsed the presidentialist view, and the votes of seven others could be explained by strategic ambiguity; D) the Senate debate reflected a strategy of ambiguity and obfuscation, not consensus, and then it compromised, just as the "strategy of ambiguity" had intended; E) Few of those eight endorsed tenure during the president's pleasure (i.e., "indefeasibility"), the central assumption of *Free Enterprise* and *Seila Law*; E) Around 60-70% of the House rejected presidentialism, just the weak form of the unitary executive. As Christine Chabot and I have shown, the First Congress otherwise rejected the unitary model in other statutes, a more reliable source than a confusing legislative history.[47]

On top of those eight "cues," Jonathan Gienapp summarized four key points on removal from his book *The Second Creation* in his panel remarks, which are elaborated in his paper for this conference:[48] 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" that had taken place in 1787-88 about removal or any claim that removal was understood in 1787-88, and there had been no incentive to hide a removal power to navigate through ratification; 3) to the contrary, some announced that they had changed their minds (Madison and Hamilton); 4) and reiterating my points, there was no majority

[47] Christine Chabot, *Interring the Unitary Executive Theory*; Shugerman, 'The Decisions of 1789 Were Anti-Unitary,' at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597496
[48] Jonathan Gienapp, 'Removal and the Changing Debate over Executive Power at the Founding' (2023) *Am. J. L. Hist.* (forthcoming).

for presidentialism.[49] 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. If the Founding era had assumed that "executive power" implied removal, the anti-Federalists surely would have raised the specter or at least a question about an implied removal power.

As the unitary executive scholars have tried to establish a historical basis for their claims, they have made a series of misreadings and stretches of the material, indicating that they are struggling to revive an originalist basis for their theory. In brief, here are some of those miscues: 1) an erroneous claim that English writers listed removal as one of the Crown's prerogative powers;[50] 2) misquoting Blackstone on the law of offices, confusing the word "disposing" of offices with "removal," when it meant "distributing" offices, among other missteps in an amicus brief filed in *Seila Law* and in defenses of that brief;[51] and confused general symbolic statements on royal authority with legal conclusions about removal; 3) errors assuming that prosecution was a centralized executive power; [52] 4) errors

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[49] Jonathan Gienapp, remarks, at 0:48:00-0:53:00, at https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=10

50. *McConnell* at 11. 28-29. 30, 99, 161-62. *See also id.* at 39, 95 (implicitly referring to removal as a listed prerogative power). There are no footnotes that support these assertions, either to Blackstone or the other source he claimed to use, Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820). See also "Originalism and the *Seila Law* Brief, Part II: Prerogative vs. Royalism, Blackstone vs. Schmitt, McConnell vs. Amicus," at https://shugerblogcom.wordpress.com/2022/01/11/originalism-and-the-seila-law-brief-part-ii-prerogative-vs-royalism-blackstone-vs-schmitt-mcconnell-vs-amicus/.

[51] For more detail on these critiques, see Shugerman, 'Removal of Context.' Ilan Wurman, 'In Search of Prerogative' (2020) 70 Duke L.J. 93, 142 n. 205; Ilan Wurman, 'The Removal Power: A Critical Guide' 2020 Cato Supreme Court Review 169, 171 n. 59. For Seila Law amicus brief, see Separation of Powers Scholars' Brief in Seila Law v. CFPB, *supra* note 19, at 3. To Wurman's credit, he conceded error on "disposing." See Wurman, "Some Thoughts on My Seila Law Brief," https://www.yalejreg.com/nc/some-thoughts-on-my-seila-law-brief-by-ilan-wurman/; Shugerman, "A Reply to the Unitary Executive Theorists on the Misuse of Historical Materials," https://www.yalejreg.com/nc/a-reply-to-the-unitary-executive-theorists-on-the-misuse-of-historical-materials-by-jed-shugerman/

[52] Ilan Wurman, 'In Search of Prerogative' at 93, 147-49 (2020) (reyling on Leonard D. White, *The Federalists: A Study in Administrative History* (1948)). Wurman criticized Lessig and Sunstein concluding that district attorneys were independent until 1820. Wurman erred in claiming, "But more importantly, the district attorneys did report to a central authority," the State Department. After 1797, district attorneys shifted to Treasury, loosely under the independent Comptroller of Treasury, and remained decentralized until 1870. Shugerman, 'Creation of the Department of Justice' (2014) 66 *Stan. L. Rev.* 121. For more on decentralized

and oversights in the use of documents from the First Congress and the ostensible "Decision of 1789";[53] 5) erroneous claims about secondary sources on general royal removal power;[54] 6) and erroneous claims the Ratification debates reflected a default assumption of removal at pleasure, and that this default was confirmed by the First Congress.[55]

II. Conversations and Concessions

Some of the most important reasons and salutary outcomes of the conference were the conversations across the spectrum, both on the dais and in between panels. The open-

executive, see Shugerman, 'Removal of Context," Shugerman, 'Despotic Displacement and Venality,' (forthcoming). For evidence of independent prosecution, see John Marshall to St. George Tucker, Nov. 18, 1800 (responding to Tucker's criticisms of President Adams of Callendar under the Sedition Act). See Matthew Steilen, https://twitter.com/MJSteilen/status/1424405551568523270; William Baude, https://reason.com/volokh/2021/08/11/john-marshall-argued-for-the-independence-of-federal-prosecutors/.

[53] Prakash, 'New Light'; Jed H. Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity,' (2003) 171 U. Pa. L. Rev. 753, 807-09; and a separately posted Appendix II at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596.

[54] Prakash, *Imperial from the Beginning* (2016)at 20, 29 (misstating Blackstone at 387, 421, and Aylmer at 69, 106, 109-10). For secondary sources showing enduring protections of tenure in office, G. E. Aylmer, *The State's Servants: The Civil Service of the English Republic*, 1649 – 1660 82-96 (1973); G.E. Aylmer, *The Crown's Servants: Government and Civil Service Under Charles II, 1660-1685*, at 93-94 (2002) (marking a shift toward tenure at pleasure, but only gradually and incompletely); for historians consistent with Aylmer, contra Prakash, see also Daniel Norman Chester, *The English Administrative System, 1780-1870*, at 16-23 (1981). See also Shugerman, 'Removal of Context.'

[55] McConnell wrongly asserted: "Congress made all the officers of the three departments, as well as the district attorneys, removable by the President at will – and the Removal Power is the principal battleground over presidential control." McConnell at 338. As a D.C. Circuit judge reviewing the CFPB, Justice Kavanaugh wrote, "In 1789, the First Congress confirmed that Presidents may remove executive officers at will." PHH v. CFPB, 139 F.3d 1, 13 (2016) (Kavanaugh, J.) (citing *Myers*). *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 168 (D.C. Cir. 2018) (*en banc*) (J. Kavanagh, dissenting); Chief Justice William Howard Taft made a similar assertion in *Myers v. United States.* Myers v. United States, 272 U.S. 52, 117 (1926). See also Free Enterprise v. PCAOB, 537 F.3d 667, 691 (2008) (Kavanaugh, J, dissenting). To Prakash's credit, he initially acknowledged in his 2005 article that the First Congress did not resolve this question: "Because Madison's opposition refused to concede that the removal power was an executive power, these Representatives did not address whether it was a power that Congress could modify or abridge…" Prakash, 'New Light' at 1072. Prakash went further to suggest that the presidential argument on indefeasibility or "unabatable" power was "never really contested." Id. That claim is incorrect. Not only did a majority of the House reject this proposal, one of the members Prakash tried to count as a "presidentialist" clearly rejected the argument in favor of congressional conditions like "neglect of duty." See Shugerman, "Indecisions of 1789." Prakash's more recent effort to claim indefeasible removal at pleasure introduced more errors. See a forthcoming response to "The Executive Power of Removal."

mindedness and concessions went in both directions. In his panel remarks, Aditya Bamzai generously credited balanced research for acknowledging evidence on both sides of the "Decision of 1789" argument.[56] To the credit of many unitary theorists at the conference, they acknowledged the weakness of the "Decisions of 1789" and some errors. In my paper, I found that Eric Nelson's opening sentence in *The Royal Revolution* erred in a core claim about the Convention as a basis for his thesis:

> On June 1, 1787, James Wilson of Pennsylvania rose in the Constitutional Convention to offer the motion that would create the American presidency. The new federal executive, he proposed, should 'consist of a single person,' and this chief magistrate should be *vested with sweeping prerogative powers*.[57]

However, turning to that page (1 *Farrand* 65), Madison's notes recorded Wilson saying the opposite: "*He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers*." In fact, the rest of Madison's notes on Wilson's speech are a problem for the claims of implied powers of removal: "The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not appertaining to and appointed by the Legislature."[58] Wilson extended his critique of the royal model, concluding "the inapplicability" of the British Crown's powers as a model for a "republic."[59] Nelson quoted from Rufus King's notes for Wilson adding some more

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[56] At 1 hour 21:50 in, on my analysis of Wingate and Lee as statements against interest, Bamzai said, "This is really something I learned from Professor Shugerman's paper, overlooked evidence in favor of the unitary theory."
https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=6

[57] Eric Nelson, *The Royalist Revolution* 1

[58] 1 *Farrand* 65 (June 1)

[59] 1 *Farrand* 66 (June 1).

sympathetic comments about the British Crown,[60] but Nelson left out the passages in King's notes showing Madison and Wilson more conclusively endorsing limited presidential powers and republicanism against monarchic power.[61]

To his credit, Nelson in a question acknowledged that Wilson, in fact, was recorded in all the notes as saying that "the prerogatives of the Crown are not the model."[62] But he added two important questions. First, he raised a concern about our claim (shared with John Mikhail) that constitutions were analogous to corporate charters, that this was a "strange development," because Wilson and other Patriots during the Revolution had rejected the private corporate model for colonies, and instead claimed that their society was sovereign.[63] My answer was that a lot had changed from 1776 to 1787, and it was now safe to regard colonial charters as a background for state constitution writing. After all, the state of Connecticut calls itself "the Constitution State" because it had the oldest constitution: its 1639 and 1662 colonial charters, which it kept on as its state constitution through the Founding era. Once the Revolution was complete and sovereignty was established, early Americans could look at the old colonial charters in a new light and see corporate charters as a relevant model in the 1780s.

Second, Nelson challenged the connection I had made about the law of offices as property and the limits on removal. Even if offices were property, the property rules did not automatically mean limits on removal. Nelson pointed out that in the case of high ministers and minsters of state, "there is no question that a ministerial office is a piece of

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[60] 1 *Farrand* 71.
[61] 1 *Farrand* 70-71 (Rufus King's notes, June 1, 1787).
[62] At 1 hour, 10 minutes, Panel 5: https://www.youtube.com/watch?v=FZY6Lkt9Wd0&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=5
[63] Id. 1 hour, 12 minutes. Panel 5: https://www.youtube.com/watch?v=FZY6Lkt9Wd0&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=5

personal property, but it could also be dismissed at will. 'Offices of state' were not held as a property right" and also could be dismissed at pleasure.[64] Here I conceded that the cabinet-level offices like the secretaries of state and the Privy Council were tenure at pleasure and not protected as property against removal – acknowledgements I had made earlier in articles and other exchanges.[65] Nevertheless, below the cabinet level, many offices had protections as property against removal, as Blackstone and many other writers had recognized.

McConnell was also open to acknowledging error. I first asked about Madison and Wilson giving a restrictive interpretation of executive power, with Madison using a phrase "ex vi termini" on June 1st to indicate only "defined," explicit and enumerated rights; and that, given that he had mistakenly claimed in his book that removal was an established royal prerogative power (and thus it would not be implied by "executive power") I asked him what would be the basis for the removal power. McConnell first acknowledged that Madison and Wilson's speeches on June 1st would mean a more limited understanding of executive power. He acknowledged that Madison's phrase "ex vi termini" would mean "by the nature of the word," and thus executive powers would include only the powers that are "strictly executive." Of course, this begs the question as to what powers were strictly executive, and the notes indicate that Wilson recognized "strictly executive" powers as the ones that the Convention actually enumerated. Thus, it is hard to see how the Convention ever endorsed an approach of implied powers, whether or not removal would have been implied at all.

On the claim the removal was a royal prerogative, McConnell admirably acknowledged error and gave credit for helping solve a puzzle:

[64] Video at 1 hour 13 minutes.
[65] 'Removal of Context,' at 128, 155, 164-65

> Professor Shugerman has persuaded me that I had made a mistake… Blackstone speaks of the power of removal in the king, and I had interpreted that as meaning a prerogative power of the king, and I no longer think that is true. Jed had persuaded me that Blackstone, although treating this as a power of the king, does not actually include it in his list of prerogative powers. And I am especially grateful because I have a whole paragraph in the book in which I comment on how weird it is, since they seem to be allocating every single listed prerogative, and I say in the book that I don't have any explanation for why they did not allocate this one, why wouldn't they? There does not seem to be any good reason for it. Jed has provided a good reason, which is actually that it was a power, but not a prerogative power, and if their methodology was to go through and allocate all the prerogative powers, that's a nice explanation.
>
> Where does the [removal] power come from? It seems to me, that as a non-prerogative power… it comes under the Take Care clause, referred to by Madison and Fisher Ames and others in the Removal Debate. Since the Take care caluse is a duty of the president, which implies a power of the president, Congress cannot take away an essential tool that the president needs in order the discharge the duty to take care that the laws be faithfully executed, and that's why it's an indefeasible power.[66]

I appreciate McConnell's generosity and openness, but some questions remain. My research into Blackstone and other sources on the royal prerogative shows more than the

[66] Panel 1, 1:22:50, https://www.youtube.com/watch?v=3DjddqGUKBU&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=1

absence of removal from the list of prerogatives; they do not list removal as a general royal power, except to specify a removal power at pleasure for some offices, but not for others. It is important to acknowledge that the eighteenth-century sources do not even acknowledge a default royal removal power at all. McConnell's shift from finding removal in the Vesting Clause to the Take Care clause has a convenient upshot for the unitary theory: McConnell concludes that the Vesting clause implies executive powers, but those powers are defeasible and open to congressional revision; but a power implied from the Take Care clause would be indefeasible. The problem is that in "Faithful Execution and Article II," published in June 2019, Andrew Kent, Ethan Leib, and I showed that "faithful execution" was its own language of limitation, its own textual condition against unfettered discretion.[67] It would be incongruous and disproportionate for a duty-imposing clause to create a power greater than the duty. Leib and I later argued that the language of "faithful execution" implies a condition of good faith and implies a congressional power to set conditions consistent with a good-faith limitation.[68]

Moreover, if McConnell is relying on Madison and Ames referring to the Take Care clause, the problem remains that Madison rejected this presidential theory entirely in the *Federalist No. 39*, argued for the congressionalist theory in May 1789,[69] then in June indicated that he had earlier believed the senatorial position but had changed his mind.[70] And just a few days after the "removal debate," he proposed a Comptroller protected during good behaviour as indefeasible.[71] Fisher Ames also wavered on whether the removal

[67] Kent, Leib, Shugerman, 'Faithful Execution and Article II'
[68] Shugerman & Kent, 'Will the Supreme Court Hand Trump Even More Power,' *N.Y. Times* (8 Oct. 2019). Shugerman & Leib, 'Faithful Execution, Corporate Removal, and Good Cause' (forthcoming)
[69] Shugerman, Indecisions of 1789, at 776-77, 851.
[70] Id. at 778-79.
[71] Id. at 824-34, 851

power came from Article II or from Congress. Neither Madison, nor Ames, nor the First Congress were good sources for an indefeasible removal power.

In his recent writings, Ilan Wurman also cautioned against reading too much from the First Congress. In 2020, Wurman wrote in an article reviewing *Seila Law*:

> Although the ultimate conclusion of the First Congress in the "Decision of 1789" is open to conflicting interpretations, what matters is the force of the arguments…
> …
> Even if the Decision of 1789 is ambiguous—as the dissent in *Seila Law* argued and as recent scholarship once again argues—few scholars or judges suggest that the Decision of 1789 governs by its own force. And those who do should probably walk back such claims. "Liquidating" ambiguous constitutional meaning requires a series of discussions and adjudications. The better lessons from the debate are the various arguments that were put on the table. It is not unreasonable to think that Madison and Ames simply got it right: their arguments are compelling interpretations of the Constitution. [72]

This is an important concession, but it is vulnerable to a mix of confirmation bias and constitutional prior assumptions about which side is more "compelling."
In the panel questions-and-answers, both Wurman and Mike Ramsey continued to cabin the First Congress and limit their claims of a "decision."

On the panel, Wurman again conceded that he is "less firm" on such a unitary "decision," that the majority was "cobbled together" from presidentialists and

[72] Ilan Wurman, 'The Removal Power: A Critical Guide' [2020] *Cato Supreme Court Review* 158, 177-78 (2020).

congressionalists. He believes that the bloc of presidentialists was "more than a third," but did not claim any more than that; he reiterated that "formalists put too much weight on the 'Decision of 1789.'"[73] The legislative history and the votes are not reliable sources of meaning. It is not quantity, but quality. Bamzai made a similar claim. I will address these points below. But first, it is important to acknowledge their concessions that the unitary theory cannot rely upon the votes in the First Congress on the Foreign Affairs bill in June 1789. So what do they rely on? Let's assess the answers they gave in their presentations or answers they gave to my challenge.

III. Reviving Removal?

A. The Statutes and Texts, not the Legislative History? (Ramsey and Mascott)

As noted above, Mike Ramsey conceded that the "Decision" did not actually decide in the Foreign Affairs debate, but the text of other statutes did indicate presidential control. Here is Ramsey's answer to my question at the end of the panel:

> First: "The statute tells us that Congress did not give the president power to remove. It's not in the statute. I think that means the president has a constitutional power to remove, or else the officers would not be removable. That's not a plausible interpretation of the statute. Now that doesn't answer the question of whether the Senate has a role in the removal. It just says that Congress doesn't have to convey the removal power… I think that's all we can get out of Congress. I

[73] One hour, 11 minutes. [YouTube]

> don't subscribe to the view that we can count noses and decide what the constitutional answer is, because, as Jed says, there were lots of institutional cross-currents, and we don't know what all of those people were thinking."
>
> Second: "We do know one thing from the debates: Madison provided an explanation… and I find that explanation persuasive as a textual matter."
>
> Third: "Congress can do unconstitutional things, including in 1789. What matters to me in 1789 and thereafter, is that, thereafter, the president is understood to have a removal power… what is accepted at the time."

The first is an admirably open-minded concession that the Foreign Affairs did not clarify the source of the removal power. Even if one assumes that the clause implies a removal power pre-existing in the Constitution, the text does not clarify whether it is the president's alone, or if it is shared with the Senate. And to his credit, Ramsey conceded that the politics of the debate were too complex to provide evidence of consensus. Ramsey seems to acknowledge the textualist critique of legislative history: it is unreliable because it is too open to cherry-picking and finding one's friends at the party. Earlier, Ramsey had said "Removal was not specified because it was already vested." Again, this is the same repeated assumption without evidence. The evidence instead reveals that removal was not specified because there was no consensus about it.

But Ramsey's second answer falls into that trap of cherry-picking. Ramsey prefers the unitary account, so he picked Madison and his favorable arguments out from a big party of contradictory views – and mostly opposing views. Ramsey relies on Madison not because Madison commanded a majority or reflected a consensus in the First Congress, but because he agrees with Madison. Even more problematic, Ramsey picks the Madison of June 16-June 22, one week of his presidential theory limited to department heads, but

ignores the arguments Madison made to the contrary in the Convention against implied powers, in *Federalist* No. 39 and in May 1789 in favor of congressional control, in June 1789 that he initially agreed with the senatorial approach, and then in late June 1789, when he proposed limits on the removal of Treasury officials.[74] Ramsey is finding his mid-June 1789 Madison friend at a party among many other Madisons who made anti-presidential arguments.

Ramsey's third answer contradicts originalism: "*Thereafter*, the president is understood to have a removal power." In other words, even if the First Congress was unclear about presidential removal, this understanding emerged later, not only after 1787-88, but after 1789. It was not a "Decision of 1789," but a decision by some people at some later point. This argument does not turn on the original public meaning during Ratification, but instead on post-Ratification, post-1789 practices, precedent, and evolving understandings. One might call this "liquidation" or "construction," but it does not rely on claims about an original understanding circa 1787-88, and it is surely vulnerable to the claim that this approach to constitutional law lets those in power change the meaning of the Constitution once in power, and in self-serving ways of using that power. This seems to defeat the concept of constitutionalism as a constraint on the use and self-interested abuses of power. It is living constitutionalism more than original public meaning.

[74] See *Federalist* No. 39 (Madison). On May 19, the first day of debate, Madison argued that the removal rules were at the "discretion of legislature," 10 DHFFC 730, while later that day making a vague reference to "executive power." Id. at 735. On June 18 he explained that his "original impression" of this question (implicitly at the start of the debate in May) was that "the same power which appointed officers should have the right of displacing them. This was a plausible idea. But on examining the constitution by its true principles…" he argued for a presidential construction. 11 DHFFC 845-46 (June 16, 1789). Like Hamilton, Madison was announcing that his original understanding – i.e., original public meaning – was the senatorial position, but he had changed his mind. Or more accurately, Madison was conceding that there had been no clear original public meaning circa 1787-88, and instead he turned to "true principles." Madison seemed to be adopting a purposive and structural approach rather than a narrow originalist approach. In the Treasury debate in late June, he renounced the view that the earlier debate on June 22d had resolved a "presidentialist" interpretation for other principal offices.

Ramsey's interpretation of the statutory texts led mostly to a separate line of debate over implied presidential powers over foreign policy, rather than a general removal power. Ramsey noted that the First Congress's statutes did not spell out duties on the officers in the Departments of War or Foreign Affairs, but they did specify duties for Treasury officials. Ramsey infers that the First Congress believed that the president would have more control over war and peace and their related officials, but not over more domestic and finance offices. This argument appeared in the 1990s from Cass Sunstein and Lawrence Lessig in their critique of the unitary executive history, as part of their argument that some departments were "executive" (and presidential) while others were "administrative" (and thus under more congressional control).[75] It is not clear how Ramsey's textual evidence indicates a general removal power.

To the contrary, the First Congress had clear evidence against such a default assumption.

Unfortunately, Ramsey did not engage with my textual evidence or Christine Chabot's evidence from the First Congress's statutes showing no assumption of presidentialism. Chabot found that the First Congress repeatedly gave executive power to unremovable officers, like the Chief Justice or the Vice President.[76] My close reading of First Congress statutes find other problems for the unitary assumptions. For example, the Judiciary Act of 1789[77] gave the marshal and deputy marshal a term of years, and then explicitly stated "removable from office at pleasure."[78] The marshal was appointed by the President and

[75] Lawrence Lessig & Cass R. Sunstein, 'The President and the Administration' (1994) 94 *Colum. L. Rev.* 1, 10-18.
[76] Chabot, 'Is the Federal Reserve Unconstitutional?'; Chabot, 'Interring the Unitary Executive.'
[77] Judiciary Act of 1789, § 27, 1 Stat. 73. 87.
[78] Id. (emphasis added). As Manners and Menand explain, "Congress's choice to start the removability phrase with the conjunction 'but'—a formulation Congress would repeat— underscores the contrast between the ordinary understanding of a term of years and the tacked-on removal permissions." Manners & Menand, 'Three Permissions' at 35.

confirmed by the Senate.[79] These First Congress specified these two offices would be held "at pleasure," and never did so again.

In the 1790s, Congress again referred to tenure "during pleasure" for other lower level offices, mostly in military contexts, but also for tax collectors.[80] The canon *Expressio unius est exclusio alterius* tells us that the express reference to "during pleasure" in one place would imply its intentional exclusion elsewhere – and no default rule for "at pleasure" tenure. Ramsey seemed more interested in defending the foreign affairs power, rather than providing evidence for a general removal power.

In terms of Chabot's statutory evidence against the unitary executive, Jennifer Mascott raised some insightful questions about Chabot's work on the Sinking Fund and the First Congress. Christine Kexel Chabot explained how the Sinking Fund Commission, proposed by Hamilton and enacted in 1790, contradicted the unitary model.[81] This commission was composed of "the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General."[82] The Chief Justice and the President of the Senate (i.e., the Vice President) could not be removed by the President. The Chief Justice was not even a member of the executive branch. Before the Twelfth Amendment, the vice president did not yet run on a ticket with the president.[83] The vice president often could have been a rival or an opponent of the president. Mascott

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[79] James Pfander, 'The Chief Justice, the Appointment of Inferior Officers, and the Court of Law' (2013) 107 *Nw. U. L. Rev.* 1125, 1153.
[80] "An Act to provide for the valuation of Lands and Dwelling-Houses," 2 Stat 580, 584 (July 9, 1798) (direct tax commissioners); "An Act for the relief of sick and disabled Seamen," 2 Stat 605, 606 (July 16, 1798) ("the said directors [of a marine hospital] shall hold their offices during the pleasure of the President."); "An Act further to protect the Commerce of the United States, 2 Stat. 578, 589, ("And the commissions [for armed private vessels] which shall be granted, as aforesaid, shall be revocable at the pleasure of the President of the United States.") http://www.loc.gov/law/help/statutes-at-large/5th-congress/c5.pdf
[81] Christine Kexel Chabot, 'Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies' (2020).
[82] Sinking Fund Act of Aug. 12, 1790, ch. 47, 1 Stat. 186.
[83] Bruce Ackerman, *The Failure of the Founding Fathers* (2005).

argued that the three of the five members of the Commission were appointed by the president, but one has to imagine that the offices were sometimes vacant or the department heads were often traveling or unavailable. These common absences would leave a two-two tie – and perhaps a two-to-one majority against the president's own appointees – that would often frustrate the execution of the commission's functions, thus preventing the president from adopting his preferred policies.

B. Mascott: Isn't Sixteen [30%] "Powerful Evidence"?

Mascott claimed that sixteen members out of 54 is still evidence for the unitary theory: "Even if there were only sixteen, is that not powerful evidence in favor of the unitary executive theory, because first, at least they were debating the issues, so it was in someone's consciousness, and second, for these folks it was totally against their interest. So it would be significant that sixteen of them were [limiting their own power]."[84]

Wurman added "That insight [of separate factions] is not new," mentioning Justice Brandeis, Corwin, David Currie. "By my count, more than the third that Jed talks about thought they were making a constitutional decision. We read passages differently."[85]

First, the critique that this argument is not new is even more problematic for the unitary theory. For a century, critics have been telling the unitary theorists that they don't have proof of a majority or a consensus. But because the Roberts Court and the unitary executive theorists keep ignoring or dismissing these critiques, I sat down with overlooked sources (Senator Maclay's diary and other Senators' notes), found that the unitary theorists did not have the votes in the Senate, and realized an overlooked story: Madison and

[84] At one hour, 12 minutes
[85] At one hour, 10 minutes

Benson turned to strategic ambiguity, and then I was the first to count the House member-by-member to confirm this new theory. And moreover, Saikrishna Prakash's misreadings of speeches and letters in the *Documentary History of the First Federal Congress* repeatedly conflated the two different kinds of arguments in favor of a presidential removal power, counting arguments from congressionalists as presidentialists). These conflations inflated the size of the presidentialists, though Prakash had not attempted a count.[86] And moreover, I discovered that Saikrishna Prakash had been misusing and misreading the speeches and letters in the *Documentary History of the First Federal Congress* sources to inflate their numbers.[87]

Second, Wurman claims "more than a third," but he does not even claim a majority, does not respond to my "strategic ambiguity" problem for even counting a third, and does not offer any names beyond the sixteen I acknowledge. Despite claiming that "we read passages differently," he offers no alternative reading of any passage, no defense of Prakash's readings that I have identified as misreadings, and no specific critique of my count, no names of members I missed.

When Mascott says a third of the House is still "powerful evidence," I find this approach to be confusing about what evidence counts for original public meaning. I had thought that clear majorities and consensus were necessary, but now sixteen for a view and 35 against that view is still powerful evidence… in favor of the sixteen? Perhaps other originalism questions might be so open to minority views, such as due process, privacy, and gun regulation.

Surely we can find at least a minority position that the Fourteenth Amendment protected reproductive choice and family autonomy among abolitionists in the mid-1860s.

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[86] See Appendix II to 'The Indecisions of 1789,' at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 .
[87] See Appendix II to 'The Indecisions of 1789,' at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 .

Surely we can identify at least a minority position on gun regulation, on robust separation of church and state in 1789. On presidential power, we find a clearer plurality in favor of the Senate having a constitutionally fixed role in removal: 17 senatorials versus a best-case 16 presidentialists versus roughly 13 congressionalists. If we take Mascott's argument seriously, then the Senate would win as a matter of constitutional law. This position that "16 (or 30%) is powerful evidence" seems to be highly selective and inconsistent with the pro-democracy arguments and the arguments that originalism limits judicial discretion to pick one's own ideological biases.

Second, I want to reiterate that 16 members of the House of 54 is the best-case scenario, but the number is likely much smaller. The number of members who spoke on the House floor and explicitly identified presidentialism were only seven, and not even a particularly consistent seven. Here are the seven who expressly endorsed a presidentialist interpretation that the Constitution resolved this question in favor of presidential power: Madison, Ames, Benson, Boudinot, Clymer, Moore, and Vining. And even some of those seven contradicted themselves or gave a mix of presidentialist, congressionalist, and strategic ambiguity arguments: Vining,[88] Ames,[89] and Madison. An eighth, Fitzsimons, briefly described the debate in two letters, and while he seemed to endorse the presidentialist view, the short passages are neither clear nor reflect close consideration.[90]

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[88] Vining was vocally presidentialist but also acknowledged strategic ambiguity. Shugerman, 'Indecisions of 1789' at 795 (citing 11 DHFFC 1035-36 (June 22)).

[89] Ames in a contemporaneous letter endorsed both: 'This is in fact a great question, and I feel perfectly satisfied with the President's right to exercise the power, either by the Constitution or the authority of an act. The arguments in favor of the former fall short of full proof, but in my mind they greatly preponderate.'"[89] Letter from Fisher Ames to George R. Minot (June 23, 1789), in 16 DHFFC (Correspondence) at 840, 840-41.

[90] His letter on June 20, 1789, oversimplified the debate into two sides, not three, indicating how he may not have been paying close attention to this nuance and how the debate had not yet distinguished between the presidentialist/congressionalist divide. He mentioned the "vesting" argument, but this point could have been a shorthand. He praised Madison's and Ames's points, and they were presidentialist 16 DHFFC 819-20. An August 24, 1789 letter makes only an oblique reference to "the Constitutional power of the president" to remove two months after the vote. 16 DHFFC 1390.

Of the other eight who voted "yes, yes, and yes," three have no recorded views on the House floor or in their letters;[91] another who did not speak on the House floor wrote a single ambiguous and non-committal letter on the constitutional question;[92] and three others who spoke on the House floor were unclear and never expressly endorsed a constitutional interpretation.[93] One of the silent yes/yes/yes members later spoke and made motions on the Treasury bill that were inconsistent with sole presidential control over removal.[94] Thus, these ambiguous eight or nine members were just as plausibly an "ambiguity bloc," voting to replace the clear text with an unclear text *because* it was unclear, not because it signaled a constitutional theory. This explanation is simply the other side of the coin of the "enigmatic bloc" theory, that the members who preferred to keep the original text were voting for a clear statement of some form of removal power, rather than an ambiguous text. If one wants to claim those votes are enigmatic and not necessarily "congressionalist," so too are the silent yes/yes/yes members also enigmatic and not necessarily "presidentialist." The unitary theorists want it both ways: count all the yes/yes/yes votes as presidentialist, regardless if they spoke or if they were ambivalent; but on the other hand, count only the yes/no/yes votes as "congressionalist" only if they spoke unambiguously for the congressionalist view. This argument is plainly inconsistent and has backwards all the burdens of establishing meaning or consensus.

One of the most remarkable misuses of the Decision of 1789 by the Roberts Court is that it is the basis for an *indefeasible* presidential removal power in *Free Enterprise* and *Seila Law*: Wurman slipped into this assertion that the presidentialists were "a faction believing

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[91] Brown, Griffin, Sinnickson. See Shugerman, 'Indecisions of 1789' at 804, 866-67; and Appendix II.
[92] Muhlenberg did not speak on the House floor, and his letter cited by Prakash for being "presidentialist" is actually ambiguous and non-committal on the constitutional question. Shugerman, 'Indecisions of 1789,' at 804, 866-67; and Appendix II (citing 16 DHFFC 856).
[93] Shugerman, 'Indecisions of 1789' at 804.
[94] Burke was silent in the Foreign Affairs debate, but then he took a position against "at pleasure" tenure in the Treasury debate. Shugerman, 'Indecisions of 1789' at 804 (citing 11 DHFFC 1080).

in an indefeasible presidential power."[95] Again, even fewer expressed that the president had a constitutional power to remove "at pleasure." No one used the term "indefeasible," though it was used the context of the Bill of Rights.[96]

C. Quality, not Quantity? Or "The Victors Write the History" (Mascott and Wurman)

Mascott's second point was that we should give more weight to the presidentialists because they were voting "against their interests," whereas the other views were self-serving. First, that argument would actually elevate the Senatorial bloc, too. The 17 members of the House who were voting for the Senate were also voting against their institutional interests by trying to give the Senate a significant lever of power, but not the House. Perhaps one might think the House would benefit from a stronger Senate, but not necessarily, and not in June 1789, when the House and Senate were in a stand-off on economic, tariff, and foreign policy. This kind of argument would mean, again, elevating the senatorial position.

But her argument assumes a "separation of powers," when the dynamic was a separation of parties – or lack thereof – as the Washington administration cultivated a pro-administration faction in Congress. In my paper at p. 37, I documented these "cabaling" "court party" dynamics – in their words, not mine: Maclay on "more caballing and meeting of the Members in knots this day, than I ever observed before"[97]; "a General hunt and

[95] 1 hour, 10 minutes, 40 seconds. https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=2
[96] Shugerman, 'Indecisions of 1789' at 844.
[97] Maclay at 113.

Bustle… it seems as if a Court party is forming"[98]; Rep. Fisher Ames huddling "in a knot" with Senators, lobbying for passage; Senator Paterson's notes of anti-administration senators alleging a "caballing spirit."[99] At p. 38 (and in my answer to Mascott), I put this dynamic into the context of Daryl Levinson's and Rick Pildes's 2006 article "Separation of Parties, Not Powers":

> Maclay's observations and other notes suspect a party spirit perhaps overcoming institutional power (an early Levinson-Pildes "separation of parties, not powers" dynamic familiar today).[100] Historians identify an emerging pro-administration "court party" in Congress, which included Madison, Hamilton, Ellsworth, and Morris, at least through 1789, and opposed by Maclay and many of the senatorial side.[101] The Senate votes for the bill fell along roughly proto-partisan lines, and the pro-administration side's lobbying diminished the likelihood of a principled meaning.

I elaborate on this interpretation as "Court Party Spin."[102] I should also include Alexander Hamilton, John Adams (the obvious court-party insider and the tie-breaking vote) and Madison's House allies Ames, Benson, Vining, and Boudinot as leading "pro-administration" members and also leaders of the presidentialist bloc, a proto-Federalist Party in the first Congress.

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[98] Maclay at 114.
[99] "July 16, 1789, Notes of William Paterson," 9 DHFFC at 489
[100] Pildes and Levinson, Separation of Parties, Not Powers, (2006) 119 *Harv. L. Rev.* 2311.
[101] Kenneth C. Martis, *The Historical Atlas of Political Parties in the United States Congress*, 1789-1989 (1989); John H. Aldrich and Ruth W. Grant, 'The Antifederalists, the First Congress, and the First Parties,' (1993) 55 *J. of Politics* 295.
[102] Shugerman, 'The Indecisions of 1789,' at 851-860.

In fact, contemporaries beyond Senator Maclay identified this dynamic: Alexander Hamilton was Treasury-Secretary-in-Waiting seeking to be in Washington's good graces. In his June 21, 1789 letter describing Hamilton's acknowledgement of his own reversal on removal, Smith also suggested that this pro-administration insider jockeying created a sycophancy that was distorting the debate away from original public meaning:

> In the course of my speech [on June 16 for the senatorial position], I quoted the *Federalist* as an authority on my side – the next day Benson [a leading presidentialist in the House] sent me a note across the house to this effect: that Publius {Hamilton} had informed him since the preceding day's debate, that upon more mature reflection he had changed his opinion & was now convinced that the Presidt. alone shod. have the power of removal at pleasure; He is a Candidate for the office of Secretary of Finance![103]

This letter is key evidence about original public meaning during Ratification, about how real-world politics and power were already skewing interpretation post-Ratification, and about how insiders were able to engage in the most effective spin – in 1789 and thereafter. Both Gienapp's book and my paper highlighted this evidence of Hamilton's own acknowledgement that *Federalist* No. 77 adopted the senatorial view, and that he announced his own "changed opinion." Even after Gienapp in his initial panel remarks emphasized this letter and how Hamilton had "changed his opinion," the panelists ignored this key point. In his answer to our challenge, Wurman repeated the same interpretation that *Federalist* No. 77 – that the Senate "would be necessary to displace" – should be read not as

[103] Letter from Rep. William Smith (SC) to Edward Rutledge, June 21, 1789 in 16 DHFFC 832-33 (June 21, 1789). Gienapp identified this letter at *Second Creation* at p. 154.

the Senate blocking the removal, but the Senate functionally or effectively blocking removal by threatening to block a new appointment.[104] Wurman claimed this was still "the best interpretation" of *Federalist* No. 77, an interpretation that Gienapp had just debunked just sixteen minutes earlier on this same panel.[105]

D. Quality to Quantity? "The Victors Write the History," Part II (Bamzai)

Gienapp and I both emphasized how Madison and Hamilton changed their minds from 1787 to 1788 to May 1789 to June 1789. And yet the unitary panelists repeated these kinds of errors as they shifted from quantity to quality. In other words, they retreated from claiming a majority of the House to claiming the most famous actors of 1789.

As noted above, Ramsey had claimed Madison as "the most persuasive," even if he did not command a majority, and Wurman ignored the evidence as he tried to re-claim Hamilton.

But perhaps the most explicit and problematic quality-over-quantity side-with-the-insiders argument was Bamzai's response to my point that the "victors wrote the history": "I gather the victors are Washington, Adams, Hamilton, and John Marshall. I'm happy to stand with those victors. Those are good victors."[106] He also identified Thomas Jefferson, but without identifying how Jefferson also endorsed the unitary interpretation of the Decision of 1789.

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[104] 1 hour, 7 minutes, https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=2

[105] 51 minutes, https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=2

[106] 1 hour, 22 minutes, https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=2

Let's set aside the problem of whether "original public meaning" can be established by cherry-picking a few famous names and their original intent. What, precisely, is the evidence that their original intent was presidential removal power before the summer of 1789? Hamilton, as demonstrated above, opposed this interpretation in *Federalist* No. 77, just as Madison more consistently opposed this interpretation in *Federalist* No. 39 and throughout most of 1789. The evidence from Adams is from July 1789, and from Washington even later. Meanwhile, Bamzai cited evidence from John Marshall even later – his summary of the "Decision of 1789" in his biography *The Life of Washington* in 1807. This was also one of Wurman's main defenses of citing the "Decision of 1789": "But it came to be seen as a permanent exposition of the Constitution. Rightly or wrongly. It quicky became very quickly the proposition that Chief Justice Marshall described in *The Life of Washington*." Indeed, he concedes, "rightly or wrongly." This was Federalist spin circa 1807. This is not originalism.

To reiterate a main point from the draft circulated for the panel: This evidence is tainted as pro-Washington administration "Court Party Spin."[107] These are all victors post-Ratification and their self-serving interpretations and spin post-Ratification. He offered only one response to the problem of having power or seeking power skewing their interpretations in favor of presidentialism: that Senator Maclay also was biased by his anti-administration politics. What Bamzai did not acknowledge: My paper mentioned those problems and more about Senator Maclay's ornery disposition, but I also explained why those problems were less troubling than the pro-administration spin: Maclay's diary was private and personal, and there is no evidence he planned to publish it. A family accidentally discovered it many years later, and it was not published until 1904. Of course,

[107] Shugerman, 'Indecisions of 1789' at 851-60 (Part VIII).

each of these actors had their own biases, but it is unfair for Bamzai to cherry-pick the biases in the key private writings of one Senator, but ignore the role of propaganda and power in influencing the public statements from his own evidence.

Let's set aside the problem of how a narrow focus on a set of insiders -- Washington, Madison, Hamilton, Adams, and John Marshall – reflects obsolete "original intent," and misses the mark on the more democratically legitimate study of original public meaning. I thought originalism is supposed to focus on pre-Ratification for precisely these problems of distortion and motivations once a particular party or faction takes power. Where is the evidence of removal as an executive power pre-Ratification? Bamzai sides with the "victors" after 1789, but he does not offer any evidence of their pre-1789 – even among the small set of powerful insiders most likely to prefer "presidentialism."

Jane Manners, Lev Menand, and I have demonstrated that offices granted for a "limited term of years" were understood widely in the First Congress and in *Marbury v. Madison* to limit removal – as a grant of the office as freehold property during that term. This legal term best explains why Chief Justice Marshall repeatedly recognized that Marbury was "not removable" from his office as justice of the peace. In his panel commentary, Bamzai suggested a response to the *Marbury* context, but as I will explain in a separate article, this response only confirms our interpretation.[108]

Conclusion: Removal Retreat, Two Steps Forward, One Step Back

[108] For Bamzai's argument based on U.S. v. More, see his panel comments at 1 hour and 2 minutes through 5 minutes at https://www.youtube.com/watch?v=bWCzYRSEpNk&list=PLAx1YswjkDmOafSJM7j61RSTrDDy_XTJf&index=6. For a fuller written explanation, see Bamzai & Prakash, 'The Executive Power of Removal,' (2023) 136 *Harv. L. Rev.* 1756; see my response, Shugerman, 'Executive Power Did Not Imply Removal,' forthcoming 2023, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119

This panel on the First Congress was, in many ways, a reason to be optimistic about scholarly engagement and open-mindedness across the political and ideological spectrum. There were moments of movement on removal. There were moments of agreement, open concessions, and acknowledging error. Several of the panelists generally acknowledged the strength of the evidence against the "Decision of 1789" and the weakness of the arguments in its favor.

On the other hand, even as these unitary scholars acknowledge the weakness of one set of arguments, they then retreat to another set of arguments, often later and later in the Early Republic, further and further away from the Ratification moment. The metaphor of "moving goalposts" comes to mind. If the votes no longer add up, the argument shifts from quantity to quality, even though claims of "quality" is in the eye of the ideological beholder and skewed by confirmation bias, and even though the "quality" of the evidence also weights against the unitary theory (the opponents had more solid legal and historical evidence, in contrast to textual inferences).[109] In emphasizing Madison's speeches private letters and (in Bamzai's case) embracing a small number of the most famous Founders, rather than majority of the House, the unitary scholars stumbled into methodological backsliding from original public meaning (the more democratic theory of originalism) to original intent (the obsolete theory overlooking that public ratification is more important than the drafting and the drafters). And even in terms of the "most famous" Founders, the evidence continues to be most clearly against the unitary theory, especially from their public Ratification debates (most importantly, Hamilton's *Federalist* No. 77 and Madison's *Federalist* No. 39), and the unitary scholars' efforts to reinterpret those documents does not hold up in the face of other documents.

[109] Shugerman, 'Indecisions of 1789,' at 819-24 (Part V: Legal Sources vs. Textual Inferences).

In relying more and more on post-ratification developments that were politically-skewed by emerging factions and "Court vs. Country Party" power dynamics, the unitary theory pivots further away from original public meaning circa Ratification 1787-1788, and now later and later after the First Congress and 1789. At a certain point, the unitary theory is no longer originalism, but more and more like "living constitutionalism" over the nineteenth and twentieth centuries.

These methodological switches are actually reason to be optimistic and highlight the positive: The unitary scholars were acknowledging the weakness of earlier evidence, and then shifting to later evidence. "Common law constitutionalists" and "living constitutionalists" might embrace these conservatives moving towards their methodological approach. The panel participants on all sides of the debate demonstrated open-mindedness and a commitment to conversation. On dialogue and weighing evidence, this panel was two steps forward, one step back. We need more of these conversations, more now than ever.