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THE PRESIDENT AND THE ADMINISTRATION

*Lawrence Lessig**
*and Cass R. Sunstein***

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INTRODUCTION

Many think that under our constitutional system, the President must have the authority to control all government officials who implement the laws.¹ The text, structure, and history of the Constitution, we are told, plainly require this result.² Under this view, it is therefore something of an embarrassment that the Supreme Court has permitted conspicuous exceptions to this constitutional imperative. We now have independent special counsels, independent agencies, and other such exceptions, commonly thought to be inconsistent with the basic founding commitment to a "unitary executive."

Some believe that this conception of unitariness derives from something that the framers decided—that the framers constitutionalized a strongly unitary executive, and that anyone following the original design must follow this structural pattern.

We think that the view that the framers constitutionalized anything like this vision of the executive is just plain myth. It is a creation of the twentieth century, not the eighteenth. It derives from twentieth century categories applied unreflectively to an eighteenth century document. It ignores strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper.

We reach this conclusion with reluctance. A strongly unitary executive can promote important values of accountability, coordination, and uniformity in the execution of the laws, and to whatever extent these were the framers' values, they are certainly now ours. If these values are

1. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 Sup. Ct. Rev. 19; Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41; Theodore B. Olson, *Founders Wouldn't Endorse America's Plural Presidency*, *Legal Times*, Apr. 27, 1987, at 11 [hereinafter Olson, *Plural Presidency*]; Theodore Olson, *Separation of Powers Principle is No 'Triviality' (Bowsher v. Synar)*, *Legal Times*, July 21, 1986, at 4 [hereinafter Olson, *Separation of Powers*].

2. See, e.g., Calabresi & Rhodes, *supra* note 1, at 1167; Currie, *supra* note 1, at 31-36; Miller, *supra* note 1, at 58-60; Olson, *Plural Presidency*, *supra* note 1, at 11-12; Olson, *Separation of Powers*, *supra* note 1, at 4.

not advanced by the original design, we seemingly face an unpleasant dilemma—either we adhere to that design and sacrifice important institutional values, or we advance these institutional values and sacrifice fidelity to the original design. History apparently leads us to choose between the original design and a design many now view as indispensable.

At least this is so unless there is a compelling nonhistorical³ argument supporting a strong unitary design. We believe that there is indeed a plausible structural argument on behalf of the hierarchical conception of the unitary executive. This is an argument that emphasizes changed circumstances since the eighteenth century, and that accommodates the framers' design within this changed constitutional context—an argument, that is, that translates⁴ the framers' original design from the language and context of the eighteenth century into the world today.

3. We use the term "nonhistorical" rather than "nonoriginalist," though at many points we will speak of originalism, a term that seems to us decreasingly helpful. Just as the "interpretivist-noninterpretivist" division now seems unsatisfactory, for reasons explained in Ronald Dworkin, *The Forum of Principle*, in *A Matter of Principle* 33, 34–35 (1985), so it is necessary to question the "originalist-nonoriginalist" division in the context of many legal disputes, especially those that involve an effort to maintain fidelity to constitutional commitments in the face of changed circumstances. When circumstances have changed, a supposedly nonoriginalist interpretation may well have a stronger claim of fidelity to the original understanding, for reasons suggested in Part III below. The approach that we advocate may therefore be described as an originalist one. See *infra* text accompanying notes 37–47.

4. The metaphor of translation has been used by many people, though in somewhat different ways. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 218–22 (1980) (arguing for nonoriginalist constitutional interpretation using a historical interpreter as translator); Michael J. Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation,"* 58 S. Cal. L. Rev. 551, 599 (1985) (discussing Robert Bennett as translator); H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 659, 672 (1987) ("[t]o converse with the founders, you need a translator") (emphasis deleted); Terrance Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1067–69 (1981) (arguing that no inflexible "core" of the founders' values exist but that instead each generation must interpret these values itself); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 494–95 (1989) (discussing effect of changed circumstances in interpreting old texts); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, in *Interpreting Law and Literature* 193 (Sanford Levinson & Steven Mailloux eds., 1988) (comparing neutral principle and interpretivist approaches to interpreting the Constitution). The notion of course was not born with Brest. Perhaps its most creative pre-Brest appearance was in an extraordinary piece by Felix Cohen, which linked the process of interpretation across contexts to the theory of relativity, to suggest that "[t]he achievements of modern mathematics and physics . . . give ground for hoping that we shall some day achieve a powerful new organon for mutual understanding,—a theory of translation." Felix S. Cohen, *Field Theory and Judicial Logic*, 59 Yale L.J. 238, 272 (1950). Most recently, James Boyd White has discussed the notion of reading as translation in James B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990). Much earlier, Francis Lieber may have captured much of the sense of translation in his distinction between "interpretation" and "construction." See Francis Lieber, *Legal and Political Hermeneutics* 11, 44 (St. Louis, F.H. Thomas & Co., 3d ed. 1880) ("Interpretation is the art of finding out the true sense of any form of words," while "[c]onstruction is the drawing of conclusions respecting subjects that lie beyond the

After outlining the debate over the origins of a unitary executive in Part I, this Article goes on to make two basic points. The first, set out in Part II, is historical. Conventional wisdom insists (1) that the framers believed in a hierarchical executive branch, with the President in charge of all administration of the laws,⁵ and (2) that we must also ensure a hierarchical executive branch, at least if we are to be faithful to the framers' constitutional design.⁶ We think that the conventional wisdom is wrong on both counts. There is no historically sound reading of the Constitution that compels anything like the first claim. Any faithful reader of history must conclude that the unitary executive, conceived in the foregoing way, is just myth.

But we also think that this conclusion does not mean that a strongly unitary conception of the constitutional design is wrong. Part III of this Article offers a justification of that conception, relying not on false history, but on the best reading of the framers' structure translated into the current, and radically transformed, context. Carried into this context, certain crucial aspects of the unitary executive view make most sense of the framers' design, even if the application of that design differs dramatically from the application in the framers' own context.

In Part III, we therefore discuss the basic commitments of the original constitutional system—the avoidance of factionalism, political accountability, a degree of centralization in government, and expedition in law enforcement—and show that in the face of post-New Deal developments, those founding commitments would be compromised by limiting presidential power over the administration of the laws. However ironic it may be, the claims on behalf of the strongly unitary executive, while implausible as a matter of simple history, may nonetheless be right as a matter of constitutional interpretation.

In Part IV, we apply these general propositions to a wide range of current disputes about the relationship between the President and the administration. We discuss Congress' power to create independent prosecutors and independent agencies. We also attempt to sort out a set of issues that have become prominent in the wake of the Supreme Court's surprising reentry into this area in the period from 1976 to the present.

expression of the text."). Alfred Hill has described a practice of constitutional interpretation that may in result be quite similar to the translator's practice. See Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. Cal. L. Rev. 1237 (1990) (asserting probable intent of founders was that common practice of the times be observed). For general treatment of the idea of fidelity as translation, see Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993).

5. By administration of the laws, we refer very broadly to all tasks that involve implementation or execution of legislative enactments.

6. See *infra* notes 19–32 and accompanying text.

I. AN OLD (BUT QUITE LIVELY) DEBATE

Whether the founders framed a strongly unitary executive, or whether we should continue to recognize what they framed, is not a new debate. Throughout our history the question has been the subject of intense controversy.⁷ Fueled more recently by the work of Presidents, judges, and academic observers,⁸ the question has regained center stage. Before the late 1970s, the question seemed well settled, even if the answers were to some observers quite-jarring. It was clear that "executive" functions must be performed by officers subject to the unlimited removal and broad supervisory power of the President.⁹ But it was equally clear that Congress had the constitutional power to remove from the President's authority officers having "quasi-legislative" and "quasi-judicial" functions.¹⁰

In these two sentences could be found the basic wisdom about the relationship between the President and administrative agencies. Some unsettled questions remained. But it appeared that those questions would be answered through accommodations, formal and informal, between Congress and the President, and not as a matter of constitutional law.

All this changed in the 1980s. Spurred by President Reagan's efforts to assert hierarchical control over the bureaucracy,¹¹ the entire field ex-

7. See especially the various opinions in *Myers v. United States*, 272 U.S. 52 (1926); see also, e.g., Nathan D. Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285, 300 (1950) (discussing debate over extent of autonomy that executive has in appointing and removing administrators); Miller, *supra* note 1, at 52-58 (laying out pragmatic and neoclassical approaches to separation of powers debate); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 599-600 (1984) (noting that the Convention was "ambivalent" about the President's relation to those who would actually administer the laws).

8. See *infra* text accompanying notes 11-18.

9. See *Myers*, 272 U.S. at 161-64. The dispute in *Myers* involved over President Wilson's power to remove a regional postmaster without first gaining the consent of Senate as the statute required. The Court found unconstitutional the statutory provision limiting the President's removal authority. *Myers* also sets out three exceptions to this rule. See *infra* text accompanying notes 102-108.

10. See *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). *Humphrey's* involved the power of President Roosevelt to remove a Commissioner from the Federal Trade Commission. The statute provided for removal by the President only for "inefficiency, neglect of duty, or malfeasance in office." The Court held that, because of the quasi-legislative and quasi-judicial nature of the Commission, these limitations on the removal power were constitutional.

11. Reagan's efforts came primarily in the form of executive orders. See Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981), reprinted in 5 U.S.C. § 601 (1988) (requiring agencies to conduct cost-benefit analyses and submit "Regulatory Impact Analyses" of such analyses to OMB); Exec. Order No. 12,498, 3 C.F.R. 323, 323 (1985), reprinted in 5 U.S.C. § 601 (1988) (directing agencies to create and publish yearly regulatory agendas for OMB approval); see also Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy 19-24* (1991) (reviewing President Reagan's executive

perienced a minor revolution. Sharp new battle lines were drawn. In several cases, the Supreme Court limited congressional efforts to insulate administration of the laws from presidential control.¹² These cases seemed to suggest that the whole idea of independent administration could no longer be sustained—a change in understanding that, if accepted, would dramatically alter the framework of American government.

This shift in the Court—toward greater solicitude for presidential control over implementation—inspired an even greater shift in the academy. Scholars began to assert more forcefully that the conventional view of the executive power—in particular, the idea that Congress could create independent agencies—was constitutionally unfounded.¹³ Perhaps the Court could eventually be persuaded to conclude that the Constitution prohibited Congress from creating “independent agencies.” But in several more recent cases the Supreme Court unambiguously committed itself to the idea that Congress may, at least sometimes and at least to some extent, make administration independent of the President.¹⁴ Indeed, the Court has allowed Congress to go beyond independent “quasi-legislators” and “quasi-judges” and create independent prosecutors¹⁵—an innovation from the previous cases that appears to expand congressional authority.

The recent cases leave many questions unanswered, involving the precise relationships among the President, the so-called executive agencies, and the so-called independent agencies. These questions assumed special importance in connection with efforts by President Bush to assert

orders); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181, 185–97, 202–03 (1986) (describing President Reagan’s executive orders and arguing that their application can and should be extended to independent agencies). President Reagan’s efforts should be seen as the culmination of a long historical trend, beginning with President Nixon. See, e.g., Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533, 546–52 (1989) (reviewing evolution of presidential management programs beginning with President Nixon).

12. See, e.g., *INS v. Chadha*, 462 U.S. 919, 965–67 (1983) (striking down the use of legislative veto); *Buckley v. Valeo*, 424 U.S. 1, 118–37 (1976) (holding that Congress does not have constitutional power to appoint members to Federal Election Commission, which is responsible for administration and enforcement of election laws).

13. See, e.g., Calabresi & Rhodes, *supra* note 1, at 1167–68; Currie, *supra* note 1, at 32–36; Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court was Wrong*, 38 Am. U. L. Rev. 313, 318 (1989); Miller, *supra* note 1, at 43.

14. In *Mistretta*, the Court upheld the constitutionality of the United States Sentencing Commission. See *Mistretta v. United States*, 488 U.S. 361, 408–12 (1989). The Commission consists of seven members, at least three of whom must be federal judges, and has the authority to promulgate binding sentencing guidelines. See *id.* at 368–70. Under the statute, the President may remove Commissioners only for “good cause.” See *id.* at 368. In *Morrison*, the Court upheld a statute that allowed the President to remove an “independent prosecutor” only for “good cause.” See *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988).

15. See 487 U.S. at 685–93.

close control over government regulation;¹⁶ they have new urgency as a result of likely new efforts by President Clinton to claim authority over a government staffed largely by Republican Presidents.¹⁷ Heated struggles arose between President Bush and Congress over a range of unresolved issues.¹⁸ Similar issues are likely to rematerialize during the Clinton Administration, and these debates will undoubtedly raise new issues about exactly how unitary the executive branch can claim to be.

It is time again to ask whether the executive is "unitary" in the sense that the President must have plenary power to control administration and execution of the laws. It seems clear that the belief in a unitary executive has captured the high ground of principle, so that arguments for an "evolving Constitution," for flexibility in interpretation, or for judicial deference to political compromise, have become moves of compromise or mere politics. But is this really a debate between principle and politics? Or more precisely, is this a debate where principle favors the unitary view?

16. See, e.g., Memorandum on Reducing the Burden of Government Regulation, 28 Weekly Comp. Pres. Doc. 232 (Jan. 28, 1992) (asking executive and independent agencies to refrain from issuing new regulations during 90 day period, and to review existing regulations with goal of minimizing economic impact); Memorandum on Implementing Regulatory Reform, 28 Weekly Comp. Pres. Doc. 728 (Apr. 29, 1992) (extending moratorium for another 120 days). President Bush also formed the Council on Competitiveness on March 31, 1989, to exercise power granted by Reagan's executive orders. See *supra* note 11.

17. Clinton has replaced President Reagan's Executive Orders 12,291 and 12,498 with Executive Order 12,866. The new order provides that OMB and the Office of Information and Regulatory Affairs will oversee agency regulation, requires that agencies undertake regulatory analyses under the new principles, and effectively places Vice President Gore in charge of the overall regulatory policymaking function. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993); see also Marshall Ingwerson & John Dillin, *Vacancy Signs Abound in Capital*, Christian Sci. Monitor, Feb. 1, 1993, at 3 (reviewing continuing Republican control of many agencies).

18. For example, President Bush lost his battle to control the Board of Governors of the Postal Service. He had attempted to prevent the board from exercising its statutory authority to represent itself in challenging a Postal Rate Commission decision, either by having the Department of Justice dismiss the suit on behalf of the board, or by removing the board. See *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 512 (1993). The D.C. District Court enjoined President Bush from removing the board, see *id.*, and the D.C. Circuit Court held that the board can represent itself in court if its position is inconsistent with that of the Department of Justice. See *id.* at 515.

Possibly the most intense battle during the Bush presidency was fought between Vice President Quayle and Congress over the role of the Council on Competitiveness. Before the issue became moot with the election of President Clinton, Congress threatened to cut all appropriations for the Council if it failed to increase public accountability. See, e.g., 138 Cong. Rec. 13,214-15 (1992) (statement of Sen. Glenn); Eric Pianin & Steven Mufson, *Administration Seeking Showdown on Spending*, Wash. Post, Sept. 13, 1992, at A1.

We begin with some basics.¹⁹ No one denies that in some sense the framers created a unitary executive; the question is in what sense.²⁰ Let us distinguish between a strong and a weak version. The strong version—held by those whom we will call the modern unitarians—contends that the President has plenary or unlimited power over the execution of administrative functions, understood broadly to mean all tasks of law-implementation. All officers with such functions must either be removable at the President's discretion or be subject to presidential countermand in the context of policy disagreements. The Constitution creates "a hierarchical unified executive department under the direct control of the President,"²¹ with consequences we develop in detail below.²² In the

19. This account draws on a recent statement of the modern position. See Calabresi & Rhodes, *supra* note 1; see also Saikrishna B. Prakash, Note, Hail to the Chief Administrator: The Framers and the President's Administrative Powers, 102 Yale L.J. 991 (1993) (building on the work of Calabresi & Rhodes).

20. See, e.g., Strauss, *supra* note 7, at 599–600 ("While it was understood that there would be departments responsible for daily administration, the Convention clearly and consciously chose a single and independent executive over a collegial body subject to legislative direction."); Prakash, *supra* note 19, at 998–99 (Convention chose a single executive based on values of accountability and efficiency).

21. Calabresi & Rhodes, *supra* note 1, at 1165. The modern unitarian view was recently, and helpfully, summarized by Calabresi and Rhodes. As they describe it, the position is grounded in the Vesting Clause of Article II, which provides: "The executive Power shall be vested in a President." U.S. Const. art. II, § 1. This clause, together with the Take Care Clause, *id.* § 3,

creat[es] a hierarchical, unified executive department under the direct control of the President. . . . [Thus,] the President alone possesses *all* of the executive power and . . . he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power. The practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.

Calabresi & Rhodes, *supra* note 1, at 1165 (footnotes omitted).

The Constitution embraces, the modern unitarians conclude, a single organizational structure, with the Take Care Clause empowering the President to exercise control over subordinates, at least so far as those subordinates exercise "purely executive power." "Unitary executive theorists reject the view that the Take Care Clause contemplates merely a housekeeping role for the President, who 'takes care' from a distance while unnamed others 'faithfully execute' the laws." *Id.* at 1167–68.

Of course Congress has some role in filling in the details, but that role, according to the modern unitarian view, is crucially limited: "Unitary executive theorists concede that Congress has broad power under the Necessary and Proper Clause to structure the executive department. . . . They maintain, however, that '[n]o matter what structure Congress selects . . . the President must retain the authority to give directives to the officers who assist' him." *Id.* at 1168 (footnotes omitted).

Finally, the modern unitarian rejects textual clues that may suggest a structure somewhat to the contrary. Thus, though the Constitution contemplates some appointments being vested (and hence some loyalty engendered) in heads of departments, and not the President, and though the framers oddly (for the unitarian) felt it necessary to make explicit that the President could get reports from his officers,

unitary executive theorists reject the contention that Congress's power to vest the appointment of inferior officers in the "Heads of Departments" necessarily

modern unitarian's view, the Constitution constitutionalizes a single organizational value—unitariness—at the expense of other possible governmental values—such as disinterestedness or independence. The conclusion is that any organizational structure that violates unitariness violates the Constitution.

The weak version offers a more unruly picture. It contends that there are functions over which the President has plenary powers; that these functions are the “executive” functions in the constitutional sense; but that in the founding vision, “executive” functions—which must of course be specified in detail²³—are not coextensive with all the functions now (or then) exercised by the President.²⁴ As for these nonexecutive functions exercised by the executive, the original unitarian—as we will refer to those who believe in the weak version—contends that Congress has a wide degree of authority to structure government as it sees fit. Under this view, unitariness is a significant constitutional value, but it is not a trumping constitutional value. Other values may at times override unitariness, and it is Congress that is to choose among these competing values.

In outline form, the belief in a strongly unitary executive is grounded in the Vesting Clause of Article II: “The executive Power shall

insulates these officers from presidential control. Rather, these theorists contend, this Clause was an insignificant housekeeping provision added at the last minute. Unitary executive theorists also deny that the President's explicitly delineated power to “require the Opinion, in writing, of the principal Officer in each of the executive Departments” implies that the President has no inherent power to tell principal officers what to do. Unitarians contend that the Opinions Clause represents too slender a reed to support this qualification of the substantial grant of power embodied in the Article II Vesting Clause.

Id. (footnotes omitted).

Charles Tiefer provides a similar description of the modern unitarian view:

This view posits constitutional mandates for executive organization, not only in areas with traditional Executive hierarchies such as communicating with foreign governments and directing the military, but also in the area of access to the courts. Under this view, the Executive branch consists of agencies organized in a unitary body under the President's control either directly or through a chain of command. Congress' checks on abuse within this unitary body consist of hearings, investigations, new legislation, political pressures, and impeachment, but Congress cannot shield agencies within this unitary body from presidential control or removal. Thus, even in conflict of interest situations, such as when the Executive department is called upon to conduct investigations of the President or his top officials, proponents of this approach maintain that Congress cannot divest the President of control over the investigation.

Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. Rev. 59, 61 (1983) (footnotes omitted).

22. See *infra* notes 25–32 and accompanying text.

23. See *infra* Part II.D.

24. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 492–96 (1987) (arguing Constitution's silence about administration was product of “explicit purpose to leave Congress free to make whatever arrangements it deemed ‘necessary and proper’”).

be vested in a President."²⁵ This clause creates "a" President, not several; it is powerful, and to some decisive, textual evidence in favor of the view that the Constitution creates a hierarchy with the President at the top.²⁶ Moreover, the President is given *all* executive power. The framers did not split up that power among different national entities. The Take Care Clause is said to reenforce this view. This clause explicitly gives the President the power to "take Care that the Laws be faithfully executed."²⁷ It may be true that the Take Care Clause is a duty at least as much as it is a power; but the duty is the President's, and as with any duty, it implies certain powers. If we take the two clauses together, the argument goes, the President exercises hierarchical control over everyone within the executive department, and people who exercise discretionary authority must serve either at the President's pleasure or remain subject to his will in the sense that he can countermand their decisions. Congress' authority to structure the executive branch cannot intrude on this basic principle.²⁸

On this view, the founders imagined a hierarchical²⁹ executive branch, with the President operating at the head of that hierarchy. From this structure, certain limitations on the power of Congress naturally flow—limitations on Congress' power to restrict or control the extent of the President's authority over subordinates who execute the laws. It follows that the so-called independent agencies are in conspicuous violation of the Constitution.³⁰ It also follows that the Independent Counsel Act,³¹ like all other efforts to separate the President from the administration, is unconstitutional under Article II.³²

One could approach the question whether the Constitution embodies the strong version of unitariness from at least two perspectives, one labeled broadly "originalist," the other not.³³ We understand originalism to require the interpreter to ask whether the modern unitarian's limitations on Congress' power were indeed understood as such by those who ratified the Constitution. As Justice Scalia has stated the test, the originalist would ask whether (1) the text standing alone contains strong unitarian limitations, or (2) whether strong unitarian limitations were so well

25. U.S. Const. art. II, § 1.

26. See, e.g., Calabresi & Rhodes, *supra* note 1, at 1165.

27. U.S. Const. art. II, § 3.

28. See *supra* note 21.

29. As we emphasize below, we are not claiming that the founders must have imagined an entirely hierarchical executive for the unitarian's claim to be in substance correct. See *infra* text accompanying notes 73–75; notes 58, 96 and accompanying text. We simply begin with what is (for us) a natural assumption here, and relax it later on.

30. See *supra* note 21.

31. See 28 U.S.C. §§ 591–598 (1988).

32. See *infra* text accompanying notes 48–53.

33. For a qualification of the originalist/nonoriginalist distinction, see *supra* note 3.

understood at the founding so as to be implied by the document itself.³⁴ A nonoriginalist who is nonetheless insistent on maintaining fidelity with founding commitments would ask either (1) whether such limitations should be understood to follow from the best understanding of the framers' design,³⁵ or (2) whether such limitations follow from the original understanding translated into the current (and quite different) context.³⁶ We now proceed to explore, on originalist grounds, which version of unitariness is embodied in the Constitution.

34. In *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), Justice Scalia sketched the method of originalism that we will employ here.

There are of course many kinds of originalism. We emphasize the form of originalism advocated by its most prominent judicial devotee, Justice Scalia, but there are competing versions. See, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59 (1988); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Compare *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring) (following "judicial tradition of a continuing evolution of doctrine" in First Amendment law), cert. denied, 471 U.S. 1127 (1985) with 750 F.2d at 1038 n.2 (Scalia, J., dissenting) (arguing that new phenomena do not call for alteration of preexisting doctrine). As we have suggested, the method that we are using here can be described as one form of originalism.

35. Cf. Ronald Dworkin, *Law's Empire* 361-63 (1986) (showing how fidelity to beliefs of framers may require abandonment of historical interpretation). It is unclear, however, to what extent Dworkin's project is one of fidelity. For instance, Dworkin is willing to look to "popular conviction" and "national tradition" in finding the best interpretation of the Constitution. See *id.* at 398.

36. For examples of cases that can be understood to use this methodology of translation, see Lessig, *supra* note 4, at 1214-50. The most famous of these may well be *West Virginia v. Barnette*:

True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. *We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.* These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

319 U.S. 624, 639-40 (1943) (emphasis added). It is significant that Justice Jackson was writing about constitutional interpretation in the aftermath of the New Deal, since constitutional interpretation in this context is a principal subject of our discussion here.

Note that the two questions asked by the nonoriginalist may not be sharply separable. It may well be that the enterprise of translating the original understanding into the current context may be a more precise way of describing the first question posed, that is, whether

II. THE ORIGINAL EXECUTIVE

How can we know whether the framers believed in a strongly unitary executive branch? Many originalists would approach this question through a (by now) standard formula—by considering almost mechanically the key sources of interpretation, “text, structure, and history,” as the basis for uncovering the Constitution’s original meaning.³⁷ And so, beginning with the framers’ text, we could read in Article II that “the executive power” is to be “vested in a President” who shall “take Care that the laws be faithfully executed.” This is quite likely to yield (for us) a very strong conception of the President’s power—after all, it says “the executive power,” not “*some*” executive power, and “*all*” this executive power is vested in “*a*” President.³⁸

There are of course other bits of text added to this core—text that defines some additional power and a few minor duties³⁹—but in the main, the document might appear quite clear. Any question about this clarity is easily resolved by considering the second originalist step—structure. Article II’s Vesting Clause is less conditional than Article I’s: Article I vests legislative power “herein granted,” while Article II vests “the executive power” without such a qualification. And so with text and structure, we quite quickly come to a conception of the executive that fits well with a familiar picture of the modern presidency—a strong, constitutionally empowered “chief-administrator” of the executive branch.⁴⁰

But we might ask up front how well this method can serve us in this setting. For when we “begin” with an old text, we are likely also to begin with a range of modern presuppositions about the meaning of that text—modern, not founding, presuppositions. The text is not self-interpreting, and the presuppositions with which we begin will color our reading of the words, possibly more than they illuminate the world the words were meant to construct.⁴¹ “Executive power” means to us all power not legislative and not judicial; but we might ask, was this its meaning for the framers? “A President” is for us the center of national policymaking, both

such a limitation should be understood to follow from the best understanding of the framers’ design. On this question, we remain agnostic. Finally, as we suggested above, see *supra* note 3, it may be that an understanding of this form of “nonoriginalism” is the best way of understanding what “originalism” should be. For further discussion of this point, see *infra* Part III.

37. See, e.g., Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1505 (1990) [hereinafter Amar, *The Judiciary Act of 1789*].

38. See *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); Calabresi & Rhodes, *supra* note 1, at 1165. It might be revealing that much of this debate is a debate through italics.

39. See U.S. Const. art. II, §§ 2, 3.

40. See, e.g., Prakash, *supra* note 19, at 991 (arguing that “[h]istorical evidence . . . indicates the Framers attempted to establish an executive who alone is accountable for executing federal law and who has the authority to control its administration”).

41. This is a pervasive problem with one version of formalism in law. If we aim to recover original meaning, we cannot rely on text “alone.”

foreign and domestic; was this who he was at the start of the nation?⁴² A power to "take Care" that the laws be faithfully executed yields for us an implied power to control and direct all those in the executive branch who administer the law; would the framers have understood this to follow? The Opinions Clause⁴³ (giving the President the power to demand written opinions), the Commission Clause⁴⁴ (requiring the President to commission officers), and the Inferior Officers Appointment Clause⁴⁵ (allowing Congress to vest the appointment of some officers somewhere else) all for us read plainly, but for the most part insignificantly; were they also unnecessary scribbles for the founders?

It is our suspicion that much of the conventional reading of Article II's text is informed by very modern ideas, and this leads us to adopt a distinctive interpretive strategy. Rather than beginning with text or structure alone, we begin with history. Our aim is to dislodge modern preconceptions about the nature of the President and executive power by contrasting these conceptions with those of the framers and with the actual theory and practice of the early Congress. It is an important truism that the framers were quite skeptical of broad executive authority, a notion that they associated with the tyrannical power of the King.⁴⁶ Their skepticism about executive authority—their rejection of the monarchical legacy—at least raises doubts about the idea that the President was to be entrusted with control over all of what we now consider administration.

We rely, however, not on general ideas about the executive, but on a more particular examination of how well the strongly unitarian claim fits with the founding vision. We begin with three puzzles presented by the original practice. In each, we compare the actual historical practice of the framers and the early Congresses with what the unitarian would predict that same practice would be. The practice is important, even if not decisive, because it is relevant to an assessment of the original understanding.⁴⁷ While the practice does not prove the original understand-

42. On the question of policymaking alone, consider President Washington's self-conception of his role in the legislative process:

"Motives of delicacy," [President Washington] once wrote, "have uniformly restrained the P— from introducing any topick which relates to Legislative matters to members of either house of Congress, lest it should be suspected that he wished to influence the question before it." He would not permit congressional committees to solicit his opinion, but intimated his willingness to express his views, "when asked," to a friend.

Leonard D. White, *The Federalists: A Study in Administrative History* 55 (1948) (quoting Draft Letter by George Washington (Feb. 1792), in 31 *The Writings of George Washington* 491, 493 (John C. Fitzpatrick ed., 1939)).

43. U.S. Const. art. II, § 2, cl. 1.

44. *Id.* cl. 3.

45. *Id.* cl. 2.

46. See Gordon S. Wood, *The Creation of the American Republic 1776–1787*, at 521 (1969).

47. No doubt there are important questions that can be raised about the usefulness of post-enactment practice for interpreting the meaning of the Constitution. The mere fact

ing, an original practice widely inconsistent with a proposed original understanding should draw that understanding into doubt. As we suggest, in every case the original practice conflicts sharply with the practice predicted by the modern unitarian's theory. Together, we suggest, the three puzzles force us to ask whether there is a different model of the original executive that better captures the original design. We conclude that there is.

A. *Original Understandings and Unitarian Puzzles: The Executive and Prosecution*

We begin with the narrow but revealing question of criminal prosecution, as presented in the contest over the independent counsel and resolved in *Morrison v. Olson*.⁴⁸ The Ethics in Government Act of 1978,⁴⁹ enacted in the wake of Watergate, established the office of the independent counsel to investigate and prosecute offenses against certain officers of the administration.⁵⁰ Without exploring the details of the Act, suffice it to say that under certain circumstances, the statute vested in the special counsel full prosecutorial authority for some limited period of time, uncontrolled by the President except to the extent that the Attorney General could discharge the special counsel for "good cause."⁵¹ The claim of Theodore Olson (the prosecuted) was that the power of Alexia Morrison (the prosecutor) was power from "the executive power," and hence "vested" in the President alone. For Justice Scalia, writing in dissent,⁵² the case was quite straightforward: The Constitution vests execu-

the early Congresses enacted a bill certainly cannot show that the bill is constitutional—take for example, the Alien and Sedition Acts. The Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801); The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–23 (1988)); The Alien Act, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800); The Naturalization Act, ch. 54, 1 Stat. 566 (1798) (repealed by Act of April 14, 1802, ch. 28, § 5, 2 Stat. 153, 155). In this area, Congress' self-interest appears to be at stake, and we may therefore discount its conclusions. We do believe the practice is relevant, even persuasive, and we will rely upon it below. But we are not using the practice to prove a particular theory; rather our aim is to use it to raise doubts about a reigning, strongly unitarian theory. A complete picture of the original understanding would include a much broader survey of practice not just after, but before the Constitution's enactment. Our aim here, however, is not the final history of the founding. It is enough to jar current understandings by emphasizing the inconsistencies they produce. Note that this practice of looking to the early Congresses as an understanding of the framers' meaning is common in the Supreme Court as well. See, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680, 2694 (1991) ("The actions of the First Congress . . . are of course persuasive evidence of what the Constitution means, [*Marsh v. Chambers*, 463 U.S. 783 (1983); *Carroll v. United States*, 267 U.S. 132, 150–52 (1925); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–02 (1819)].").

48. 487 U.S. 654 (1988).

49. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at scattered sections of 2, 5, 18, 28 & 39 U.S.C.).

50. See 28 U.S.C. §§ 49, 591–598 (1988).

51. See *id.* § 596.

52. See 487 U.S. at 697 (Scalia, J., dissenting).

tive power in the President, and prosecution is an executive power; the independent counsel exercises prosecutorial discretion, but without the President's control; the act creating the independent counsel is therefore unconstitutional. For Justice Scalia, the President must in some way control the exercise of all executive power, and this statute did not furnish that control.⁵³

So much certainly follows as a matter of modern unitarian theory; but what about the framers' actual practice? At the core of Justice Scalia's argument was an implicit claim about that practice. In defining the scope of "executive power," Justice Scalia wrote:

In what *other* sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) *except* by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive Governmental investigation and prosecution of crimes is a quintessentially executive function.⁵⁴

This is a textually plausible claim. To many modern readers, it seems certainly correct. But has "the executive Power" "always and everywhere" been so understood?

In answering this question, again, we proceed in two steps. First, does the constitutional text in its original context speak to the question at issue? Second, if the text does not squarely answer the question, does the original practice reveal an understanding uniformly shared by the framers that itself resolves the question?⁵⁵ The text of course does not say whether prosecution is within the term "executive Power."⁵⁶ So the originalist must turn to the second step, and ask whether despite textual ambiguity, the framers clearly understood prosecution to be within the term "executive Power."

If the framers' and early Congresses' actual practice is any indication of their original understanding, then they did not understand prosecution to be within the notion of "executive Power" exclusively, and therefore did not understand it to be within the exclusive domain of the

53. See *id.* at 705–15 (Scalia, J., dissenting).

54. *Id.* at 706 (Scalia, J., dissenting).

55. Again, this method was used by Justice Scalia in *Harmelin v. Michigan*, 111 S. Ct. 2680, 2691–99 (1991). See *supra* note 34.

56. While the Constitution explicitly grants the President five executive powers, nowhere is the power of prosecution explicitly mentioned. These powers include the power to receive ambassadors, the power to take care that the laws be faithfully executed, the power of commander in chief, the power to veto legislation, and the power to grant pardons in federal cases. See Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 *Hastings Const. L.Q.* 13, 14–15 (1974). Compare Peter Strauss' list, Strauss, *supra* note 7, at 598 (listing only Article II powers, thereby omitting veto power).

President. While the argument for this conclusion has been discussed before in depth,⁵⁷ we can quickly summarize the important points here.

Consider first the original structure of federal prosecution. If the modern unitary model were the framers' model, one might think that the framers would have established a hierarchical department of legal affairs, responsible for all federal prosecution, with officers answerable to the President or the President's agent (for example, the Attorney General).⁵⁸ In fact, the record is not at all so neat. The first Congress established no hierarchical department of legal affairs—as we discuss below, the Department of Justice was not even born until 1870.⁵⁹ Nor did the framers establish a general or centralized body for federal prosecution. Most importantly, they established no absolute rule that prosecution must be conducted solely by those answerable to the President. In each of these three design elements, the unitary model mispredicts the original practice. We consider these in turn.

First: For the first eighty years of the Republic, there was no centralized and hierarchical department of legal affairs in the executive branch. While the Judiciary Act of 1789 did create the office of Attorney General, it did not create a "department" under him.⁶⁰ By statute, the Attorney General had just two duties: to represent the United States in the Supreme Court (only), and to answer legal questions submitted to him by the President or heads of departments on matters relating to the operation of those departments⁶¹—though from the start, the Attorney General also served as the President's legal advisor.⁶² The same act created district attorneys who prosecuted suits on behalf of the United States in the district courts.⁶³ Until 1861, however, these district attorneys did not report to the Attorney General, and were not in any clear way answerable to him. Before 1861, the district attorneys reported either directly to no one (1789 to 1820) or to the Secretary of the Treasury (1820 through

57. See, e.g., Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 Am. U. L. Rev. 275 (1989); Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 Alb. L. Rev. 49, 53–60 (1988); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L.J. 1069 (1990).

58. It is important to emphasize that we are not saying a unitarian must link this organizational norm of hierarchy with the unitarian claim of ultimate control. Hierarchy is just one of any number of organizational forms that could still give the executive ultimate control. To twentieth century ears, however, it is a likely organizational form, and we consider it here first as just one possibility.

59. See Act of June 22, 1870, ch. 150, 16 Stat. 162.

60. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93; Lawrence Lessig, *Readings by our Unitary Executive*, 15 Cardozo L. Rev. 175, 186–96 (1993).

61. See *id.*

62. See White, *supra* note 42, at 164–68.

63. See Judiciary Act of 1789 § 35, 1 Stat. at 92.

1861.⁶⁴) Throughout this period, they operated without any clear organizational structure or hierarchy.⁶⁵

Second: The first centralized federal prosecution was outside the direct control of the President. Within the Department of the Treasury, Congress established the office of the Comptroller, and in 1797 charged him with the power "to institute suit for the recovery of" a "sum or balance reported to be due to the United States, upon the adjustment of any [revenue officer's account]."⁶⁶ This power was expanded in 1817, giving the Comptroller the power "*to direct suits and legal proceedings*, and to take such measures as may be authorized by the laws to enforce prompt payments of all debts to the United States."⁶⁷ But the Comptroller himself was not directly within the President's control, and most commentators understood the Comptroller to be "relatively independent."⁶⁸ So special was the Comptroller's position that it led Madison, who ordinarily supported an absolute removal power by the President over executive officers, to comment that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."⁶⁹ At one point in the debate, Madison argued that the Comptroller should hold his office for a fixed tenure.⁷⁰

64. Note that during this period the Secretary of the Treasury reported to Congress. See *infra* text accompanying note 156.

65. Leonard White describes the early control of district attorneys as follows: By clear implication and subsequent practice the district attorneys thus became subject to the comptroller's instructions for this class of cases, as well as the fifth auditor's instructions after 1820 in cases involving delinquent collectors of revenue. They also assisted the Postmaster General in suits against delinquent postmasters and their sureties, and in the prosecution of offenses against the mails. The attorneys might, therefore, receive instructions from three major federal agencies, to none of which they were clearly responsible.

Leonard D. White, *The Jeffersonians: A Study in Administrative History 1801-1829*, at 340 (1951); see also Tiefer, *supra* note 21, at 75 ("The Attorney General did not control or supervise federal district attorneys; his function was merely to advise the President and the Cabinet. Federal revenue collectors obtained legal enforcement for their collection cases in decentralized fashion, paying fees to the federal district attorneys or to private counsel." (footnotes omitted)).

66. Act of Mar. 3, 1797, ch. 20, § 1, 1 Stat. 512, 512; see also Tiefer, *supra* note 21, at 75. For a general discussion of the Comptroller's office, see Harvey C. Mansfield, *The Comptroller General* (1939).

67. Act of Mar. 3, 1817, ch. 45, § 10, 3 Stat. 366, 367 (emphasis added); see also Tiefer, *supra* note 21, at 75.

68. See Darrell H. Smith, *The General Accounting Office: Its History, Activities and Organization* 22 (1927); Tiefer, *supra* note 21, at 73-74.

69. 1 *Annals of Cong.* 636 (Gales & Seaton eds., 1834); see also Tiefer, *supra* note 21, at 74.

70. See 1 *Annals of Cong.* 636 (Gales & Seaton eds., 1834). It should be noted, as lawyers are wont to do, that much of the argument against modern unitarians hangs on this single reference to one debate by Madison. Indeed, Madison the next day "withdrew the proposition which he yesterday laid upon the table," *id.* at 639, though it is not entirely clear to what proposal this refers. The point that must be stressed, however, is that too much of the anti-unitarian case may be resting upon this single speech by Madison.

Congress did not entirely follow Madison's suggestion,⁷¹ but nonetheless the Comptroller's decisions to prosecute were independent, as were his final determinations of disputes referred by statute to him.⁷² More importantly, whether Madison's initial thoughts prevailed or not, what is clear is that all thought the matter open for Congress' determination—that is, that Congress had significant flexibility in structuring the duties of this "executive" officer.

Thus, the organizational structure of the original executive, at least with respect to prosecution, was not hierarchical. But perhaps the essence of unitarianism is not organizational *structure*. Perhaps instead the essence is mere control, through whatever structure. If the President retained either directory authority over the district attorneys, or removal authority over all exercising prosecutorial power,⁷³ the unitary position may seem unimpaired, at least so far. While acknowledging that there was no clear organizational hierarchy, the unitarian could still claim that the essential requirement of presidential control was preserved⁷⁴: Even if the story just told shows that the Attorney General could not direct or remove district attorneys, nothing yet shows the President could not.⁷⁵

Third: But so far this story ignores a crucial fact about federal prosecution at the founding—federal officers were not the only ones who conducted federal prosecutions. State officials also conducted federal prosecutions, and these officers were clearly not subject to control by the

71. The Act contained a general removal clause that stated: "if any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor, . . . and shall upon conviction be removed from office." Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67. Compare this with the removal provision for the Secretary, which stated simply "[t]hat whenever the Secretary shall be removed from office by the President," without providing any limitations on the President's removal power. § 7, 1 Stat. at 67.

72. See Tiefer, *supra* note 21, at 74. We believe that Madison's concern here certainly was that the Comptroller be independent of the President for checks and balances reasons. But the modern unitarian could perhaps argue that the real motive for the independence was simply efficiency, and therefore that the Comptroller's position is not strongly probative of the framers' understanding of any constitutionally required control of the President.

73. On the distinction between directory and removal authority, see James Hart, *The Ordinance Making Powers of the President of the United States 188-97* (1925); Itzhak Zamir, *Administrative Control of Administrative Action*, 57 Cal. L. Rev. 866, 877 (1969).

74. Though as Susan Bloch convincingly argues, it is not at all clear the framers believed they were vesting in the President removal authority over the Attorney General. See Susan L. Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 582.

75. Jefferson at least exercised the directory power when he ordered district attorneys to cease prosecution under the Alien and Sedition Acts. See, e.g., Letter from Thomas Jefferson to Wilson C. Nicholas (June 13, 1809), in 12 *The Writings of Thomas Jefferson* 288 (Andrew A. Lipscomb ed., 1905) [hereinafter *Lipscomb*, *Writings of Jefferson*]; Letter from Thomas Jefferson to Edwin Livingston (Nov. 1, 1801), in 8 *The Writings of Thomas Jefferson* 57-58 n.1 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1897) [hereinafter *Ford*, *Writings of Jefferson*]. In 1897, the Supreme Court concluded the President had the power to remove a U.S. attorney, despite his being granted a four-year term under the appointment statute. See *Parsons v. United States*, 167 U.S. 324, 343 (1897).

President. Perhaps it would be possible to say that state officers enforcing federal law were not exercising "the Executive power of the United States"; but it seems quite reasonable to think that insofar as enforcement of federal law is at stake, this was indeed their responsibility. As Harold Krent writes,

Congress vested jurisdiction in state courts over actions seeking penalties and forfeitures, granted concurrent jurisdiction to state courts over some criminal actions, and assigned state officials auxiliary law enforcement tasks. Thus, Congress assigned law enforcement responsibility to state officials who were far removed from control of the executive branch.⁷⁶

Even when actions were criminal, "[t]he decisions whether to sue and what punishments to seek remained in the discretion of individuals outside the Executive's control."⁷⁷ The original practice thus violated the unitarian's plan, even in its most minimal form.⁷⁸ Here at least, some federal prosecution was exercised that was clearly beyond the President's control.

But not here only. For not only was federal prosecution vested in at least some federal officers not subject to direct presidential control,⁷⁹ and in some state officers far removed from executive control,⁸⁰ but federal

76. Krent, *supra* note 57, at 303. Krent's very careful analysis makes three distinct points: (1) "Congress limited the Executive's effective control over law enforcement by dispersing supervisory responsibility among various executive officials," *id.* at 286; (2) Private actions constituted prosecution outside the executive's control, see *id.* at 290-303; (3) States exercised some federal prosecutorial authority, see *id.* at 303-10. The last two points are discussed below, see *infra* text accompanying notes 77, 81-83. For an example of a statute giving control of prosecution to state officials, see Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577, 577 (respecting alien enemies); see also Thomas Sergeant, *Constitutional Law 269-70* (Philadelphia, Abraham Small 1822). Finally, one should note that there is an important difference between vesting executive authority in a state official and vesting executive authority in a federal official not directly responsible to the President. Only the latter is subject to the machinations of Congress, and hence the former might be considered constitutionally distinct. We do not address that difference, pointed out to us by Alan Meese, in the analysis that follows.

77. Krent, *supra* note 57, at 304.

78. One should ask what the appropriate baseline is for evaluating unitariness, or alternatively, the extent of original executive control. For obviously one cannot carry over modern conceptions, built upon modern capacity and technology, to the eighteenth century world. What may appear to us to be lax control may have, in context, appeared quite centralized. And indeed, as Charles Thach argues, against the background of state executives, and the continental executive, Article II's executive was quite strong. See Charles C. Thach, Jr., *The Creation of the Presidency 1775-1789: A Study in Constitutional History*, Johns Hopkins University Studies in Historical and Political Science, No. 4 1922, at 1, 77. It would remain possible for the modern unitarian then to argue that compared to the degree of control existing before 1787, the new Constitution was a more centralized and unitarian structure. Nonetheless, that it was *more* centralized would not entail a present understanding of it as *fully* centralized.

79. Recall the discussion of the district attorneys and the Comptroller, *supra* notes 64-72 and accompanying text.

80. See *supra* text accompanying notes 76-77.

prosecutorial authority was also granted to private individuals wholly outside the executive's control. Both through citizen access to federal grand juries,⁸¹ and through civil *qui tam* actions (treated for at least some purposes as criminal actions),⁸² citizens retained the power to decide whether and in what manner to prosecute for violations of federal law. Here too the decision whom to prosecute and what crime to charge was placed in a person not subject to presidential direction or removal.⁸³

Together, these bits of history are devastating to the modern unitarian's originalist claims about prosecution.⁸⁴ Contrary to the unitary model, not all federal prosecution was vested in officers answerable (whether directly or not) to the President. Although Justice Scalia is technically correct that "always and everywhere—if conducted by government at all—[the prosecutorial authority has] been conducted never by the legislature, never by the courts, and always by the executive,"⁸⁵ this

81. See Reisman, *supra* note 57, at 56–57.

82. See Krent, *supra* note 57, at 300 ("Because *qui tam* actions historically were viewed as criminal or quasi-criminal, Congress, by authorizing such actions, determined that private individuals could don the mantle of a public prosecutor."). On the *qui tam* action generally, see Evan Caminker, Comment, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341 (1989). Blackstone discusses *qui tam* actions in 3 William Blackstone, Commentaries *161–62. For examples of early *qui tam* statutes, see Act of Mar. 22, 1794, ch. 11, § 2, 1 Stat. 347, 349 (prohibiting carrying on the slave trade); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137 (regulating trade and intercourse with Indian tribes); Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (governing and regulating seamen in merchant service). See also *Musgrove v. Gibbs*, 1 U.S. (1 Dall.) 216 (Pa. 1787) (action for usury); *Phile v. The Ship Anna*, 1 U.S. (1 Dall.) 197 (Pa. Ct. of C.P. of Philadelphia County 1787) (forfeiture of vessel); *Talbot v. Commanders and Owners of Three Brigs*, 1 U.S. (1 Dall.) 95 (Pa. High Ct. of Err. & App. 1784) (marine trespass).

83. Here too it would be possible to say that the "Executive power of the United States" is not at stake, but what is important for our purposes is that the early practice allowed enforcement activity to take place outside of presidential control. On the question of whether *qui tam* actions by private parties are exercises of the United States government's powers, see *United States v. Boeing Co.*, No. 92-36660, 1993 WL 460501 (9th Cir. Nov. 5, 1993).

84. One problem with the history related to the citizen suits is the problem of periodization. Krent is quite happy to draw on precedents spanning from the late revolution through the first quarter of the nineteenth century. So too have we. It remains for a historian, however, to question the methodology that so casually compresses 75 years of history into a single story line, or alternatively, to question the methodology that so casually presumes that the nature of the events is somehow the same.

There are two responses to this criticism. First, as the tussle between Congress and the President has never really been resolved, it is at least plausible to presume that this is indeed a unified story line, and thus the wide temporal and contextual span is justified. Second, as the purpose throughout our use of this history is simply to explore whether certain issues were of concern to the framers—issues such as unified prosecution that would be central for the modern unitarian—we scan widely to see whether there is any evidence that these constitutionalists resolved the issues in a manner that modern unitarians deem mandatory. For these purposes, we believe the time frame problem is less pronounced.

85. *Morrison v. Olson*, 487 U.S. 654, 705–06 (1988) (Scalia, J., dissenting). But cf. Julius Goebel, Jr., & T. Raymond Naughton, *Law Enforcement in Colonial New York*

does not mean it has always and everywhere been the domain of the *President*. Sometimes government did not prosecute (private citizens did), and sometimes the federal executive did not prosecute (state executives did⁸⁶). And if we put standing issues to one side,⁸⁷ nothing in principle would have stopped the framers from assigning the decision to prosecute someone to a federal official not subject to presidential removal (as Madison argued the Comptroller should have been⁸⁸), or to state officials clearly outside federal control, or indeed to private citizens prosecuting *qui tam* actions (as every Congress since the founding has allowed⁸⁹). In short, the decision "who should prosecute whom" was a decision the early Congresses at least thought far more subtle and complex than do the believers in a strongly unitary executive.⁹⁰

Perhaps it remains for the modern unitarian to insist on the implied control over prosecution reserved to the President through the pardon power. As the President has the power to pardon either before or after conviction,⁹¹ he retains throughout prosecution a practical control over the effects of prosecution. Thus one could say that, in effect, the President does retain ultimate control over the executive function of prosecution, even if prosecutorial power is vested elsewhere. Notably, this argument would mean that *Morrison* was rightly decided and indeed that Congress could place prosecutorial power wherever it chooses, so long as the President retains the authority to pardon.

No doubt the pardon power is an important grant to the President of control over prosecution. But it is a limited grant as well. There is an important difference between the power not to prosecute and the power to pardon—for the latter is much more likely than the former to incur significant political costs. It would be fully consistent with a conception of separated powers that the President retain the power to pardon, but that he suffer political consequences to limit the exercise of this power. The power to control prosecution is conceptually and politically distinct from the power to grant pardons, and therefore the modern unitarian's

321–22, 366–67 (1970) (describing the prosecutorial duties of the Supreme Court and its judicial officers in colonial New York).

86. See *supra* text accompanying notes 76–77.

87. See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) (reviewing the Court's invalidation of citizen standing in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), and arguing that the Court's holding is based on a misinterpretation of the original Constitution).

88. See *supra* text accompanying notes 69–71; *infra* text accompanying note 128.

89. The "citizen suit" is the modern incarnation of the *qui tam* action. Citizen suit provisions are most pervasive in environmental law. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (1988); Clean Air Act, 42 U.S.C. § 7604(a) (1988 & Supp. II 1990). Congress recently revitalized the False Claims Act, a long dormant *qui tam* statute. See False Claims Amendments Act of 1986, 31 U.S.C. §§ 3729–31 (1988) (originally enacted in 1863, see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696).

90. For an excellent summary of the same point, see Dangel, *supra* note 57, at 1070.

91. See Pardons, 1 Op. Att'y Gen. 341, 342 (1820); Louis Fisher, *The Politics of Shared Power: Congress and the Executive* 10–12 (2d ed. 1987).

conception of prosecutorial control cannot derive from the power to pardon.⁹²

Thus far, then, we have seen that the original practice does not suggest a presidential monopoly over the power of prosecution. In a number of settings, enforcement of the criminal law was placed beyond the control of the President.

B. *Original Understandings and Unitarian Puzzles: Departments*

Prosecution constitutes the first puzzle with the unitary model. But it is left to the modern unitarian to respond that perhaps the framers did not understand prosecution to be a "core" executive function.⁹³ Perhaps prosecution was an anomaly;⁹⁴ perhaps the framers thought that this function was a distinctive one entitled to a unique exemption from the general principle of presidential control over administration of the laws.

We suggest that, on the contrary, the story of prosecution suggests a need for a much more fundamental rethinking of the framers' understanding of what the executive was. The second puzzle presented by the original practice confirms the need for reevaluation.

If the Constitution entrenches presidential control over all departments,⁹⁵ we would expect the framers to have adopted a relatively uniform organizational structure—departments to be arranged hierarchically, all subordinate to the President and all answerable to him in the exercise of all discretionary functions.⁹⁶ Congress may impose duties on departmental officers, but it may not "structure the executive

92. Historically, it has not always been clear whether control over prosecution derives from the pardon power, from the "take Care" power, or from executive power generally. Indeed, the first real exercise of executive control over prosecution suffered from this ambiguity. Jefferson's power to dismiss Sedition Act prosecutions was at times explained as flowing from the pardon power, see Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 15 Lipscomb, *Writings of Jefferson*, supra note 75, at 212, 214, and sometimes from the power to "take Care that the laws be faithfully executed," see Letter from Thomas Jefferson to Edwin Livingston (Nov. 1, 1801), in 8 Ford, *Writings of Jefferson*, supra note 75, at 57-58.

93. The notion of a "core" executive function was discussed in *Morrison v. Olson*, 487 U.S. 654, 688-90 (1988) (holding that ability of Congress to restrict removal power through "good cause" provision does not depend on whether official performs a "core" executive function), though it was conceded there that prosecution was such a function.

94. See Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 *Cardozo L. Rev.* 313, 319 (1993).

95. Again, however, the argument from the structure of the Constitution alone here is quite weak. While some may suggest the President's control over departments follows from his power to appoint heads of departments, no one suggests that the President has a power to control judges because he appoints them. See Zamir, supra note 73, at 870 (arguing that the constitutionally enumerated powers of the President are ambiguous as to control of "executive powers by all officers under all laws").

96. Note again, what is crucial is not the particular form of the organizational control of the executive power. All that matters is that the Constitution require ultimate presidential control, whatever the structure of the organization. Nonetheless, while a particular form may not be crucial, that there was not a consistent form is at least suggestive.

department in ways that would deprive the President of his constitutional power to control that department."⁹⁷

We can test that theory against the framers' actual practice by examining the structure of the original executive departments. According to the modern unitarian, that structure should make manifest the President's exclusive power to control and direct department heads in the exercise of their discretionary functions. But, in fact, the authors of the original practice embraced no such single structure. Interestingly, they created a variety of structures, not a single one. More important, they did not give the President plenary control over all of the institutions that they created.

The first great Supreme Court opinion on this general subject, *Myers v. United States*,⁹⁸ relies primarily on the great debate about the President's removal powers that occurred when the first Congress created the first departments in the new government—a debate known as the Decision of 1789.⁹⁹ The Decision of 1789 is in turn a universal source of historical support for the belief in a strongly unitary executive.¹⁰⁰ In *Myers*, Chief Justice (and former President) Taft relied on that debate to establish three important propositions: the framers conceived of a President who was vested constitutionally with control over the executive departments; Congress could not limit his control, through removal, over the members of those departments; and therefore Congress could not condition his ability to fire a member of a department, in this case the postmaster.¹⁰¹

However strong a statement of the unitarian's vision, Taft's claims show some relative modesty. The *Myers* Court offered three important qualifications to the modern unitarian's view. First, it said that the Civil Service Act, immunizing inferior officers from plenary presidential control, did not offend Article II and the unitariness of the executive branch.¹⁰² Second, the Court agreed that officers with adjudicative duties could be immunized from presidential *influence*, even if those officers operated within the executive branch: "[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect the interests of individuals, the discharge of which the President can not in a particular case properly influence or control."¹⁰³ Third, it said that Congress might be

97. Calabresi & Rhodes, *supra* note 1, at 1168.

98. 272 U.S. 52 (1926).

99. The debate began on May 19, 1789, and continued throughout the summer. The House debates are set out in 1 *Annals of Cong.* 384–412, 473–608, 614–31, 635–39 (Gales & Seaton eds., 1834). There is no reliable record of the Senate debates. The details of the debate are discussed *infra* text accompanying notes 112–129.

100. See, e.g., Grover Cleveland, *Presidential Problems* 24 (1904); James Hart, *Tenure of Office Under the Constitution* 217–22 (1930); Thach, *supra* note 78, at 140–65.

101. See 272 U.S. at 111–32.

102. See *id.* at 173–74.

103. *Id.* at 135.

able to prevent the President from "overruling" administrators in certain instances, even if he disagrees with them: "[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."¹⁰⁴ All the Constitution required, Taft asserted, was that the President have the power to discharge the employee for making a decision contrary to the President's wishes; but Congress need not give him control to direct the decision itself.¹⁰⁵ This conception of presidential oversight—that the President may not dictate outcomes, although he may discharge people with whom he disagrees—has considerable importance,¹⁰⁶ and we will return to it below.¹⁰⁷ But it is sufficient here simply to recognize that *Myers* does not stand for unlimited executive authority that some take it to require.¹⁰⁸

The commentary on the *Myers* opinion, and on its terse partial rejection merely eleven years later in *Humphrey's Executor v. United States*,¹⁰⁹ is of course vast.¹¹⁰ What we want to emphasize here is the *Myers* Court's failure to present the complete story of the Decision of 1789. We can move quickly through what is essential for our purposes. Everyone agrees that this debate is crucial for understanding the framers' conception of the executive; but unlike some who have relied upon Taft's opinion,¹¹¹

104. *Id.*

105. See *id.*

106. See also William H. Taft, *Our Chief Magistrate and his Powers* 125 (1916). Taft states:

In theory, all the Executive officers appointed by the President directly or indirectly are his subordinates, and yet Congress can undoubtedly pass laws definitely limiting their discretion and commanding a certain course by them which it is not within the power of the Executive to vary. Fixing the method in which Executive power shall be exercised is perhaps one of the chief functions of Congress. . . . Congress may repose discretion in appointees of the President, which the President may not himself control. The instance I have already given is one of these, in which the Comptroller of the Treasury has independent quasi-judicial authority to pass on the question of what warrants are authorized by appropriation acts to be drawn by him on the funds of the Treasury.

Id. This passage may well suggest only that the President must not tell his employees to violate the law, rather than indicating, as does the *Myers* dictum, that the choice of course of action is for the employee rather than the President, subject to the President's power to discharge. See 272 U.S. at 135.

107. See *infra* text accompanying notes 141–143.

108. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 723–24 (1988) (Scalia, J., dissenting); Calabresi & Rhodes, *supra* note 1, at 1166 & n.56.

109. 295 U.S. 602, 626 (1935) (limiting *Myers* to the narrow point that the Senate may not play a direct role in removal of purely executive officers).

110. See, e.g., Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 100–10 (Ronald W. Bland et al. eds., 5th ed. 1984); Miller, *supra* note 1, at 90–94; Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 *Yale L.J.* 1766, 1767–68 (1985).

111. See, e.g., Calabresi & Rhodes, *supra* note 1, at 1166–67; Currie, *supra* note 1, at 34.

we think that the debate defeats rather than supports the claim on behalf of a strongly unitary executive.

Beginning in May of 1789, Congress considered the original organization of the new government. Representative Boudinot proposed that the House resolve itself into a committee of the whole, and Representative Benson proposed the establishment of three departments: Foreign Affairs (which was changed to the Department of State in September 1789¹¹²), War, and the Treasury.¹¹³ The committee of the whole took up deliberations initially on the Department of Foreign Affairs. Those deliberations show that distinctive organizations were thought to warrant distinctive treatment.

In supporting the strong version of the unitary executive, the modern unitarians focus on the debate over the President's power to remove the Secretary of Foreign Affairs. As originally proposed, the Secretary of Foreign Affairs was to be removable by the President, but this proposal gave rise to confusion. Some thought that removal of necessity followed appointment, and that since the President and Senate were involved in appointment, only the President and the Senate could remove. On this view, a shared role in removal was a matter of constitutional necessity. (This indeed was the apparent position of the executive's strongest booster, Alexander Hamilton, writing in *The Federalist Papers*.¹¹⁴) From

112. See Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68, 68; White, *supra* note 42, at 132 n.12.

113. See 1 *Annals of Cong.* 384 (Gales & Seaton eds., 1834). A fourth department, the Domestic Department, was rejected, since it was thought that many of the domestic matters could be assigned to the Secretary of State. See *id.* at 385–86; White, *supra* note 42, at 133.

114. See *The Federalist No. 77*, at 459–62 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The consent of [the Senate] would be necessary to displace as well as to appoint.”). Contemporaries were a bit upset with the fact that Hamilton, a strong supporter of a strong presidency, apparently conceded that the Constitution did not grant the President the Royal Prerogative of removal from office. See *Field v. People ex rel. McClelland*, 3 Ill. (2 Scam.) 79, 161–74 (1839) (Lockwood, J., concurring) (reviewing debate over President's removal power). Nonetheless, courts subsequently inferred the President's power to remove officers unilaterally. See, e.g., *id.* at 116–19. The battle over Hamilton's position did not end, however, with his publication of *Federalist No. 77* in the *New York Packet*, April 4, 1788. After Hamilton's publication, editors reworked Hamilton's words. The first general publication of the *Federalist*, in 1810, by Williams and Whiting added a note to the sentence of Hamilton just noted that read, “This construction has since been rejected by the legislature; and it is now settled in practice, that the power of displacing belongs exclusively to the president.” *The Federalist No. 77*, at 220 n.* (Williams & Whiting eds., New York 1810). There is no indication that this note is not Hamilton's own words, as at other places in the same edition, notes that clearly are Hamilton's are indicated in the same manner. A reader could not tell the difference. The phantom note disappears in the Henry B. Dawson edition, published in 1863, see *The Federalist No. 77*, at 532 (Henry B. Dawson ed., New York, Charles Scribner 1863) (mislabelled as No. 76), but reappears in the 1892 edition of the *Federalist*, edited by John C. Hamilton, see *The Federalist No. 77*, at 568 n.* (John C. Hamilton ed., Philadelphia, J.B. Lippincott Co. 1892). The note does not appear in modern editions of *The Federalist*, see, e.g., *The Federalist No. 77*, at 459 (Clinton Rossiter ed., 1961).

this point, some concluded that by assigning removal to the President alone, the proposal deprived the Senate of its constitutional role. Others thought that removal followed appointment, and that since the President appointed (Senate consent notwithstanding), only the President could remove. But these members were concerned that by stating in the statute what the Constitution compelled, later interpreters would believe the power was not constitutionally required. Still others thought the matter wholly within Congress' power to regulate.¹¹⁵ The President was ultimately though implicitly given plenary removal power, if by a revealingly narrow vote.¹¹⁶ Importantly, however, as Justice Brandeis pointed out in *Myers*,¹¹⁷ the final vote did not express the conviction that the power to remove even this purely executive officer was constitutionally vested in the President. Indeed, the vote reveals, as David Currie argues, that there "was no consensus as to whether [the President] got [the authority to remove] from Congress or from the Constitution itself."¹¹⁸

The details of this complex debate are not essential here. For what has been too quickly overlooked is a more fundamental fact of the debate, and one that is not subject to any similar ambiguity. Whatever dispute there may be about the removal power of the President over the Secretary of Foreign Affairs and similar officers,¹¹⁹ there is no ambiguity

115. For a full account of the four positions in the debate, see Letter from James Madison to Edmund Randolph (June 21, 1789), reprinted in James Hart, *The American Presidency in Action 1789*, at 156–58 (1948); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 234–35 (1989).

116. See Casper, *supra* note 115, at 237. As Casper reports, the decision in the house was "sealed in an evenly split Senate, with the Vice President casting the decisive vote." *Id.* at 237. Following the debate on the power of the Secretary of Foreign Affairs, Congress considered the power of the Secretaries of War and Treasury.

117. See *Myers v. United States*, 272 U.S. 52, 286–87 n.75 (1926).

118. David P. Currie, *The Constitution in Congress: The First Congress, 1789–1791*, at 66 (1993) (unpublished manuscript, on file with the Columbia Law Review).

119. It bears repeating that it was not at all clear at the founding, let alone in 1789, whether removal was implied. Recall that Hamilton, certainly the strongest proponent of a strong executive, see, e.g., Lynton K. Caldwell, *The Administrative Theories of Hamilton & Jefferson* 100 (1964), apparently presumed that the Senate would share in the removal power. See *The Federalist* No. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Even if one believes that the President retained, in the framers' conception, complete authority to remove any subordinate officer, one should be careful not to mistake the form of this removal power with its substance. It may well have been that the framers understood the nature of the power—in particular, the grounds under which it could be exercised—in a restrictive sense. Jefferson, for example, did not believe he could remove subordinates just because they did not share his political beliefs. See White, *supra* note 65, at 351. Adams also declined to exercise the removal power, partly on principle and partly on political grounds. See *id.* at 67. Consistent with the claim we make below—that the framers treated different departments differently—the framers struggled more or less with respect to the removability of the heads of different departments. For example, Hart notes that "a number" of senators who had favored presidential removal of the *other* Secretaries were at first against his removal of the Secretary of the *Treasury*." Hart, *supra* note 115, at 217.

about a central point: the first Congress conceived of the proper organizational structure for different executive departments differently. This conception, we believe, argues against the belief in a strongly unitary executive.¹²⁰

The relevant difference is manifest in two important ways. First, Congress treated the departments differently in their formation. Congress established the Departments of Foreign Affairs and War as "executive departments,"¹²¹ with little detail, and with secretaries who were obligated to "perform and execute such duties as shall from time to time be enjoined on or intrusted to [them] by the President of the United States."¹²² But the treatment of the Department of the Treasury was wholly different. Unlike with Foreign Affairs and War, the enacting Congress (1) did not denominate Treasury an "executive department,"¹²³ (2) did specify in detail the offices and functions of Treasury, (3) did impose on the Treasurer specific duties, and (4) did shield the Comptroller (an office within Treasury) from presidential direction.¹²⁴

120. To the same general effect, see Caldwell, *supra* note 119, at 98–99; Hart, *supra* note 73, at 195 n.30; 3 Westel W. Willoughby, *The Constitutional Law of the United States* 1480 (2d ed. 1929); Bloch, *supra* note 74, at 572–73, 576; Strauss, *supra* note 7, at 605; A. Michael Froomkin, Note, In Defense of Administrative Agency Autonomy, 96 Yale L.J. 787 (1987); see also *infra* Appendix, comparing and contrasting the original departments.

121. See Act of July 27, 1789, ch. 4, 1 Stat. 28 (establishing an executive department denominated the Department of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (establishing an executive department denominated the Department of War).

122. Act of July 27, 1789 § 1, 1 Stat. at 29; Act of Aug. 7, 1789 § 1, 1 Stat. at 50.

123. See Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (titled "An Act to establish the Treasury Department")—although nine days later, in a salary bill, Congress referred to the Secretary of the Treasury as the secretary of an "executive" department. See Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67; Bloch, *supra* note 74, at 578 n.56. Thach takes the later correction in the salary bill as evidence that the Congress was just confused earlier, and always genuinely conceived of the departments as uniformly executive. See Thach, *supra* note 78, at 144–45, 158.

124. See Act of Sept. 2, 1789 §§ 1, 2, 8, 1 Stat. at 65–67. As described by Gerhard Casper:

The real decisions of 1789 are those embodied in the statutes establishing the "great departments" of government. These statutes are of considerable interest beyond the fact that they recognized a presidential removal power. Three departments—Foreign Affairs, War, and Treasury—were established that were the direct successors to those of the Continental Congress. The departments of Foreign Affairs and War were denominated "executive" departments, and thus were placed squarely within the executive branch. Although areas of responsibility were spelled out, the secretaries were subjected explicitly to presidential directions The initial organization of the departments was skeletal, with only a chief clerk named expressly.

Matters were completely different as to the Department of Treasury. The Treasury was not referred to as an "executive" department, even though the Secretary of the Treasury was grouped with other "executive officers" in the act setting salaries and the Secretary was removable by the President. The legislation was silent on the subject of presidential direction, yet did not vest the appointment of inferior officers in the Secretary. An elaborate set of such officers and their responsibilities was spelled out in detail. . . . For instance, disbursement

As Professor White describes, "Congress at first believed the Treasury Department should be closely associated with it, . . . occupying a status different from that of State and War."¹²⁵

These differences in structure reveal one sense in which the first Congress considered the organizational form of the government to be mixed rather than unitary.¹²⁶ And this, we suggest, has enormous implications. Some thought that entities whose duties bear a strong affinity to the judiciary need not be subject to presidential supervision alone.¹²⁷ Madison, for example, stated and believed that Congress had considerable authority over entities that have "judicial qualities."¹²⁸ Many agencies, both executive and independent, are now engaged in adjudicative tasks. It appears to have been Madison's conviction that Congress has the authority to immunize such agencies from presidential control and indeed that Congress should exercise that authority.¹²⁹

Madison's view was not shared by all. But at a minimum, we can say that the framers were not of one mind about the proper organizational structure and responsibility for these different departments. More likely, they had different conceptions about the proper structures, depending on the nature of the department at issue. Where from the nature of the office it was "proper" for an office holder to be subject to the control of Congress, or insulated from the influence of the President, the Constitution empowered Congress so to provide. But where it was not proper in this sense, it did not. Again, Madison's writings suggest this understanding:

Whatever . . . may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the legislature may take place in such a partake of the judicial qualities, and that the Legislative power is suffi-

could be made only by the Treasurer, upon warrants signed by the Secretary, countersigned by the Comptroller, and recorded by the Register.

Casper, *supra* note 115, at 239-40; see also Fisher, *supra* note 91, at 124 ("the House of Representatives regarded the Treasury Department partly as a *legislative agent*"); Tiefer, *supra* note 21, at 73-74 (Comptroller "clearly was expected to exercise independent judgment, since the safeguard of having him countersign the Secretary's warrants would be lost if he were wholly under the Secretary's direction."). On the President's power to remove the Comptroller, see *supra* note 71.

125. White, *supra* note 42, at 118-19; see also 3 Willoughby, *supra* note 120, at 1480 (debates surrounding Act and language of Act show that Congress intended Treasury to take its direction from Congress).

Wilson noted this difference between the Treasury and the War and Foreign Affairs departments, and, rather than read Treasury as the exception, treated the limited control over the Treasury as the rule. See Woodrow Wilson, *Congressional Government: A Study in American Politics* 262 (Boston, Houghton Mifflin 1885).

126. Fisher suggests a similar point. See Fisher, *supra* note 91, at 133.

127. See 1 *Annals of Cong.* 637-38 (Gales & Seaton eds., 1834).

128. See *id.* at 636.

129. See *id.* at 636-37.

cient to establish this office on such a footing as to answer the purposes for which it is prescribed.¹³⁰

The presence of this understanding of permissible insulation from the President is significant enough when we are dealing with the Department of the Treasury. The problem for the unitary model only grows as we consider the next two great departments created by Congress: the Department of the Navy and the Post Office. The debate surrounding the formation of the Navy department (in 1796) was the first on a "new" department since 1789. Its organizational form followed that of State and War, while the organizational form of the Post Office tracked more closely Treasury's.

• Consider Navy first. Like the Department of War, Congress formed the Department of the Navy primarily to help the President to execute his commander in chief powers, powers constitutionally committed to him in Article II. And, like War, Congress' specification of the internal structure of this department was sparse. It was enough to establish a secretary who was to obey the President, for it was the President's power that he would be executing. Moreover, the Act creating the Department of the Navy, like those creating the Departments of War and State, was brief and simple: The Act established an "executive department" with a Secretary as its chief officer, whose duty was "to execute such orders as he shall receive from the President of the United States" concerning the "procurement of naval stores . . . , the construction . . . , equipment and employment of vessels of war and naval matters."¹³¹

But the Post Office followed the opposite pattern. The statute creating the Post Office in 1789 did make the Postmaster General "subject to the direction of the President of the United States in performing the duties of his office."¹³² But Congress did not denominate the Post Office an "executive department" as it did the Departments of State, War, and the Navy.¹³³ Moreover, the original act was clearly provisional, explicitly contemplating its replacement within the year,¹³⁴ and when Congress reorganized the office in 1792, Congress gave the Postmaster the authority to enter contracts and make appointments, and permitted the Post Office to operate from postal revenues.¹³⁵ When this change occurred, Congress removed the language making the Postmaster General subject to the direction of the President.¹³⁶ The purpose of this change was to avoid the

130. *Id.* at 636; see Casper, *supra* note 115, at 238.

131. Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553, 553; see also White, *supra* note 42, at 158.

132. Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70, 70.

133. See 1 Stat. at 70 (titled "An Act for the temporary establishment of the Post Office"). This might lend further support to the view that the failure to denominate Treasury as an executive department was intentional. See *supra* text accompanying note 123.

134. See § 2, 1 Stat. at 70.

135. See Act of Feb. 20, 1792, ch. 7, §§ 2, 3, 1 Stat. 232, 233-34.

136. See § 3, 1 Stat. at 234; Fisher, *supra* note 91, at 132.

charge that the scheme would combine "purse and sword" by giving the President power over the revenues directly.¹³⁷ The office, functioning to carry into effect the post power of Congress, was separated from presidential review and control.¹³⁸

The framing Congress thus followed two basic tracks when establishing the departments we now consider departments of the executive. For some departments (Foreign Affairs, War, and Navy), Congress granted the President plenary power over the affairs of agents within those departments—they were truly *his* agents. For the remaining departments (Treasury and Post Office), Congress granted the President no clearly stated or implied authority over the affairs of the relevant officers, and did not hesitate to articulate the full range of departmental structures and officers, complete with a full specification of the duties such officers had. Some departments the framing Congress treated as purely executive, and others not; where the departments were not purely executive, Congress did not hesitate to create a degree of independence from presidential will.

One final feature of the original departmental structures should also be remarked. The differential treatment of these five departments suggests that the early Congress viewed the degree of presidential control required over executive officers differently. But as with control over prosecution, it is left to the modern unitarian to argue that the President still retained control, through removal, over each of these officers, the "relatively independent" no less than the purely executive. This does not yet capture the full story of Congress' view of its ability to create independent entities.

Consider the status of the first truly independent agency in the republic's history, the Second Bank of the United States, created in 1816.¹³⁹ Certainly few agencies in the early republic had as much power over the nation as did the Bank.¹⁴⁰ But what is crucial about the Bank for our purposes is its relative independence from the President's control—indeed, in some respects, it was absolutely independent. Of the Bank's twenty-five directors, the President could appoint only five, and these were the only directors subject to his power of removal.¹⁴¹ Obviously, directors of the Bank made what we would consider policy decisions; ob-

137. On this concern that tyranny follows mixing power over the purse with power over the sword, see, e.g., 1 *The Records of the Federal Convention of 1787*, at 144 (Max Farrand ed., 1966) [hereinafter *Farrand*] (opinion of Col. Mason).

138. See Grundstein, *supra* note 7, at 299–300 ("The fact, too, that the Post Office Establishment was for some years organized on a basis apparently independent of Presidential direction seemed additional evidence that Congress did not consider administration as necessarily subordinate to the President and beyond legislative control.").

139. See Act of Apr. 10, 1816, ch. 44, 3 Stat. 266.

140. Indeed, as we discuss later, the power of the Bank and its independence sparked the first true challenge to executive supremacy. See *infra* Part II.G.

141. See Froomkin, *supra* note 120, at 808.

viously those decisions had a dramatic effect upon the nation.¹⁴² But the vast majority of those directors were outside the control of the President.¹⁴³ Here, as with federal prosecution, not only did the President have relatively less control—he had no control at all.

One final bit of evidence helps confirm the view that the President need not control all of what we now consider to be departmental administration. In a recent and important essay, Saikrishna Prakash recovers something of the framers' understanding about the role of state executives in the execution of federal law.¹⁴⁴ As he quite forcefully demonstrates, the framers fully expected that Congress could vest in state executives the power to execute particular federal laws.¹⁴⁵ They understood the Constitution to permit, as Prakash puts it, a type of "field office federalism," where state executives (if not state legislatures) could be "commandeered" by Congress to help execute federal law,¹⁴⁶ all without the control of the President.¹⁴⁷ In just the way that federal executive departments could be vested with the execution of federal law, state executives could be vested with the execution of federal law.

Some questions might be raised about presidential control over federal departments, or indeed about federal control over the original bank. But there is little question about the President's control over state executives. The President had no power to remove state executives who executed federal law in a way inconsistent with the President's view about how such laws should be executed; and as should be equally obvious, the President had no power to recall the authority that Congress by law had granted state executives to execute federal law.¹⁴⁸ To the extent that the framers understood the original design to permit the vesting of the power of execution in state executives, the framers understood the original design as something other than unitary.

What this puzzle about the original departments comes to is this: the modern unitarian would predict that the framers, mindful of the unitarian injunction, would have left in the President a wide range of executive control over officers within those departments. But history shows something quite different: Congress vested different degrees of control in the

142. For a discussion of the modern analog, the Federal Reserve, see Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 84–85 (1990). In that essay, Krent discusses a different aspect of the limitations on executive power, limitations created by delegations of power outside the executive. We do not address this important dimension of the unitary executive question here.

143. Indeed, as Richard Latner suggests, the President could not even get access to information about what was going on within the bank. See Richard B. Latner, *The Presidency of Andrew Jackson: White House Politics 1829-1837*, at 173 (1979).

144. See Saikrishna B. Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993).

145. See *id.* at 1990–2004.

146. See *id.* at 1995–96.

147. See *id.* at 2000–01.

148. We discuss this more *infra* text accompanying notes 283–284.

President, and in some cases, no control at all. The early Congresses' practice undermines the claim that the founding vision was motivated by a single organizational ideal.

C. *Original Understandings and Unitarian Puzzles: The Opinions Clause*

Anomalies surrounding presidential control over prosecution suggested similar anomalies surrounding organization of departments more generally, and these constituted the second puzzle about the original practice. Before we attempt a resolution of these two puzzles, consider finally a third.

The Opinions Clause of Article II provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."¹⁴⁹ Believers in a strongly unitary executive have noted that this clause was adopted with little recorded debate.¹⁵⁰ They have argued that it was, as Hamilton said, a "mere redundancy . . . , as the right for which it provides would result of itself from the office,"¹⁵¹ and thus provides "too slender a reed to support [the weak unitarian's] qualification of the substantial grant of power embodied in the Article II Vesting Clause."¹⁵²

No doubt, standing alone in the face of clear evidence that the framers were adopting the strongly unitary conception, this clause would be a slender reed, and a redundancy. What possible reason could there be for providing the President with a constitutional power to demand written reports from officers over whom he already had an inherent power of control? But the question we are asking here is *whether* the framers adopted the strongly unitary conception, and for that purpose, the clause is certainly relevant for choosing among the competing views. Although standing alone the clause would not support our rejecting a strongly unitarian view of the Constitution, at least it raises an enormous puzzle.¹⁵³ And this should lead us to ask what the history of the clause does suggest.

149. U.S. Const. art. II, § 2.

150. See Calabresi & Rhodes, *supra* note 1, at 1206-07 & n.261.

151. The Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also 2 John R. Tucker, *The Constitution of the United States* 718 (Chicago, Callaghan & Co. 1899) ("This is, as Mr. Hamilton says, 'mere redundancy, as it would have been inferred necessary without being expressed.'"); Prakash, *supra* note 19, at 1004-07 (Opinions Clause means that President may ask for considered opinions and implies that President will make the ultimate decision). But see Froomkin, *supra* note 120, at 800-01 (arguing that "Constitution should not be read to have such a redundancy").

152. Calabresi & Rhodes, *supra* note 1, at 1168. But see Reisman, *supra* note 57, at 76-77 ("If the President had unlimited control over the principal Officers in the executive bureaucracy [the Opinions Clause] would . . . be meaningless and superfluous."); Froomkin, *supra* note 120, at 800-01 ("A more reasonable interpretation is that the opinions in writing clause exists because it was not assumed, or at the very least not obvious, that the President had absolute power over Heads of Departments.").

153. Zamir argues that the clause suggests the greater power (to do more than obtain opinions) was not granted. See Zamir, *supra* note 73, at 870.

The origin of the Opinions Clause is somewhat obscure. The clause appears to have surfaced for the first time on August 20, 1787, in a proposal by Pinckney and Morris, which vested the President with the power to demand opinions of both the Supreme Court and the heads of departments.¹⁵⁴ The former power was dropped, and only the latter retained. And though it was not much debated, the clause was before the convention for most of the convention's life.¹⁵⁵

What does the clause say about the inherent power of the President over the affairs of the executive branch? While an unambiguous reading is impossible, some hints do emerge. It seems clear that the framers thought the legislative branch possessed an inherent authority to demand reports—while there is no opinions clause in Article I, the first Congress had no difficulty instructing the Secretary of the Treasury to report on matters within his domain.¹⁵⁶ Does this history suggest that it makes sense to read the same understanding about inherent authority in Article II? Did the framers, as do the unitarians, believe that the President has an inherent power to demand written reports?

We believe that they did not. Instead, we suggest two quite different readings of the Opinions Clause, both of which would make sense of the clause as something more than a redundancy, and each of which entails a vastly narrower conception of the President's inherent authority. We begin with the more limited of the two readings, relying on the framers' consideration, and eventual rejection, of an opinions clause for the Supreme Court.

What does it mean that the framers considered and then rejected an opinions clause for the Supreme Court? Certainly all would agree that without an opinions clause, the President could not demand written opinions of the Justices.¹⁵⁷ If this is so, then proposing the clause for the Supreme Court was a recognition of that inability, and its defeat a judgment that such a power in the President was not desirable. In this way, both the proposal and its defeat seem to have probative value for the Opinions Clause vis-à-vis the departments: If this were the way the fram-

154. See 2 Farrand, *supra* note 137, at 334, 336–37. The clause gave the President power over the also proposed “Council of State.” The Council of State was to be a constitutionally specified council of department heads. Later drafts of course dropped the constitutional enumeration of executive departments, leaving to Congress the establishment of departments.

155. See generally Prakash, *supra* note 19, at 1004–07 (describing treatment of Morris-Pinckney proposal).

156. See Fisher, *supra* note 91, at 40. In fact, the first act establishing the Department of the Treasury required the Secretary to report to Congress. See Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66. In contrast, consider the odd history relating to Congress' ability to require the Attorney General to give it legal opinions. See Lessig, *supra* note 60, at 188–90.

157. The Court itself indicated as much in a letter to Secretary of State Jefferson. See Correspondence of the Justices (1793), reprinted in Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 65–67 (3d ed. 1988).

ers understood the President's power vis-à-vis the Supreme Court, then so too might it be the way they understood the President's power vis-à-vis the departments—that without this clause, the President would not necessarily have had the power to direct the departments to report to him.¹⁵⁸ And if the framers did not understand the President to have the inherent power to order opinions from the departments, or if the framers did not understand the President to have that power by virtue of the Vesting Clause, then we would have decisive evidence against the unitary conception.

So understood, the clause would have an important function. Without it, there would be nothing to constrain Congress from making administrative departments wholly independent from the President, even to the extent of allowing a department to refuse to report to the President about its activities. With it, the Constitution brings about at least a minimum of presidential control over executive departments, by assuring that at least one official—the President—has access to information about the operations of those departments, and by limiting Congress' power to structure departments as it might wish. Without this clause, Congress could clearly forbid, say, the Attorney General from reporting to the President on the activities of the special prosecutor; with the clause, Congress could not so require.¹⁵⁹

But this reading still reads “departments” in a unitary fashion, as if the President's power to demand opinions would be the same for all types of departments. To support the argument that, for the framers, all departments were not the same, there must be a second way of reading the Opinions Clause—a way that is ultimately more radical.

As James Hart noted forty-five years ago, there is a particular oddity in the structure of the original three departments established by Congress in 1789, and this oddity may help us understand the original meaning in the Opinions Clause.¹⁶⁰ The statutes establishing the Department of Foreign Affairs and the Department of War both declared that “there shall be a *principal officer* therein, to be called the Secretary for the Department of” Foreign Affairs and War respectively.¹⁶¹ By contrast, the statute establishing the Department of the Treasury declared that there “shall be . . . a Secretary of the Treasury, to be deemed *head of the department*.”¹⁶² Why, one might ask, did the early Congress not consider

158. At least, the President would not have this power by constitutional necessity. This would not limit the departments' right to do so voluntarily, or limit Congress' power to direct the heads of departments or principal officers to respond to the President's requests.

159. This would apply so long as the Attorney General is the head of a department. Recall that he was not designated as such at the founding. See *supra* text accompanying note 60.

160. This discussion is drawn from Hart, *supra* note 115, at 219–20.

161. Act of July 27, 1789, ch. 14, § 1, 1 Stat. 28, 29; Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (emphasis added).

162. Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (emphasis added).

the Secretary of the Treasury a "principal officer" in just the way the Secretaries of Foreign Affairs and War were? What was it that was different about these officers that lead them to refer to some as "principal officers" and some as "heads of departments?"

Add to this curiosity the particular language of the Opinions Clause—that the President "may require the Opinion, in writing, of the *principal Officer* in each of the *executive Departments*."¹⁶³ And finally, add again the only reference to "Heads of Departments" in the Constitution, the Inferior Officers Appointment Clause, which provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President *alone*, in the Courts of Law, or in the Heads of Departments."¹⁶⁴ These distinctions in language raise a number of questions. Why does the Opinions Clause speak only of "executive" departments? Are there other kinds of departments? And why speak of "Heads of Departments" in clause 1 of section 2, but "principal Officers" in clause 2?

Perhaps these puzzles are not terribly probative. Certainly the usage of the framers in debate is not wholly inconsistent.¹⁶⁵ But clearly nothing in the modern unitarian's conception—that the framers imagined just one kind of department—could easily explain such different usages. If all departments were the same, there would be no reason to speak of the heads of Foreign Affairs and War any differently from the head of the Treasury, or the Post Office. If all departments were the same, there might be no reason to qualify the power of the President to demand written opinions by saying that he had that power over principal officers of the "executive" departments. If all departments were the same, and all equally under the President's directory control, there would be little reason to give Congress the power to vest appointments in "Heads of Departments," as the President would have the power both to direct the heads of departments to make appointments and to remove those they have appointed.¹⁶⁶

But consider these same bits of text against the background of another conception of the original understanding—one that imagines that the framers conceived of departments differently, and contends that the President would, by the Constitution, have directory power over only some of those departments. If there were in effect two kinds of "departments" rather than just one, then we could understand the Opinions Clause to extend to the President the power to demand written opinions

163. U.S. Const. art. II, § 2, cl. 1 (emphasis added).

164. *Id.*, cl. 2 (emphasis added).

165. We are indebted to Sai Prakash for pointing this out to us. See, e.g., Answer to Mason's Objections by Iredell, reprinted in *Pamphlets on the Constitution* 333, 344–50 (Paul L. Ford ed., Brooklyn, N.Y. 1888) (President may receive written opinions from principal officers, but "must be *personally responsible* for everything").

166. There would be even less reason to give Congress power to vest appointment powers in the Courts of Law.

over principal officers of "executive" departments, implying that the President has no *constitutional* authority to demand opinions from the nonexecutive departments and that Congress could choose whether to extend that power or not.

But what could these nonexecutive departments be? Here we invoke again the acts establishing the first three "great Departments." When the framers speak of "principal officers" in the way the Opinions Clause speaks of "principal Officers," they are referring to the two departments clearly established to help the President with his "executive" functions, Foreign Affairs and War, where "executive" here refers to those functions constitutionally enumerated within Article II—principally foreign affairs powers and war making powers.¹⁶⁷ Putting the Opinions Clause together with the first three department acts, it appears possible that the framers spoke of "principal Officers" only when speaking of "executive Departments," and spoke of "Heads of Departments" when intending to include nonexecutive departments as well.¹⁶⁸

How would this help explain the Inferior Officers Appointment Clause? As with the Opinions Clause, many have considered this clause in part a redundancy of its own—if the President has an inherent authority to direct the departments, what function could there be in giving Congress the power to vest appointment in someone the President already controls? At most, the clause (so understood) is a convenience, possibly useful as clarification, but certainly not essential to any overarching separation of powers design.

167. See U.S. Const. art. II.

168. See Hart, *supra* note 115, at 219–20, 243. On the distinction in language, Hart posits that:

since it presumably had a purpose, it may be ventured as an hypothesis that "departments" and "heads of departments" were the *generic* terms applicable to *all three* of the departments first created; and that "executive departments" and "principal officers" were the smaller category which included *only* those departments created to act as administrative arms of the President in the exercise of his constitutional executive powers.

Id. at 243. Note finally that the next two departments follow this pattern as well. The act establishing the "Post-office" does not denominate it an executive department, and does not refer to the Postmaster as a "principal officer." See Act of Feb. 20, 1792, ch. 7, 1 Stat. 232; *supra* text accompanying notes 132–138. The act establishing the Navy, on the contrary, does refer to that department as "an executive department," Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553, 553, and refers to the head of that department as the "chief officer." See *supra* text accompanying note 131.

It might be argued that because the Inferior Officers Appointment Clause allows Congress to vest the appointment of inferior officers in "the President alone, in the Courts of Law, or in the Heads of Departments," it cannot be that the "principal officers" of the Departments of State and War were considered to be different from the "Heads of Departments"—otherwise, vesting in them the appointment of inferior officers, as the original statutes did, would have been unconstitutional. But as the quotation from Hart just given suggests, if "Heads of Departments" is a generic term, then for purposes of the Inferior Officers Appointment Clause, it could include the top person in any executive department.

But if we understand the framers to have understood different departments differently—if some are “executive” in the constitutional sense and others not—and if we adopt the framers’ apparent convention of speaking of “principal officers” when speaking narrowly of the heads of *executive* departments, then the Inferior Officers Appointment Clause has a new meaning. For it says that Congress could remove the appointment of some inferior officers from the President, and vest it in an officer (a head of a department) who was not constitutionally the mere agent of the President (as a “principal officer,” such as the Secretary of War or Foreign Affairs, was) but was an officer whom Congress could make relatively independent of the will of the President (as the discussion above suggests the Secretary of the Treasury could be considered¹⁶⁹). This does not mean that a principal officer could not be given the appointment power, for a principal officer could also be a head of department. All we claim is that the clause also means that a member of the more general class—including those not necessarily controlled by the President—could be given this appointment power as well.

Thus, on this reading, among the “Heads of Departments” are a subset who are also “principal Officers.”¹⁷⁰ These, the first acts of Congress suggest, are those officers who lead an “executive department”—for the first Congress, Foreign Affairs and War—and from whom the President has a power to demand written opinions. What would seem to follow from this by negative implication is that the President would have no

169. See *supra* note 156 and accompanying text.

170. This again was Hart’s reading. See *supra* note 168. The question whether “principal officers” are a subset of, or distinct from, “Heads of Departments” is important, but one we do not need to resolve here. Again, if “principal Officers” are a subset of “Heads of Departments” then it follows that they could be given the inferior officer appointment power; if they are distinct, it follows that only the President could be given the appointment power for officers inferior to the “principal Officers.” Supporting the suggestion that “principal Officers” were not to be considered “Heads of Departments” is Chief Justice Marshall’s discussion in *Marbury* about the distinction between the President’s duty to commission officers, and his power of appointment. Marshall says these are distinct powers, because the “Heads of Departments” clause makes it possible that someone could be appointed whom the President would not want appointed. Nonetheless, the Commission Clause requires him to commission this unwanted officer. This supports reading heads of departments as distinct from principal officers since it is unlikely that the framers conceived of principal officers in executive departments as independent of the President. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154–56 (1803).

Finally, it should be clear that, at the least, this historical usage draws into doubt the Court’s opinion in *Freytag v. Commissioner*, 111 S. Ct. 2631 (1991). There the Court determined that the “tax court” could not be considered a “department” for purposes of the Inferior Officers Appointment Clause, since, as the Court held, “department” in that clause, like “department” in the Opinions Clause, refers to “cabinet-level” departments, and a tax court was not a cabinet-level department. See *id.* at 2643. But, however broadly one reads “departments,” it seems clear at least that the original usage undermines an argument that treats the usage in the Opinions Clause as equivalent to the usage in the Inferior Officers Appointment Clause. For as just noted, the usage suggests the framers and the first Congress were speaking of entities of a different kind.

power by virtue of the constitution, express or implied, to order written opinions from those heads of departments who were not also "principal Officers" of "executive Departments."¹⁷¹

We do not want to make too much of these textual differences, nor do we claim that there is decisive evidence in favor of any particular interpretation. But whether one adopts the more conservative understanding of the Opinions Clause, or the more radical, it is enough here to remark that both make clear the oddity in the idea that the framers imagined the President to have inherent authority to direct executive officers by virtue of the Vesting Clause of Article II alone. If that were so, there was no need to enact the Opinions Clause in any form, and plausibly little purpose in giving Congress the power to vest appointment of inferior officers in "the Heads of Departments." No doubt, standing alone the Opinions Clause does not dispose of the matter: there may be many possible reasons for the dropping of the Supreme Court opinions clause, and these might allow the clause to be considered a redundancy.¹⁷² But the clause does suggest a serious puzzle for those who believe that the executive power includes an inherent power to direct or supervise all administration.

D. *Original Understandings: Rethinking Executive Versus Administrative*

The modern unitarian would predict that the founders would have vested a function as executive as "prosecution" exclusively in the control of the President; they did not. The modern unitarian would predict that the original departments would follow a single organizational design, with the President recognized as the head of all discretionary authority within those departments; the original departments did not follow this pattern. The modern unitarian would predict that a power as small as the power to order written reports would be unnecessary in the Constitution's unitary scheme; but for the framers, it was not unnecessary.

In each case, the model of the modern unitarian bumps up against an inconsistent practice of the framers. We are naturally led to the question: Are we missing something? Is there something about the world in which the framers lived that we no longer see and that explains the widespread contemporary misunderstanding of the original constitutional theory and practice?

We suggest that there is. Together these puzzles perhaps do not prove that the unitary conception of the framers' design is false, but they

171. Congress could always grant the power by statute. Cf. the statutory "heads of departments" opinions clause, discussed in Lessig, *supra* note 60, at 187-90.

172. The redundancy of course could have been intentional; the framers could simply have been making clear the obvious, to protect, for example, the heads of departments from interbranch conflicts. Cf. Bloch, *supra* note 74, at 580 (arguing removal legislation was intentionally redundant). We have assumed, perhaps incorrectly, that the principle adopted in drafting the Constitution was to avoid such redundancy. See *supra* note 151.

do give us a reason to look further. We suggest that there are two distinct aspects of the framers' world that are forgotten today, the first touching the substance of what we understand "executive power" to be, the second involving the nature of the framers' understanding of categories such as "executive" or "legislative" authority. In outline form: First, by "executive power" the framers meant something substantively different from what we have come to mean by the same term. Second, the framers thought of questions of administrative structure in a much more pragmatic and flexible way than we think of the same questions. Both differences matter crucially to how we now understand the framers' design.

Consider first the definition of "executive power." At its core lies a distinction central to most constitutionalists, but which our generation of constitutionalists seems to have lost. Stated too briefly, the distinction is this: When we speak of "executive" power, we tend to conflate two ideas that for many are quite distinct. As one commentator at the turn of the century made the point,

The functions of a chief executive of a sovereign State are, generally speaking, of two kinds—political and administrative. In different countries, with different governmental forms, the emphasis laid respectively upon each of these functions varies. In some, the powers and influence of the executive head are almost wholly political. In others, as for example in Switzerland, the political duties of the executive are so fully under legislative control that its chief importance is upon the administrative side.¹⁷³

For most constitutionalists, resolving issues of what we call "executive" power means deciding two different sets of questions. The first set relates to who performs the *political* functions of an executive—the power to conduct foreign affairs, for example, or the power to act as head of state. The second set of questions relates to who directs the *administrative* functions of an executive—in parliamentary systems, who controls the government.

Consider three possibilities:

- (1) a constitution could vest control over all political and administrative functions in the executive;

173. 3 Willoughby, *supra* note 120, at 1479. Consider also Frank Goodnow's description of the functions of government:

[T]here are two distinct functions of government, and their differentiation results in a differentiation . . . of the organs of government provided by the formal governmental system. These two functions of government may for purposes of convenience be designated respectively as Politics and Administration. Politics has to do with policies or expressions of the state will. Administration has to do with the execution of these policies.

Frank J. Goodnow, *Politics and Administration: A Study in Government* 18 (reissued ed. 1967).

(2) a constitution could vest control over just the political functions in the executive, and control over the administrative functions in the legislature; and

(3) a constitution could vest control over all political and some administrative functions in the executive, but leave to the legislature the power to decide how much of the balance of administrative power should be afforded the President.

Option two describes most existing constitutional systems; England is the most familiar example.¹⁷⁴ Option one describes what most believe the framers created¹⁷⁵—a President with constitutional control over the administrative functions. But we believe that it is option three that describes best the original understanding of the framers' design. That is, we believe that the framers meant to constitutionalize just some of what we now think of as "the executive power," leaving the balance to Congress to structure as it thought proper. What follows from this is that if there were some functions that were not within the domain of what the framers were constitutionally vesting in the President when they vested "the executive power," then there are some functions over which the President need not, consistent with the original design, have plenary executive control.¹⁷⁶

There are at least two ways to understand this claim that the framers did not intend to vest in the President control of all administrative functions. The distinction between these two ways connects with the second misunderstanding we have described above—that is, it connects with how we understand how they understood these categories of governmental power. One understanding would be that the framers had in their heads clear categories of "executive power" (or in many cases equivalently "political power") and "administrative power," and by constitutionally

174. See Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* 1–20 (1984).

175. See, e.g., Prakash, *supra* note 19, at 992 n.9 ("The Chief Administrator theory is a claim that the unitary executive may control the administration of federal law and may control the exercise of statutory discretion.").

176. There should be obvious parallels between this conception of the nature of "executive power" and Akhil Amar's conception of how far the "judicial power" "shall extend" in Article III, section 2. Just as we believe Article II constitutionalizes some executive power, and leaves the rest to Congress to define under the Necessary and Proper Clause, Amar argues that Article III establishes two tiers of possible objects of the judicial power; the first tier Congress must (consistent with the Constitution) provide for, the second tier Congress may in its discretion provide for. See Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 254 n.160 (1985) [hereinafter Amar, *A Neo-Federalist View*]; Akhil R. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 481–83 (1989) [hereinafter Amar, *Original Jurisdiction*]; Akhil R. Amar, *Reports of My Death are Greatly Exaggerated: A Reply*, 138 U. Pa. L. Rev. 1651, 1653–54 (1990) [hereinafter Amar, *Reply*]; Amar, *The Judiciary Act of 1789*, *supra* note 37, at 1507–08; see also *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838) (describing necessary and proper power over Article III).

vesting in the President "the executive power" they intended to vest constitutionally just "executive power," leaving the second category, "administrative power," for Congress to vest as it thought proper. This understanding relies on clear categories of governmental power.

A second understanding does not turn on clear *categorical* understandings of these powers, but rather on a more ambiguous and undeveloped conception of what these powers could be. It understands the framers to believe that some powers fall clearly within the domain of "the executive" (and these they constitutionalized), but the balance (what we would roughly call administrative) they believed would be assigned pragmatically, according to the values or functions of the particular power at issue. While the first understanding treats the framers as budding constitutional formalists, who simply chose not (or forgot given the small number of administrative functions) to include a vesting clause for "the administrative power," the second treats them as speakers of a less categorical, more pragmatic, language, at least for a wide range of (what we consider) executive functions.

Our understanding is emphatically the second.¹⁷⁷ We believe that the framers wanted to constitutionalize just some of the array of power a constitution-maker must allocate, and as for the rest, the framers intended Congress (and posterity) to control as it saw fit.¹⁷⁸ Modern constitutionalists find it so hard to see this undeveloped design as the framers' design because modern constitutionalists treat the terms "executive" or "legislative" or "judicial" as describing fully developed categories that carve up the world of governmental power without remainder, as if governmental power were the genus, and executive, legislative, or judicial were the only species.¹⁷⁹ But the founders' vision was not so complete,

177. Indeed, the modern sense of "administration" is quite new. See John A. Fairlie, *Public Administration and Administrative Law*, in *Essays on the Law and Practice of Governmental Administration* 3, 24 (Charles G. Haines & Marshall E. Dimock eds., 1935) (asserting that statutory and judicial recognition of the term "administration" did not begin until 1874).

178. This view is pressed most forcefully by Peter Strauss. See Strauss, *supra* note 7, at 578 (arguing that when considering "the structure given law-administration below the very apex of the governmental structure, the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances"); see also Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267, 333 (1933) (arguing that Necessary and Proper Clause limits Congress' ability to distribute government power).

179. Peter Strauss writes:

The preceding review of the existing institutions of American government and of the body of textual, contextual and interpretational constraints bearing upon them should cast doubt on the idea that our Constitution *requires* that the organs of government be apportioned among one or another of three neat "branches," giving each a home in one and merely the possibility of relations with the others.

Id. at 639.

their ideas not so developed, their experience not so extensive, and their intent to constitutionalize just a part of the many issues of governmental power that they understood to confront any government.

To be convincing about our understanding of the framers' vision, we must accomplish two quite distinct tasks. First, we must make clear the type of power that we believe the framers did not constitutionally vest. Second, we must point to what in the framers' own actions indicates that they did not understand their constitution to constitutionalize the full range of (again, modern understandings of) executive powers, but rather understood Congress as free to assign powers as such assignment seemed proper. To complete the first task, we pass briefly through the first self-conscious attempt by constitutional scholars to define the scope of executive versus administrative power, a debate that rose through the nineteenth century and peaked at the beginning of this century, and that revealed a conception of the framers' design wholly alien to the modern unitarian. To complete the second, we use a model derived from this alien nineteenth century perspective to look again at familiar features of the founding debates, and ask whether the modern unitarian's model, or the nineteenth century theorists' model, better makes sense of the structures that the framers actually established.

The conclusion of these two steps will be an understanding of the framers' Constitution that is quite distinct from the current understanding. We emphasize at the start, however, that we are not arguing that the framers' understanding is the same as what we will call the nineteenth century understanding. Indeed, we believe that there are three distinct views, associated with the framers, the nineteenth century constitutional theorists, and the modern unitarians. The modern understanding is different from that of the nineteenth century theorists' because where moderns see one category (executive power), they saw two (executive and administrative). But both the modern and nineteenth century understandings are different from that of the framers, because where the first two see *categories* of executive power, the eighteenth century constitutionalists saw a collection of functions, none fitting firmly or completely within our current categorical structure. The nineteenth century view helps us see that the framers' was a world of more than one type of executive function, but its formalism obscures the fundamentally pragmatic approach that the original constitutionalists brought to the question of allocated federal power. To understand the framers' world, we must understand not just the differences in the substance of their constitutional structure, but also the difference in the very language with which they thought and spoke of that structure.

In the end our claim against modern unitarians is first that they import to the eighteenth century a false conception of what was meant by the term "executive power," and second that they import to the eighteenth century a wrong-headed conception of the form of constitutional discourse.

1. *The Nineteenth Century View.* — In our path back to the understanding of the eighteenth century, we pause first with the understanding of the scope of executive power held by nineteenth century theorists and commentators¹⁸⁰ when confronted with precisely the same question of the Constitution's implicit executive structure. The nineteenth century view will give us a language with which to understand the difference between the contemporary view and that of the framers. But importantly, this language will function as no more than a heuristic—as a device to help us see the difference in understandings—and a heuristic that we will in the end discard.

Begin with a debate born at the birth of the modern administrative state. At the turn of the century, theorists in both law and political science were confronted with an increasingly uncomfortable question—who was to run the administrative agencies? Did the Constitution unambiguously vest this power in the President? Did the President have a constitutional claim to control the full range of administration, whether Congress vested in him that control or not?

180. More particularly, we focus on the view of three nineteenth century scholars, Westel Woodbury Willoughby, William Franklin Willoughby, and Frank Goodnow, and perhaps unjustifiably, take these three as standards for what we will call the nineteenth century view. The Willoughbys were twin brothers, born in 1867, and like Goodnow, influential in the political science movement begun at Johns Hopkins. Goodnow was one of the founders of the study of administration, and the first president of the American Political Science Association. A central focus of his early work was the attempt to make representative democracy work in the context of growing administrative functions. See Frank J. Goodnow, *Politics and Administration: A Study in Government* chs. 6–9 (1900). This, Goodnow believed, required the creation of expert bodies to implement the will of the people. See Frank J. Goodnow, *The American Conception of Liberty and Government* 58–59 (1916). More importantly, it required that administrative law reflect changes in the political and economic context. See Frank J. Goodnow, *Comparative Administrative Law* 59–60, 71–74 (New York, Putnam, student ed. 1893). The Willoughbys can be seen to carry on from Goodnow's work. See *Essays in Political Science in Honor of W.W. Willoughby* 355–64 (John M. Mathews & James Hart eds., 1937) (considering the work of Westel Woodbury Willoughby); Grundstein, *supra* note 7, at 289–94 (discussing work of William Franklin Willoughby). The three we focus on are of course not the only relevant theorists. Nathan Grundstein discusses two additional theorists:

The main contours of the concept of the unity of the executive power as it has developed in relation to the national administration are delineated in the early literature on administrative law, particularly in the writings of Freund and Wyman. . . . Constitutional interpretation was to strive to secure for the President a control over administration that would exhibit the attributes set forth by Freund and Wyman as characteristic in a fully integrated administrative hierarchy—unity, through the subordination of the officers constituting the administration; central direction of the exercise of official powers; discretionary authority and the complete integration of official discretion; and the actual or symbolic vesting of all authority in the head of the administration, whose status as chief executive was coordinate with that of the legislature.

Grundstein, *supra* note 7, at 287. As will become apparent, it is not important whether the views of these three were aberrations. Nothing hangs on their position being representative, for our use of these views is purely heuristic.

Ask why the question was uncomfortable to them. For to modern observers, the question appears just daft. In the modern conception, there are three branches of government; any agency of government must fall within one; and administration falls within the executive.¹⁸¹ Congress may create things called "administrative" agencies, but what Congress creates becomes part of the executive, subject to "the executive power." For modern readers "administrative" and "executive" are just the same idea. The framers carefully placed all executive power in the President, the existence of a separate "administrative" branch is a conspicuous violation of the constitutional plan.

But if we are to understand a different period, we must first make sense of what appears especially silly. What would one have to believe to make the question, who runs the administration, a real question?

One thought would be a firm sense of distinction between the categories of *executive* and *administrative* power. And indeed, that is precisely what the late nineteenth century theorists claimed the framers had. As they saw it, to the framers this distinction (even if to us apparently naive¹⁸²) was a crucial one, which Grundstein describes as having had "the stature of a first principle" even if it "today [is] on the verge of obliteration."¹⁸³ As one of the leading nineteenth century theorists described it:

Owing to the fact that the President at the present time in fact exercises large administrative powers and is in appearance the head of the administrative departments the popular opinion prevails that the framers of the constitution employed the term executive as including what are now known as administrative powers and that it was their intention that the President should be the head of the administration. *This is a mistake. There can be no question but that they used the term executive in its technical sense as covering only the political duties of the titular head of the nation. "[I]t was undoubtedly intended,"* writes W. W. Willoughby . . . , "*that the President should be little more than a political chief; that is to say, one whose function should, in the main, consist in the performance of those political duties which are not subject to judicial control.*"¹⁸⁴

181. See, e.g., Miller, *supra* note 1, at 43. But see Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 Cardozo L. Rev. 201, 201-02 (1993) ("The President's Constitutional powers over the administrative state should . . . be determined in light of a careful assessment of the particular functions involved.").

182. It is naive, or appears so, because it rests upon a faith in a scientific conception which we no longer share. See *infra* text accompanying notes 388-392.

183. Grundstein, *supra* note 7, at 287.

184. W. F. Willoughby, *An Introduction to the Study of the Government* 251 (1919) (emphasis added); see also 3 Willoughby, *supra* note 120, at 1479-80. This conception of the framers' fundamental distinction between "politics" and "administration" was shared by Goodnow as well. See, e.g., Frank J. Goodnow, *The Principles of the Administrative Law of the United States* 70 (1905) ("The American conception of the executive power prevailing at the time of the adoption of the United States constitution corresponded with that part of the executive power which has been called political."); *id.* at 73-74 ("The grant

If one understood these notions as “naturally” distinct, then as these theorists suggested, it would also seem natural to see that while the framers had assigned “executive” power to the President, this assignment entailed no judgment about where Congress must assign administrative power, and more importantly, about who gets to control the administrative power. Again, these theorists suggested, the question was left to Congress under the Necessary and Proper Clause.¹⁸⁵ In this way, the nineteenth century theorists picked up the understanding, apparently clear (to them) in the text, that Congress had broad authority to structure the administration of government institutions as it saw fit—so long as such structures were both “necessary and proper.”¹⁸⁶

To these commentators, then, the question whether the President has a right to direct or control the actions of his agents turns upon whether the agents are exercising “executive” or “administrative” power. If executive, the President would have such a right; if administrative, he would not have this right (at least not by virtue of the Constitution). If the power exercised by the agents was administrative power, the Constitution would not require Congress to vest such control in the President.

What then is the distinction between “executive” and “administrative” powers? As will become apparent in what follows, the line is not at all a clean one. But we can begin with a sketch of the difference: Among

to the President of the executive power had for its effect that the President was to have military and political power rather than administrative power. The meaning of the words ‘executive power’ is explained by the specific powers granted to the President by the constitution.”); *id.* at 78 (“[P]erusal of the early acts of Congress organizing the administrative system of the United States will show that the first Congress did not have the idea that the President had any power of direction over any matters not political in character.”). For President Wilson’s account, see Woodrow Wilson, *Constitutional Government in the United States* 59 (1908) (“The makers of the constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy.”).

185. The framers referred to this as the Sweeping Clause. See 3 *The Debates of the State Conventions* 463–64 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1881). The Necessary and Proper Clause provides that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art. I, § 8, cl. 18. It was this view of Congress’ power that lead Woodrow Wilson to view Congress as the ultimate chief. See Wilson, *supra* note 125, at 262 (“Of course the secretaries are in the leading-strings of statutes, and all their duties look towards a strict obedience to Congress. Congress made them and can unmake them. It is to Congress that they must render account for the conduct of administration.”).

186. The same conclusion has been drawn by a wide range of modern-day constitutionalists. See, e.g., Zamir, *supra* note 73, at 869, 873 (“Guided by the model of the colonial governments, the framers of the Constitution probably did not intend the President to be the administrative chief of the executive branch, clothed with a general power to control the acts of all executive officers.”); Froomkin, *supra* note 120, at 795 (discussing distinction between “presidential” and “executive” powers).

the laws that the President *executes*, we can distinguish two types. One type is the set of laws necessary and proper to a power specifically described in Article II (defining the executive power); the second type is the set of laws necessary and proper to a power specifically described in Article I (defining the legislative power). As a rough first cut at the difference between administrative and executive power, we can call the laws necessary and proper to Article II powers *executive*, and the laws necessary and proper to Article I powers *administrative*. As will become clear, our claim about the framers' vision is that they saw a difference in the constitutionally required control that the President would have over administrative and executive power. In short, whatever control was required over executive power, less was required (constitutionally) over administrative.

To understand fully the source of this nineteenth century conception would require us to stray far beyond the scope of this Article. Obviously, much of the spirit of the time echoes in their hard, formal, and categorical distinctions.¹⁸⁷ And just as importantly, Willoughby and Goodnow were fighting their own intellectual campaigns;¹⁸⁸ indeed, they, along with such aspirants as Woodrow Wilson, were locked in a campaign to reform the executive by making less political many of its administrative functions.¹⁸⁹ Enthusiastic about impartial expertise, they sought to make an apolitical space for independent administrators in American government. This spirit, and their motives, obviously draw into question the fidelity of their readings of the framers as a matter of history.

But our purpose in pointing to these scholars is simply comparative, and our use of this intellectual history merely suggestive. The aim is to use their conception of the executive to suggest a second model for executive power, one that distinguishes between two kinds of functions and the extent of executive control constitutionally required over each. With this model we will examine again the three puzzles already presented, and ask whether a model of the executive that conceives of more than one type of executive function better explains the framers' actual practice. If it does, the unitarian's single-function-and-responsibility model is incomplete: And, as we have hinted, so too will the nineteenth century theorists' model be incomplete: for again, it speaks as if the framers had a firm or clear categorical conception of administrative functions versus

187. See for example the character of the discussion in Leonard D. White, *The Republican Era: A Study in Administrative History 1869-1901* (1958).

188. For contemporary reviews of Willoughby's and Goodnow's positions, see Robert E. Cushman, Book Review, 24 *Am. Pol. Sci. Rev.* 746 (1930) (reviewing Westel W. Willoughby, *The Constitutional Law of the United States* (2d ed. 1929)); Ernst Freund, Book Review, 1 *Am. Pol. Sci. Rev.* 136 (1906) (reviewing Frank J. Goodnow, *The Principles of the Administrative Law of the United States* (1905)) (criticizing Goodnow's distinction between administration and politics).

189. This was in part to allow a shift of the public business from Congress, perceived by Wilson and his followers as hopelessly corrupt, to the administration. For a modern discussion with similar goals, see Stephen Breyer, *Breaking the Vicious Circles: Toward Effective Risk Regulation* 59-72 (1993).

executive functions. The framers had no such conception. As we will develop further below, the framers had no clear idea how their unruly intuitions about executive power would work out, but instead imagined them to become defined over time through practice.

2. *Linking the Nineteenth Century View to the Constitutional Text.* — The nineteenth century view sees two executive functions where the modern unitarian sees one. But how are these functions divided? Does something in the text itself, or in the political context, help us understand what this nineteenth century executive would be?

An initial question is whether the text of Article II supports the idea that the framers contemplated two kinds of (what we consider) executive functions. One immediately apparent argument that it does not, presented by the modern constitutionalists, rests on the Vesting Clause. As Calabresi and Rhodes recently argued, Article II's Vesting Clause appears to vest executive power beyond those powers enumerated in the balance of Article II.¹⁹⁰ For unlike the Vesting Clause in Article I (which provides, "All legislative power *herein granted*"¹⁹¹), the Vesting Clause of Article II ("The executive power"¹⁹²) does not limit its power to the enumerated powers listed in Article II.¹⁹³ Therefore, the argument goes, the framers did not understand the executive power to be limited to the particular powers enumerated; and if not limited to the enumerated powers, it would follow that one cannot divide executive functions from "administrative" functions, at least for constitutional purposes.¹⁹⁴

We think that this argument is unpersuasive. Even if the Constitution vests all executive power in the President, there is now enough reason to question whether all executive power as then understood includes all executive power as now understood. As we conceive it, the framers intended the Vesting Clause to vest constitutionally little more than the enumerated executive powers.¹⁹⁵ It says *who has the execu-*

190. See Calabresi & Rhodes, *supra* note 1, at 1175–79. Others, of course, have argued the same before. See, e.g., Cleveland, *supra* note 100, at 14–15.

191. U.S. Const. art. I, § 1 (emphasis added).

192. *Id.* art. II, § 1.

193. The executive power extends beyond those enumerated in Article II at least to the veto power in Article I. See *id.* art. I, § 7. For a useful comparative analysis of the veto power, see Chester J. Antieau, *The Executive Veto* (1988).

194. See, e.g., Hart, *supra* note 73, at 221 (noting conflicting evidence but concluding "take Care" is a "grant of general power of an executive nature"); Prakash, *supra* note 19, at 995–97 (relying on statements of Hamilton and Madison in asserting that "take Care" Clause is a general grant of authority).

195. See Hart, *supra* note 100, at 223–24; cf. Zamir, *supra* note 73, at 870–71 (asserting that founders read Vesting Clause to grant President full control only over "those officers appointed to . . . political functions which the Constitution vested in the President"). Consider also the statement of Representative White, during the debate of the removal of the Secretary of Foreign Affairs. "The executive power is vested in the President; but the executive powers so vested are those enumerated in the constitution." 1 *Annals of Cong.* 485 (Gales & Seaton eds., 1834). Justice Jackson makes a similar argument in the *Steel Seizure Case*. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

tive power; not what that power is, just as the Vesting Clause of Article I says who has the legislative power (a Congress), while section 8 says what that power is,¹⁹⁶ and the Vesting Clause of Article III says who has the judicial power (one Supreme Court at least) while section 2 specifies to what that power "extend[s]."¹⁹⁷ As Daniel Webster described it,

It is true, that the Constitution declares that the executive power shall be vested in the President; but the first question which then arises is, *What is executive power?* . . . Executive power is not a thing so well known, and so accurately defined, as that the written constitution of a limited government can be supposed to have conferred *it in the lump*.¹⁹⁸

Four arguments support this conclusion. First, if the Vesting Clause were read in the way that Calabresi and Rhodes would read it, it would have the effect of rendering superfluous much of the balance of Article II,¹⁹⁹ since much of the balance of Article II merely articulates what Calabresi and Rhodes would say is implied in the Vesting Clause.²⁰⁰ There is reason to seek a reading that can eliminate this redundancy.²⁰¹ There is good reason as well to minimize the significance of this distinctive language in Article II—"herein granted." For the addition of "herein granted," relied upon by Calabresi and Rhodes,²⁰² was made at the last moment by the Committee on Style, a committee without the authority to make substantive changes.²⁰³ The change induced no debate at all; this

579, 640-41 (1952) (Jackson, J., concurring). That nothing more than the enumerated powers are vested does not entail that those powers are to be understood narrowly. In particular, this does not determine the scope of the Take Care Clause, see *infra* Part II.D.4. All we mean is that the Vesting Clause does nothing more than show who (*a* President) is to exercise the executive power, and not *what* that power is.

196. See U.S. Const. art. I, § 8.

197. See *id.* art. III, § 2. For a related analysis, see Joseph P. Verdon, Note, The Vesting Clauses, the *Nixon* Test, and the Pharaoh's Dreams, 78 Va. L. Rev. 1253 (1992). As that Note well argues, one should not give the Vesting Clauses a substantive meaning beyond identifying who holds the respective powers, but should grant to Congress through the Necessary and Proper Clause the power to fill in details where the Constitution does not resolve the question. See *id.* at 1258. For a nineteenth century perspective, see Goodnow, *supra* note 184, at 73-80. This was Daniel Webster's understanding of the Vesting Clauses. See Daniel Webster, Speech in the Senate (May 7, 1834), in 7 The Writings and Speeches of Daniel Webster 124-25 (Nat'l ed. 1903) [hereinafter Writings and Speeches of Webster].

198. Daniel Webster, Speech in the Senate (Feb. 16, 1835), in 7 Writings and Speeches of Webster, *supra* note 197, at 186 (second emphasis added).

199. This assumes of course that redundancy is to be avoided in reading the Constitution. See *supra* note 151 and accompanying text; see also Hart, *supra* note 73, at 115-16 (broad grant of "royal prerogatives" would make commander-in-chief superfluous).

200. See Calabresi & Rhodes, *supra* note 1, at 1176.

201. See Goodnow, *supra* note 184, at 73-80 (claiming that Vesting Clause does not grant powers beyond those enumerated).

202. See Calabresi & Rhodes, *supra* note 1, at 1177-78.

203. Consider Thach's account:

The next stage . . . was to give the Constitution its final literary polish. Consequently, on September 8 a committee was chosen consisting of Johnson,

suggests that the framers saw it as having an effect as slight as we argue it should have.²⁰⁴

Second, not even Hamilton described the Vesting Clause as an independent source of substantive executive power, though he was in general quite eager to define a strong executive. In his catalog of the executive powers, contrasting the American executive with the British monarch, nowhere does he discuss a general executive power arising from the Vesting Clause.²⁰⁵

Third, while the federal constitution certainly constituted a more unitary executive than most state constitutions, the same language vesting executive power in state constitutions had been understood at the time of the framing not to mark an inherent power, but to describe an authority

Hamilton, Gouverneur Morris, Madison and King "to revise the stile of and arrange the articles which had been agreed to by the House." This work was entrusted to Morris. . . . Positively with respect to the executive article he could do nothing. But he could do much by leaving the vesting clause as it stood. When the report of the committee of style was submitted it was found that the legislative grant now read: "All legislative powers herein granted shall be vested in a Congress." . . . Whether intentional or not, it admitted an interpretation of executive power which would give to the President a field of action much wider than that outlined by the enumerated powers.

Thach, *supra* note 78, at 138–39. Importantly, however, the ratifiers would not have known when "herein granted" was inserted. Therefore, it remains for the modern unitarian to argue that the Constitution as ratified contemplates these two kinds of vesting clauses.

204. This argument rests, of course, on the much disputed Doyle canon of construction—Sherlock Holmes's inference that the visitor was familiar because "the dog did not bark." See Arthur C. Doyle, Silver Blaze, in 2 The Annotated Sherlock Holmes 261 (William S. Baring-Gould ed., 1967). Compare *Chisom v. Roemer*, 111 S. Ct. 2354, 2364 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark"), *Church of Scientology v. IRS*, 484 U.S. 9, 17–18 (1987) (lack of debate may be likened to "Sir Arthur Conan Doyle's 'dog that didn't bark'"), *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (if the construction would make a sweeping change, judges "may take into consideration the fact that a watchdog did not bark in the night") with *Chisom*, 111 S. Ct. at 2370 (Scalia, J., dissenting) ("We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie.") and *Harrison*, 446 U.S. at 592 ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."). The challenge against the Doyle canon has less force, we believe, in the context of the Constitution than it does in the context of a statute, for the canon makes sense where so much is at stake.

Webster's account adds further support to this interpretation:

They did not intend, certainly, a sweeping gift of prerogative. They did not intend to grant to the President whatever might be construed, or supposed, or imagined to be executive power; and the proof that they meant no such thing is, that, immediately after using these general words, they proceed specifically to enumerate his several distinct and particular authorities; to fix and define them. . . .

Daniel Webster, Speech in the Senate (Feb. 16, 1835), in 7 Writings and Speeches of Webster, *supra* note 197, at 186.

205. See The Federalist No. 69, at 417–33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

limited to that power enumerated.²⁰⁶ At least as a presumption, similar language in the federal constitution would suggest a similar understanding.²⁰⁷

Finally, and perhaps most interesting for our purposes, is an argument resting on the other vesting clause similar to the Vesting Clause of Article II and more explicit than the Vesting Clause of Article I: that is Article III's clause which provides that "[t]he Judicial Power . . . shall be vested." If the difference between Article II and Article I entails broad inherent power in the President, does it entail the same broad grant of inherent power in Article III? For just like Article II, and unlike Article I, Article III vests "[t]he judicial power" (and not just the judicial power "herein granted") in "the Supreme Court." But does this mean that the judicial branch has a wide range of inherent and (legislatively) unregulable judicial authority beyond that enumerated and granted by Congress, drawn from English practice? Can the Supreme Court claim a range of implied authority to decide any issue of a judicial matter, or does the subsequent specification of "cases and controversies" exhaust that authority?

It is at least clear how an originalist should answer this structural question. For the originalist is quick to point to Justice Iredell's argument in *Chisolm v. Georgia*²⁰⁸ for the proposition that the Constitution granted no inherent judicial power to create judicial remedies where

206. For an extraordinary record of this, see *Field v. People ex rel. McClelland*, 3 Ill. (2 Scam.) 79 (1839), in which the Illinois Supreme Court, reading a similar vesting clause in its own constitution, concluded, "[t]his clause . . . is a declaration of a general rule; and the same remarks are applicable to this, as a grant of power, that have been made in reference to them. It confers no specific power." *Id.* at 84. No doubt, as Thach comments, the aim of the framers was to create an executive more powerful than state executives, see Thach, *supra* note 78, at 52, but that is not enough to conclude the President is to have unlimited inherent power. However, one can rely on state experience only with caution. As Gerhard Casper remarks, "No clear-cut state precedents were available to the members of the House of Representatives as they faced the task of interpreting the provisions of the United States Constitution with respect to the tenure of executive officers." Casper, *supra* note 115, at 234; cf. Daniel Webster, Speech in the Senate (May 7, 1834), in 7 Writings and Speeches of Webster, *supra* note 197, at 125 (noting that even in state constitutions, there were no perfectly drawn lines between the powers of each department).

207. Indeed, nothing could have been further from the framers' objective than to constitutionalize a claim to *inherent* powers by anyone. The tenor of the time is well sounded in Virginia's declaration of 1776, that "'the executive powers of government' were to be exercised 'according to the laws' of the commonwealth, and that no power or prerogative was ever to be claimed 'by virtue of any law, statute, or custom of England.'" Corwin, *supra* note 110, at 6. Justice Scalia argues that we should infer from the absence of similar language in the federal Constitution that the federal executive power is not to be so limited. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 859-60 (1989). But the predicate for applying this modified *expressio unius* rule is too weak to support the conclusion. The fact that one political body enacted a stronger statement of independence from the English conception of the executive need not mean that another political body is adopting the English conception of the executive.

208. 2 U.S. (2 Dall.) 419, 429 (1793) (Iredell, J., dissenting).

Congress has chosen not to do so. The judicial power, Iredell believed, was just that power to hear "cases and controversies." But this did not mean any "case or controversy." As he wrote there,

I conceive, that all the Courts of the United States must receive, not merely their organization as to the numbers of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only. This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority. There being many such, at the end of the special enumeration of the powers of Congress in the Constitution, is this general one: 'To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' None will deny, that an act of Legislation is necessary to say, at least of what number the Judges are to consist; the President with the consent of the Senate could not nominate a number at their discretion. The Constitution intended this article so far at least to be the subject of a Legislative act. Having a right thus to establish the Court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings. Upon this authority, there is, that I know, but one limit; that is, 'that they shall not exceed their authority.'²⁰⁹

We believe that what Iredell says here about Article III power applies to Article II powers as well. Article III gives certain courts "the judicial power," which power "extend[s]" to certain "cases and controversies"; nonetheless, Iredell argues, this does not yet imply any power of the court to decide cases or grant remedies unless Congress has acted to confer such jurisdiction.²¹⁰

The same should hold for executive power. Article II gives the President "the executive power," which is defined to include a catalog of powers in section 2, and some in section 3, and at least one specified in

209. *Id.* at 432-33 (Iredell, J., dissenting) (emphasis deleted). It would in general be quite odd to rely upon a dissenting opinion to help establish the original intent (though some would say that Justice Harlan's view of the Fourteenth Amendment in *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting), was closer to the truth than Justice Brown's), but Iredell's position (in part) was subsequently ratified by the Eleventh Amendment. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 8 (1988).

210. This point with respect to the power of Congress to control Article III jurisdiction is made by Akhil Amar. See Amar, *A Neo-Federalist View*, *supra* note 176, at 254 n.160; Amar, *Original Jurisdiction*, *supra* note 176, at 481-82; Amar, *Reply*, *supra* note 176, at 1653 n.12; Amar, *The Judiciary Act*, *supra* note 37, at 1504; cf. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) (suggesting Congress has plenary power to distribute original jurisdiction in civil cases, but not criminal cases).

Article I, section 7 (veto). If the Article III power does not even extend to the full range of an enumerated power without Congress' intervention, a vesting clause notwithstanding, so too should it follow that the executive power in Article II does not extend beyond the enumerated powers there, unless Congress, through the Necessary and Proper Clause, acts to extend it. Congress must act in both cases for the power to be effective.²¹¹

These arguments together suggest an understanding of the nineteenth century theorists' two-function view: if "executive power" extends to just those powers enumerated, then the "administrative power" spoken of by the nineteenth century scholars would extend to departments and agencies created by Congress independent of these Article II powers.²¹² And it would follow that any constitutional limit on Congress' power would track just these powers enumerated as the President's. One would test limitations on other powers granted by Congress—for example, limitations on the control over aspects of the administration unrelated to the enumerated powers—not by any Article II consideration, but instead by the reach of the Necessary and Proper Clause.

This understanding makes sense of two other central features of the original executive debate. First, it is consistent with what we view as the real question in the debate—whether the President would be one or many. Against that background, what section 1 does is simply say: We have chosen one President. Second, the nineteenth century understanding makes sense of another important feature of the founders' understanding that we have lost. The nineteenth century view distinguished between executive and administrative; the former it called political, the latter not. We can recover this sense of "political" by comparing it with our judgments about legislative power, the nature of which is relatively clear. We consider a grant of legislative power to Congress, within the boundaries of constitutional limitation, to be a grant of a prerogative to select or not to select topics for legislation, or to enact or not to enact bills, all subject to the sanction of the political process only. The granting of this prerogative makes legislative decisions to act or not act *political*, in an early sense of that word—political in the sense that they are subject to the review of no one directly, though subject to the review of the people indirectly (through elections, popular outcry, and the like).²¹³ Congress' legislative power is political in the sense that Congress exercises it without the review of anyone else within the government.

211. Note that there are three distinct grounds upon which Congress may regulate judicial power—the power to "constitute Tribunals inferior to the supreme Court," U.S. Const. art. I, § 8, cl. 9, the power to make "Exceptions, and . . . Regulations" to the Supreme Court's appellate jurisdiction, *id.* art. III, § 2, and the Necessary and Proper Clause power, see *id.* art. I, § 8, cl. 18. See also Amar, *The Judiciary Act of 1789*, *supra* note 37, at 1504.

212. The obvious gap in this analysis so far—the Take Care Clause—is discussed below. See *infra* Part II.D.4.

213. See *infra* text accompanying notes 221–234.

So too should we think of the original grant of "executive power." As Professor Bestor describes Blackstone's conception of "executive power:"

Executive power signified to Blackstone, as it did to the American framers, those powers of decision and action that can be exercised by a chief executive, or in his name, simply by virtue of the authority granted directly to him by the constitution or the laws. Though the executive may ultimately be held responsible—by impeachment or by the repudiation at the polls—for executive decisions made or executive actions carried out, executive powers themselves are almost by definition discretionary, and therefore capable of being exercised without the necessity of submitting a proposed course of action to prior legislative deliberation and approval.²¹⁴

The point is stated succinctly in the following account of present-day English constitutional practice: "For the exercise of a prerogative power the prior authority of Parliament is not required. . . . Parliament may criticize Ministers for the consequences which result from the exercise of prerogative; Parliament too may abolish or curtail the prerogative by statute; but in regard to the exercise of the prerogative Parliament has no right to be consulted in advance."²¹⁵

What marks a power as executive (within the framers' language) is that the decision whether and how that power is to be exercised lies within the discretion of that person designated as the executive. Under this conception, an executive need no more consult others before exercising executive power than the legislature need consult others before exercising its powers.²¹⁶

214. Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 *Seton Hall L. Rev.* 527, 532 (1974).

215. *Id.* at 532 n.14 (quoting E.C.S. Wade & G. Godfrey Phillips, *Constitutional Law* 185 (E.C.S. Wade & A.W. Bradley eds., 8th ed. 1970) (footnote omitted)).

216. On this point, see Charles Tiefer:

Constitutional law since 1789 has distinguished between executive officers performing "political" functions, and executive officers performing other functions, and it has rejected the notion that such non-"political" functions must be under the President's exclusive direction. In the "political" realm, the President must direct all; in the non-"political" realm, Congress may make an officer independent of presidential control, and instead may subject the officer solely to the direction of the law.

Tiefer, *supra* note 21, at 86.

Note, however, that this special sense to the word "political" does not entail a special sense to the word "administration." Indeed, the original usage of "administration" seems quite ordinary to our ears. For example, consider Hamilton's use in the *Federalist Papers*:

The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and

If we can use this bit of contextual understanding, if executive powers are political in this early sense of that word, and finally, if the Vesting Clause is limited in the sense we describe, then there is an entirely obvious sense in which one can distinguish "executive" functions from other functions contingently exercised by the executive. If executive powers are those granted the President under the Constitution, then the nineteenth century's "administrative" powers are those given the President or officers of the government by Congress. And while Congress has only questionable power to condition the constitutional grant of executive powers,²¹⁷ Congress has clear authority to limit the exercise of administrative powers as a condition to its grant of these powers to any officer of the government.²¹⁸ In the original conception, what constrains Congress when creating administrative power is principally the requirement that it be necessary and proper; beyond that limitation, the Constitution does not speak.

In this view, then, the framers' vision about the executive comes to this: The Vesting Clause of Article II designates the President as the holder of "the executive power"—not a council, not a triumvirate,²¹⁹ but a single person. The balance of Article II defines what that executive power is. More specifically, it defines what executive powers the President can exercise as a matter of constitutional prerogative; other powers Congress can grant if it thinks proper. With respect to those exercising the President's constitutionally enumerated powers, including the President himself, Congress has considerable authority to impose obligations of law; with respect to people exercising the President's constitutionally specified authority, the President must have hierarchical control; but beyond these enumerated aspects of "the executive power" is an un-

navy, the direction of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.

The Federalist No. 72, at 435–36 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

217. For example, it is doubtful that Congress could constitutionally refuse to vote any funding for White House functions. Cf. Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess. 473–74 (1987) (minority views) (arguing that the President is the "sole organ" of the government in foreign affairs, and that Congress cannot constitutionally prevent the President from sharing information, asking other governments to contribute to the Nicaraguan resistance or entering into secret negotiations with factions inside Iran). Compare the discussion in Alex Whiting, Note, Controlling Tin Cup Diplomacy, 99 Yale L.J. 2043 (1990) (discussing contours of Congress' power to control executive foreign affairs conduct through use of funding statutes).

218. See *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). We do not consider here any limitations on Congress' powers to place duties on the President, as distinct from agents of the President.

219. Hamilton discusses these options in Federalist No. 70. They were discussed in the convention, see 1 Farrand, *supra* note 137, at 64–66 (Wilson-Rutledge-Sherman, June 1); *id.* at 88–89 (Rutledge-Randolph, June 2); *id.* at 96–97 (Gerry, June 4); *id.* at 252 (Wilson, June 16); 2 Farrand, *supra* note 137, at 100–01 (Williamson, July 24); *id.* at 537–38 (Mason, September 7).

defined range of powers that we would now describe as "administrative power," marking a domain within which one has a duty to act according not to one's own judgment, but according to the standards or objectives of a law.²²⁰ With respect to these latter powers, Congress has wide discretion to vest them in officers operating under or beyond the plenary power of the President.

3. *Linking the Nineteenth Century View to the Court's Early Executive Cases: Marbury and Kendall.* — This view—that by constitutionalizing the "unitary executive" the framers did not believe that they were constitutionalizing who must have power over all functions that we now call administrative—gains support from early Supreme Court cases dealing with the scope of executive power. In this section, we consider just two of those cases. In both, we believe that the Court's approach can be understood through the view that we have just sketched.

Most famous of these cases is of course *Marbury v. Madison*,²²¹ although less for its relationship to the debate over the unitary executive than for its founding of judicial review.²²² Before Chief Justice Marshall struck a statute of Congress, he sketched broadly the Court's conception of the executive, and its amenability to the control of other branches, whether Congress or the courts. This view, we suggest, ties directly to the model that we have outlined.

Recall the basic facts. John Adams had appointed William Marbury to be a Justice of the Peace in the District of Columbia.²²³ The Senate had confirmed his appointment, and President Adams had signed the commissions. But unfortunately for Marbury and four other similarly situated magistrates-to-be, Marshall (the same), who had been Secretary of State under Adams, failed before leaving office to deliver the commissions to Marbury and the others. Madison, the new Secretary under President Jefferson, refused to deliver the commissions. Marbury sued to compel him to deliver his commission.²²⁴

For our purposes, we can focus on one crucial aspect to the Court's dictum. Central to Marshall's analysis is a distinction between two kinds of authority or power under which the Secretary of State may act—one that he calls "political" authority and the other authority derived from law (the same distinction we have traced). As Marshall explained:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of

220. Reconsider the Decision of 1789 in this light, discussed *supra* text accompanying notes 112–130.

221. 5 U.S. (1 Cranch) 137 (1803).

222. But see Tiefer, *supra* note 21, at 86–87 (discussing distinction made in *Marbury* between "political" functions, over which President exercises complete discretion, and other functions for which Congress might provide direction).

223. The office had been created by what has come to be called the "Midnight Judges Act." See Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107; see also William W. Van Alstyne, A Critical Guide to *Marbury v. Madison*, 1969 Duke L.J. 1, 3–6.

224. See 5 U.S. (1 Cranch) at 146.

which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.²²⁵

Thus far then, Marshall sounds like a believer in a strongly unitary executive, at least to the extent that he is pointing to an absolute power in the President to exercise control over subordinates, and to the unreviewability of their acts pursuant to that authority.

Marshall then immediately links this power to a department we have just reviewed. Says Marshall,

The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.²²⁶

Thus, Marshall conceived the foreign affairs department to flow from this power that Marshall calls "political" and that we have been calling executive. In this way, Marshall sounds very much like Chief Justice Taft, writing in *Myers*.²²⁷ When an officer exercises the (executive) power, which this department has by virtue of its tie to the constitutional grant of this executive power to the President, his acts "can never be examin[ed]" by a court.²²⁸

But Marshall goes on to qualify this sea of unreviewability in a crucial way:

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.²²⁹

Thus, an executive officer is either an agent of the President (a "political officer") or an "officer of the law." He can serve either the President or the lawmakers (Congress), but when he serves Congress' will (as expressed in law), his performance under that will is, Marshall asserts, subject to the review by the courts.

225. *Id.* at 165-66 (emphasis added).

226. *Id.* at 166.

227. See *Myers v. United States*, 272 U.S. 52, 132-34 (1926) (ruling that President must have "unrestricted power to remove" those officers acting under the President's "political" powers), discussed *supra* text accompanying notes 98-108.

228. See 5 U.S. (1 Cranch) at 166.

229. *Id.*

Now it is important to qualify what Marshall has said so far, by pointing out that Marshall was not arguing that the only "political" power possessed by the President was that given by the Constitution. Though he says "by the constitution" the President is vested with political authority, Congress too, he suggests, can grant the President a "legal discretion," and when he or his officers act under that discretion, then he or his officers enjoy the same immunity from judicial review as when the officers act under a constitutional discretion.²³⁰ But where neither the law nor the Constitution gives any discretion, the officer is subject to the duty of the law, the President notwithstanding.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.²³¹

In *Marbury* itself, then, the Court declared that because the President had completed the last act required to complete his exercise of his appointment power, the duty fell on the Secretary of State to deliver the commissions to Marbury.²³² Thus, according to Marshall:

The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power and his discretion has been completely applied to the case. If, by law, the officer [appointed] be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.²³³

230. See *id.*

231. *Id.*

232. The steps to this conclusion are not essential here, though they are somewhat complex. Signing the commission, Marshall said, was the last act in the appointment, since it was a public act manifesting the completion of the appointment; the act of signing was, however, distinct from the appointment. The commission was just the evidence of the appointment. See *id.* at 155-58.

233. *Id.* at 167.

Now on the face of this claim—that the President controls the officials to the extent they are acting on a constitutional or legal discretion, and not when the officer is acting as an “officer of the law”—the believers in a strongly unitary executive may find nothing at all problematic. The modern unitarian’s claim has always been that the President must be able to direct *discretionary* exercises of authority; and believers in a strongly unitary executive have long yielded the point regarding “ministerial” acts. No one thinks that the President may authorize administrative officers to violate the law.²³⁴

So far, then, the modern unitarian view appears to be both coherent and consistent with what we have quoted. But it is not entirely consistent with how the framers and the Court in *Marbury* understood things. The believers in a strongly unitary executive say that *whenever an exercise of authority is discretionary*, the Constitution permits the President to control such an exercise; but the original view would suggest that what the framers meant was that *whenever it is a political power, derived from the Constitution, or a legal discretion granted by Congress*, the President must have the power to direct the exercise of this discretion. Nothing in this entails that where Congress directs otherwise—by vesting in an officer a discretionary power beyond the President’s review—the President nonetheless has power to direct or even to interfere with the exercise of that power. The modern unitarian confuses the *source of the power* to act (the Constitution versus laws of Congress) with the *type of power* acted upon (discretionary versus ministerial). Power may derive from the Constitution or from law; power may be ministerial or discretionary. As we understand the founding view, Congress had a measure of authority to structure what modern observers consider to be executive with respect to power deriving from law, whether ministerial or not.

All this suggests a sharp distinction between (a) the acts that the President may control and (b) the acts that Congress may regulate. This distinction flows from the nature of the source of the authority to act (Article I’s Necessary and Proper Clause versus Article II) rather than from the nature of the act (discretionary versus ministerial). The point is not unambiguous in *Marbury* itself; there it is merely suggested. But the point emerges clearly from another case that many believers in a strongly unitary executive take to stand for precisely the opposite point, *Kendall v. United States ex rel. Stokes*.²³⁵

Postmaster Amos Kendall refused to pay a claim made by a William B. Stokes (and others), who had contracted with the Post Office to deliver the mail. Congress had by law directed that the Postmaster make the payment; Kendall, at the urging of President Jackson, refused. At issue

234. See *supra* note 106. The exception is in cases where the executive believes the underlying law unconstitutional. See, e.g., *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988) (executive refusing to enforce law viewed as unconstitutional).

235. 37 U.S. (12 Pet.) 524, 561 (1838).

was the power of the district court²³⁶ to issue a *mandamus* to the Postmaster to pay the debt.²³⁷

Kendall is often understood to stand for the proposition that where the action enjoined upon the executive is "ministerial," then the executive can be directed by law to perform it, which suggests (wrongly we believe) that if the action is "discretionary," then the executive cannot be directed by law to perform it. But this implication follows neither in logic nor from the opinion. What is crucial to the opinion (and conceded by the dissenting justices as well) is that the authority at issue in *Kendall* derives from law,²³⁸ and not from the constitutionally committed executive powers; and since derived from law, the executive could not control it.²³⁹

The argument for the Court follows precisely the distinction drawn by Chief Justice Marshall: "The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."²⁴⁰ Thus, where the source of the President's power is the Constitution,²⁴¹ he is free from the control of the courts or Congress.

But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be claimed by the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president.²⁴²

Note here the unqualified nature of Congress' power. Congress has the power to impose upon *any* executive officer "*any duty they may think proper*" so long as this is not repugnant to "rights secured by" the Constitution. A duty may be ministerial or nonministerial (discretionary or nondiscretionary). With regard to ministerial duties, all that *Kendall* says is: "And this is emphatically the case, where the duty enjoined is of a mere ministerial character."²⁴³

236. The *Marbury* mistake was not to be made again. This time the *mandamus* action was brought in a court with the power to hear the claim within its original jurisdiction.

237. See 37 U.S. (12 Pet.) at 534.

238. See *id.* at 626 (Taney, C.J., dissenting); *id.* at 641-42 (Barbour, J., dissenting).

239. See *id.* at 610-13.

240. *Id.* at 610. Recall Marshall's statement *supra* text accompanying note 225.

241. We include here statutes designed to allow implementation of the President's constitutional powers.

242. 37 U.S. (12 Pet.) at 610.

243. *Id.*

Modern defenders of the unitary model have read this single sentence to mean that the President's power is cabined *only* when the power Congress grants is ministerial.²⁴⁴ From this they have drawn the lesson that where the power is not ministerial, Congress may not interfere; it may not, that is, constrain the President's power to control the discretion of "his" officers. But this is not the Court's claim. All the Court says is that "it is *emphatically* the case" that the officer can be constrained when the duty is merely ministerial. The Court does not say that the officer can be constrained *only* when the duty is ministerial.²⁴⁵

The grounds for this point were made even more clearly by Chief Justice Taney in dissent (note again: the dissenters agreed with the Court that Congress could give the courts *mandamus* power over an executive; the dispute among them was over whether Congress had given the courts such power):

The office of postmaster general is not created by the constitution; nor are its powers or duties marked out by that instrument. The office was created by act of congress; and *wherever congress creates such an office as that of postmaster general, by law, it may unquestionably, by law, limit its powers, and regulate its proceedings; and may subject it to any supervision or control, executive or judicial, which the wisdom of the legislature may deem right.* There can, therefore, be no question about the constitutional powers of the executive or judiciary, in this case. The controversy depends simply upon the construction of an act of congress.²⁴⁶

As Taney and the Court affirmed, the judgment about how to control the department was Congress', so long as Congress exercised that judgment according to *law*. Once expressed by law, the duty of the President is plain: The Constitution directs him to "take Care" that the laws be faithfully executed, and "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."²⁴⁷

244. This reading is suggested, for example, by Tiefer, *supra* note 21, at 88 n.144.

245. Cf. Hart, *supra* note 73, at 31 (discussing absence of judgment involved in "ministerial" tasks, as compared to "administrative determinations" that involve some degree of judgment). Even President Taft, author of *Myers v. United States*, 272 U.S. 52 (1926), understood as much. See Taft, *supra* note 106, at 125-26.

246. 37 U.S. (12 Pet.) at 626 (Taney, C.J., dissenting).

247. *Id.* at 613. This view is echoed by Chief Justice Rehnquist, expressed in a memo when working for the Department of Justice:

It is in our view extremely difficult to formulate constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law, is by definition, an executive function and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.

To be sure, this statement may be taken to stand for the narrow and uncontroversial view that the President must obey the law, and that he may not order his subordinates to do otherwise. As we have noted, modern unitarians do not dispute this claim. But something more was happening in the case. The President had argued in *Kendall* a ground that resonates well with the current believers in a strongly unitary executive. His attorney general told the Court:

[T]he executive ought to have this power, because it is executive in its nature. The executive is fitted to execute it, and armed with means to execute it. It can always execute it . . . promptly, uniformly, and in the time and manner that the public interests may require; and as its means may enable it.²⁴⁸

But whether the "executive ought" or not, as every Justice in *Kendall* affirmed, the Constitution allowed the President only those powers of execution given by Congress. We do not claim that *Marbury* and *Kendall* dispose of the debate over the nature of the unitary executive. There are many ambiguities in the opinions. But the language and spirit of the opinions seem to fit better with the approach we have offered here.

4. *The Take Care Clause.* — If (1) the Vesting Clause is not meant to vest executive power generally, but rather was meant to vest just the enumerated executive powers, and (2) the framers understood the executive powers that derived from the Constitution as political (subject only to the control of the ballot box²⁴⁹) and distinguishable from what we might term the administrative power (a creation of law, subject to the control of Congress and the courts), then the nineteenth century model of the executive gains support over the unitary model of the twentieth century. But before we reconsider how well the nineteenth century model explains the puzzles that began this Article, consider one final hurdle that the opponents of the modern unitarian view must clear—the Take Care Clause.

Commentators have consistently relied on the Take Care Clause as a firm basis for the modern unitarian view.²⁵⁰ This clause, together with the Vesting Clause, is taken to suggest the President's plenary authority in the realm of all that is executive and administrative. It is the President,

Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 397 (1987) (quoting now Chief Justice Rehnquist).

248. 37 U.S. (12 Pet.) at 545.

249. The framers also may have permitted reasonable statutory limits, a subject we do not discuss here.

250. See, e.g., Cleveland, *supra* note 100, at 16; Taft *supra* note 106, at 85–88; Prakash, *supra* note 19, at 1000–03. While he does not read the Take Care Clause so broadly, Peter Strauss does believe (as do we) that it has an important role in the structure of Article II. See Strauss, *supra* note 7, at 648–50. Justice Holmes stated the minimalist reading of the Take Care Clause in *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.").

and not anyone else, who is given the power to "take Care" of the faithful execution of the laws, and he must have the power to perform his responsibility over all who are engaged in carrying out the law.

But there is something quite odd about the structure of the Take Care Clause if it was conceived by the framers as the source of presidential power over all that we now consider administration: Unlike the other power clauses of Article II, the Take Care Clause is expressed as a duty rather than a power.²⁵¹ Indeed, rather than appearing in section 2 of Article II, where the balance of the President's basic powers are articulated,²⁵² the Take Care Clause appears in section 3 of Article II, in the context of a laundry list of other discretionary presidential duties and (arguably) powers.²⁵³ Most of these are expressed not as something the President may choose to do (as is the case where he has the "power" to undertake actions), but as something that he "shall" do.

This language and its placement notwithstanding, modern unitarians claim that even if a duty, the clause implies that if the President has a *duty* to take care that the laws are faithfully executed, he also has a *power*

251. See, e.g., 3 Willoughby, *supra* note 120, at 1474. Tiefer suggests that it was intended as a clause "to preclude presidential claims of super-legal authority, not to confer positive authority to override legislative acts." Tiefer, *supra* note 21, at 90 n.151.

252. Article II, section 2 provides:

[1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States; when called into the actual Service of the United States, he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have *Power* to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

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

[3] The President shall have *Power* to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Const. art. II, § 2 (emphasis added).

253. Section 3 of Article II provides:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Id. § 3.

to direct and control all administrative functions directed to the execution of those laws regardless of the law's nature, or the source of the law's authority. On this view, this directing and supervising authority is just one more executive power that must be vested exclusively in the President.

What is most striking about the centrality claimed for this clause is its relatively modern origin.²⁵⁴ By the beginning of the modern presidency, constitutional scholars were pointing to the Take Care Clause as the primary source of executive power. President Taft relied on the clause to support the notion that the President can act to advance federal interests without specific legal authority,²⁵⁵ and Theodore Roosevelt believed that the clause meant that the President could do anything so long as there was not specific legal authority forbidding it.²⁵⁶ But at the founding, the clause received relatively little consideration by practically everyone in the debate.²⁵⁷ Hamilton devoted only a few lines in the *Federalist Papers* to discussion of this "minor" executive power or responsibility.²⁵⁸ The fact that the clause received so little initial attention suggests that one ought not take it as a broad grant of presidential power over administra-

254. We do not claim that the argument was entirely unheard of by the framers. Representative Ames, for example, argues the point in the Removal Debate, see 1 *Annals of Cong.* 492, 561 (Gales & Seaton eds., 1834), as does Madison, see *id.* at 516. Neither, however, advances the position as strongly as the modern unitarians. That strong claim reaches back to President Jackson. Something like this argument was relied upon by Jackson in his removal of funds from the Bank of the United States. See *infra* Part II.C. Webster's response to this claimed authority is telling:

I will never agree that a President of the United States holds the whole undivided power of office in his own hands, upon the theory that he is responsible for the entire action of the whole body of those engaged in carrying on the government and executing the laws. Such a responsibility is purely ideal, delusive, and vain. There is, there can be, no substantial responsibility, any further than every individual is answerable, not merely in his reputation, not merely in the opinion of mankind, but *to the law*, for the faithful discharge of his own appropriate duties.

Daniel Webster, Speech in the Senate (May 7, 1834), in 7 *Writings and Speeches of Webster*, *supra* note 197, at 143.

255. In Taft's words, "[t]he widest power and the broadest duty which the President has is conferred and imposed by [the Take Care Clause]." Taft, *supra* note 106, at 78.

256. See Theodore Roosevelt, *An Autobiography* 357 (1929); see also Hart, *supra* note 73, at 221 n.67 (stating that "executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers").

257. See John C. Hueston, Note, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 *Yale L.J.* 765, 779 (1990) (arguing that lack of debate was due to public pressure to complete the convention rapidly).

258. Hamilton completely fails to discuss it in his consideration of presidential powers in *Federalist* 69. See *The Federalist No. 69* (Alexander Hamilton). In *Federalist* 77, Hamilton says, "no objection has been made to this class of authorities; nor could they possibly admit of any. It required, indeed, an insatiable avidity for censure to invent exceptions to the parts which have been excepted to." *The Federalist No. 77*, at 463 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

tion, at least to the extent that it would solve the hardest and most sharply disputed questions.

More significant than the lack of debate over the scope of the Take Care Clause is the shift in the language of the clause and its relationship to the Necessary and Proper Clause. By reviewing the development of these two clauses, we hope to show that the framers shifted from the President and to the Congress a crucial aspect of the decision of how laws were to be carried into effect.

Like other clauses in Article II, the Take Care Clause came into the constitutional text with apparently little debate.²⁵⁹ The language "take Care that the laws be faithfully executed" emerged from the work of the Committee on Style, which reported to the convention on September 12, 1787. This Committee was the last step in a long series of debates that began with a number of resolutions from Randolph of Virginia. These resolutions were the focus of the convention that convened May 25, 1787, to discuss amendments to the Articles of Confederation.

Before the Committee on Style created this text, something close to it had appeared in various earlier drafts. Its first appearance was in Randolph's resolution number 7, which resolved "that a National Executive be instituted . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation."²⁶⁰

This was May 29, 1787. It was not until June 1 that the convention, now convened as a Committee of the Whole, turned to consider the executive power. Madison suggested that the committee first consider the scope of the executive power, before it decide the central question—whether there would be one or more "executives." As Madison outlined it, the President (whether a single person or a plurality) was to have three powers:

[the] power to carry into effect the national laws; to appoint to offices in cases not otherwise provided for, and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature.²⁶¹

Note the last of these three powers—the power to execute "such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature."²⁶² To someone who believes that the Constitution recognizes just three powers, executive, legislative, and judicial, what could be powers "not Legislative nor Judiciary in their Nature" be, such that the executive would not in any case possess them? For if the only powers are powers legislative, judicial, and execu-

259. See Hueston, *supra* note 257, at 779.

260. 1 Farrand, *supra* note 137, at 21 (Madison, May 29).

261. 3 Documentary History of the Constitution of the United States of America 38 (1900) [hereinafter *Documentary History*].

262. *Id.*

tive, then it follows that a power not legislative and not judicial is executive; and presumably,²⁶³ the executive would have all powers executive.²⁶⁴

This power to exercise powers “not Legislative and not Judiciary” suggests a limited executive power, which Congress may supplement according to its judgment. The language was proposed by Pinckney.²⁶⁵ It is significant if only because it suggests the possibility of a power neither legislative, nor judicial, nor executive.²⁶⁶ Certainly it would have been easier to say that Congress may delegate other “executive” powers if that is what Pinckney meant by “not Legislative nor Judiciary.” Instead, the power of which Madison is speaking suggests a power that we, and the nineteenth century theorists, might call administrative.

Support for this reading of this obscure clause derives first from what may have been its original source—Jefferson’s proposal in the early 1780s for the Virginia constitution. There Jefferson argued for a Governor who was to be granted those powers “which are necessary to execute laws (and administer the government) and which are not in their nature either legislative or judiciary,” their precise nature being “left to reason.”²⁶⁷ Clearly in this reference, Jefferson evinces an understanding of the diverse types of power—executive and administrative—that can be possessed by the executive. This understanding is further supported by the debate in the Convention following Madison’s proposal. Immediately after Madison made this proposal, Pinckney rose to suggest that the third clause be struck, not because (as modern constitutionalists would think) there is no such thing as a power simultaneously not legislative not judicial and not executive, but because, in his words (as reported by Madison): “they were unnecessary, the object of them being included in the ‘power to carry into effect the national laws.’”²⁶⁸ The President did not need a special power to execute the powers not legislative and not judicial, since this power was implied by the power to “carry into effect” the nation’s laws.

In both Randolph’s and Madison’s view, the President had the power to execute the laws, as well as an implied power to define how it was that the laws would be “carried into effect.” But what was the scope of this implied power? Members of the convention were quick to express their own concern about questions of scope. By the time the convention completed the draft of these resolutions, at least two members had reconsid-

263. We can say only “presumably” because there was no clear vesting clause yet, so it is conceivable these three would have been exclusive.

264. See also Thach, *supra* note 78, at 117 n.26 (discussing Pinckney’s move to strike out last clause as the power it granted was included in the general power to execute laws).

265. See 3 Documentary History, *supra* note 261, at 38.

266. This language also suggests that the implied power would be defined by Congress, but this point we discuss below. See *infra* text accompanying notes 279–282.

267. See Wood, *supra* note 46, at 435; Jefferson’s Proposed Revision of the Virginia Constitution, in 6 The Papers of Thomas Jefferson 278, 299 & 307 nn.34, 36 (Julian P. Boyd ed., 1952).

268. 3 Documentary History, *supra* note 261, at 38.

ered the extent of the grant of this "power." On July 20, 1787, Dr. McClurg of Virginia asked the convention

whether it would not be necessary, before a Committee for detailing the Constitution should be appointed, to determine on the means by which the Executive is to carry the laws into effect, and to resist combinations [against] them. Is he to have a military force for the purpose, or to have the command of the Militia, the only existing force that can be applied to that use? As the Resolutions now Stand the Committee will have no determinate directions on this great point.²⁶⁹

James Wilson agreed that something more should be specified, and Rufus King assured the convention that the Committee on Detail would address the matter.²⁷⁰ Just about a week later, the Committee of the Whole finally approved the "resolution respecting the national executive,"²⁷¹ and on July 26, 1787, the proceedings of the Committee of the Whole were sent to the Committee on Detail.

The document that emerged from that Committee reveals the extent to which the drafters had addressed McClurg's question. Two critical changes had been made. First, as the Committee on Detail returned the plan, the language at issue—the power "to carry into execution"—was removed from the President's list of powers. Therefore (under the reasoning of Pinckney) he no longer had an implied power to say how to carry into execution the laws. Instead, the President now had the duty to "take Care that the laws be faithfully executed." Second, at the same time, Article I gave Congress a power that closely tracked the power the President had lost.²⁷² It was now Congress that had the power, in the Necessary and Proper Clause, "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²⁷³

After the Committee on Detail was finished, then, the Constitution granted Congress the power to define just how these powers, which, Pinckney argued,²⁷⁴ included powers that we would call administrative, were to be executed. And the Constitution instructed the President to take care that he follow Congress' instructions. In this way the convention chose between a relatively broad grant of executive power to the President to select the means of executing federal law, and a relatively

269. *Id.* at 389–90.

270. *See id.* at 390.

271. 2 Farrand, *supra* note 137, at 116 (Journal, July 26). The committee resolved, "[t]hat a national Executive be instituted . . . with power to carry into execution the National Laws [and] to appoint to Offices in cases not otherwise provided for." *Id.*

272. Saikrishna Prakash has carefully traced the lineage of the Necessary and Proper Clause in Prakash, *supra* note 19, at 1009 n.123. As he has pointed out to us, the clause appears first in Pinckney's plan. *See* 3 Farrand, *supra* note 137, at 598–99.

273. U.S. Const. art. I, § 8, cl. 18.

274. *See supra* text accompanying notes 261–268.

narrow imposition of duty—simply to follow and to execute the laws Congress enacts.

That the Necessary and Proper Clause was to become the fount for power to define the means by which the government's powers are carried into effect is plain not just from this bit of history, but even more emphatically, from the text of the clause itself. The clause, as a whole, empowers Congress:

- (1) To make all laws that shall be necessary and proper *for carrying into Execution* the foregoing Powers [Congress' powers];
- (2) To make all laws that shall be necessary and proper *for carrying into Execution all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.²⁷⁵

Chief Justice Marshall, in *McCulloch v. Maryland*,²⁷⁶ of course made famous the first half of this crucial clause—the vertical dimension to the Necessary and Proper Clause—allowing Congress to determine the implied powers necessary to give effect to *its* enumerated powers.²⁷⁷

But for our purposes, what is far more crucial is the second half of the clause—the horizontal dimension to the Necessary and Proper Clause.²⁷⁸ In as clear a textual commitment as possible, it is Congress that is granted the power to determine the means for specifying *how* powers—and again, *all powers*—in the federal government are to be exercised.²⁷⁹ And a dictum of Chief Justice Burger notwithstanding,²⁸⁰ if the clause extends the enumerated powers of Congress, by suggesting a scope for implied powers, it also vests the judgment about the extent of any implied power anywhere in the government in Congress alone.²⁸¹

275. See U.S. Const. art. I, § 8, cl. 18.

276. 17 U.S. (4 Wheat.) 316 (1819).

277. See *id.* at 415.

278. For the most important presentation of this argument, see William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, *Law & Contemp. Probs.*, Spring 1976, at 102, 111; see also Lawson & Granger, *supra* note 178. Lawson and Granger argue persuasively that the framers imagined the Necessary and Proper Clause to be a real constraint on congressional power. While we do not agree that the clause is a limitation on Congress' power (rather than a grant of power), we do agree that the constraints of "propriety" are real constraints on Congress.

279. Cf. Hart, *supra* note 73, at 202 (positing that although not requiring statutory authorization for every presidential act, Necessary and Proper Clause makes it clear that the President cannot legislate).

280. See *United States v. Nixon*, 418 U.S. 683, 705 n.16 (1974) (asserting that absence of privileged communications provision in Article II does not resolve issue of existence of the privilege).

281. Van Alstyne summarizes the same point:

Neither the executive nor the judiciary possesses any powers *not essential* (as distinct from those that may be merely helpful or appropriate) to the performance of its enumerated duties as an original matter—and each can exercise a wider scope of incidental power if, but only if, Congress itself has determined such powers to be necessary and proper.

Through the Necessary and Proper Clause, then, it is Congress that is given the power to define the means to carry into effect any power of the federal government. The only limit on this power is the requirement that Congress act through *laws* and that those laws be "necessary and proper." Subject to those constraints, and linked to the Take Care Clause as sketched above, we suggest that it is Congress that is vested with the power to determine how to structure the administration and how it is to function. In at least this respect, the domain of implied executive power is Congress', *not* the President's.²⁸²

It is time to conclude. The history of the Take Care Clause, and the text of the Necessary and Proper Clause, further support the claim that the framers viewed executive power less uniformly than the modern unitarians now view it. This section has shown that the framers toyed with a clause that appears to imagine Congress delegating something other than executive power; that they at first seemed to decide in favor of a structure

Van Alstyne, *supra* note 278, at 111. Van Alstyne also makes the obvious point that the current understanding of neither the President nor the Judiciary is consistent with this original understanding. As he says:

The most obvious current illustration of an implied executive power is that of 'executive privilege.' Presidents have taken the view that just as Congress may make provision for all things it not unreasonably deems necessary and proper in aid of its own enumerated powers granted in article I of the Constitution, so also may the President in aid of the enumerated executive powers granted in article II. . . .

It is not at all difficult to find similar examples of incidental or implied powers in the judiciary. Here, too, a claim of coequal authority to initiate rules conducive to the judiciary's express powers has sometimes been made The 'supervisory' authority of the Supreme Court is a familiar example. A different, very recent illustration is found in *Bivens v. Six Unknown Named Agents*, which sustained a claim for money damages for a fourth amendment violation even though Congress made no provision for that kind of remedy.

Id. at 107-10. But whether the original understanding should control is a question Van Alstyne does not address. That question is the subject of Part III below.

Finally, of course the judgment is not made by Congress *alone*—Congress exercises necessary and proper power only through laws, and laws must be presented to the President.

282. Tucker makes a similar point:

Again, we think it is clear that the incidental powers which may be necessary and proper to carry into effect the powers vested in the Executive Department by the Constitution are legislative powers, and not executive, because the seventeenth [sic] clause of the eighth section of the first article gives to Congress the power—the legislative power—to supply the means necessary and proper for carrying into execution the powers vested in the Executive Department. It would seem indeed that while the express powers vested in the President are not in any degree within the control of the legislative power, yet where an executive power needs co-efficient means for carrying it into execution, those means are not executive powers at all, but are to be supplied by the legislative powers of Congress.

Tucker, *supra* note 151, at 694; see also Van Alstyne, *supra* note 278, at 115-16 (arguing that *Myers* has been an embarrassment to the Court, and the Court has therefore since defined some administrative agencies as "legislative" and "judicial").

that gave the President a broad claim for implied power to “carry into execution” the laws of the Nation, which power must include something like what we would today conceive of as administrative power; and that this broad implied power was then eliminated, by granting to Congress the power to specify the means by which laws were to be executed, and leaving to the President the duty merely to take care that those means were followed. All these are clues suggesting that the framers conceived of the type of power, and the place it should reside, in a far more flexible and nuanced way than modern unitarians suggest.

In our understanding then, the Take Care Clause (as originally understood) obliges the President to follow the full range of laws that Congress enacts, both (a) laws regulating conduct outside the executive branch, and (b) laws regulating execution by regulating conduct within the executive branch. The modern unitarian’s understanding is that “laws” of type (b) are inherently suspect—that if the President has a duty to “take Care,” he must have a power to say how he will take care. But this is a simple non sequitur. One could have a duty to pay income taxes; it does not follow that one would have the power to say how he or she will pay income taxes (for example, when, in what form, whether full or partial). The choice over *who* gets to specify the *how* of federal execution was made by the framers when they drafted the Necessary and Proper Clause. This does not mean that every law regulating execution is constitutional, any more than it means that every law regulating conduct is constitutional. In both cases, Congress could breach a constitutional limit. The difference between our position and the modern unitarian’s is that we believe that a wider range of values inform the judgment whether a particular law regulating execution is necessary and proper, and that this wider range of values was manifested by the types of executive and administrative structures erected by the early Congresses.

We can sharpen the point even further. As Sai Prakash has argued, the framers and the early Congresses believed that state officers could be empowered to execute federal law.²⁸³ More importantly, they believed that “[a]lthough the federal government can utilize state officers, the federal government may not interfere with the personnel practices of state agencies.”²⁸⁴ Thus, the framers imagined that the execution of some federal law could be vested in officers subject neither to the removal power nor the directory power of the President, an exception to the ordinary rule that the President superintends the execution of all federal law. In our view, such statutes were not necessarily unconstitutional under the original understanding: so long as the vesting did not remove the President’s control over enumerated executive powers, they could be necessary and proper. Under the modern unitarian’s view, such statutes must be considered unconstitutional, unless one imagines that the

283. See Prakash, *supra* note 144, at 1990–2007.

284. *Id.* at 2000.

President has the power to divest state officers of powers granted them by Congress if such officers disobeyed the President's direction. No one has suggested the President has such power, and we know of no example of any President purporting to exercise it.

E. *The Original Executive Power: Puzzles Revisited*

The modern unitarian imagines one category of executive functions. It says that the President must have plenary power to direct and control the administration of the laws. The nineteenth century view imagines two categories of executive functions—one executive, one administrative—only one of which the President has a constitutional right to direct and control. If we had to choose between these two models, which makes more sense of the historical data? Which better solves the three puzzles of the early period?

1. *Puzzle 1: Prosecution.* — As illustrated above, modern unitarians cannot easily explain the actual practice of prosecution at the founding.²⁸⁵ In particular, they cannot explain how, in some cases, effective control over prosecution was taken away from the President. Can the nineteenth century conception explain the original practice any more completely?

The history is fully consistent with the nineteenth century theorists' conception. Prosecution is not among the list of enumerated executive powers; indeed, at the framing there was a long history of nongovernmental prosecution,²⁸⁶ and this history would have made it odd to conceive of the powers as exclusively the government's at all. According to the nineteenth century conception, prosecution is a power incidental to Congress', and Congress may vest such authority wherever "proper."

Most of the time, it may be *proper* to vest it with the executive—though whether it is proper turns on a range of factors that are particular to the type of prosecution at hand. For example, in conditions like those of the founding, it made little sense to vest in the President centralized control over district attorneys, given their distance from the center, and it would be fully understandable that they would function relatively independently of the President. Under other conditions, it may be constitutionally required that Congress vest control over prosecution in the executive. But even in these conditions sometimes (say, prosecution of high-level executive officials), it may be proper to vest such power in someone other than the President—or at least, it is within the power of Congress to decide so. The decision whether or not to vest control in the President turns on its propriety, and under the nineteenth century picture of the executive branch, the factors that determine whether a vesting is proper are more than the single factor of unitariness.

285. See *supra* Part II.A.

286. See *supra* text accompanying notes 60–83.

2. *Puzzle 2: Departments.* — It is also relatively easy to see how the nineteenth century model can account for the multiplicity in the organizational forms of executive departments. Where the power exercised by the department relates to an executive power (derived from Article II)—foreign affairs, war, and navy—the early Congresses properly left much of the determination of the department's structure and direction to the President.²⁸⁷ Where the power exercised by the department derives from an administrative power (stemming from Article I)—treasury and post office—the early Congresses properly took pains to control these departments, treating them as the creation of Congress, rather than the creation of the Constitution.²⁸⁸

In this diversity, then, the early Congresses reveal again the wide range of values that affect whether a particular structure should be considered proper. In answering the question, is this a proper structure, they considered not only the value of unitariness, but also the values of disinterestedness, efficiency, accountability, and others.²⁸⁹ Applying the nineteenth century vision as mechanically as possible to some modern developments,²⁹⁰ we think that Congress could not constitutionally make the Department of Defense into an independent agency; but it could allow at least a degree of independence for such modern institutions as the National Labor Relations Board and the Federal Communications Commission.

Finally, the nineteenth century view can explain a relatively minor but puzzling inconsistency in denomination. For both the Constitution and its framers seem to conceive of at least two types of "departments"—executive and not. Indeed, when first establishing the departments, Congress spoke of the Executive Departments of War and Foreign Affairs,

287. Indeed, as Susan Bloch argues, the first Congress showed some fear in getting at all close to regulating these departments.

In establishing the two "great executive departments" . . . Congress was notably concerned with assuring presidential control and limiting congressional interference with presidential powers. There was a threshold concern that mere congressional *definition and establishment* of executive departments was an undue intrusion on presidential powers. Senator William Maclay suggested, for example, that the President should have discretion to create whatever administrative institutions he desired. . . . Although Congress rejected this proposal, its sensitivity to the separation of powers issue is striking. As will be shown, Congress made no effort to dictate the internal structure of these departments and explicitly provided that the President had the power to appoint these officers, control their actions, and remove them at his will.

Bloch, *supra* note 74, at 572–73.

288. See *supra* text accompanying notes 123–125, 132–138.

289. One particularly clear value animating the early structure was the desire to keep the "purse" separate from the "sword," as the Treasury, the Post Office, and the Bank of the United States—the three relatively independent original structures—all involved control over financial affairs. See *supra* text accompanying notes 121–143.

290. We question this approach to interpretation below, see *infra* Part III.A.

but only of the "department" of Treasury.²⁹¹ The departments denominated executive were those relating to the President's Article II powers; those not so designated were what we would now call administrative departments, created by Congress and if Congress chooses, entitled to a degree of protection from ongoing presidential control.

3. *Puzzle 3: The Opinions Clause.* — Finally, the nineteenth century conception makes perfect sense of the Opinions Clause, under either the conservative or radical reading suggested above.²⁹² Under the conservative reading, against a background of congressional power over administrative structures, the Opinions Clause has a clear unifying purpose. Against this background, it sets a minimum below which Congress cannot step—requiring at least that the President have the power to discover what is happening within departments.²⁹³ So understood, the Opinions Clause serves as a requirement of minimal unitariness.

The clause also has a purpose under the radical reading. In a world where power exists only when power is enumerated—as we suggest was the framers' world—it made sense for the framers to enumerate the control the President would have over departments that were executive, to protect against attempts by Congress to invade the President's domain. Rather than relying on relatively weak "inherent authority" claims, the Constitution so understood gives the President a constitutional right to access over information related to his constitutional functions. So, for example, if he believed he needed to remove the principal officer of an executive department, he could at least have access to the information that formed the basis of his judgment, and thereby protect himself politically from the consequences of such a dramatic act. So understood, the clause serves as a buttress to support the executive's separated powers.

Under either reading, the Opinions Clause would have a function distinct from the redundancy it plays in the modern unitarian's conception. And so here again, a more discriminating model of the executive—distinguishing executive from administrative functions—helps elucidate the framers' actual design.

F. *The Language of the Original Executive*

Modern constitutionalists think of just one thing when reading the Vesting Clause of Article II: executive power. Nineteenth century constitutionalists thought of two: executive and (what we are calling) administrative. Here, as elsewhere, believing is seeing. Because modern readers believe that there is just this single thing (the executive), they do not see the implications that flow from a distinction between executive and administrative. Because nineteenth century constitutionalists see executive

291. Note again the inconsistency with the salary bill. See *supra* note 123.

292. See *supra* Part II.C.

293. See, e.g., Strauss, *supra* note 7, at 647 (President always can exercise a minimal control through Opinions Clause).

and administrative power, they argue that Article II is quite clear about the locus of executive power (in *a* President) and that Article II is not so clear about the locus of administrative power. And under this view—fueled by the progressive enthusiasm for administrative expertise—because the framers believed that the Constitution was not so clear about the locus of such power, the contours of administrative power would be left largely to Congress. It would follow that for the framers, any claim by the executive of inherent authority to direct the administration is quite fantastic—for the framers were quite clear (as the nineteenth century constitutionalist views the world) that Congress retained the power to regulate presidential control over administrative officials.²⁹⁴

But as we suggested at the start, the view of the nineteenth century constitutional theorists is misleading in one important respect, and it is time now to distance our ultimate view about the framers' design from the filter of the nineteenth century view. The modern unitarian argues that there is one clear category of executive power. To the extent that the nineteenth century constitutional theorists argued that there is *more than one* type of executive function, that argument seems certainly correct. But to the extent that the nineteenth century constitutional theorists argued that rather than one, there were just two clear categories of executive power—executive and administrative—the argument is misleading. While there is good evidence to suggest that the framers thought the structure of executive power far more complex than the single dimension offered by the modern unitarians, there is no good evidence to suggest that the framers thought the structure of executive power was as simple as the nineteenth century constitutional theorists believed. The mistake, that is, is not just in seeing one category where there were two; the mistake is also in seeing *clear categories* and *defining judgments* when the framers offered no such vision.²⁹⁵

294. See *supra* text accompanying notes 184–186.

295. Woodrow Wilson points to another quite colorful presuppositional difference in criticizing the framers' theory of checks and balances. As Wilson wrote:

The government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe. In our own day, whenever we discuss the structure or development of anything, whether in nature or in society, we consciously or unconsciously follow Mr. Darwin; but before Mr. Darwin, they followed Newton. Some single law, like the law of gravitation, swung each system of thought and gave it its principle of unity. Every sun, every planet, every free body in the spaces of the heavens, the world itself, is kept in its place and reined to its course by the attraction of bodies that swing with equal order and precision about it, themselves governed by the nice poise and balance of forces which give the whole system of the universe its symmetry and perfect adjustment.

The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. . . . This is not theory, but fact, and displaces its force as fact,

Rather than constitutionalizing everything, from the top level governmental functions down through the bottom level administrative details, the framers thought it enough to draw a few clear lines and leave the balance to Congress.²⁹⁶ They thought it enough not only because they thought flexibility a virtue, but also because they had no clear models of separation to follow. Their (from our perspective) confusion, their mixing of functions at the administrative level, their failure to remark what to our eyes appears plainly wrong-headed conflation—all are evidence that the lines between the branches had not yet been drawn, either in the framers' heads, or in the text of their document. The framers were politicians—pragmatic even if principled—and their first task was rescuing a revolution from disaster. They did not have a sufficiently developed conception of the distribution of national powers to allow for clear and authoritative legal judgments about who would direct what we now call administration. On these points, their understanding was far murkier.

One example makes clear the framers' (from a modern perspective) confusion and mixture of functions at the administrative level. In March 1792, Congress enacted the "Invalid Pensions Act,"²⁹⁷ designed to provide relief to veterans from the Revolutionary War. The details of this statute are quite telling for one who pictures the framers either as the modern unitarians do or as the nineteenth century constitutional theorists did.²⁹⁸ Congress did not establish a commission or agency to administer this program. Indeed, given the constraints of geography, and the absence of any substantial federal presence throughout the nation, such a bureaucracy would have been exceptionally expensive.²⁹⁹ Instead, circuit courts were to receive and process applications, and submit to the Secretary of War a list of pensioners, which the Secretary of War could change if he suspected "imposition or mistake."³⁰⁰ In a wholly pragmatic sense, this division of labor made perfect sense—circuit courts could

whatever theories may be thrown across its track. Living political constitutions must be Darwin in structure and practice.

Wilson, *supra* note 184, at 54–57.

296. See Casper, *supra* note 115, at 260–61 (asserting that no clear separation of powers model emerged from the Constitutional Convention); Strauss, *supra* note 7, at 597–99, 639 (with regard to departments, "a determination was made to eschew detailed prescription as a means of underscoring presidential responsibility and preserving congressional flexibility").

297. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

298. See generally Maeva Marcus, *Separation of Powers in the Early National Period*, 30 Wm. & Mary L. Rev. 269, 272–73 (1989) (describing judicial responses to duties of circuit courts under Invalid Pensions Act as ad hoc and individual); Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527, 527–41 (describing decisions concerning Invalid Pensioners Act as varied and pragmatic).

299. Compare Amar's use of the difficulty of travel during the formative years as a justification for the original jurisdiction clause. See Amar, *Original Jurisdiction*, *supra* note 176, at 476–78.

300. See Act of Mar. 23, 1792 § 4, 1 Stat. at 244; see also Bloch, *supra* note 74, at 590–91.

most efficiently find the facts about whether an allegedly injured veteran was in fact injured, and the Secretary of War could most efficiently determine whether the claimant was in fact a veteran.

To modern separation of powers sensibilities, the statute is a constitutional howler. Under the statute, not only were Article III courts tethered with "administrative" tasks, but their work was subject to the review of the secretary of an executive department. So thought at least five of the six Supreme Court justices, who expressed their concerns—their advisory opinions, that is—to President Washington in a collection of letters.³⁰¹

But when did the Invalid Pensions Act become a constitutional howler? In an age when the Court has invalidated twenty-five acts of Congress in the past twenty years,³⁰² we are quick to accept the judgment that Congress has gone wrong constitutionally. But this is the second Congress, not the one hundred and second. While five of the six justices may have thought the statute unconstitutional, at least forty of the sixty voting members of the House did not.³⁰³ Moreover, nowhere in the debate in Congress is there a suggestion of this constitutional concern. Nor did President Washington indicate that there was anything problematic about the statute as written.

What the Invalid Pensions Act reveals, we think, is not a Congress blind to the constraints of the Constitution, but a Congress legislating before the contours of what is constitutional had been carved out. What the statute shows, with its mix of administrative courts and executive review, is a pragmatic approach to the problems of executive administration. What unified this peculiar structure was a multiplicity of checks and balances, not a singularity of organizational design.³⁰⁴ The second Congress did not see its Act as a constitutional howler, because as the Constitution was framed, it was not a constitutional howler. Why it became so, and what influences that change reveals, are important and interesting questions, but questions unrelated to the question framed by the familiar version of originalist methodology.

The conventional character of the Invalid Pensions Act is even further confirmed when we compare it with other court structures existing at the time. Courts at the founding were administrators in just the sense

301. The advisory opinions are collected in 1 American State Papers, Miscellaneous 49–53 (1834). The existence of the letters at all is an intriguing fact.

302. We draw this statistic from a report by the Congressional Research Service. See Cong. Res. Serv., *The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 16, 99th Cong., 1st Sess. 1885–1912 (1987 & Supp. 1988). It is of course a radically conservative estimate. See *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting) (asserting that decision "sounds the death knell" for nearly 200 statutory provisions); Sunstein, *supra* note 87, at 165 & n.11 (discussing effect of *Lujan* on "citizen standing" statutes). If one counts *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), and *Chadha*, the number would be more like 400 acts of Congress in the past 10 years.

303. See 3 Annals of Cong. 803–04 (Gales & Seaton eds., 1834).

304. See the description of checks and balances in Wilson, *supra* note 125, at 12–13.

we think they cannot be any more; they handled matters that today would be within the executive branch, not primarily because of some principled reason why such matters should be handled by courts, but more because of the administrative ease in relying upon the existing court structures to administer state programs.³⁰⁵

Nor were modern administrative/judiciary borders the only borders that the framing generation crossed. We have already mentioned the lack of any centralized control of the prosecutorial power in the original republic.³⁰⁶ This decentralized structure led Jefferson, when attempting to stop prosecutions under the Alien and Sedition Acts, to ask his Postmaster General to instruct the local district attorney (the equivalent of today's U.S. Attorney) to cease prosecution. Obviously Jefferson here trades on more than mere authority when he requests the district attorney to stop prosecution,³⁰⁷ and we should take this small clue about the nature of executive authority as a reason to look at a structure of authority without our modern bureaucratic categorical divisions.

A fair picture of the founding generation, then, is not one of clear-cut categories or sharply articulated boundaries between branches cutting from the top to bottom. It is instead a picture of a web of interactions, many political, many more unbureaucratic, that through the mixture of influence and authority yielded a government that, it was hoped, would work.³⁰⁸ Our structures, our intuitions, our categories, our law—all of these are ours, the product of two hundred years of theory and practice. The originalist must work to separate this intermediation from the picture of the founders he sketches.

Adding these final twists to the picture we outline is important, if only to force the critical point that the modern unitarian must face. As suggested at the start, the originalist requires either a clear limit in the constitutional text or a clear understanding in the enacting context

305. For a description of the mixture of functions in colonial practice, see Goebel & Naughton, *supra* note 85, at 366–67.

306. See *supra* text accompanying notes 58–83.

307. See Letter from Thomas Jefferson to Gideon Granger, Esq. (Mar. 9, 1814), in 14 Lipscomb, *Writings of Jefferson*, *supra* note 75, at 111, 116–17.

308. See Casper, *supra* note 115, at 212–24; Strauss, *supra* note 7, at 604. As Susan Bloch describes it:

But while history cannot provide definitive answers, it offers an instructive approach to constitutional interpretation. The framers of the Constitution and the early legislators understood they were creating—"constituting"—a dynamic organism. They created a unitary Presidency, but did not mandate complete presidential control over all administrative offices that Congress might establish. Their approach to questions of control was neither rigid nor doctrinaire. On the contrary, it was remarkably subtle and pragmatic. The simplified model of separation of powers assumed by many modern discussants misses the nuances the framers and early legislators appreciated.

Bloch, *supra* note 74, at 563.

before the Constitution may stand in the way of Congress' will.³⁰⁹ What this picture of the framers' pragmatism shows is first, that it is hazardous in the extreme to read constitutional text in a contextual vacuum, and second, that except for a narrow if important class of textually committed executive powers, no clear consensus existed at the framing as to the fully articulated governmental structure. The framers gave us at most some starting clues. It is fanciful to suggest that this history is enough to yield a definitive constitutional commitment for a wide range of issues involving the modern executive branch. And when used to resist the will of the democratic branches, it is something much worse.³¹⁰

309. See, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680, 2696–99 (1991) (Scalia, J.) (affirming life sentence for drug offense because “[t]here are no textual or historical standards” to enable judges to determine whether a particular penalty is disproportional); *supra* notes 34, 55 and accompanying text.

310. On the founders' vision of separation of powers, consider the following descriptions. Bloch writes:

Nonetheless, this early history, used judiciously, can guide and inform modern analysis. In particular, the experiences in establishing the principal offices of government, including that of the Attorney General, are important for what they suggest about constitutional interpretation. The drafters of the Constitution established the framework of the government and created the major institutions of President, Congress, and Supreme Court. But they left the implementing details to Congress. They anticipated that Congress would create departments and imposed some requirements . . . but, for the most part, the specifics were left for Congress. And the First Congress's exercise of that power is instructive. In particular, we can learn from the early legislators' approach toward the question of presidential control of the various offices they created, an approach that was distinctively functional and pragmatic. Although it is unlikely that anyone in the 1790s anticipated precisely the questions raised by modern-day interbranch disputes, the framers and early legislators were sensitive to the difficult issues of control and approached them without rigid rules or formulas, an approach from which we can profitably learn.

Bloch, *supra* note 74, at 635–36 (footnotes omitted). Casper makes a similar point: Forrest McDonald . . . has concluded from the decisions of the Convention that the ‘doctrine of the separation of powers had clearly been abandoned in the framing of the Constitution.’ This judgment presupposes that a doctrine existed that could be abandoned. Given the state of the discussion of the framers in the last quarter of the eighteenth century and the constitutions enacted after 1776, a ‘pure’ doctrine of separation of powers can be no more than a political science or legal construct. . . .

No consensus existed as to the precise institutional arrangements that would satisfy the requirements of the doctrine. The only matter on which agreement existed was what it meant *not* to have separation of powers: it meant tyranny. This insight is not to be belittled. Madison and Sherman were right when, in their 1789 proposals, they claimed that the particular distribution of powers founded in the Constitution could be legitimately seen as a version of an uncertain doctrine.

Casper, *supra* note 115, at 224 (footnotes omitted). And again, Marcus:

Chief Justice John Jay . . . indicated what everyone's approach should be: “[W]ise and virtuous men,” he declared, “have thought and reasoned very differently respecting Government, but in this they have at Length very unanimously agreed . . . that its Powers should be divided into three, distinct,

We have completed the final stage in our effort to dislodge the modern conception of the executive. We understand better what the framers were constitutionalizing if we distinguish executive from administrative functions,³¹¹ and view the framers as constitutionalizing only the former; we understand still better if we can see the range of functions the framers were pragmatically adjusting, rather than fixed categories of executive and administrative. The framers spoke less categorically, and more pragmatically; they gave us an executive at once more flexible and less universal than the executive perceived by modern unitarians.

G. *The Tale of the Bank*

So much then about the framers' constitution, and the world within which they authored that text. There is no question that along many dimensions, the framers' world has radically changed, and along with that change, so too have shifted conventional views about the presidency. We all now quite firmly believe that the President retains a strong and inherent authority to direct a wide range of executive and administrative actions, and in the second half of this Article, we address the question of whether one can derive that authority from a faithful interpretation of the Constitution. But let us first complete our description of the original practice of executive power. One final piece of evidence helps reveal the boundaries of this vision; it also marks the first successful claim by an executive of a power more expansive than what we claim the founders understood to exist. This is the confrontation between Jackson and the Bank of the United States, and Jackson's insistence that his Secretary of the Treasury remove funds from the Bank contrary to the Secretary's best judgment.

We should be clear about the purpose for which we offer the story that follows. Our aim is not so much to convince about the truth or error of Jackson's conception of the presidency. It is instead to show the first and sharpest conflict between two fundamentally different conceptions of the executive power. For in the debate that follows, we see the end of the presidency as we believe the framers saw it, and the birth of the presidency as we have come to know it.

In brief, the story of the confrontation is this: Jackson and the Bank had suffered a long and unfriendly relationship. Jackson had opposed the Bank on a number of grounds, both political and constitutional. The

independent Departments But how to constitute and ballance [sic] them in such a Manner as best to guard against Abuse and Fluctuation, & preserve the constitution from Encroachments, are Points on which there continues to be a great Diversity of opinions, and on which we have all as yet much to learn."

Marcus, *supra* note 298, at 270 (quoting John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790) (John Jay Papers, Columbia University)) (footnotes omitted).

311. On the distinction between executive and administrative functions, see *supra* text following note 186.

Bank too had opposed Jackson, perhaps most importantly for Jackson, by resisting his reelection in part with bank funds.³¹² Spurred by the Bank's blatantly political manipulation of the money supply³¹³ in an attempt to defeat his reelection, Jackson, upon reelection, ordered the Secretary of the Treasury to withdraw funds from the Bank. The Secretary's refusal inaugurated the executive's first midnight massacre, as Jackson fired Secretary after Secretary until he found one willing to obey his orders.³¹⁴ Jackson promoted the first refusing Secretary, McLane, to Secretary of State. A second, Duane, judged that he could not in good faith exercise his authority to remove funds from the bank; Jackson summarily fired him. Finally, Jackson appointed Roger Taney (later Chief Justice Taney), who carried out the President's wish.³¹⁵

The statute challenged by Jackson's action plainly raises the problem of unitariness that we are discussing, for it undertook to vest a discretionary authority in the Secretary of the Treasury. The statute required that the Secretary of the Treasury deposit all funds of the United States in the Bank of the U.S.

in places which the said bank and branches thereof may be established, [and] shall be made in said bank or branches thereof, unless the Secretary of the Treasury shall at any time otherwise order and direct; in which case, the Secretary of the Treasury shall immediately lay before Congress . . . the reasons³¹⁶

For the modern unitarian, this authority, since discretionary, must lie ultimately within the President's supervision and control.³¹⁷ This was Jackson's understanding as well. Jackson argued that the President had an inherent authority to exercise the discretion vested in the Secretary of the Treasury by statute, at least through the removal power; through his threats and removals, he, in effect, exercised that discretionary power.³¹⁸

312. See, e.g., Latner, *supra* note 143, at 165.

313. The story is told by Buchanan at 13 Cong. Deb. 440, 442-43 (1837) (Expunging Debate). For other accounts of the removal crisis, see Thomas P. Govan, Nicholas Biddle: Nationalist and Public Banker, 1786-1844, at 106-287 (1959); Hart, *supra* note 100, at 211-12; Latner, *supra* note 143, at 164-92; 3 Robert V. Remini, *Andrew Jackson and the Course of American Democracy, 1833-1845*, at 1 (1984); Arthur M. Schlesinger, Jr., *The Age of Jackson 75-102* (1953).

314. See Clay's description in 13 Cong. Deb. 429, 431 (1837) (Expunging Debate).

315. See Hart, *supra* note 100, at 211-12. Duane recounts his story in William J. Duane, *Narrative and Correspondence Concerning the Removal of the Deposites and Occurrences Connected Therewith* (Philadelphia 1838). Taney suffered greatly for his loyalty, though not as much as the executioner of our generation's Saturday Night Massacre, Robert Bork. See Stanley I. Kutler, *The Wars of Watergate 406-14* (1990).

316. Act of Apr. 10, 1816, ch. 44, § 16, 3 Stat. 266, 274.

317. There is an internal dispute in the modern unitarian camp over whether the President may order the Secretary to act or (what is not the same thing) inform the Secretary that while the decision is for him (the Secretary) to make, the President will remove him from office if he acts contrary to the President's wishes. See *supra* note 73 and accompanying text.

318. See Daniel Webster, Speech in the Senate (May 7, 1834), in 7 Writings and Speeches of Webster, *supra* note 197, at 145-47 (Webster's summary of Jackson's claims).

Jackson's action—described by Clay as “Jackson’s Thunderbolt”³¹⁹—drew immediate and intense sanction by the Senate, which, on March 28, 1834, passed a resolution condemning his actions as contrary to the law and the Constitution.³²⁰ The text of this resolution is instructive. After many drafts, the Senate resolved: “That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both.”³²¹ Jackson’s action had spurred passionate denunciations across the nation, as the action of a monarch, wholly without the power of law and ominously foretelling the great power this presidency could display.

At first the debate was not over Jackson’s power to fire the Secretary of the Treasury. Calhoun and Webster both (at least initially) conceded the President’s right of removal, secured by the Constitution, at least as interpreted by the Decision of 1789.³²² Only later did their position shift to the view that the Decision of 1789 was in error, and that the President did not have a constitutionally vested power of removal.³²³ Instead, the

Jackson ground his argument in the familiar claim that “the executive power” plus the “take Care” duty meant the President must have inherent authority to supervise the decisions of all subordinates. See *id.*

319. See 13 Cong. Deb. 429, 431 (1837) (Expunging Debate).

320. See 10 Cong. Deb. 1187 (1834).

321. *Id.*

322. See, e.g., John C. Calhoun, Speech in the Senate (Jan. 13, 1834), in 12 *The Papers of John C. Calhoun* 200, 215 (Clyde N. Wilson ed., 1979) [hereinafter *Papers of Calhoun*] (“I cannot doubt that the President has, under the Constitution, the right of removal from office: nor can I doubt that the power of removal, wherever it exists, does, from necessity, involve the power of general supervision . . .”); Daniel Webster, Speech in the Senate (May 7, 1834), in 7 *Writings and Speeches of Webster*, supra note 197, at 105 (“I have to say, that I did not vote for the resolution on the mere ground of the removal Although I disapprove of the removal altogether, yet the power of removal does exist in the President . . .”).

323. See John C. Calhoun, Speech in the Senate (Feb. 20, 1835), in 12 *Papers of Calhoun*, supra note 322, at 483, 484–85 (arguing power of Congress to control removal flowed from Necessary and Proper Clause); Daniel Webster, Speech in the Senate (Feb. 16, 1835), in 7 *Writings and Speeches of Webster*, supra note 197, at 185 (“I am very willing to say, that, in my deliberate judgment, the original decision [of 1789 and my own view of that decision] was wrong. I cannot but think that those who denied the power in 1789 [of the president to remove] had the best of the argument . . .”). Webster believed Congress could, in 1835, pass a resolution effectively reversing the Decision of 1789. See *id.* at 198–99. No doubt in part this change of heart by Webster and Calhoun was due to the radical use of the removal power by Jackson, which was said by Calhoun to be at least “ten or twenty to one greater than all made by all our former Executives.” *United States’ Telegraph*, Jan. 12, 1836, at 3, reprinted in 13 *Papers of Calhoun*, supra note 322, at 31. Others too had by this time reconsidered the President’s removal power. James Kent is a famous example. See Letter from James Kent to Daniel Webster (Jan. 21, 1830), in 3 *The Papers of Daniel Webster* 11, 12 (Charles M. Wiltse ed., 1977) (“I begin to have a strong suspicion that Hamilton was right [that removal required the concurrence of the Senate]”). Supporters of Jackson—James Buchanan in particular—argued the Senate should rely on the Decision of 1789, in part because it was a decision made at a time when the country was not “convulsed by party spirit.” See James Buchanan, Speech in the Senate (Feb. 17,

initial complaint attacked Jackson's "assumption" of a discretion vested in his Secretary of State—and more particularly, the use of his removal power to sap from the Secretary any discretion at all.³²⁴ The argument against Jackson was that the President had no authority to usurp the properly vested discretion of the Secretary.

Eventually, however, it was Jackson's argument, not that of Clay, Calhoun and Webster, that prevailed. Within three years, Jackson had won this constitutional battle, for in 1837, the Senate took the extraordinary action of expunging its journal of the resolution that had condemned Jackson.³²⁵ The expunging of 1837 indicates at the least that by then, the nation's conception of the Presidency had begun its mammoth transformation. Proponents of the expunging resolution (Senator and later President Buchanan was Jackson's prime ally) defended Jackson both on the merits (though never with as broad a claim of inherent authority as present day believers in a strongly unitary executive would make), and on the more technical ground that the charges made were grounds for impeachment, but Congress had not followed the Constitution's procedures for impeachment.³²⁶

Defending the Senate's action condemning Jackson three years earlier were two of the nation's most prominent statesmen, Daniel Webster and Henry Clay.³²⁷ It is Clay's characterization of the events leading up to the resolution against Jackson that captures perhaps our last glimpse of the framers' conception of the President's power. Clay began his defense by remarking on the special character of the Treasury—a character we have already seen discussed above.³²⁸ As he said,

1835), in 2 *The Works of James Buchanan* 422 (John B. Moore ed., Antiquarian Press 1960) (1908–1911).

324. Webster stated:

Now, Sir, it is precisely this which I deem an assumption of power not conferred by the Constitution and laws. I think the law did not give this authority to the President, nor impose on him the responsibility of its exercise. It is evident that, in this removal, the Secretary was in reality nothing but the scribe; he was the pen in the President's hand, and no more. Nothing depended on his discretion, his judgment, or his responsibility. . . . This, Sir, is what I call assumption of power.

Daniel Webster, Speech in the Senate (May 7, 1834), in 7 *Writings and Speeches of Webster*, *supra* note 197, at 107.

325. In order to meet arguments that such a resolution violated the Constitution's journal requirement, they simply "[drew] black lines round the said resolve, and [wrote] across the face thereof, in strong letters, the following words: 'Expunged by order of the Senate, this 16th day of January, in the year of our Lord 1837.'" 13 Cong. Deb. 504 (1837).

326. See *id.* at 441–44, 448–50. The proponents said that it was the House that by the Constitution had been given the power to resolve charges against the President, and the Senate that was to try them; and that by simply concluding, as the Senate had done, the President had been denied his right to answer and defend himself. See *id.* at 450.

327. For a full account of Clay's attack, see Henry Clay, Address on the Removal of the Deposits (Dec. 26, 1833), in 5 *The Works of Henry Clay* 575 (Calvin Colton ed., New York, Henry Clay Pub. Co. 1897).

328. See *supra* text accompanying notes 121–125.

Our immediate ancestors, profiting by the lessons on civil liberty which had been taught in the country from which we sprung, endeavored to encircle around the public purse, in the hands of Congress, every possible security against the intrusion of the Executive. With this view, Congress alone is invested, by the constitution, with the power to lay and collect the taxes. When collected, not a cent is to be drawn from the public treasury but in virtue of an act of Congress. And among the first acts of this Government was the passage of a law establishing the Treasury department, for the safe keeping and the legal and regular disbursement of the money so collected. By that act a secretary of the treasury is placed at the head of the Department; and varying in this respect from all the other Departments, he is to report, not to the President, but directly to Congress, and is liable to be called to give information in person before Congress. It is impossible to examine dispassionately that act, without coming to the conclusion that he is emphatically the agent of Congress, in performing the duties assigned by the constitution to Congress. The act further provides that a Treasurer shall be appointed to receive and keep the public money and none can be drawn from his custody but under the authority of a law, and in virtue of a warrant drawn by the Secretary of the Treasury, countersigned by the Comptroller, and recorded by the Register. Only when such a warrant is presented can the treasurer lawfully pay one dollar from the public purse. Why was the concurrence of these four officers required in disbursements of the public money? Was it not for greater security? Was it not intended that each, exercising a separate and independent will, should be a check upon every other? *Was it not the purpose of the law to consider each of these four officers, acting in his proper sphere, not as a mere automaton, but as an intellectual, intelligent and responsible person, bound to observe the law, and to stop the warrant, or stop the money, if the authority of the law were wanting?*³²⁹

The design of the law was then clear—to keep separate “sword and purse” the President was not to have control over the funds save through the check of his (relatively) independent Secretary of the Treasury.³³⁰

Independence notwithstanding, Jackson defeated this design, resting his claim on an inherent power of superintendence, all following from the now familiar claim to the power of removal. Again, we can hear Jackson’s argument in Clay’s rebuttal:

But [even] if the power of dismissal was as incontestable as it is justly controvertible, we utterly deny the consequence deduced from it. The argument is that the President has, by implication,

329. 13 Cong. Deb. 429–30 (1837) (Expunging Debate). For Webster’s similar account in response to Jackson’s protest against the resolution condemning his action, see Daniel Webster, Speech in the Senate (May 7, 1834), in 7 Writings and Speeches of Webster, *supra* note 197, at 103–47.

330. Recall the similar thinking at the founding. See *supra* text accompanying note 137.

the power of dismissal. From this first implication another is drawn; and that is, that the President has the power to control the officer, whom he may dismiss, in the discharge of his duties in all cases whatever; and that this power of control is so comprehensive as to include even the case of a specific duty expressly assigned by law to the designated officer.

Now, we deny these results from the dismissing power. That power, if it exists, can draw after it only a right of general superintendence. It cannot authorize the President to substitute his will to the will of the officer charged with the performance of official duties. Above all it cannot justify such substitution in the case where the law, as in the present instance, assigns to a designated officer exclusively the performance of particular duty, and commands him to report, not to the President but to Congress in a case regarding the public purse of the nation, committed to the exclusive Control of Congress.³³¹

By Clay's time, the presidency and the nation had changed. And yet Clay could still point backwards to a shared understanding of the nature of the original presidency, one perhaps eclipsed by the times, but nonetheless still alive in the memory of the nation. From the meek and timorous institution presided over by Washington, it had become, in Clay's mind at least, a monster.

How is it with the President? Is he powerless? He is felt from one extremity to the other of this vast republic. By means of principles which he has introduced and innovations which he has made in our institutions, alas! but too much countenanced by Congress and a confiding people, he exercises uncontrolled the power of the State. In one hand he holds the purse, and in the other brandishes the sword of the country. Myriads of dependents and partisans, scattered over the land, are ever ready to sing hosannas to him and to laud to the skies whatever he does. He has swept over the Government, during the last eight years, like a tropical tornado. Every department exhibits traces of the ravages of the storm.³³²

Whatever the presidency had become by the end of Jackson's reign, it was a different presidency from that of the founders. As we have tried to argue, we often miss this crucial fact, in part because we have been raised on the image of the presidency Clay and Webster so passionately feared.

* * * * *

It has been our aim to suggest the framers used more than one lens to view the executive where we have just one; that they were concerned not just with allocating what they understood to be executive power, but also with a class of authorities that we might call roughly administrative

331. 13 Cong. Deb. 431-32 (1837) (Expunging Debate).

332. *Id.* at 438.

power; and that even if they had a single model for the regulation of those powers called executive, they had no single model for the allocation of those powers we would call administrative. Instead, the framers had a pragmatic and not fully worked-out understanding of the appropriate connections of control and review, leading them to adopt different structures for different problems.

What this pragmatism created was a relatively simple structure of power. Where the President claimed power by virtue of executive power granted by the Constitution, his discretion in executing that power was subject to the review of none save the people.³³³ Where members of his administration claimed administrative power by virtue of an act executing Congress' power, then their power, and the President's power to control them, was as Congress defined it. This is not a claim that the President may be separated from the superintendence of all federal law altogether. Indeed, a reasonable understanding of Congress' actions would be to presume control in the President where Congress does not otherwise specify. But there is no evidence that the framers imagined that such control was constitutionally compelled—no evidence that they saw an implicit limitation on the power of Congress to structure administration as they saw fit. One can infer no such implicit limitation on the democratic process from the multitude of views that populated the founding. Even if some members of the founding generation had a firm conception of a strongly unitary executive, there is insufficient evidence that the framers and ratifiers meant this conception to become part of the Constitution.³³⁴

333. There are two possible qualifications on this plenary power: (1) substantive statutory provisions must be respected and (2) it may have been possible for Congress to say that the President cannot make the ultimate decision, but that he can fire an official who refuses to do what he wants. See *supra* note 106 and accompanying text. Of course some statutes would involve constitutionally granted authority, and here the President must be allowed to control his subordinates.

334. We do not discuss here the particular controversies over presidential power that followed the framing period, particularly those occurring during the Civil War and New Deal periods. Instead we focus more narrowly on the original understanding, adapted as it must sometimes be for changes in circumstances. No doubt a full account of the growth of presidential power must account for the enormously significant and self-conscious changes in the role of the presidency from the period following Jackson through Franklin Roosevelt. Our purpose in this Article is more limited—looking just to the first moment of constitutionalism, can we understand the executive as the modern unitarians propose it. For a broader view, see 1 Bruce Ackerman, *We the People* (1991). But we do note two developments of interest. The first is *The Tenure in Office Act*, ch. 154, 14 Stat. 430 (1867), amended by Act of Apr. 5, 1869, ch. 10, 16 Stat. 6 (deleting provision applicable to cabinet members), repealed by Act of Mar. 3, 1887, ch. 353, 24 Stat. 500, by which Congress insulated members of the President's Cabinet from at-will discharge. The Act was declared unconstitutional, long after the fact, in *Myers v. United States*, 272 U.S. 52, 176 (1926); but it is of considerable interest that it was enacted at all, and also of interest that President Johnson's violation of the Act was thought by a majority of Congress to be a basis for an impeachment conviction. The vote for conviction fell short by one member. See Michael L. Benedict, *The Impeachment and Trial of Andrew Johnson* app. B at 193 (1973) (the vote was 39–19–0); Laurence H. Tribe, *American Constitutional Law* § 4–17, at 291

III. THE PROBLEM OF CHANGED CIRCUMSTANCES: STRUCTURE AND UNITARINESS

The founding generation did not believe that all those who engage in what we now think to be "executive" activities must operate under the control of the President. But is this decisive for current constitutional law? Does history entail the conclusion that Congress has free rein to allocate administrative tasks to people immune from presidential supervision? For some originalists,³³⁵ the answer must be yes. The framers did not constitutionalize anything like the single value of unitariness; it follows (from one version of originalism) that neither can we.

But is there an account of constitutional fidelity that might yield a contrary answer?³³⁶ Is there an account of fidelity that can produce a strongly unitary executive even if the framers did not accept that view? We believe that such an argument can be made. Our purpose here is to outline its features, without making a judgment on whether it might ultimately be made persuasive. To introduce the argument in advance: The central point is that the national government has changed dramatically since the founding, and so too has the national presidency. In light of these changes, mechanical application of the founding understanding—to allow independent officials to engage in tasks that the framers never

(2d ed. 1988). Second, shortly after the New Deal President Roosevelt attempted to assert broad authority over the administration via the Reorganization Act of 1939, ch. 36, 53 Stat. 561. After a prolonged debate, involving many of the issues discussed here, Congress rejected Roosevelt's efforts. See Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 Sup. Ct. Rev. 163, 187–88. Whether and how these developments should bear on constitutional interpretation raises complex issues that are beyond the scope of this Article.

335. On competing versions of originalism in constitutional interpretation, see *supra* note 34.

336. There are of course methods of constitutional interpretation that are not methods of fidelity, in the sense that they do not ultimately depend on whether the outcome is traceable to some judgment or commitment of the framers. See, e.g., Ronald Dworkin, *Law's Empire* chs. 2, 10 (1986) (describing constitutional interpretation as an effort to cast the relevant constitutional provision "in the most favorable light," or to make it "the best it can be"). For the issue at hand—the meaning of "executive" in Article II—probably this method would make it necessary to ask whether hierarchical presidential control of administration makes the best sense out of the Constitution, given applicable requirements of "fit," see *id.*; and it may well be that in light of our discussion below, this method would entail conclusions similar to those that we will reach in this Article. There are intriguing similarities and differences between a method of fidelity based on changed circumstances, and a method of the sort described by Dworkin. It might appear that Dworkin's method would entail much more in the way of policymaking and principle-espousing discretion for the judge. The appearance may well be reality. But, of course, any effort to come to terms with changed circumstances will involve a measure of discretion, especially in characterizing the relevant constitutional commitments, see *infra* text accompanying notes 371–380. This is not the occasion for a discussion of the relationship between seeking fidelity across changed circumstances and more avowedly and self-consciously nonoriginalist approaches to constitutional law. Instead we assume that judges should follow a method of fidelity, without defending that assumption. For relevant observations, see Cass R. Sunstein, *The Partial Constitution* ch. 4 (1993).

foresaw—may well disserve the very commitments that underlay the founding itself. Under current circumstances, a strongly unitary executive is the best way of keeping faith with the most fundamental goals of the original scheme.

As noted, it is not our aim to defend fully this view against possible alternatives. Our goal is more modestly to sketch the argument so as to give a sense of its familiarity and coherence. The argument proceeds in several steps. We begin with general remarks on interpretation across changing circumstances. In the next section, we apply these ideas to the broad area of presidential power. In Part IV, we discuss the application of the method to a number of currently contested Article II issues.

A. *Method*

Within the American constitutional tradition, most practices of constitutional interpretation can be described as practices of fidelity—practices in which the commitments of the framers have a prominent place in finding and preserving constitutional meaning.³³⁷ “Originalism” is the paradigm within this tradition. For the originalist, the commitments of the framers are the exclusive source of constitutional authority, unless subsequently changed by constitutional amendment.

Within this tradition of interpretive fidelity, everyone must confront what we can think of as the fundamental problem for constitutional interpretation, namely how a constitutional text is to be read over time. All methods of fidelity, that is, must ask how changes over time should affect understandings of the framers’ commitments—what kinds of changes will count, and how they will be treated. The point may seem obscure in the abstract, but it emerges naturally from familiar practices, as we will see shortly.

Let us distinguish between two very different responses to the problem of reading over time. Some methods of fidelity track or follow changes in the constitutional text only (that is, constitutional amendments); others track or attend to nontextual changes as well (that is, changes in the world that affect the meaning of the text’s application). Said differently, some methods focus on the *foreground* of the constitutional meaning only (the text), and some focus on both the *foreground* and *background* of constitutional meaning (text and context). So, for example, while all originalists track changes in the constitutional text when finding constitutional meaning, some originalists will also examine changes in the constitutional context that could affect meaning.³³⁸

337. An alternative view, seeing constitutionality as a common law process concerned with case-by-case decisions over time, is defended in Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L.J.* 221 (1973); David Strauss, *Constitutional Interpretation and the Common Law* (1993) (unpublished manuscript, on file with the Columbia Law Review).

338. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 995–96 (D.C. Cir. 1984) (Bork, J., concurring) (discussing proper scope for the First Amendment in a way that allows

Other originalists will not.³³⁹ Instead, these latter originalists simply locate a meaning that the document originally had, and apply that meaning "in the same way" today, without regard to how the context today may have changed.³⁴⁰

Let us now consider those who (1) are committed to interpretive fidelity and (2) follow or track the changes in both the foreground text and background context. For such people, it follows that particular applications of a constitutional text may change over time as the context of application changes—all consistent with the command of fidelity. *Brown v. Board of Education*³⁴¹ is a famous example.³⁴² In *Brown*, the Court changed the application of the Equal Protection Clause (as compared with *Plessy v. Ferguson*³⁴³) in large part because of a change in the social context since *Plessy*.³⁴⁴ Perhaps it could be said that in *Plessy*'s context, state-run schools were so insignificant as to make state-imposed segregation constitutionally legitimate under the Equal Protection Clause. In the context of *Brown*, however, state-run schools were of central importance, and this change was highly relevant to interpretation. Public schools had assumed an entirely different role. This change required a different interpretation of whether school segregation violated the commitment to equal protection of the laws. No longer could the harm of segregation—to the underlying constitutional principle—be legitimately ignored, even, or perhaps especially, if our concern was to respect the original constitutional principles.³⁴⁵

Or perhaps it was possible to think that at the time of *Plessy*, the view that segregation stigmatized blacks was a product not of the law of segregation, but of the "construction" placed on it by black people. This understanding of the facts, explicit in *Plessy* itself,³⁴⁶ was not sustainable by the time of *Brown*.

consideration of changes in context since the founding period), cert. denied, 471 U.S. 1127 (1985).

339. See, e.g., 750 F.2d at 1036–39 (Scalia, J., dissenting) (rejecting what he considers to be Judge Bork's expansive reading of the First Amendment).

340. See, e.g., *Schad v. Arizona*, 111 S. Ct. 2491, 2507 (1991) (Scalia, J., concurring in part and concurring in the judgment) (discussing interpretation of due process); Edwin Meese, Address Before the Federalist Society Lawyers Division, in *Interpreting Law and Literature*, supra note 4, at 24, 29 ("On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed." (quoting President Jefferson)).

341. 347 U.S. 483 (1954).

342. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretation and Neutral Principles*, 96 Harv. L. Rev. 781, 800–01 (1983).

343. 163 U.S. 537 (1896).

344. See *Brown*, 347 U.S. at 492–93.

345. An argument of this kind is offered in Robert H. Bork, *The Tempting of America* 74–84 (1990); see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2813 (1992) (plurality opinion) (discussing shift from *Plessy* in related terms).

346. See 163 U.S. at 551.

[The social] understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. . . . The *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.³⁴⁷

In other words, the application of the Equal Protection Clause changed because understandings of the background facts had changed.

For convenience, we will use the term "translation"—understood as a metaphor—to describe methods of fidelity that pay attention to, and try to account for or track changes in context.³⁴⁸ If an argument of constitutional fidelity points to a change in the context of application to justify a changed application of a constitutional text, then we will consider that method a practice of translation. Whether the translator may account for any change in context, or whether other institutional values constrain the types of changes the translator may notice, are questions beyond the scope of this Article.³⁴⁹ Of course, some examples of translation are more energetic and controversial than others; some purported translations are clear abuses of interpretive authority. Moreover, the very practice of translation may create risks to the project of fidelity (though we think that the failure to translate creates at least equivalent risks). It is enough for our purposes simply to focus on the distinction between methods that track changes in the background of interpretation (methods of translation) and methods that do not (some forms of originalism).

In some ways the term "translation" may appear exotic. But as we have said, the method is quite conventional. Consider two more examples to help make the point—both of them (not incidentally) involving the post-New Deal transformation of the constitutional framework.³⁵⁰

The first is a mildly stylized history of the Commerce Clause, granting to Congress the power to "regulate Commerce . . . among the several States."³⁵¹ As originally understood, the clause gave to Congress a power that fell far short of plenary authority over the national economy.³⁵² In-

347. *Casey*, 112 S. Ct. at 2813. This development could be connected to large-scale changes associated with the New Deal. See Sunstein, *supra* note 336, ch. 2.

348. Again, in using this methodology, we are not the first, see *supra* note 4.

349. For a detailed discussion, see Lessig, *supra* note 4.

350. Bruce Ackerman understands the New Deal as a constitutional amendment, described as such in part because, in Ackerman's view, we cannot otherwise make sense of the constitutional changes of the 1930s. See 1 Ackerman, *supra* note 334, at 103–04. What we say here suggests a different understanding: The developments of the New Deal period can be seen as legitimate interpretation in the context of changed circumstances. See Cass R. Sunstein, *New Deals, The New Republic*, Jan. 20, 1992, at 32; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory* 59–87 (1993) (unpublished manuscript, on file with the Columbia Law Review).

351. U.S. Const. art. I, § 8, cl. 3.

352. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

stead, the framers understood it only to allow Congress to regulate interstate commerce,³⁵³ and most commerce was unmistakably (conceived to be) intrastate, and thought rarely to affect the national economy. In light of the nature of the nineteenth century economy (and economics), the category of "Commerce . . . among the several States" could be understood to be relatively narrow, at least by modern standards. Hence the founders' understanding of the scope of the Commerce Clause was quite limited.

But by the early twentieth century, much had changed in the context of the Constitution's application, though of course not in the text. Dramatic changes in communications, transportation, and technology had produced a highly integrated national economy. Intrastate commerce commonly had significant interstate effects.³⁵⁴ Commerce Clause doctrine therefore faced a conceptual crisis: Should the Court interpret the clause in accordance with the framers' conception of its narrow scope, or should the Court interpret it in a way that is consistent with the text, that seems to fit with the framers' basic commitments, but also takes account of new conditions that created a quite different economy?

The Court eventually settled on the latter approach, in a way similar to the Court's own description of what happened between *Plessy* and *Brown*.³⁵⁵ Did fidelity require the Supreme Court to understand the twentieth century Commerce Clause to extend no further than the framers believed in the eighteenth? We do not believe so. In light of the changes in circumstances, fidelity to the original design properly allowed an extended commerce power, translated into the new context. The text of the clause reaches all interstate commerce, and that category had greatly enlarged by the twentieth century. The original purpose was to

353. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1396 (1987).

354. Consider Hart's remarkable description of this slow realization:

What do we mean by saying that this relegation of laissez-faire to the background has been, and will continue to be, a "necessity?" We refer, of course, to no mystical "force" driving us on, to no fatalistic philosophy. We mean primarily that the development of a network of complicated economic relationships has multiplied the instances in which the associated activity of one group affects indirectly the other groups in the community; and that these other groups have, in the more obvious cases, recognized these indirect consequences as affecting their interests, often adversely, and accordingly have sought, through government, to control such consequences.

Hart, *supra* note 100, at 31.

355. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118-19 (1942) (holding that Commerce Clause reaches completely intrastate activities that would frustrate interstate regulation); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-37 (1937) (holding that Commerce Clause extends to all activities that have a "close and substantial" relation to interstate commerce, even if activities are entirely intrastate). Of course we do not claim that all of the modern commerce cases were rightly decided. Nor do we suggest that the translatative issue is simple or clear. Lost in translation of the early cases at least was any understanding of the federalist component (if there was such) to the original federal limitation.

ensure that the national government could reach all such commerce. In these circumstances, fidelity to the original design entitled the Court to understand the clause quite differently from the way the framing generation had understood it.

The post-New Deal understanding of the Commerce Clause is an example of a changed reading of a constitutional text in light of a changed context. But still this change is quite moderate (at least formally), for the new reading is quite consistent with the original text. (This is the nature of the argument we shall make with respect to presidential power.³⁵⁶) One can see, that is, how "commerce among the several States" could touch most or perhaps even all of the full range of commerce regulable under the modern Court's conception of the Commerce Clause.

Consider, however, a second example in which the translated reading is not consistent with the original text—an example generally overlooked but quite important: The First Amendment says "*Congress*" shall make no law abridging the freedom of speech.³⁵⁷ For a textualist, and for some originalists, it would seem clear that the executive branch, through regulations, may abridge rights of free expression without offense to the First Amendment. The text does not speak of "the executive." Nor does it refer to the judiciary—notwithstanding the curiosity that in *New York Times v. Sullivan*,³⁵⁸ no one complained of this fact.³⁵⁹ How is it that the modern Court—without even a mention of this textual inconsistency—can apply the proscriptions of the First Amendment to all government, whatever its form?³⁶⁰ How is it that this textually implausible application is taken to be entirely uncontroversial?

One argument that might justify the changed reading of the text of the First Amendment—again, a reading plainly inconsistent with the text—might go something like this: The limitation of the First Amendment to Congress was based on a set of distinctive assumptions about the background—most important, the assumption that *de facto* and *de jure* lawmaking power would be exercised primarily or perhaps even exclusively by Congress. In the context of the founding, the executive branch posed little or no threat to free speech because its regulatory authority was sharply limited. Any executive (or administrative) intrusions on expression would occur pursuant to a law that plainly called for such intrusions.

356. See *infra* Part III.C.

357. See U.S. Const. amend. I.

358. 376 U.S. 254 (1964).

359. See Mark P. Denbeaux, *The First Word of the First Amendment*, 80 Nw. U. L. Rev. 1156, 1158–59 (1986).

360. Note that this question is distinct from the question of incorporation. The Fourteenth Amendment certainly can be read to extend the proscriptions of the First Amendment to the states. But a precise extension could well have been to extend the limitations to state legislators. What ground then does the Court have to extend it to state common law courts, as it did in *New York Times*? See 376 U.S. at 276 (describing how "Congress" can mean "government" in First Amendment context).

In the aftermath of the New Deal, this assumption is of course unsustainable. The executive branch is a principal national lawmaker. Its regulations are law-like in character, partly because its institutions make large policy judgments with relatively little congressional guidance. In order to maintain fidelity with the original design, it is at least plausible to think that the First Amendment, understood in our context, must apply to the executive branch as well. If it were not so understood, an important goal of the original design—the effort to ensure against intrusions on speech by national institutions endowed with lawmaking power—would be defeated. Thus, courts have rightly read the First Amendment with a gloss, rightly in the sense of being faithful to the basic or most fundamental commitments in the original design, constitutional text notwithstanding.

These examples raise many questions, questions we do not begin to resolve here. Perhaps a clear textual resolution ought to be decisive in cases of this kind. No doubt it would be easy to imagine cases in which there would be a large abuse of authority in the claim that new circumstances call for a new conception of constitutional meaning. No doubt the enterprise of preserving meaning in new contexts is extremely complex, and we do not suggest that any method of translation is simple, or mechanical, or uncontentious. There is no doubt that the “meaning” being preserved is not a brute fact, but a product of constructive interpretation. Constitutional commitments, described at a level of generality, are not self-defining, and their application to particular cases involves much judgment. For present purposes, we mean only to suggest that over time, some constitutional applications may change as a result of changes in context, and that accommodating these changed contexts to preserve constitutional meaning is a recognizable and even familiar part of the project of fidelity in constitutional interpretation.

B. *The Method Applied*

Now let us turn to the question of presidential authority. Begin with the constitutional text. As we have argued, two principal questions are relevant to the constitutionality of a particular condition or limit on presidential power over administration of the laws. First, we have to know whether “executive” power (in the constitutionally relevant sense) is at stake. Second, we have to know whether the limit on that power is both “necessary and proper” to carry into execution the President’s power or other powers in the national government.

With respect to the first question, the issue is what the scope of the powers of the President will now be taken to be. Just as “commerce among the several States” took on a wider scope over time because of changes in the structure of the economy, so too might the executive power take on a wider scope because of changes in the structure of the national government itself. That is, it is possible that certain authority

should now be deemed executive that was originally not so categorized, and precisely because of changed conditions and understandings.

With respect to this second question (whether a limitation on executive power is "necessary and proper"), the problem is more complex. What are the values against which Congress must test the administrative structures it establishes to determine whether they are "proper"? Should Congress look only to the values of the framers when testing a particular executive structure? Can or must Congress look to contemporary institutions and even contemporary values when testing a particular executive structure? And what is the role of reviewing courts in assessing a claim that a particular structure is necessary and proper?

To answer all these questions fully would be to enter debates far beyond the scope of this Article. For our purposes here, a few observations will suffice. First, like any number of other clauses in the Constitution—the Cruel and Unusual Punishments Clause,³⁶¹ the Due Process Clause,³⁶² the Equal Protection Clause³⁶³—both the Vesting Clause³⁶⁴ and the Necessary and Proper Clause³⁶⁵ have a degree of open-endedness, at least on their face.³⁶⁶ We might understand the Cruel and Unusual Punishments Clause, for example, to require the interpreter to look at least in part to a current society's "standards of decency"³⁶⁷ to determine the scope of the clause's reach. Of course, an interpreter could simply look to the world that the framers saw when filling in the meaning that such clauses leave open. One could, that is, look to what was considered cruel and unusual at the framing,³⁶⁸ or to the process then considered due,³⁶⁹ or to the government structures then considered proper, and test a particular punishment, or procedure, or government structure against those standards.

It is clear, however, that many believe that the Constitution demands something else of a constitutional interpreter. Just as the interpreter who aims to assure that the meaning of the Constitution is preserved³⁷⁰ must locate those punishments now to be treated as "cruel and unusual," so

361. U.S. Const. amend. VIII.

362. *Id.* amend. XIV, § 1.

363. *Id.*

364. *Id.* art. II, § 1, cl. 1.

365. *Id.* art. I, § 8, cl. 18.

366. Of course, in some sense this is true of every clause.

367. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion).

368. See the discussion of *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), *supra* notes 34, 55 and 309.

369. See *Schad v. Arizona*, 111 S. Ct. 2491, 2507 (1991) (Scalia, J., concurring in part and concurring in the judgment).

370. Of course the whole enterprise of "preservation" is a constructive task. There is no preinterpretive "it" out there that is being translated, either in literary translation itself, or in its metaphorical application here. All one can do is make a best effort at making sense of a past understanding, by understanding how it would fit within a current world. That it is constructive, that it has no firm limits, that it is not mechanical—all this is acknowledged.

too must an interpreter who aims to assure the meaning of the Constitution is preserved locate those governmental structures permissibly thought proper now, and not just those permissibly thought proper at the founding. This is so at the very least because of dramatically changed circumstances since the period in which the framers wrote. In other words, the interpreter should locate the equivalent sanction that the requirement of propriety compels now, by locating the equivalent demands of propriety then.

All this is very abstract; we will come to particulars shortly. But first a proviso. What we have said emphatically does not mean that the constitutional words are simply bottles into which any generation simply pours its own values. The interpreter's role is to take account of changing circumstances insofar as these bear on the question how best the framers' commitments are to be implemented. As we understand it, the interpreter is bound by the duty of fidelity; the Constitution should not be made to take on values that are not fairly traceable to founding commitments. In the context at hand, a new understanding of the word "executive" or "proper," if different in application from the framers' application, must be based on a claim that that understanding manifests a better means of implementing the framers' commitments in this different world. Applications of the constitutional requirements may change, not because underlying values change, but because our understanding of how best to implement those values changes, making mechanical adherence to old understandings inconsistent with fidelity.

C. *New Circumstances, Old Commitments*

We are concerned with the task of preserving initial constitutional commitments in light of changes in the constitutional context. In what follows, we first outline some relevant initial commitments, and then sketch two types of contextual change that make new applications necessary if these old commitments are to be maintained.

From our focus on what the framers said and did, we can identify a number of values that bear on whether we categorize a particular institution as "executive" (and hence requiring plenary presidential control) and that affect whether a particular limit on presidential control is "proper." Unitariness was unquestionably one such value. As we have seen, the framers rejected a plural executive, and the Decision of 1789 shows that for some decisions, presidential control was indeed required.³⁷¹ The framers believed that unitariness advanced the interests of coordination, accountability, and efficiency in the execution of the laws. All of these policies argued against a fragmented executive.³⁷² In certain cases, it was critical that the executive be able to act with dispatch

371. See *supra* text accompanying notes 121–122, 131.

372. See *The Federalist* No. 74 (Alexander Hamilton); Strauss & Sunstein, *supra* note 11, at 183–84.

and without dissent.³⁷³ To account for those cases, the framers decided that the executive structure should be unitary.

The Vesting Clause of Article II—by placing the executive in one rather than many presidents—embodied this judgment. It is therefore clear that the constitutional text and structure reflect commitments to the unitary virtues of coordination, accountability, and efficiency in government. These commitments account for the unitariness of the presidency and of the executive power across a certain domain.

But it is equally certain that in some cases other values were relevant, and these values may at times constitutionally trump unitariness. On the founding view, efficiency not only justifies unitariness but also occasional legislative departures from that notion; it explains something of the relative independence of the district attorneys.³⁷⁴ So too does fear of executive and judicial aggrandizement. We have already noted the complexities in the Decision of 1789, but one lesson of that story was that sometimes the values of independence from the President could rightfully trump the interests of unitariness.³⁷⁵ The independence of adjudicative officers is one such interest. Maintaining congressional control over spending, to take another example, led the framers to reduce executive control over the Treasury, unitarian considerations notwithstanding.³⁷⁶

From these distinct values we can draw together two that are for our purposes central. First is a value in accountability—where no special reason existed to separate responsibility from the President, the pattern of original executive structures strongly supports the conclusion that the President remains accountable for the actions of government officers.³⁷⁷ Of course, the general idea of accountability is embodied not only in the allocation of executive power, but also in the grant of legislative power to Congress, accompanied by a ban on open-ended delegations of legislative power.³⁷⁸ Second is a value of avoiding faction.³⁷⁹ This goal is, of course, at the center of the constitutional structure, and it helps explain the system of checks and balances in general.³⁸⁰

Accountability and avoidance of factionalism, then, are two central values of the framers' original executive. Let us focus now on two sorts of

373. The structure of the Departments of War, Navy, and Foreign Affairs (State) evidence this concern. See *supra* text accompanying notes 121–122, 131.

374. See *supra* text accompanying notes 60–65.

375. Recall Madison's comments regarding the Comptroller, *supra* text accompanying notes 69–70, 128.

376. See *supra* text accompanying notes 123–125.

377. See, e.g., *The Federalist* No. 77 (Alexander Hamilton).

378. See *infra* text accompanying notes 478–479.

379. See *The Federalist* No. 10 (James Madison); Cass R. Sunstein, Interest Groups in American Public Law, 38 *Stan. L. Rev.* 29, 39–43 (1985).

380. See *The Federalist* Nos. 10, 51 (James Madison); Joseph M. Bessette, Deliberative Democracy: The Majority Principle in Republican Government, in *How Democratic is the Constitution?* 102, 109–11 (Robert A. Goldwin & William A. Schambra eds., 1980).

changes in the current constitutional context that may require accommodation to continue to preserve these two original values.

The first, and least controversial, type of change is in the *functions* of what we are calling administrative agencies. What agencies do—the nature of their power and the way that power is exercised—is very different now from what it was at the framing period. Lawmaking and law-interpreting authority is now concentrated in an extraordinary array of regulatory agencies. This development has ensured that domestic policymaking is often done, not at the state level or even through Congress, but through large national bureaucracies.³⁸¹

This massive transformation in the institutional framework of American public law was entirely unanticipated by the framers, and it fundamentally altered the original constitutional design. We do not contend that administration was itself unanticipated, or that at the founding period it was trivial. On the contrary, the original period contained a precursor of the modern administrative state.³⁸² But what we do now is not what was done then. General managerial functions were not within the domain of the national government, much less the President. Much of the organization of the national economy was left to state courts.³⁸³ By contrast, the national government restricted itself largely to national improvements, subsidies, tariffs, patents, tonnage, and the disposal of public lands.³⁸⁴ Whether or not Articles I and II were designed for “congressional dominance,”³⁸⁵ it seems clear that the early presidency involved little policymaking role in domestic affairs.

Things are of course different today. To take just one example, the Federal Communications Commission (FCC) sets national policy with respect to broadcasting. The FCC is not fully analogous to the administrative institutions at the founding, which never (or almost never³⁸⁶) had such broad policymaking discretion. The problem is intensified when we recall that the FCC is merely one of a bewildering array of national administrative entities armed with similar power. Perhaps the immunization of such entities from presidential authority would now compromise constitutional commitments, indeed the very commitments that underlay

381. This change is discussed pointedly in Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* 45–58 (1985).

382. See generally Frank Bourgin, *The Great Challenge: The Myth of Laissez-Faire in the Early Republic* (1989) (reviewing national programs by early Presidents in areas of land development, public credit facilities, industrial development, and transportation system improvements).

383. See Stephen Skowronek, *Building a New American State* 27–28 (1982); Cass R. Sunstein, *After the Rights Revolution* 17–18 (1990).

384. See Lowi, *supra* note 381, at 24.

385. *Id.* at 34.

386. The qualification is necessary because some agencies had considerable policymaking authority and a large degree of discretion as well. Consider the Department of the Treasury and the Bank of the United States. See *supra* text accompanying notes 123–125, 139–143.

the decision to create a (kind of) unitary presidency. Consider the original interest in coordination and the extent to which that interest would be compromised by allowing Congress to prevent the President from overseeing environmental or energy policy.³⁸⁷ For this reason, some institutions currently denominated administrative could arguably fall under presidential control as a matter of constitutional compulsion. This is because what administrative institutions do now is, in nature and scope, quite different from what administrative institutions did then—indeed, what such institutions do now is in terms of sheer importance more analogous to what unquestionably executive agencies did at the founding period. We will lay principal stress on this difference, suggesting that the framers' acquiescence in allowing some institutions to be independent of the President does not entail the conclusion that current, very different institutions can be similarly independent.

Second, and more controversially, some values may have become more or less important because we now have a better pragmatic understanding about how institutions actually function³⁸⁸ and a better understanding of the nature of the values at issue. This is the lesson from experience. Here the change consists not of new institutions raising unforeseen issues, but instead of new understandings of what certain governmental activities entail.³⁸⁹ (Here the analogy is to one understanding of what happened between *Brown* and *Plessy*—that is, a new view of the underlying facts.) At one time, for example, it may have been thought that an independent agency would best advance the policy interests of program X, but experience reveals that with independence, an independent agency is highly likely to fall victim to factional capture.³⁹⁰ Or it may have been thought that some sufficiently protected agencies could engage in apolitical, scientific, technocratic implementation of the laws³⁹¹; but now many believe that the notion of purely apolitical implementation is impossible, at least when discretionary judgments are involved. Of course assessments of this kind should be made principally by nonjudicial officials. But they may bear on constitutional interpretation as well.³⁹² If either change occurred, then entities that Congress legitimately made "independent" when either view reigned must, perhaps, now be placed under the wing of the President as a matter of constitutional compulsion.

387. Cf. Breyer, *supra* note 189, at 39–42, 73–78.

388. See, e.g., Miller, *supra* note 1, at 55–57.

389. This is more controversial because some would say that such changes in perception call for constitutional or legislative change, not for new interpretations by courts. But see the discussion of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in Lessig, *supra* note 350, at 40–47.

390. This is the influential argument of Marver Bernstein. See Marver H. Bernstein, *Regulating Business by Independent Commission* 282–87 (1955). On capture in general, see Kay L. Schlozman & John T. Tierney, *Organized Interests and American Democracy* (1986).

391. See *supra* text accompanying notes 187–189.

392. For a more detailed discussion of this issue, see Lessig, *supra* note 350.

We begin, then, with the values of accountability and avoidance of faction, and we are confronted with changes in the types of function performed by modern regulatory agencies and in the lessons provided by experience with regulation. Consider how these two changes might work together to suggest that the modern executive must be strongly unitary, even if the framers' executive was not.

In the original understanding, officials who exercise the President's enumerated powers must operate under his control.³⁹³ But Congress was originally entitled to immunize some officials from presidential control when it thought proper—in particular, if those officials operated like judges, or if their duties were ministerial, or even if (as in the case of the Comptroller) their actions were discretionary but properly separated from the President's. All this of course operated in the context of a presidency that had an exceptionally narrow range of discretionary policymaking authorities in the domestic arena, at least compared to what we now find routine.³⁹⁴ Most of the functions performed by what we call the federal "executive branch" were originally the province of state legislatures and state courts, which had principal authority over regulation of the economy.³⁹⁵

Now consider the character of the modern presidency. In the aftermath of the New Deal, administrative agencies carry out a wide range of highly discretionary policymaking tasks in the domestic arena. Because of delegations of discretionary authority to administrative agencies,³⁹⁶ the functions of those who execute the law have dramatically altered.³⁹⁷ Because of this discretionary authority, these agencies are now principal national policymakers—in practice, crucial lawmakers, both through

393. Control in this context means at least that the President has the power to discharge at will. It is acceptable to constrain the power to make the ultimate decision. See the discussion of *Myers v. United States*, 272 U.S. 52 (1926), *supra* text accompanying notes 98–108. The same is true for officials that Congress has seen fit to place under the President.

394. See Lowi, *supra* note 381, at 31–32. Leonard White provides a useful contrast in the example of President Monroe. As he writes:

Monroe not only believed that the President should allow Congress to make up its own mind on domestic matters without influence from the Chief Executive; with an occasional exception he put his theory into practice. The greatest political issue of his day was the admission of Missouri and the status of slavery in Louisiana Territory. During all the bitter debates, he remained silent and abstained from interference in the struggle.

White, *supra* note 65, at 38–39.

395. See Lowi, *supra* note 381, at 24 (itemizing some national and state functions in early American history).

396. Some post-1960 delegations are far less broad, and embody closer congressional judgments about policy. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 478–83 (1987). But the aggregate level of discretionary authority is extraordinarily high, and this is all that is necessary for our purposes.

397. For a history of this delegation, see Hart, *supra* note 73, at 70–109.

regulation³⁹⁸ and interpretation.³⁹⁹ For example, control of the environment is in large measure a policy decision of the administrator of the Environmental Protection Agency. Parallel observations might be made for decisions relating to occupational safety and health, consumer products, and energy, including nuclear power. The same is true of implementation decisions. Rather than being ministerial, they involve highly discretionary choices about the content of domestic policy.

To say this is not to say that administrators at the founding had no policymaking power; of course they did. But it is hard to dispute the view that there has been a fundamental change in the legal context, involving the scope and nature of policymaking discretion that members of administrative agencies now possess. As the scope of the discretion of administrators has increased, their function has dramatically changed. At the founding, ministerial functions were freed from presidential control, and a wide range of administrative tasks plausibly could have been considered ministerial. Similarly, entities that performed judicial functions, or that engaged in tasks related to the purse, were also free of executive control. But now many administrators exercise what seem uncontroversially to be "political" functions, in the sense that their actions involve a great deal of discretion about policy and principle in implementing federal law. It remains true that many administrators also adjudicate; but the very process of adjudication frequently involves the creation of national policy under vague standards, as in, for example, the work of the National Labor Relations Board, the Federal Communications Commission, the Securities and Exchange Commission, and the Federal Trade Commission.⁴⁰⁰

In short, in a period in which administrators exercise a wide range of discretionary authority, the very meaning of immunizing them from presidential control changes dramatically.⁴⁰¹ When fundamental policy decisions are made by administrators, immunizing them from presidential control would have two significant consequences: first, it would segment fundamental policy decisions from direct political accountability and thus the capacity for coordination and democratic control; and second, it would subject these institutions to the perverse incentives of factions, by removing the insulating arm of the President, and increasing the opportunity for influence by powerful private groups.⁴⁰² Neither of these consequences was favored by the framers. Indeed, both problems were specifically what the framers sought to avoid. For both these reasons—

398. See, e.g., Hart, *supra* note 73, at 107–09 (detailing some regulations Presidents are permitted by law to delegate).

399. See, e.g., *Martin v. Occupational Safety & Health Rev. Comm'n*, 111 S. Ct. 1171, 1176 (1991) (finding that interpretation of statutes is necessary task of OSHA).

400. See, e.g., *id.* at 1177 (acknowledging broader powers of today's regulatory agencies than traditional administrative agencies).

401. For a description of the rise of regulation contemporaneous with the rise of independence, see James T. Young, *The Relation of the Executive to the Legislative Power*, 1 *Proc. of the Am. Pol. Sci. Ass'n* 47, 47–48 (1904).

402. See *infra* text accompanying notes 431–433.

retaining accountability and avoiding factions—an interpreter could reasonably conclude either that it makes sense to understand the term “executive” to include more of the administrative power than the framers would have (specifically) included, or alternatively, that a legislative effort to insulate what is misleadingly labeled “administration” from the President is an improper exercise of legislative authority under the Necessary and Proper Clause.

All this describes how the function of administration has changed, and in ways that raise doubts about whether independence can be given to administrators, consistent with original constitutional commitments. Now consider a second change, one equally important.

In the last two centuries, there have been large-scale shifts in the nature of our understanding of what the administrators’ power is. What was striking about the nineteenth century view was the faith in the ability of administrative bodies to stand impartial in some scientific search for the true (rather than best) policy judgment. This was the progressive faith in administrative expertise.⁴⁰³ As Grundstein, a turn of the century theorist, wrote:

Administration . . . was the realm of the professional, the scientist and the neutral technician, in the affairs of government, . . . set . . . apart from “Politics” in the sense that while the latter had “to do with policies or expressions of the state will” administration had to do with their execution.⁴⁰⁴

But the post-New Deal view questions the very presupposition of this nineteenth century model—the presupposition that the political can be so sharply separated from the administrative. To be sure, many insist on technocratic rationality—on the importance of expertise in helping people to make informed judgments about the relations between means and ends.⁴⁰⁵ This is an enduring theme in administrative law. We do not mean to disparage the importance of expertise in providing the foundation for sound public judgments. On the contrary, the absence of expertise, or the distortion of expert judgment through anecdote and interest-

403. The classic account is James M. Landis, *The Administrative Process* (1938). For a modern appreciation of the progressive faith, see Bruce A. Ackerman & William T. Hassler, *Clean Coal/Dirty Air* 4–7 (1981).

404. Nathan D. Grundstein, *Presidential Power, Administration and Administrative Law*, 18 *Geo. Wash. L. Rev.* 285, 289 (1950). The nineteenth century theorists’ view was a function of their belief about the nature of the material being regulated. Consider one nineteenth century commentator:

If we examine the public problems brought up for discussion in the President’s message it will be seen that they are pre-eminently industrial or commercial in character and that they are technical rather than popular. The numbers and importance of this class of public problems are growing by leaps and bounds,—a fact which necessarily brings into greater prominence the executive as the expert branch of government.

Young, *supra* note 401, at 49.

405. See Ackerman & Hassler, *supra* note 403, at 26–27; Breyer, *supra* note 189, at 61–63.

group power, is an important obstacle to a well-functioning system of regulatory law.⁴⁰⁶ But there has been an unmistakable and we believe fully warranted diminution in the progressive era's faith in the ability of expertise to solve regulatory problems on its own. This diminution has brought about a significant shift. As noted by (it is reported) Judge Scalia in the per curiam decision of a three judge district court striking a portion of the Gramm-Rudman-Hollings Act,

These cases reflect considerable shifts over the course of time, not only in the Supreme Court's resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions. It is not clear, moreover, that these shifts are at an end. Justice Sutherland's decision in *Humphrey's Executor*, handed down the same day as *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), is stamped with some of the political science preconceptions characteristic of its era and not of the present day. . . . It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.⁴⁰⁷

In a world where administration is conceived as apolitical,⁴⁰⁸ granting administrators relatively independent authority could be thought to raise few constitutional issues. If the administrators are simply executing a technical skill, there is little reason to make their judgment subject to the review of the President. In such a world, the grant of authority to independent commissions could build directly on two precedents provided in the framing period—ministerial duties, which by definition do not involve discretion, and the quasi-judicative Comptroller. The Supreme Court accepted this highly technocratic conception of administration in *Humphrey's Executor v. United States*,⁴⁰⁹ the heyday of the progressive model within the judiciary. On progressive assumptions, *Humphrey's Executor* builds quite directly on framing premises and precedents insofar as the Court emphasized quasi-legislative and quasi-judicative functions—an

406. See Ackerman & Hassler, *supra* note 403, at 26–27; Breyer, *supra* note 189, at 33–39.

407. *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C.) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

408. This was the battle cry of the nineteenth century constitutionalists that we discussed in Part II. See *supra* text accompanying notes 187–189.

409. 295 U.S. 602 (1935).

irony in view of the widespread view that the case was a bizarre and unfounded exercise in constitutional innovation.⁴¹⁰

But once this view of administration changes—once one sees the nature of administration as fundamentally political—new questions are raised about the extent to which courts may permit this power to be independent of the President. Currently, a fundamental premise of administrative law is the lawmaking ingredient of practically every executive act, including, in *Chevron U.S.A. v. NRDC*,⁴¹¹ the act of interpretation itself. In such a period, the whole notion of independent political bodies becomes highly problematic, especially in light of founding commitments. The presupposition behind independent administration—what made it capable of drawing on analogies like the Comptroller General and the Postmaster in the founding period—is no longer sustainable. The question for interpretation is how to accommodate this fundamental change in understanding.

If all this is true, an argument for the strongly unitary executive under modern conditions takes the following form. From the actual administrative entities that the framers established, we can infer that the framers did not intend to allow administrative officials exercising broad policymaking authority to operate independently of the President.⁴¹² With respect to such officials, they made no explicit judgment, for their existence was not foreseen. The framers anticipated a much smaller national government, in which states would have the fundamental role and in which Congress would engage in basic policymaking, and they believed that the President would exercise a good deal of discretionary authority only in international relations.⁴¹³ The execution of federal domestic law would often be mechanical, and crucially, nonpolitical. For this reason, the founding commitment to a unitary executive could coexist with a range of federal officials not directly subject to presidential control.

To the framers, centralization of executive power in the President was indeed designed to promote accountability, expedition, and coordination in federal law, and nothing we have said questions their commitment to a unitary executive at this level of generality. Indeed, these were fundamental constitutional principles. Our point is only that the framers did not believe that those principles would be compromised by insulating particular administrators from presidential control.

410. See, e.g., Miller, *supra* note 1, at 92–94 (describing *Humphrey's Executor* as “one of the more egregious opinions” written by the Supreme Court); Van Alstyne, *supra* note 278, at 116 n.51 (arguing that *Humphrey's* was an awkward attempt at narrowing without overruling the embarrassing decision in *Myers*).

411. 467 U.S. 837, 842–45 (1984).

412. A qualification is necessary here: The early Congress did allow independence with respect to control over the purse. See *supra* text accompanying notes 121–143.

413. As discussed above, the structure of Article II provides some indication of the framers' intent; Article II gives the President “power” over foreign affairs, while imposing a “duty” on the President to carry out “Congress” laws. See *supra* text accompanying notes 119–121.

It was in the nineteenth century that one of the features distinguishing the framers' world from ours changed. Here was the rise of a massive federal bureaucracy;⁴¹⁴ but unlike the legal culture today, the culture of the nineteenth century theorists was firm in its faith in the scientific model of administration, so that the theorists did not see constitutional problems with relatively independent agencies. The nineteenth century culture could accommodate the growth in bureaucracy by approving relatively independent agencies while staying within the bounds of fidelity.

But for us, the central fact of the eighteenth century executive (limited national government and limited delegations to federal administrators) has changed, and the central assumption of the nineteenth century solution (neutral, scientific administration) has failed. For now, we not only have a large administrative bureaucracy, but we also have profound skepticism about whether it is possible and desirable for that bureaucracy to operate free from political judgment. Echoing Justice Brandeis (quoting Justice Holmes) in *Erie R.R. Co. v. Tompkins*,⁴¹⁵ we could say that administration "in the sense in which courts speak of it today" can no longer be understood to be neutral, or scientific. Politics is at its core, in the sense that value judgments are pervasive and democratic controls on policymaking are indispensable.⁴¹⁶ This raises a central problem for a modern bureaucratic state. The question the interpreter must answer is how best to accommodate this current skepticism—what structure makes most sense of the framers' design, given the change in the extent of the bureaucracy and the change in our understanding of what bureaucracy is.

The answer to this question is not simple. No doubt our understandings are complex and multiple, and no doubt the principal place for registering changes in understanding is the legislature, not the judiciary. Congress' diminished enthusiasm for the independent agency form attests to the possibility that new views about expertise and factionalism can influence legislative judgments, informed by constitutional considerations, about appropriate structures.⁴¹⁷ It would be possible to say that courts should not take account of changed understandings in the process of constitutional interpretation. But it is also possible to think that changes of this kind are relevant to interpretation as well as to lawmaking, as the Court itself recently insisted in describing the shifts from *Plessy* to *Brown* and *Lochner* to *West Coast Hotel*.⁴¹⁸

A structural argument for a unitary executive, then, comes down to this: Where the framers allocated a power that they thought of as political, that power was allocated to people who were themselves politically accountable. This was part of the fundamental commitments to account-

414. See Young, *supra* note 401, at 47–48.

415. 304 U.S. 64, 79 (1938).

416. It is not necessary to claim that such control must take any particular form.

417. See Sunstein, *supra* note 396, at 478–83.

418. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2812–14 (1992); Lessig, *supra* note 350, at 27–31, 67–71.

ability and avoidance of factionalism. At the founding period, the existence of a degree of independence in administration could not realistically have been thought to compromise these commitments. Today, by contrast, a strong presumption of unitariness is necessary in order to promote the original constitutional commitments. The legislative creation of domestic officials operating independently of the President but exercising important discretionary policymaking power now stands inconsistent with founding commitments.

It follows that in order to be faithful to the founding vision in changed circumstances, courts must now bar Congress, at least as a presumption, from immunizing from presidential control the activities of officials who exercise discretionary policymaking authority—at least if those officials are not adjudicators.⁴¹⁹ In order to be faithful to the original design, that is, the interpreter must see as part of the constitutional structure a constraint not explicitly stated in that design, requiring that certain kinds of policymaking remain within the control of the executive.

This general statement leaves many unanswered questions and ambiguities, and we will address some of them below. But the basic conclusions of the argument are not obscure. To the extent that Congress has authorized executive officials to engage in adjudicative tasks, it may immunize those officials from presidential control by, for example, preventing presidential interference in ongoing cases and offering “for cause” protection against discharge. To the extent that an employee has truly ministerial tasks, and is not engaged in policymaking activity, “for cause” protections are entirely acceptable. The Court was correct in *Myers*; the Civil Service Act is constitutional.⁴²⁰ But to the extent that an agency official makes discretionary decisions about the content of public policy, the best reading of the constitutional plan is that in general, the official may not be insulated from presidential supervision. The President must retain the power to discharge him if his decisions are contrary to presidential dictates.

A contrary view, set out forcefully by Abner Greene, could also be suggested by this same history—one that argues against a strongly unitary executive.⁴²¹ Perhaps the original design reflected a carefully calibrated set of judgments about institutional authority, with a division between lawmaking and law implementation; perhaps the most important changed circumstance was the disturbance of this calibration through the delegation of policymaking authority to the President. On this view, the key founding commitments call for diffusion of power and for checks and

419. Here we mean adjudicators in the sense of non-policymaking adjudication discussed in *Martin v. Occupational Safety & Health Rev. Comm’n*, 111 S. Ct. 1171, 1178 (1991).

420. See *Myers v. United States*, 272 U.S. 52 (1926).

421. See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 125–26 (1993).

balances between the legislature and the executive.⁴²² The principal threat of the post-New Deal period lies in the concentration of lawmaking and law-executing power within the presidency. To restore the original balance, courts must now allow a high degree of independence from presidential power, so as to prevent what the framers dreaded most: the concentration of governmental power in a single institution—here, the executive.⁴²³

This argument also stresses the need to maintain fidelity with the original constitutional design. It too is an argument of translation. But it takes the post-New Deal developments as a reason for more rather than less caution about unitariness in administration. The new circumstances mean that unitariness is a far greater threat than it once was—not that unitariness is a constitutionally compelled solution.⁴²⁴

More particularly, this view fears that the new delegations have threatened to confer excessive power on the executive branch—to create an “imperial presidency.” The changed circumstances argue in favor of a narrow reading of “executive power” and for broad congressional authority under the Necessary and Proper Clause, precisely in the interest of maintaining the original commitment to a system of checks and balances.⁴²⁵ On this view, congressional power to insulate administration from presidential control is a necessary *quid pro quo* for the exercise of discretionary lawmaking power by people other than legislators.⁴²⁶ The rise of lawmaking by nonlegislative bodies—most especially, the downfall of the nondelegation doctrine⁴²⁷—makes it especially necessary to insist on congressional prerogatives under the Necessary and Proper Clause, in order to prevent an aggregation of powers in the presidency. In short, Greene urges, the post-New Deal developments mean that modern interpreters should place less value on unitariness than did the framers, because of the need to maintain fidelity with the commitment to the diffusion of power.⁴²⁸

This argument is hardly without force. It shows that there is no algorithm for deciding how to maintain fidelity with past instructions in the face of changed circumstances. But we do not believe that the argument

422. See *id.*

423. See *id.*

424. See *id.*

425. See *id.* at 137–38.

426. A view of this kind has been prominently set out by Justice White. See *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting) (arguing that legislative veto is appropriate means by which Congress can secure accountability of executive and independent agencies that have significant delegated power).

427. The nondelegation doctrine bans open-ended grants of discretionary authority to agencies. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). For the brief history of the doctrine—not invoked to invalidate a statute since *Schechter* itself—see Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 66–91 (3d ed. 1992).

428. See Greene, *supra* note 421, at 141–42.

is ultimately persuasive. The first and most fundamental problem is that the argument treats diffusion of power as an end in itself, rather than as an instrument for serving various purposes connected with the preservation of liberty. The second problem is that even if broad delegations of authority are the problem, independent agencies are not the solution.

We can make these points by considering two lessons of the post-New Deal experience. First, there is the problem of administrative accountability, one of the important founding values. The rise of independent regulatory commissions compromises that value.⁴²⁹ Second, there is the problem of faction, the very problem that the system of checks and balances was intended to solve. To the extent that we multiply (and specialize) the bodies exercising lawmaking power (without a presidential or congressional check), we increase geometrically the opportunities and the costs of faction. From the standpoint of constitutional structure and constitutional commitments, the creation of a body of independent entities seems to be a cure worse than the disease. Both theory and practice support this conclusion.⁴³⁰

The original diffusion of power was supposed to protect liberty, in large part by limiting the authority of factions.⁴³¹ The rise of a large bureaucracy immunized from presidential control tends to endanger rather than promote that original goal.⁴³² Through concentrating power in bureaucracies that combine lawmaking and law-executing authority, we do not promote a healthy system of checks and balances, but instead aggravate the relevant risks to liberty.⁴³³ The insulating arm of the President is not free from risk. But because the President has a national constituency—unlike relevant members of Congress, who oversee independent

429. Jerry Mashaw argues in favor of administrative rather than legislative policymaking discretion, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81, 81–82 (1985); but the argument depends crucially on the assumption of presidential direction of bureaucracy.

430. See Bernstein, *supra* note 390, at 291–97 (concluding that independent agencies “have proved to be more susceptible to private pressures, to manipulation for private purposes, and to administrative and public apathy than other types of government agencies”); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 *U. Chi. L. Rev.* 407, 426–28, 439–40 (1990) (arguing that independent agencies have been “highly susceptible to the political pressure of well-organized private groups”).

431. See *The Federalist* Nos. 47–51 (James Madison).

432. See *supra* note 429.

433. See Bernstein, *supra* note 390, at 293. Barry Weingast and Mark Moran have discussed the problems of control over independent agencies by congressional committees, noting that committees are not the same as Congress. Weingast argues that there is too simple a slippage from legislative control to committee influence. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 765, 777–79, 788–92 (1983) [hereinafter Weingast & Moran, *Bureaucratic Discretion*]; Barry R. Weingast & Mark J. Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC, Regulation*, May/June 1982, at 33, 33–34 [hereinafter Weingast & Moran, *Runaway Bureaucracy*]; see also *INS v. Chadha*, 462 U.S. 919, 946–48 (1983).

agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration.⁴³⁴

Perhaps Congress can point to the need to limit presidential authority in order to support some isolated efforts to prevent concentration of power in the President. We will offer some examples below. But it seems clear that the changed circumstances do not justify the immunization of all or most bureaucratic power from the President. This is because it is hard to identify how independent administration is a realistic solution to the constitutional problems caused by changed circumstances. Indeed, independent administration would sacrifice many values the founders saw as essential.

We conclude that if the framers thought that the realm of “executive” power was roughly coextensive with the realm of political choice, it makes sense to say that most of modern administration must fall under the power of the executive; and this is so even if the framers had a relatively capacious, but not specifically constitutionalized, conception of what counted as “the administrative.” Their conception of administrative (or permissibly nonexecutive) power certainly did not extend to the broad-scale selection of domestic policies for the country as a whole. If we are to translate their structural choices into current conditions, we may conclude that a largely hierarchical executive branch is the best way of keeping faith with the original plan. At least this is so if we are asking whether the President has a degree of removal and supervisory power over people who are authorized to make high-level discretionary decisions about the content of national policy.

IV. CURRENT ISSUES

In this section, we briefly discuss the implications of our approach on the resolution of current issues involving the relationship between the President and the administration. Our goal is not to reach final conclusions about these questions, many of which would require far more elaborate treatment than we can provide here. We are concerned principally with a general approach, not with specific solutions. We are attempting to see how the argument from translation might bear on contemporary disputes, a surprisingly large number of which are unsettled.

A. *Constitutionality of Independent Agencies*

We have noted that the 1980s saw a surprising rebirth of contestation about the issue of presidential control over administration of the laws.⁴³⁵ It is clear from the recent cases that the so-called independent agencies are constitutional—at least in the sense that Congress has the power to provide that some administrative officers do not serve at the pleasure of

434. See Frank H. Easterbrook, *Public Choice and Our Vision of the State*, 107 Harv. L. Rev. (forthcoming 1994).

435. See *supra* notes 11–18 and accompanying text.

the President.⁴³⁶ To this extent, the constitutional assault on independent administration, at least in its broadest forms, has been decisively repudiated. And to this extent, we think that current law is entirely unobjectionable. The independent agencies perform a large number of adjudicative functions; consider the NLRB, the FTC, and the FCC. More important, and in our view crucially, it is possible to interpret the statutes conferring independence on certain agencies in such a way as to maintain the essentials of presidential power, that is, the power necessary to maintain basic presidential authority over the relevant areas.⁴³⁷ It follows from this interpretation that, for example, President Clinton has a degree of supervisory authority over the FCC, the FTC, and the NLRB, insofar as broad policymaking authority is involved. This conclusion is inconsistent with current understandings in Congress and the executive branch,⁴³⁸ but it is, in our view, consistent with a proper understanding of the constitutional scheme.

Insofar as we emphasize this last point, we claim that complete independence from the President—if Congress sought to create it—would in many cases raise serious problems. But the unitary structure for which we argue would produce no question about independence in cases in which special institutional considerations support a legislative judgment that it is proper to achieve a degree of immunity from the President. Here the Necessary and Proper Clause provides ample authority, and here the argument from changed circumstances is not decisive, since it does not supply considerations that argue sufficiently against limiting presidential authority. The Federal Reserve Board is a good example. There is no question that the Federal Reserve Board exercises policymaking authority; but just as the framers sought to insulate the Comptroller from the President, and vested the discretion over deposits in the U.S. Bank in the Secretary of the Treasury,⁴³⁹ so too the value of separating the “purse from the sword” would justify keeping the Federal Reserve Board (holder of the post-Keynesian purse) distant from the President.

436. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding constitutionality of independent prosecutor); *Bowsher v. Synar*, 478 U.S. 714 (1986) (upholding lawmaking Comptroller General removable only by congressional initiative, but limiting Comptroller's ability to perform executive functions).

437. See *infra* Part IV.C.

438. For example, in their Executive Orders requiring administrative agencies to undertake cost-benefit analyses before enacting new regulations, both President Reagan and President Clinton expressly exempted those agencies that are considered independent under 44 U.S.C. § 3502(10) (1988). See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (but requiring all agencies to comply with regulatory agenda for interagency coordination); Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981), reprinted in 5 U.S.C. § 601 (1988); see also 139 Cong. Rec. 12,909 (1993) (statement of Sen. Exon, comparing the “independent forum of the Interstate Commerce Commission to the politically controlled Department of Transportation”).

439. See *supra* text accompanying notes 123–125, 139–143; see also the discussion in Froomkin, *supra* note 120, at 810 & n.149.

This is a historical point; but it is supported by a distinctive structural consideration. If the Federal Reserve Board were subject to day-to-day presidential supervision, there would be a risk that in reality, or in public perception, the money supply would be manipulated by the President for political reasons. Even a perception of this sort would have corrosive effects on democratic processes; it would mean that the state of the economy would be perceived to be an artifact of short-term partisan considerations. This would be intolerable from the democratic point of view; it would likely have adverse effects on the economy as well. Congress could permissibly decide that it is proper to prevent this state of affairs. But this argument is limited to the particular concerns surrounding the Federal Reserve Board; it could not easily be invoked for such agencies as EPA, OSHA, or even the nominally independent NLRB.

To be sure, it would be possible to say that independence is quite generally required to protect against distortions of elections by political interest. If, for example, the EPA is subject to presidential authority, perhaps environmental enforcement will be influenced by electoral considerations. It would be most surprising if this has never happened in the past. But independence would pose obvious difficulties for a range of constitutionally recognized policies such as coordination⁴⁴⁰ and accountability. The risks to democratic elections are far greater for a political Federal Reserve than for a political EPA. And if independence were acceptable for the EPA, it would probably be acceptable nearly everywhere else. We do not think that the argument that independence is necessary should be accepted without a very strong congressional showing; the model of the Federal Reserve could not be easily adopted elsewhere without compromising central (if translated) constitutional commitments.

B. *Immunizing Specific Functions from the President*

The relevant history suggests that Congress may indeed immunize some specific functions from the President, and nothing in subsequent circumstances should draw this conclusion into question. As we have seen, the framers did not believe that prosecutorial authority need be concentrated in the President operating through the Attorney General.⁴⁴¹ Moreover, our argument based on changed circumstances does not lead to the conclusion that the Independent Counsel Act is unconstitutional. We have emphasized the need to promote accountability and to limit factionalism by ensuring that large-scale domestic policymak-

440. Consider in this regard the large number of agencies enforcing environmental policy and the importance of a coordinating presidential role in order to produce rational regulation. See generally Al Gore, *From Red Tape to Results: Creating a Government that Works Better & Costs Less* (National Performance Committee, 1993) (concluding that helpful method to eliminate waste would be to give the President greater power); see also Breyer, *supra* note 189, at 10-29 (cataloguing problems in lack of coordination and systematization of policy).

441. See *supra* Part II.A.

ing is not placed in independent actors.⁴⁴² It would be an unwarranted expansion of the argument to apply it to the independent counsel, who does not engage in domestic policymaking in the sense in which we understand that term.⁴⁴³

There is a further consideration. As in the case of the Federal Reserve Board, a special structural justification applies to the independent prosecutor. The structural consideration lies in the notion, of course familiar to the framers, that no person should be judge in his own cause.⁴⁴⁴ It is at least unseemly⁴⁴⁵ to say that the prosecution of high-level executive branch officials will be controlled by other high-level executive branch officials. Congress could reasonably decide that the appearance or reality of favoritism requires an independent prosecutor for such officials. If the congressional judgment is reasonable on this point, courts should defer, especially in light of the complexity and delicacy of the underlying questions. To be sure, many people have offered plausible objections to the Independent Counsel Act,⁴⁴⁶ but these objections raise issues of policy, not of constitutional obligation, at least in light of the Constitution's structural commitment to preventing self-dealing by government officials.

The Court's validation of the Independent Counsel Act is probably the largest and most controversial innovation in the recent cases. Before 1980, there was general agreement that executive officers must be under the authority of the President; the Court distinguished *Humphrey's Executor* from *Myers* on precisely this ground.⁴⁴⁷ Now the distinction lies elsewhere, in the line between independence, which is sometimes constitutional, and encroachment, which is not.⁴⁴⁸ On the old view, independent agencies performed adjudicative and legislative functions as well as executive functions, and it was for this reason that they could be insulated

442. See *supra* text accompanying notes 401–402.

443. To say this is not to deny that the independent counsel has discretion, or to say that the Act is desirable as a simple matter of policy. Note too that the statute upheld in *Morrison v. Olson*, 487 U.S. 654 (1988), allowed the Attorney General to discharge the counsel for “good cause,” a provision that meant the counsel is not truly independent, and that therefore makes the constitutional issue simpler. See *infra* text accompanying notes 465–466.

444. See, e.g., *The Federalist* No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

445. Cf. *Ex parte Siebold*, 100 U.S. 371, 397–98 (1879) (agreeing with Congress that it is most appropriate for circuit courts to appoint officers to monitor elections for federal officials).

446. See Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amicus Curiae in Support of Appellant at 11, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279).

447. See *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (distinguishing *Myers* on grounds that office of postmaster is purely executive, unlike a commissioner of FTC).

448. See *infra* Part IV.E. For an earlier suggestion to this effect, see Strauss, *supra* note 7, at 667–68 (advocating a separation of function and checks and balances analysis rather than formal separation of powers analysis).

from the President. But after *Morrison v. Olson*,⁴⁴⁹ execution of the laws can be split off from the President if the splitting does not prevent the President from performing his "constitutionally appointed functions."⁴⁵⁰ This is a lamentably vague standard; but it has considerable historical support insofar as it turns on whether the authority in question is within the Article II enumeration.⁴⁵¹ For present purposes our conclusion is very modest: At least insofar as we are dealing with prosecutors for whom there is a special claim for independence—as is of course the case for investigation of high-level presidential appointees—some degree of independence is constitutionally acceptable. Other efforts to insulate prosecution would be more difficult, because the prosecutorial power is now intermingled with substantive policymaking.⁴⁵²

C. What Does "Good Cause" Mean?

In *Morrison*, the Attorney General was able to discharge the independent counsel for "good cause," and the Court emphasized this point in upholding the (for this reason misnamed?) Independent Counsel Act.⁴⁵³ But the Court has not said what "good cause" means. The Court has also failed to define "inefficiency, neglect of duty, or malfeasance in office"—the ordinary standards for presidential removal of members of the independent commissions.⁴⁵⁴ Nor does anything in *Humphrey's Executor* speak to the particular issue, notwithstanding some casual dicta suggesting a high degree of independence.⁴⁵⁵

This is an extremely important matter. There is no controlling judicial decision on how "independent" the independent agencies and officers can legitimately claim to be. If the statutory words allow for considerable presidential removal (and hence supervisory) power, the notion of independent administration of the laws can be solved simply as a matter of statutory construction. Perhaps Congress has not, in fact, created any truly independent administrators.

We think that it would indeed be possible to interpret the relevant statutes as allowing a large degree of removal and supervisory power to remain in the President. At the very least, the statutory words do not entirely immunize commissioners from the control of the President, but

449. 487 U.S. 654 (1988).

450. *Id.* at 685.

451. See *supra* Part II.B.

452. Consider environmental policy, immigration policy, and the "war on drugs."

453. 487 U.S. at 696.

454. See, e.g., 15 U.S.C. § 41 (1988) (establishment of FTC); 29 U.S.C. § 661(b) (1988) (appointment of commissioners for OSHRC). But see 26 U.S.C. § 7443(f) (1988) (Tax Court judges may be removed by the President, "after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other reason." (emphasis added)).

455. In dicta, Justice Sutherland describes the commissioners of the FTC as "independent of executive authority, except in selection." *Humphrey's Executor v. United States*, 295 U.S. 602, 625 (1935); see also Greene, *supra* note 421, at 166.

instead allow him to remove them in certain circumstances. Purely as a textual matter, the words "good cause" and "inefficiency, neglect of duty, or malfeasance in office" seem best read to grant the President at least something in the way of supervisory and removal power—allowing him, for example, to discharge, as inefficient or neglectful of duty, those commissioners who show lack of diligence, ignorance, incompetence, or lack of commitment to their legal duties. The statutory words might even allow discharge of commissioners who have frequently or on important occasions acted in ways inconsistent with the President's wishes with respect to what is required by sound policy. Perhaps in some such cases, the statutory basis for discharge has been met.

Of course, the case would be easier if the President could show that the officer's policy judgments amount not just to policy disagreements but to unquestionable inefficiency, neglect, or malfeasance—because they reflect (for example) incompetence or a refusal adequately to consider consequences. But perhaps the President's power could go further. A commissioner of the FTC might well, for example, be thought to neglect her duty if she consistently ignores what the President has said, at least if what the President has said is supported by law or by good policy justifications. At the minimum, we suggest that the statutory words could be taken to allow a degree of substantive supervision by the President.

This result might seem strongly counterintuitive in light of the frequent understanding that independent agencies are entirely immunized from presidential policymaking.⁴⁵⁶ But there is a partial precedent for precisely this conclusion: *Bowsher v. Synar*.⁴⁵⁷ In that case, the Court held that Congress could not delegate power to administer the Gramm-Rudman-Hollings Act to the Comptroller General, because—and this is a central claim—the Comptroller was subject to congressional will. In the Court's view, those who execute the law must not be subject to the policymaking authority of the Congress except insofar as legislative instructions are embodied in substantive law.⁴⁵⁸ The relevant statute allowed the Congress to discharge the Comptroller for "inefficiency," "abuse of office," "neglect of duty," or "malfeasance."⁴⁵⁹ The Court said that these words conferred on Congress "very broad" removal power and would authorize Congress to remove the Comptroller for "any number of actual or perceived transgressions of legislative will."⁴⁶⁰

The words governing congressional power over the Comptroller General and presidential power over independent agencies are substantially the same. If those words have the same meaning in these admittedly different contexts, the President turns out to have considerable power over the commissioners. If the words have the same meaning, the

456. See, e.g., *Humphrey's Executor*, 295 U.S. at 628; see also *supra* note 438.

457. 478 U.S. 714 (1986).

458. See *id.* at 726.

459. 31 U.S.C. § 703(e)(1)(B) (1988).

460. 478 U.S. at 729.

President has "very broad" removal power over the commissioners of the independent agencies, with correlative powers of supervision and guidance. It would follow that the independent agencies are in fact subject to a considerable degree of presidential control "for any number of actual or perceived transgressions of presidential will." They are not, as a matter of statute, "independent" of him at all.

This is an adventurous and not unassailable conclusion. As we have noted, it is inconsistent with the general⁴⁶¹ understanding that independent agencies are immune from the policy oversight of the President. It would of course be plausible to suggest that because of the difference in the contexts, the same words should have different meanings. Perhaps a statute restricting congressional power over the Comptroller General should be understood to impose thinner limitations than a statute controlling presidential power over independent commissioners—even if the words are the same. Such a reading would hardly be an implausible reconstruction of legislative goals. Congress unquestionably created many of the independent agencies in a period in which it sought to limit presidential supervisory power.

In view of what we see as the constitutional backdrop, however, courts should probably invoke a "clear statement" principle;⁴⁶² one that interprets statutes to grant the President broad supervisory power over the commissions. On this approach, courts would allow the President such power unless Congress has expressly stated its will to the contrary. Such an approach would minimize the risks of the independent agency form and promote coordination and accountability in government. It would recognize that many independent agencies perform important policymaking functions, and that the performance of such functions by truly independent agents is plausibly inconsistent with the constitutional structure.⁴⁶³ At the very least, we would require Congress to speak unambiguously if it wants to compromise those goals.⁴⁶⁴ These suggestions do not answer the question of precisely when the President may discharge the commissioners. But they do indicate that he has far more authority than is usually thought.

461. This common understanding is not, however, universal; the American Bar Association appears to agree with the point we are making here. See American Bar Assoc. Recommendation, reprinted in Strauss & Sunstein, *supra* note 11, app. at 206–07. The Department of Justice also holds this view. See Memorandum for Hon. David Stockman Director, Office of Management and Budget, reprinted in Peter M. Shane & Harold H. Bruff, *The Law of Presidential Power: Cases and Materials* 355, 357–58 (1988).

462. Cf. *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (declaring the Court will construe narrowly all delegated powers that may curtail citizens' right to travel).

463. See *supra* Part IV.A.

464. See also Strauss & Sunstein, *supra* note 11, at 197–205.

D. *May Congress Create Truly Independent Administrators?*

Suppose that the independent counsel could never be removed by the Attorney General, even "for good cause." Or suppose that Congress amended the statute governing the FTC so as to provide that the commissioners are independent of both Congress and the President, in the sense that they could be removed by the President only for "high crimes and misdemeanors" or "gross misconduct amounting to criminality." Would such statutes be constitutional?

Nothing in the relevant cases clearly decides these questions. Probably the best answer is that the independent counsel must be removable for "good cause" in order to qualify as an "inferior officer" (and thus be appointable, as the current law provides, by judges⁴⁶⁵). The notion of "inferior" implies the existence of a superior, and a truly independent counsel—that is, one not at all controllable by the Attorney General or the President—would have no superior. We may therefore infer from the *Morrison* Court's emphasis on the "good cause" provision that some sort of control by the Attorney General (or otherwise through the chain of command headed by the President) is a constitutional imperative for "inferior officers."⁴⁶⁶ Nothing we have said here is inconsistent with this understanding.

The question is more difficult for the Federal Trade Commissioner. He is not an inferior officer appointed by judges, and indeed he has been appointed through the normal channels, that is, by the President subject to advice and consent by the Senate. The question is therefore one of permissible constraints on the power of removal and supervision. In *Bowsher* and indeed *Myers* itself, Congress reserved to itself a role in removal—raising the problem of encroachment⁴⁶⁷—and a truly independent commissioner (or head of OSHA, or the EPA, or the Department of Education) would not suffer from that infirmity. On the question whether Congress can create genuinely independent administrators, there is precious little guidance.

Probably the best answer is that as a general rule (and subject to important exceptions), Congress is without constitutional power wholly to immunize administrative officers exercising important discretionary policymaking authority from presidential control. Congress is therefore without power to create a "headless Fourth Branch" of government.⁴⁶⁸

465. See U.S. Const. art. II, § 2, cl. 2; 28 U.S.C. § 593(b) (1988).

466. See *Morrison v. Olson*, 487 U.S. 654, 691–93 (1987).

467. See *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (statute made Comptroller General removable only at initiative of Congress); *Myers v. United States*, 272 U.S. 52, 107 (1926) (Act required consent of Congress to remove Postmaster).

468. See *Freytag v. Commissioner*, 111 S. Ct. 2631, 2661 (1991) (Scalia, J., concurring) (agreeing that Chief Judge of Tax Court is a "head of a department"); see also *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("[Administrative bodies] have begun to have important consequences on personal rights. . . . They have become a *veritable fourth branch* of the Government, which has deranged our three-branch

To be sure, true independence in administration does not create the distinctive dangers of encroachment and aggrandizement;⁴⁶⁹ but it does threaten the core constitutional commitments to political accountability, expedition in office, and coordinated policymaking. If our argument from changed circumstances is persuasive, Congress cannot properly immunize such officers from the President without violating the Vesting Clause of Article II and thus exceeding its power under the Necessary and Proper Clause.

There are important exceptions to this general proposition. These would include (1) purely adjudicative officers,⁴⁷⁰ (2) people who perform ministerial duties,⁴⁷¹ and (3) people who perform merely investigatory and reportorial functions—recall that Congress can have a staff.⁴⁷² All three exceptions have historical roots. But subject to these exceptions, we believe that Congress could not create fully independent officials without offense to the constitutional structure, at least in the absence of special circumstances. This conclusion follows from the constitutional commitments to coordination, accountability, and prevention of factionalism.

Whether current courts should so conclude is another question. It may be that in light of the difficulty of the relevant line-drawing problems, courts should defer to legislative judgments, and the constitutional prohibition should be under-enforced by judges.⁴⁷³ Certainly courts should give Congress the benefit of the doubt in close cases.

E. *Independence Versus Aggrandizement*

Here we arrive at a crucial innovation in the post-1980 cases—the distinction between encroachment and independence. The cleanest line between *Bowsher* and *Chadha* on the one hand and *Mistretta* and *Morrison* on the other is that in the first two cases Congress attempted to give itself a degree of ongoing authority over the administration of the laws.⁴⁷⁴ The

legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.” (emphasis added)).

469. See *infra* Part IV.E.

470. See *supra* text accompanying note 420.

471. See *id.*

472. This was the meaning of the reference to quasi-legislative duties in *Humphrey's Executor*; the Court was not discussing rulemaking power, in which the FTC was not engaged at the time. See *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935).

473. This is Justice Scalia's approach to the nondelegation doctrine. See *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting); see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1693–97, 1799–1800 (1975).

474. Compare *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (finding unconstitutional simultaneous grant of executive powers to and retention of congressional control over Comptroller General) and *INS v. Chadha*, 462 U.S. 919, 959 (1983) (finding unconstitutional congressional reservation of veto power over executive decision to allow deportable alien to remain in United States) with *Mistretta*, 488 U.S. at 411 (upholding Act limiting President's removal power over Federal Sentencing Commissioners to “good

Court has firmly set itself against such aggrandizement. In the Court's view, independence in administration is one thing; congressional encroachment into the administrative process is quite another. "Aggrandizement" and "encroachment" are defining constitutional evils. Separation of administration from the President and Congress does not involve either aggrandizement or encroachment, and is far less objectionable.

The Court has not given a clear rationale for this sharp distinction. In some ways it seems quite puzzling. For one thing, independence can be understood as a form of aggrandizement. Congress might make agencies independent not to create real independence, but in order to diminish presidential authority over their operations precisely in the interest of subjecting those agencies to the control of congressional committees.⁴⁷⁵ Independence, in short, might be a way of increasing legislative power over agencies. More fundamentally, the distinction sometimes reads like a kind of "turf protection" model of the Constitution, one that is disassociated from text, history, or structure, and also from any underlying values that maintenance of the relevant "turfs" are supposed to preserve.⁴⁷⁶

The question, in short, is this: How is the presence of a congressional role in law-execution worse than an absence of a presidential role? It might be thought that the two pose equivalent risks to constitutional commitments.

But there are in fact plausible structural reasons for the distinction. First, congressional control over administration creates a specter of combination of lawmaking functions and law-executing functions. The decision to divide the two is unambiguous in the Constitution, and that decision is in turn a product of a belief that the division is an important guarantor of private liberty, democratic control over government, and protection against factionalism. Encroachment is plausibly a greater threat to these values than independence.⁴⁷⁷

cause") and *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (upholding Act requiring that Attorney General have "good cause" for removing independent counsel).

475. See Sunstein, *supra* note 430, at 430; Weingast & Moran, *Bureaucratic Discretion*, *supra* note 433, at 768-70; Weingast & Moran, *Runaway Bureaucracy*, *supra* note 433, at 33-34.

476. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1546-48 (1991) (arguing for substantive, individualist approach to separation of powers rather than a structural "turf"-oriented one).

477. To be sure, the broad discretionary authority of an agency may also combine functions. But the Administrative Procedure Act (APA) helps counter this problem, see 5 U.S.C. §§ 554, 556, 557 (1988), and we think these provisions have constitutional foundations. It is not an adequate answer to say that independence itself threatens this value. Independent agencies are subject to a degree of internal separation of functions. See *id.* § 554 (precluding agency employees who engage in prosecution from participating or advising in decisions). This provision, together with other safeguards in the APA, counteracts some of the risks involved in combination of execution and legislation. We think that provisions of this kind are responsive to genuine constitutional concerns; they

Second, the prohibition on congressional participation operates as a check against open-ended delegations of power. If Congress may not delegate administrative authority to its own agents, it is likely to be clearer in delegating policymaking authority in the first instance. We can understand the Court's hostility to encroachment as having roots in the structural commitment against open-ended delegations of authority, a commitment with clear connections to the goal of providing a kind of accountability.⁴⁷⁸ Congress may be content not to set out law in advance if it knows that it may control implementation decisions on a case-by-case basis. Even if the Court will not play a large role in enforcing the nondelegation doctrine directly, mostly for institutional reasons,⁴⁷⁹ it can discipline the prospect of delegation through institutionally acceptable devices that impose incentives on Congress to limit the scope of delegation.

Courts have not yet explained the distinction between independence on the one hand and encroachment and aggrandizement on the other. We do not suggest that it should be made as critical as the Supreme Court has made it. But if the foregoing arguments are right, the distinction can be explained by reference to constitutional structure. It makes sense as a means of separating functions and discouraging broad delegation of law-making authority.

F. *Cross-Branch Appointments*

Morrison upholds cross-branch appointments,⁴⁸⁰ but the Court was properly cautious about the basic idea, which could produce many oddities. Suppose, for example, that Congress said that judges would henceforth appoint the Assistant Secretaries of State and Defense and the Assistant Attorneys General. In such cases, there would have to be an implicit structural limit on Congress' power under the Inferior Officers

have a kind of constitutional status, not in the sense that courts should mandate them, but in the sense that they grow out of constitutional commitments.

478. We think that this idea does have roots in Article I of the Constitution, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (citing Necessary and Proper Clause as support for prohibiting congressional abdication or transfer of "essential legislative functions"); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* 92-97 (2d ed. 1979) (criticizing as unconstitutional liberal delegations of power by Congress to administrative agencies); see also Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 *Am. U. L. Rev.* 295 (1986) (describing how broad delegations of power defeat the rule of law as embodied in the Constitution), even though we do not believe that courts should carefully police the prohibition, see Richard B. Stewart, *Beyond Delegation Doctrine*, 36 *Am. U. L. Rev.* 323, 324 (1987) (arguing against court invalidation of statutes based on over-delegation).

479. See *Mistretta v. United States*, 488 U.S. 361, 371-74 (1989); *id.* at 413-16 (Scalia, J., dissenting) (but concurring on fall of nondelegation doctrine); Stewart, *supra* note 478, at 326.

480. See *Morrison v. Olson*, 487 U.S. 654 (1988).

Appointment Clause.⁴⁸¹ Otherwise Congress could wreak havoc with the system of checks and balances.

But when are cross-branch appointments constitutional? Probably the answer lies in the Court's emphasis in *Morrison* on the absence of an "incongruity" in the vesting of appointment power in another branch.⁴⁸² We should understand the term to refer to principles of constitutional structure, having to do with the integrity of each branch. Where there is incongruity, the Constitution contains a structural barrier to the placement of appointing authority. It follows that in the cases we have hypothesized, there would be a valid objection based on the system of checks and balances. But this idea casts no doubt on *Morrison* itself. Indeed, in *Morrison* presidential appointment might itself have been incongruous in light of the obvious conflict of interest. The congressional judgment was permissible only for this reason.

If this is the relevant concern, cross-branch appointments should be permitted only in the narrowest circumstances. On this view, *Morrison* was a case about the oddity of allowing the President to be the judge in his own cause. It does not stand for any broader proposition.

G. *Precisely Which Officers May Be Protected with a Good Cause Standard?*

Both *Mistretta* and *Morrison* allow certain officials exercising important governmental responsibilities to be immunized from plenary presidential control.⁴⁸³ But it is surely true that some employees must serve at the will of the President. Without offering a detailed analysis of the complexities here, we suggest that there are four distinct categories of cases, and that the categories should be treated differently.

(1) High-level officials who exercise foreign affairs powers and other authorities included in the enumerated authority of the President⁴⁸⁴ must be at-will employees. This much follows from adherence to the original understanding. As we have seen, the founding belief in a unitary executive entailed presidential control over a range of important functions.⁴⁸⁵ Nothing in current circumstances argues in the other direction. Thus (to take the two principal examples) the Secretary of State and the Secretary of Defense must be at-will employees.

481. See U.S. Const. art. II, § 2, cl. 2.

482. See 487 U.S. at 676. One may question, however, whether this judgment of congruity is one the Constitution allows the Supreme Court to make. Article II, section 2, clause 2 provides that Congress may "by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." The emphasized language may indicate that the judgment as to propriety is left to Congress alone. Consider section 3 of Article II, which provides that the President "may adjourn them to such Time as he shall think proper," which likewise would appear to vest the judgment in the President alone. See also U.S. Const. art. I, § 9, cl. 1 (states may continue migration of people as they "think proper" to admit).

483. See 488 U.S. at 410; 487 U.S. at 691.

484. See U.S. Const. art. II, § 2.

485. See *supra* text accompanying notes 121-122, 131.

(2) Good cause limitations are permissible for officers who exercise adjudicative or ministerial functions. The original understanding exemplified this judgment,⁴⁸⁶ and our argument for changed circumstances does not undermine or complicate that analysis.

(3) The same conclusion applies to those few officials who have the sorts of conflicts of interest exemplified by the Federal Reserve Board and independent counsels. This conclusion builds on historical understandings.⁴⁸⁷ It also fits comfortably with current institutional arrangements.

(4) Domestic officials who do not fall within (1), (2), or (3) may be protected by "good cause" provisions, but for the most part only if those provisions are interpreted so that the relevant officials are controllable through general policy directions of the President. As we have said, a good cause standard should be interpreted to allow for a high degree of presidential supervisory authority.⁴⁸⁸ At least in most cases involving important policymaking functions, a removal standard would be unconstitutional if it were inconsistent with this idea, that is, if it entirely eliminated presidential control over general policy decisions. It follows that Congress could allow many officials to be protected by a "good cause" provision—not merely the heads of such traditionally "independent" agencies as the FCC, FTC, and SEC, but also those of (for example) the EPA and some of the Cabinet departments as well. But on our understanding, a good cause limitation does not immunize the relevant officials from the policy direction and oversight of the President.⁴⁸⁹

CONCLUSION

The framers did not constitutionalize presidential control over all that is now considered "executive"; they did not believe that the President must have plenary power over all we now think of as administration. The textual argument to the contrary uses twentieth century understandings to give meaning to eighteenth century terms.

With respect to implementation of the laws, history suggests that the framers understood Congress to have broad power to structure government arrangements as it saw fit. Many prosecutors, state as well as federal, were free from the control of the Attorney General and the President. The first Congress also made the Comptroller free from presidential control, because some of his functions were related to those of Congress and the judiciary. The Postmaster General was similarly immu-

486. See *supra* text accompanying notes 103, 126–130, 236–248 (discussing original view that ministerial functions, and also those involving adjudicative powers, could be immunized from the President).

487. See *supra* note 137 and accompanying text (discussing founders' desire to keep separate the purse and sword); *supra* text accompanying note 444 (noting Hamilton's concern that no person should be judge in his own cause).

488. See *supra* Part IV.C.

489. Of course, this notion leaves a degree of vagueness, and it does not resolve many particular issues that might arise through assertions of presidential authority.

nized from presidential control, because of his distinctive role in spending taxpayer funds. The Opinions Clause would be entirely superfluous if the framers understood the President to have plenary control over administration; why would the framers deem it necessary to give the President the power to demand written opinions from people over whom he had full control as a matter of constitutional compulsion? Finally, the text and history of the Necessary and Proper Clause suggest that Congress had considerable authority to structure the executive branch as it chose.

In light of all these considerations, our first goal has been to respond to the persistent notion that if we care about constitutional text and history, independent prosecutors and independent agencies are an embarrassing accommodation to political necessity, or a shameful compromise with expediency. We have shown that the belief in a strongly unitary executive does not derive from the framers themselves.

We reach this conclusion about the framers with reluctance. The belief in a strongly unitary executive has considerable appeal. It is simple and unambiguous. It fits well with important political and constitutional values, including the interests in political accountability, in coordination of the law, and in uniformity in regulation. Believing that these interests have constitutional status, we have ventured an argument on behalf of the strongly unitary executive, one that emphasizes changed circumstances and an interpretive practice concerned with fidelity to original commitments and labeled here as translation.

The crucial development in this regard is the downfall of the nondelegation doctrine and the rise of unforeseen administrative agencies exercising wide-ranging discretionary power over the domestic sphere. In view of this development, it would not be faithful to the original design to permit officers in the executive branch, making discretionary judgments about important domestic issues, to be immunized from presidential control. We have therefore sketched an argument on behalf of a strongly unitary executive, in which the President has a high degree of supervisory and removal authority over most officials entrusted with discretion in the implementation of federal law. We have applied this argument to many areas of current dispute.

We believe that this view is consistent with constitutional commitments and that it maintains fidelity with those commitments in dramatically changed circumstances. But it is important to acknowledge that our argument is based on a distinctive method, one that rejects ahistorical claims about the unitary executive. It follows that the constitutional commitment to unitary execution of the laws should not be rooted in the supposed mandates of history. It should be based instead on the effort to interpret the Constitution faithfully over time, an effort that will inevitably involve a large measure of pragmatic judgment, and historical understanding.

APPENDIX

The Great Departments

	Foreign Affairs†	War††	Treasury†††
Denomination	An act for establishing an Executive Department, to be denominated the Department of Foreign Affairs.	An act to establish an Executive Department, to be denominated the Department of War.	An Act to establish the Treasury Department
Establishing	§ 1. <i>Be it enacted, &c.</i> , That there shall be an Executive department, to be denominated the Department of Foreign Affairs,	§ 1. <i>Be it enacted, &c.</i> , That there shall be an executive department to be denominated the Department of War,	§ 1. <i>Be it enacted, &c.</i> , That there shall be a Department of Treasury,
Head Officer	and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs,	and that there shall be a principal officer therein, to be called the Secretary for the Department of War,	in which shall be the following officers, namely: A Secretary of the Treasury, to be deemed head of the department; a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury, which assistant shall be appointed by the said Secretary.
Head officer's Duties	who shall perform and execute such duties as shall from time to time be enjoined on or entrusted to him by	who shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by	§ 2. <i>And be it further enacted</i> , That it shall be the duty of the Secretary of the Treasury to digest and prepare

†. Act of July 27, 1789, ch. 4, 1 Stat. 28 (emphasis added).

††. Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (emphasis added).

†††. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

Head officer's Duties (Cont.)

Foreign Affairs

the President of the United States, agreeable to the Constitution, relations or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs, as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall, from time to time, order or instruct.

War

the President of the United States, agreeable to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military or naval affairs, as the President of the United States shall assign to the said department, or relative to the granting of lands to persons entitled thereto, for military services rendered to the United States, or relative to Indian affairs; And furthermore, that the said principal officer shall conduct the business of the said department in such manner, as the President of the United States shall from time to time order or instruct.

Treasury

plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue, and the public expenditures; to superintend to collection of the revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant under the limitations herein established, or to be hereafter provided, all warrants for monies to be issued from the Treasury, in pursuance of appropriations by law; to execute such services relative to the sale of the lands belonging to the United States, as may be by law required of him; to make report, and give information to either branch of the legislature, in person or in writing (as he may be required) respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office; and generally to perform all such services relative to the finances as he shall be directed to perform.

Foreign Affairs

Inferior Officers

§ 2. *And be it further enacted*, That there shall be in the said department, an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief Clerk in the Department of Foreign Affairs,

War

§ 2. *And be it further enacted*, That there shall be in the said department an inferior officer, to be appointed by the said principal officer, to be employed therein as he shall deem proper, and to be called the chief clerk in the department of war,

Treasury

§ 3. *And be it further enacted*, That it shall be the duty of the Comptroller to superintend the adjustment and preservation of the public accounts; to examine all accounts . . .

§ 4. *And be it further enacted*, That it shall be the duty of the Treasurer to receive and keep the monies of the United States, and to disperse the same upon warrants drawn by the Secretary of the Treasury . . .

§ 5. *And be it further enacted*, That it shall be the duty of the Auditor to receive all public accounts . . .

§ 6. *And be it further enacted*, That it shall be the duty of the Register to keep all accounts of the receipts and expenditures of the public money . . .

Removal power

and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department.

§ 7. *And be it further enacted*, That whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office of Secretary, the Assistant shall, during the vacancy, have the charge and custody of the records, books, and

	Foreign Affairs	War	Treasury
Removal power (Cont.)		department.	papers, appertaining to the said office.
Independence	<p>§ 3. <i>And be it further enacted</i>, That the said principal officer, and every other person to be appointed or employed in the said department, shall, before he enters on the execution of his office or employment, take an oath or affirmation well and faithfully to execute the trust committed to him.</p> <p>§ 4. <i>And be it further enacted</i>, That the Secretary for the Department of Foreign Affairs, to be appointed in consequence of this act, shall forthwith after his appointment, be entitled to have the custody and charge of all records, books and papers in the office of Secretary for the Department of Foreign Affairs, heretofore established by the United States in Congress assembled.</p>	<p>§ 3. <i>And be it further enacted</i>, That the said principal officer, and every other person to be appointed or employed in the said department, shall, before he enters on the execution of his office or employment, take an oath or affirmation well and faithfully to execute the trust committed to him.</p> <p>§ 4. <i>And be it further enacted</i>, That the Secretary for the Department of War, to be appointed in consequence of this act, shall forthwith after his appointment, be entitled to have the custody and charge of all records, books and papers in the office of Secretary for the Department of War, heretofore established by the United States in Congress assembled.</p>	<p>§ 8. <i>And be it further enacted</i>, That no person appointed to any office instituted by this act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce</p>
Transition			