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Cover Page Footnote

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CONSISTENT WITH THE LETTER AND SPIRIT: *SEILA LAW V. CONSUMER FINANCIAL PROTECTION BUREAU* AND THE FUTURE OF PRESIDENTIAL REMOVAL POWER

Patrick J. Sobkowski[*]

I. INTRODUCTION

The original Constitution provided a basic vessel, but the Framers knew that the contents of that vessel would "depend on the attitude and decisions of Congress" in subsequent years.[1] The structure of the federal

[*] J.D., University of Dayton School of Law. I would like to extend my gratitude to Jeffery Schmitt and James Steiner-Dillon for reading the early drafts of this paper and for their unending guidance and mentorship. Thanks are also due to Julian Davis Mortenson, Jonathan Gienapp, John Dearborn, Calvin TerBeek, Noah Rosenblum, Nick Bednar, Tommy Bennett, Blake Emerson, and Richard Primus for their thoughtful correspondence and recommendations throughout this project. Special thanks to Michael McConnell of Stanford Law School for generously sharing an early manuscript of his new book. All remaining errata are the author's.

[1] LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 17 (2d ed. 1956).

government and the departments housed within it, then, would be left to the political process.[2] With its decision in *Seila Law v. Consumer Financial Protection Bureau*, the Supreme Court eschewed that notion.[3] At issue in the case was the constitutionality of the Consumer Financial Protection Bureau's ("CFPB") structure, specifically, the statutory structure of the Agency's single director.[4] The statute provided for a single director, who was, among other things, responsible for enforcing nineteen federal statutes, "covering everything from home finance to student loans to credit cards to banking practices."[5] The majority believed such power was too much power.[6] Writing for a five to four majority, Chief Justice Roberts struck down the statutory structure as violative of the separation of powers.[7] In so doing, the majority provided a strong endorsement of the "unitary executive theory," which holds "the "executive Power'—all of it—is 'vested in a President'" who must faithfully execute the laws.[8] In dissent, Justice Kagan criticized the majority opinion for its formalistic reading of the Constitution's structure.[9] Justice Kagan instead applied a functionalist approach to the question in *Seila Law*, recognizing that historically, the "Court has left most decisions about how to structure the Executive Branch to Congress and the President . . . ."[10] *Seila Law* is merely a microcosm of a much broader debate concerning the constitutional validity of administrative agencies and the person(s) at the head of them. Further, *Seila Law* comes as part of a larger movement to revolutionize constitutional and administrative law.[11]

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[2] E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 169 (2018).

[3] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020).

[4] *Id.* at 2191.

[5] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[6] *Seila Law*, 140 S. Ct. at 2192.

[7] *See id.*

[8] *Id.* at 2191. The Unitary Executive has been endorsed time and again by high-level government officials, most recently in the Trump Administration. *See generally* William P. Barr, *The Role of the Executive*, 43 HARV. J. L. & PUB. POL'Y 605 (2020).

[9] *Seila Law*, 140 S. Ct. at 2226.

[10] *Id.* at 2224.

[11] The Unitary Executive theory has been embraced by every president, at least since Ronald Reagan. *See generally* Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 79 (2009). For discussion on the conservative legal movement, see generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008). The Roberts Court has been especially accommodating to the theory. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (holding that "dual" for-cause removal limitations violated the separation of powers). The nondelegation doctrine is yet another aspect of the impending revolution. Justice Gorsuch has joined Justice Thomas in expressing skepticism of the constitutionality of congressional delegations of legislative power to administrative agencies. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (arguing that delegations of legislative power have no basis in the original public meaning of the Constitution); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 66–91 (2015) (Thomas, J., concurring in the judgment) (arguing that, under the original public meaning of the Constitution, it is unconstitutional for Congress to delegate "the discretion to formulate generally applicable rules of private conduct."). It is important to note, however, that there is significant evidence that the originalist position on the nondelegation doctrine is historically dubious. *See, e.g.*, Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L .J. 1288 (2021) (arguing that originalist advocates of the

The first sentence of Articles I, II, and III of the Constitution grant or "vest" the respective branch with a general power.[12] These "Vesting Clauses," then, serve as initial grants of authority—legislative, executive, or judicial—to each branch of the federal government that are thus written at a certain level of vagueness and generality.[13] The language of the Article II Vesting Clause has been especially labyrinthine to scholars and judges alike.[14] Importantly, the text of the Constitution is silent with regard to how the Vesting Clauses interact with the Necessary and Proper Clause of Article I.[15]

Recent scholarship has shown that, as a matter of original understanding, the Article II Vesting Clause was a thin grant that merely contained the power to carry laws into execution.[16] Others agree that the Vesting Clause was indeed the power to execute the laws set forth by Congress, but such scholars argue that the power to execute the laws was necessarily robust and included an implicit authority to control executive officers.[17] Still, others argue that both the Article II Vesting Clause and Take Care Clause operate as distinct grants of authority.[18]

Focusing on the Article II Vesting Clause, and given that it was understood as a relatively *thin* grant of power, this Comment argues that the Necessary and Proper Clause should be understood as a kind of "catch-all" provision that leaves Congress with broad authority to structure the federal

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nondelegation doctrine are wrong to argue that no early congressional grants of rulemaking power were coercive and domestic); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (refuting the claim that the original Constitution contained a nondelegation doctrine). It remains to be seen how far the Court is willing to go, but challenges to administrative agencies on nondelegation grounds are bound to continue. *See, e.g.*, West Virginia v. EPA, No. 20-1530, 2021 U.S. LEXIS 5337 (Oct 29, 2021); Jarkesy v. SEC, No. 20-61007, 2022 U.S. App. LEXIS 13460 (5th Cir. May 18, 2022) (holding that delegating discretion to the SEC to decide whether to adjudicate fraud claims in Article III courts or in front of Administrative Law Judges violates the nondelegation doctrine).

[12] U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

[13] *See e.g.*, U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[14] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.").

[15] *See* U.S. CONST. art. I, § 8, cl. 18.

[16] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019); Julian Davis Mortenson, *What Two Crucial Words in the Constitution Actually Mean*, ATLANTIC (June 2, 2019), https://www.theatlantic.com/ideas/archive/2019/06/executive-power-doesnt-mean-much/590461/.

[17] *See, e.g.*, Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020).

[18] MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 165, 167 (Stephen Macedo ed., 2020). Professor McConnell sets forth a framework with which to analyze separation of powers disputes. *See generally id.* In McConnell's view, the Framers vested the President with certain prerogative powers, such as the commander-in-chief power, that may not be limited by Congress. *Id.* Other powers—those implicit in the Vesting Clause—are residual and may be limited by Congress pursuant to its own enumerated powers. *Id.*

government, specifically the Executive Branch, through legislation.[19] That authority includes broad power to control removal power.[20] This authority is not limitless.[21] In *Seila Law*, the Supreme Court relied on the unitarian reading of the Article II Vesting Clause to strike down the structure of the CFPB.[22] In so doing, the Court determined that shielding the single director of the CFPB from at-will removal violated the separation of powers.[23]

The majority opinion in *Seila Law* provided a ringing endorsement of the Unitary Executive Theory and sounded a warning toll for administrative agencies headed by single directors. Indeed, the Court's holding in *Seila Law* will likely spawn extensive litigation concerning the constitutionality of other important agencies whose discretion encompasses issues ranging from housing to review of patents.[24] Scholars have frequently noted that the Constitution is bereft of a presidential "removal clause."[25] Indeed, the text merely provides a method for *appointing* federal officers subject to senatorial advice and consent.[26] But, the only explicit method for removal of officers is through impeachment by the House of Representatives and conviction by the Senate.[27] Given that textual silence, this Comment contends that the Necessary and Proper Clause grants Congress plenary power to place limits on the President's removal power regarding "inferior" executive branch officers.

The position of Unitary Executive theorists—that the President wields illimitable removal power by virtue of "the executive Power," exempt from Congressional limitation—is therefore best understood as an exception

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[19] *See* U.S. CONST. art. I, § 8, cl. 18 (granting Congress the authority to legislate in pursuance of the "enumerated" powers, the Necessary and Proper Clause also grants Congress the power 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.").

[20] *See generally* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (Kagan, J., concurring in part and dissenting in part).

[21] *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (holding that the President is vested with general removal power by virtue of the Vesting Clause); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (holding that "dual" for-cause removal limitations violated the separation of powers).

[22] *See Seila Law*, 140 S. Ct. 2183 (2020).

[23] *See id.*

[24] The Court decided *Collins v. Yellen* in 2021, which calls into question the constitutionality of the Federal Housing Financing Agency ("FHFA"); the structure of the FHFA is nearly identical to that which the Court struck down in *Seila Law*. *See generally* 141 S. Ct. 1761 (2021). Additionally, the Court recently decided *United States v. Arthrex*, which concerns the constitutionality of statutory provisions that vest the Secretary of Commerce with power to appoint administrative patent judges, removable only for cause. *See generally* 141 S. Ct. 1970 (2021). For a critique of the Federal Circuit's decision in *Arthrex*, see Patrick J. Sobkowski, *A Matter of "Principal": A Critique of the Federal Circuit's Decision in* Arthrex v. Smith & Nephew, Inc., 98 WASH. U.L. REV. ONLINE 30 (2021).

[25] *See* Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 358 (1927); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 85 (1957); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 9 (2013).

[26] U.S. CONST. art. II, § 2, cl. 2.

[27] *Id.* art. II, § 4.

to the Constitutional rule.[28] Thus, in characterizing the removal limitations upheld by the Supreme Court in *Humphrey's Executor* and *Morrison v. Olson* as *exceptions* to the President's otherwise illimitable removal power, the majority opinion in *Seila Law* gets it exactly backwards.[29] This Comment is both critical and prospective in nature. It is critical in the sense that the Supreme Court's removal jurisprudence is profoundly mistaken and prospective in that it discusses the implications of that jurisprudence for other administrative agencies going forward. The Court's decision also presents an opportunity to discuss the nature of the relationship between Congress and the Executive Branch.

This Comment is divided into three parts and shall proceed as follows. Part II will provide a brief historical and doctrinal background regarding the Necessary and Proper Clause and the Article II Vesting Clause. Given the capacious literature regarding both Clauses, Part II will synthesize various primary sources, as well as marshal the relevant literature into a coherent whole. Part III will discuss the relevant case law regarding removal power, with special emphasis on *Seila Law*. The Supreme Court has never definitively embraced the Unitary Executive Theory despite vigorous advocacy to the contrary.[30] Instead, the Court has policed a kind of middle ground, wherein it "plays the field" between strictly formalistic and functionalist approaches to removal power.[31] In Part IV, this Comment will discuss the implications posed by *Seila Law* with regard to future questions regarding removal power and limitations thereon. Scholars recognize that the Court's decision will invite further litigation concerning the constitutionality of removal limitations on other agencies.[32] While the Court appears to be positioning itself to embrace a stronger form of the Unitary Executive, it should refrain from using the theory to gut agencies headed by "inferior" officers. A full embrace of the Unitary Executive would cripple administrative agencies and overrun an already-inhibited Congress.

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[28] For some helpful expositions of the Unitary Executive Theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935 (2009). *See generally* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789 (1923); WILLIAM HOWARD TAFT, THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS (1916).

[29] *Compare* Humphrey's Executor v. United States, 295 U.S. 602, 631–32 (1935), *and* Morrison v. Olson, 487 U.S. 654, 657–59 (1988), *with* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020).

[30] *See, e.g.*, *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). Justice Scalia's "lone dissent" in *Morrison* has become the standard by which unitarian scholarship is measured. *See generally* Jay S. Bybee, Printz, *the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269 (2001).

[31] *See generally* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

[32] *See* Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 390 (2020).

Therefore, the Constitution's textual silence on presidential removal should instead be understood to indicate that Congress, via the Necessary and Proper Clause, is vested with complete power to place "for cause" limitations on the removal of inferior officers. This Comment will thus provide a critique of the Court's jurisprudence regarding "principal" officers and provide a prospective analysis regarding related questions. A conclusion on the assertions made throughout will then follow in Part V.

II. BACKGROUND: THE CLAUSES IN THE SUPREME COURT AND HISTORY

This section shall provide a brief discussion of both the Necessary and Proper Clause and the Article II Vesting Clause, as each has been interpreted by the Supreme Court and throughout history. Naturally, such a discussion will entail the synthesis of primary and secondary sources concerning each Clause. Part I.A will present a survey of the relevant literature regarding the Vesting Clause. As mentioned above, scholars maintain two general positions regarding the Article II Vesting Clause: the Unitary Executive Theory and the "law execution" thesis.[33]

In Part I.B, this Comment provides a historical and doctrinal survey of the Necessary and Proper Clause. Chief Justice Marshall's discussion of the Clause's breadth in *McCulloch v. Maryland* has spurred centuries of debate, beginning principally with the Court's expansion of federal power in the New Deal Era and culminating in the "federalism revolution" of the Rehnquist Court in the late twentieth century.[34] All of this is to say that the Necessary and Proper Clause has traveled a tumultuous interpretive path, with no clear exposition of the exact contours of its reach.

A. The Executive Power and Removal

Justice Joseph Story begins his lengthy discussion of the executive branch with a declaration that defining its powers and duties "are problems among the most important, and probably the most difficult to be satisfactorily solved, of all which are involved in the theory of free governments."[35] The Articles of Confederation had shied away from vesting executive officers with too much power; indeed, executive officers had virtually no power at all under the Articles.[36] States such as Virginia consciously declined to vest its

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[33] I borrow this term from Julian Davis Mortenson. *See* Mortenson, *supra* notes 11, 16 and accompanying text.

[34] *See* Wickard v. Filburn, 317 U.S. 111 (1942); *cf.* United States v. Lopez, 514 U.S. 549 (1995) (famously striking down the 1990 Gun-Free School Zones Act as beyond Congress's legislative authority under the Commerce Clause—the first time in half a century).

[35] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 515 (Little, Brown & Co., 5th ed. 1891).

[36] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 250 (Alfred A. Knopf ed., 1996) ("The evisceration of executive power was the most conspicuous aspect of the early state constitutions, which deprived the executive of its political independence *and nearly every power that smacked of royal prerogative*.") (emphasis added).

governor with the power over areas such as foreign affairs.[37] Hesitance on the part of the Framers to empower a chief executive is understandable. After all, the Framers and their ancestors had seen the potentially deleterious results of a monarchy.[38] Furthermore, America's hard-fought independence from Great Britain had just been won based, at least in part, on its distaste for monarchical authority.[39] The Framers feared an executive officer who appealed directly to the people.[40] Instead, they anticipated that Congress would respond to the people's wishes and legislate accordingly; the President was to "*check* popular enthusiasms."[41] The key issue was to strike a balance between the weakened Confederation executive framework and a traditional monarch.[42]

The debate over the executive branch at the Constitutional Convention was extensive.[43] The delegates were deeply conflicted as to what powers should be vested in the new President.[44] Indeed, the debate concerned such seemingly-minuscule details, such as the title of the executive officer.[45] While such a debate may seem frivolous by contemporary standards, the delegates were not convinced that future incumbents would be able to resist the temptation of nobility.[46] Pennsylvania Senator William Maclay was the principal advocate against titles of nobility, stressing that they "have lately had a hard struggle for our liberty against kingly authority and everything related to that species of government is odious to the people."[47] Senator Maclay's cautionary soliloquy is indicative of similar sentiments among certain delegates.

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[37] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 136–37 (1969). For example, Thomas Jefferson agreed with William Hooper of North Carolina that a magistrate would be necessary for execution, but only for execution. *See id.* Indeed, Jefferson's 1776 draft of the Virginia Constitution contemplated a governor "without a voice in legislation, without any control over the meeting of the Assembly, without the authority to declare war or make peace," and without any of the powers traditionally associated with royal prerogatives. *Id.*

[38] RAKOVE, *supra* note 36, at 245. The early American perspective on executive power was inextricably linked to historical instances: the disputes of Stuart England; ministerial corruption under the Hanoverian kings; and lessons learned from state constitutions' attempts to cabin executive power. *Id.*

[39] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 131 (2005) ("The young continent needed a president who would be far more than a legislative presiding officer, a state governor, or a prime minister, but far less than a king."). *But see generally*, ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014) (arguing that the Framers actually endorsed broad, king-like grants of executive authority).

[40] *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2072 (2009).

[41] *Id.* (emphasis added).

[42] *See generally* MCCONNELL, *supra* note 18.

[43] *See generally* DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE (2013).

[44] *See generally* MCCONNELL, *supra* note 18.

[45] AMAR, *supra* note 39, at 135.

[46] *Id.* ("[M]any who had risked their lives against King George III strove to preserve the New World order from even the slightest hint of creeping monarchy and aristocracy.").

[47] *Id.*

Edmund Randolph, the firebrand Virginia governor, echoed the concerns that surrounded a single, united executive.[48] Randolph "strenuously opposed a unity in the Executive magistracy" and worried that the imposition of a too-powerful executive would be the "fœtus of monarchy."[49] Not unlike Randolph, delegates like Roger Sherman advocated for a single but limited executive officer.[50] He saw the executive as "nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only . . . ."[51] This position is ostensibly similar to the theory advanced by some aforementioned scholars.[52] Gouverneur Morris harbored a familiar fear; he worried that the legislative branch would usurp power.[53] He also vigorously argued for a number of executive officers to aid the President in his constitutional duties.[54] In short, a united yet limited executive was thought to be an essential feature of the separation of powers.[55]

The Framers debated the nature of the powers to be granted to the executive at length.[56] As mentioned above, the nature of "the executive Power" is hotly contested among scholars, but the Framers also were careful to explicitly enumerate a handful of concrete powers for exercise by the President.[57] The Constitution weakened the President's powers by granting some of those to Congress.[58] The Constitution thus created a government whose branches would *share* certain powers.[59]

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[48] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., Yale U. Press 1911).

[49] *Id.*

[50] *Id.* at 65.

[51] *Id.*

[52] *See, e.g.*, Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, *supra* note 16, at 1186.

[53] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 48, at 52 ("It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy and utility of the Union among the present and future States. It has been a maxim in political Science that Republican Government is not adapted to a large extent of Country because the energy of the Executive Magistracy can not reach the extreme parts of it. Our Country is an extensive one. We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it.").

[54] *Id.* at 53–54 (These executive officers included "certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amendable by impeachment to the public Justice.").

[55] For a discussion of the evolution of the American Presidency, particularly the development of the Unitary Executive Theory, see Skowronek, *supra* note 40.

[56] *See* RAKOVE, *supra* note 36, at 245.

[57] *See generally* MCCONNELL, *supra* note 18.

[58] U.S. CONST. art. I, § 8. Article I of the Constitution grants Congress the power to "declare War, . . . [t]o raise and support Armies, . . . [t]o provide and maintain a Navy," and various controls over the militia. *Id.*

[59] RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (1990) (famously asserting that the Constitution did not create a government of separated powers, but "a government of separated institutions *sharing* powers").

The Framers saw fit to give the President help to perform his constitutional duties.[60] As such, it expressly vested the President with the power to appoint executive branch officers.[61] This marked a departure from early fears that appointment in the hands of the chief magistrate would lead to corruption.[62] But, the same provision gives Congress permission to vest appointment of "inferior" officers elsewhere.[63] However, the Appointments Clause differed from the treaty power in one key aspect: only a simple majority of the Senate was necessary to confirm an appointment.[64] Treaties would necessarily have vast implications for international affairs; whereas appointments would "have no direct impact on domestic or international law . . . ."[65] In fact, the Framers initially believed that the appointment power should be unconditionally vested in the President; the initial draft of the Constitution did not require senatorial advice and consent.[66] This would change quickly, however, when the provision was amended by committee to read as it does today.[67]

The Appointments Clause inevitably begged the question of removal power. The question was largely left unresolved at the Constitutional Convention, and as a result, the Constitution's only express provision for removal is by way of impeachment.[68] Indeed, aside from the removal via the Impeachment Clause, "[t]he subject was not discussed in the Constitutional Convention."[69]

As mentioned, the removal power was not discussed at length at the Constitutional Convention; instead, it was debated at length in what has been deemed "The Decision of 1789."[70] The Decision (or indecision) took place during the First Congress and centered around the establishment of several

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[60] *See generally* LINDSAY M. CHERVINSKY, THE CABINET: GEORGE WASHINGTON AND THE CREATION OF AN AMERICAN INSTITUTION (2020). Curiously, the Constitution is silent with regard to a board of advisors or "cabinet" for the President to consult. *Id.*

[61] U.S. CONST. art. II, § 2, cl. 2. ("[A]nd 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.").

[62] *See* WOOD, *supra* note 37, at 144. William Blackstone discussed the power conferred on the English monarchs by appointment power. *Id.* The ability of the King to enlist the help of officers "extended the influence of government to every corner of the nation." *Id.*

[63] U.S. CONST. art. II, § 2, cl. 2.

[64] *Id.*

[65] AMAR, *supra* note 39, at 192.

[66] *See* STORY, *supra* note 35, at 351.

[67] *See id.* at 351–52.

[68] U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

[69] Myers v. United States, 272 U.S. 52, 109–10 (1926).

[70] *See* CLINTON ROSSITER, 1787: THE GRAND CONVENTION 302 (1966).

executive departments—specifically, a department of foreign affairs—and who should have the power to control the officials in those departments.[71]

The debate on removal was necessary; after all, the various state constitutions that preceded the new Constitution were inconclusive on the issue.[72] The relative confusion was further compounded by Alexander Hamilton's concession in *The Federalist* that "advice and consent" were necessary for both appointment *and* removal of executive branch officers.[73] Aside from Hamilton's passing mention, the removal power was absent from constitutional debate until the First Congress.[74]

The Representatives at the First Congress debated the removal power at length.[75] But that debate arguably did not resolve itself.[76] The issue arose out of necessity; if the President were to manage the government effectively, he would need helping hands that were at least somewhat answerable to him.[77] New Jersey Representative Elias Boudinot advocated that the First Congress "carry the intention of the Constitution into effect" by creating various executive departments.[78]

As the debate in Congress unfolded, there emerged four principal theories of removal authority.[79] Each theory had a handful of supporters, but the "impeachment theory" was the first to be disposed of, presumably because of the cumbersome nature in practice.[80] The dismissal of the "impeachment theory" makes sense; impeachment was—and still is—a drastic measure, and the practical difficulties resulted in very few adherents.[81] Limiting removal power exclusively to impeachment would have left the President at the mercy of Congress, which would have inevitably resulted in inefficiency in government.[82]

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[71] *See* J. DAVID ALVIS ET AL., THE CONTESTED REMOVAL POWER, 1789–2010, at 18 (2013).

[72] *Id.* at 17.

[73] THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The consent of [the Senate] would be necessary to displace as well as to appoint.").

[74] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 36 (1997).

[75] *See generally id.*

[76] *See, e.g.*, Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism*, (May 1, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566.

[77] *See* Saikrishna Prakash, *New Light of the Decision of 1789*, 91 CORNELL L. REV. 1021, 1029 (2006).

[78] ALVIS ET AL., *supra* note 71, at 17.

[79] *Id.* at 18. The first, the "impeachment theory" held that impeachment was the *only* textually enumerated mode of removal. *Id.* The "advice-and-consent theory" vested the removal power in the President and Congress jointly, and no other mode was permissible. *Id.* The "congressional delegation theory" held that, since the text was silent, Congress could vest removal power in the President alone, or reserve some latitude for itself. *Id.* Finally, adherents to the "executive power theory" said that the grant of "executive Power" in Article II vested the President *alone* with removal power. *Id.*

[80] *Id.* at 18–19.

[81] *See* Prakash, *supra* note 77, at 1035. The impeachment theory had the support of "no more than two or three Representatives." *Id.* (footnote omitted).

[82] *See generally* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 48 (showing that generally there were inefficiency concerns as to removal power being tied to impeachment).

The "executive power" theory found support in none other than James Madison, albeit after switching sides, who argued that the "[C]onstitution affirms that the executive power shall be vested in the [P]resident."[83] The "executive power" theory was especially palatable to those Representatives who supported a broad interpretation of the Article II Vesting Clause.[84] Fisher Ames of Massachusetts also prominently joined the proponents of the "executive power" theory, arguing to "put all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of one man, demand the aid of others."[85] Additionally, George Clymer of Pennsylvania bluntly asserted that "the power of removal was an executive power" and therefore rested with the President by virtue of "the express words" of the Vesting Clause.[86] Eventually, even Hamilton joined Madison and Clymer as among those advocating for broad presidential authority to remove officers.[87] The evidence is supportive of assertions that prominent Representatives believed in broad removal authority for the President.[88] As such, this theory of removal power conveniently maps onto the modern rendition of the Unitary Executive Theory embraced by a number of scholars.[89]

Despite the demonstrated agreement between prominent representatives, legal historians have shown that the "Decision of 1789" perhaps was not a decision at all.[90] Indeed, there is much historical evidence that demonstrates a lack of consensus in the First Congress regarding the removal question.[91] The Treasury Act enacted by the First Congress contained an anti-corruption clause, which enabled the judiciary to remove Treasury officers who had been convicted of "high misdemeanors."[92] In essence, the "high misdemeanors" language was legally equivalent to the

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[83] *See* Prakash, *supra* note 77, at 1040.

[84] *See* Calabresi & Prakash, *supra* note 28, at 644.

[85] *Id*.

[86] CURRIE, *supra* note 74, at 38.

[87] *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 155 (2018).

[88] *See* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 195 (2015).

[89] For some helpful, prominent conservative interpretations of the Article II Vesting Clause, see Morrison v. Olson, 487 U.S. 654, 697–99, 704–06, 710–13, 715 (Scalia, J., dissenting). *See generally* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006); MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007).

[90] *See generally* Shugerman, *supra* note 76

[91] *See id.* at 3.

[92] *Id*. at 8.

"modern "inefficiency, neglect of duty, or malfeasance in office" language used in statutes such as the one at issue in *Seila Law*.[93]

In other words, the First Congress, typically used by Unitary theorists to show that the original understanding of the Article II Vesting Clause contained the removal power, did not quite settle on indefeasible presidential removal power.[94] Rather, the vesting of removal authority in the judiciary by the Treasury Act shows that Congress seems to have rejected the Unitary Theory.[95] Further, the "high misdemeanors" language (and its modern equivalent) has been shown to be a removal *permission*.[96] This means that the President may remove an officer, but *only* if that officer has acted wrongfully, failed to perform their statutory duties, or has performed their duties in a wasteful manner.[97] In other words, the President may not simply remove an officer because they feel like it.[98] Rather, the permissiveness of the removal language is contingent upon some sort of inefficiency, neglect of duty, or malfeasance in office.[99] The debate over removal was important for yet another reason: it pointed out the indeterminacy of the Constitution as a governing document and demonstrated that subsequent practice would be determinative in constructing its true meaning.[100]

Though the initial debate over the removal power began in 1789, it has continued to manifest itself amongst scholars and the Supreme Court itself.[101] However, the Supreme Court does not currently embrace anything akin to the "executive power" theory of removal, even despite some rhetorically powerful advocacy.[102] Despite this advocacy, even supporters of the Unitary Executive have acknowledged that the debate over removal is an ongoing enterprise.[103] Instead, the debate over removal power has settled on

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[93] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5–6 (2021).

[94] *See* Shugerman, *supra* note 76, at 8. Unitary Executive theorists point to early congresses as having special standing in terms of discerning original public meaning. Scholars have set forth frameworks through which constitutional meaning can be "liquidated" or "constructed" through historical practice or debate and settlement. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (detailing the theory of constitutional liquidation that is commonly attributed to James Madison); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) (arguing that constitutional interpretation requires "construction" whereby political actors formulate constitutional meaning).

[95] *See generally* WHITTINGTON, *supra* note 94.

[96] *See* Manners & Menand, *supra* note 93, at 8.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See* GIENAPP, *supra* note 87, at 128.

[101] The Supreme Court continues to hear cases such as *Seila Law* and *Collins v. Mnuchin*, which pose constitutional challenges to the structures of various administrative agencies. *See generally* Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Collins v. Mnuchin, 141 S. Ct. 207 (2020).

[102] Justice Scalia's dissent in *Morrison v. Olson* is still hailed as a magisterial achievement in the unitarian canon. S*ee* Morrison v. Olson, 487 U.S. 654, 697–99, 704–06, 710–13, 715 (1988) (Scalia, J., dissenting).

[103] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 10 (2008).

jurisprudence that allows latitude for Congress to place some limits on the President's removal power.[104] The key distinction in these cases is that Congress has merely placed *limits* on the President's removal power; it has not *reassigned* that removal power from the President.[105]

B. The Necessary and Proper Clause

The Necessary and Proper Clause has been appropriately described as "a masterpiece of enigmatic formulation . . . ."[106] Indeed, much historical debate remains regarding the meaning of the Necessary and Proper Clause and federalism more generally.[107] Scholarly interpretations of the Clause's breadth in relation to federalism are equally as capacious.[108] Moreover, some scholars have argued that the Clause should be interpreted narrowly as only having granted Congress the incidental powers to execute the enumerated powers.[109] Still, other scholars have claimed that the Clause is best viewed as an "auxiliary enumerated power," meaning that Congress may not enact legislation simply because it is "necessary and proper" to do so.[110] A recent

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[104] *See generally Morrison*, 487 U.S. 654. A primary argument against the constitutionality of the independent counsel was that the President's grant of "executive Power" vested him with unfettered power to remove the independent counsel. *Id.*

[105] *See* Brief for Court-Appointed Amicus Curiae in Support of Judgment Below at 9, Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7).

[106] JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 4 (1999). The Clause reads 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. 1, § 8, cl. 18.

[107] *See generally* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Gonzales v. Raich, 545 U.S. 1 (2005).

[108] Scholars have long engaged in debate on, and theories of, federalism, comparing "dual federalism," "cooperative federalism," and "dynamic federalism." For a leading exposition of "dual federalism," see generally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). McConnell argues that dual federalism is best suited "(1) 'to secure the public good,' (2) to protect 'private rights,' and (3) 'to preserve the spirit and form of popular government." *Id.* at 1492. Likewise, for a defense of cooperative federalism, see generally Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001). Weiser argues that this brand of federalism preserves spheres for both the federal and state governments. *Id.* Specifically, a federal framework undoubtedly exists, but that framework leaves ample space in which state agencies may "cooperate" with the federal government in implementing policy. *Id.* at 667. Notably, the Supreme Court has observed that cooperation is desirable, but Congress may not "commandeer" or force state governments to implement policy. *See generally* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). Finally, some scholars advocate for "dynamic federalism" under which the federal and state governmental authorities overlap, and nearly any matter is within the jurisdictional purview of both. For an argument that dynamic or "polyphonic" federalism creates helpful space for both agreement and conflict between the state and federal governments, see generally Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005). A detailed exposition of the various theories of federalism is beyond the scope of this Comment but the important takeaway is that the *scope* of the Necessary and Proper Clause is contested.

[109] *See, e.g.*, GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52 (2010).

[110] Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 407 (2015).

school of "revisionist" scholars has questioned the notion of enumerated powers, the limitations placed on Congress thereby, and the implications for constitutional structure.[111]

Much of the Supreme Court's jurisprudence regarding the Necessary and Proper Clause has developed in relation to the enumerated powers, specifically in the context of the Commerce Clause.[112] As such, it is helpful to discuss the Court's decisions bearing on federalism generally and the Necessary and Proper Clause more specifically.

The nature of federal power—and the extent thereof—was a central concern at the Constitutional Convention.[113] The debates took the form of state-versus-federal power, whose roots could be found in the core concept of sovereignty.[114] That concept provided a foundation on which the entire legitimacy of the new government rested.[115] The Articles of Confederation had created two separate spheres of authority between the states and the Confederation Congress.[116] Indeed, James Madison recognized that those competing interests did not necessarily "lie between the large states and small [s]tates . . . [but] between the Northern and Southern."[117] The disparity undeniably found its roots in the debate over slavery.[118] The Anti-Federalist opponents of the Constitution complained that those provisions that granted federal power were ambiguous and that the "states [were] robbed of important governmental functions."[119] Lurking in the background of these debates was the issue of slavery and whether the new Congress could abolish the institution in several states.[120] Indeed, the success of the Constitution depended on this issue; for example, Charles Cotesworth Pinckney of South Carolina opined that he would "be bound by duty to his State" to oppose the Constitution unless the document curtailed congressional power over

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[111] *See generally* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1 (2016); DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (2019); Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U.L. REV. 183 (2020).

[112] *See generally Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598; *Gonzales*, 545 U.S. 1.

[113] *See generally* AMAR, *supra* note 39.

[114] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1967).

[115] *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988). Morgan famously argued that the idea of sovereignty was weaponized by the political elites in order to successfully establish the new federal government. *Id.*

[116] RAKOVE, *supra* note 36, at 167.

[117] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 48, at 486.

[118] *See* Jeffrey Schmitt, *Slavery and the History of Congress's Enumerated Powers*, 74 ARK. L. REV. 641 (2021).

[119] SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 30 (1999).

[120] *See generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016).

slavery.[121] In short, curtailment of federal legislative power was a prerequisite to the success of the Constitutional Convention of 1787.[122]

Concerns about the nature of federal power were compounded with the advent of the Necessary and Proper Clause.[123] During Ratification, Anti-Federalist critics, such as George Mason, worried that Congress would use the Clause as a cudgel to inflict severe punishments upon dissenters and "threaten the powers retained by the states and rights retained by the people."[124] John Rutledge of South Carolina had vehemently opposed the vagueness of the residual grant of authority proposed by the Virginia Plan.[125] During the Constitutional Convention, delegates such as George Mason, Elbridge Gerry, and Edmund Randolph maintained reservations about key provisions of the Constitution's text.[126] Some of those reservations manifest themselves in the relationship between the Senate and President on matters such as the appointment of executive branch officers, treaties, and impeachment.[127] Chief among those concerns, however, was the potential for legislative aggrandizement, specifically through the ambiguity of "necessary and proper."[128] As noted by James Madison, the concern was not exclusive to those in opposition to the Constitution.[129]

Opposite Rutledge was James Wilson, a lawyer from Pennsylvania and "perhaps America's most incisive legal thinker."[130] Unlike Rutledge, Gerry, and Randolph, Wilson was forceful in his advocacy for broad legislative authority.[131] When Wilson introduced the initial draft of what would become the Necessary and Proper Clause to the Committee of Detail, it vested the "Supreme legislative power" in Congress.[132] Notably, that initial draft omitted the now-famous "enumerated powers," only to be included after rejecting the aforementioned "supreme legislative power" language.[133] Additionally, Resolution VI of the Virginia Plan vested Congress with the power to "legislate in all cases to which the separate

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[121] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 48, at 95.

[122] *See generally* Schmitt, *supra* note 118.

[123] *See* U.S. CONST. art. I, § 8, cl. 18.

[124] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 46 (2010).

[125] *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1060–61 (2014).

[126] STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 43, 50, 73 (Frederick D. Drake & Lynn R. Nelson eds., 1999).

[127] *Id.* at 73–74.

[128] MAIER, *supra* note 124, at 51.

[129] *See* THE FEDERALIST NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 1961) (explaining that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.").

[130] GIENAPP, *supra* note 87, at 67.

[131] *See generally id.*

[132] *Id.* at 67.

[133] *Id.*

States are incompetent."[134] Again, Rutledge and Pinckney "objected to the vagueness of the term *incompetent*."[135] It is thus fair to say that any language hinting at unlimited legislative reach was toxic to the possibility of the Constitution's ratification.[136]

Despite the early debate over the language, the final formulation of the Clause was accepted without much contention, passing unanimously at the Convention.[137] Some of the delegates accepted that the Clause would grant residual powers to Congress but did not openly advocate that notion for fear that it would scare the Anti-Federalists.[138] Thus, in terms of the *language* of the Clause, Rutledge won his battle with Wilson.[139] Rutledge opposed the "incompetence" language and instead argued for an enumeration of powers that would limit the powers of Congress to the execution of the "foregoing powers."[140] The key takeaway from the history of the Necessary and Proper Clause is that, while the *language* of the Clause found its way into the Constitution's text without much debate, the precise *meaning and scope* of the powers conferred by that language have been subject to much subsequent debate.[141]

1. The Necessary and Proper Clause in the Supreme Court

Conventional wisdom holds that the Constitution created a government of limited and enumerated powers.[142] That proposition has become the constitutional orthodoxy as embraced by the Supreme Court.[143] As mentioned above, the precise interaction of the enumerated powers and the Necessary and Proper Clause has vexed the Court and scholars.[144] Rather than undertake to precisely and concisely define "necessary and proper," the Court has demarcated limits in what can fairly be described as a case-by-case basis.[145] As recently as 2012, in *National Federation of Independent Business v. Sebelius* ("*NFIB*"), the Court struck down the individual mandate and held that a given regulation could be "necessary" but not "proper" under the Constitution.[146] Instead of defining the exact contours of the Necessary and Proper Clause, the Court drew a line between activity

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[134] RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 65 (1987) (footnote omitted).
[135] *Id.* (footnote omitted).
[136] *See generally* Schmitt, *supra* note 118.
[137] RAKOVE, *supra* note 36, at 180.
[138] *See* LYNCH, *supra* note 106, at 21.
[139] *See generally id.*
[140] *See* Mikhail, *supra* note 125, at 1061.
[141] *See, e.g.*, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969) (compiling the anonymous letters written by Marshall in defense of the decision).
[142] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 297 (2d ed. 1988); GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 113 (2d ed. 2011).
[143] *See* United States v. Lopez, 514 U.S. 549, 552 (1995).
[144] *See generally* LYNCH, *supra* note 106.
[145] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
[146] *See id.* at 560.

and inactivity.[147] The Court declared that the Framers vested Congress with the power to "*regulate* commerce, not to *compel* it" and declined to augment congressional power otherwise.[148] The Court's decision in *NFIB* thus attached a caveat to the Rehnquist Court's blessing of Congress's power to regulate economic activity: Congress may *regulate* economic activity, but it may not *create* such activity.[149]

Debates concerning congressional power under the Commerce Clause were not novel, and for roughly the first third of the twentieth century, the Court interpreted the Clause quite narrowly.[150] Under Chief Justice Taft's leadership in the early twentieth century, the Court aggressively struck down economic and social legislation.[151] The Taft Court's narrow conception of the Commerce Clause stemmed from the Court's nineteenth-century conception when the Court significantly narrowed the scope of federal congressional power in favor of robust states' rights in the wake of Reconstruction.[152] The Court continued this trend into the mid-1930s, repeatedly striking down President Franklin Roosevelt's New Deal legislation as beyond congressional regulation.[153]

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[147] *Id.* at 555.

[148] *Id.*

[149] *Id.*

[150] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Guffey Coal Act, which regulated coal prices, minimum wages, and maximum hours, as beyond Congress's power under the Commerce Clause). For a recent revisionist account of the Taft Court, see KEVIN J. BURNS, WILLIAM HOWARD TAFT'S CONSTITUTIONAL PROGRESSIVISM (2021).

[151] David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 504 (1987).

[152] *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019). Foner is a part of the academy that argues the Reconstruction Amendments completely reoriented the structure of the Constitution. For Foner and other scholars, the narrow interpretation of the 14th Amendment was incorrect. *See generally* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876 (1985). However, the Court's narrowing of congressional power following Reconstruction has not gone without controversy. For example, Kurt Lash argues that the Framers of the 14th Amendment only intended to incorporate *enumerated* rights—those in the Bill of Rights—against the states; for Lash and other scholars, then, the Court's action in cases such as *Slaughter-House* were consistent with the original meaning of the 14th Amendment. *See generally* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014). Still, other scholars argue that the 14th Amendment, particularly the Privileges or Immunities Clause, was not intended to incorporate *any* rights against the states. Instead, the Framers meant the provisions in Section 1 of the Amendment as *equality* provisions. In other words, states could enact nearly any law, but they had to apply that law equally to all citizens. *See generally* ILAN WURMAN: THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 10 (2020); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). Conversely, scholars such as Michael Kent Curtis have argued that the Bill of Rights was incorporated against the states by way of the Privileges or Immunities Clause of the 14th Amendment. *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); Adamson v. California, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting).

[153] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down labor regulations in the coal industry); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down labor regulations in the poultry industry).

The Court famously reversed doctrinal course in 1937 in the face of President Roosevelt's threat to "pack" the Court.[154] Some scholars argue that the practical effect of the famous "switch in time" was minimal and that the Court had actually begun laying the foundations for its shift prior to 1937.[155] Alternatively, some scholars argue that the Court's sudden and dramatic shift amounted to a de facto constitutional amendment.[156] Regardless of which interpretation is correct, the New Deal Court marked a significant departure from settled doctrinal principles and precedent.[157] Scholars have long debated whether the Court in this era acted in accordance with, or opposition to, the original meaning of the Commerce and Necessary and Proper Clauses.[158] The Rehnquist Court sought to curtail the New Deal Court's expansion of federal legislative power under the Commerce and Necessary and Proper Clauses.

Prior to its monumental decision in *NFIB*, the Court interpreted the Clause relatively narrowly regarding the amount of leeway afforded to Congress in acting against the states.[159] These cases involved issues ranging from firearm regulation to gender-motivated violence to the power to legislate under section five of the Fourteenth Amendment.[160] These decisions expressly sought to limit congressional purview and protect states' rights.[161] But, the "federalism revolution" of the Rehnquist Court generally declined to disturb the Court's jurisprudence with respect to Congress's power to structure the federal government.[162] This hesitance was not novel.

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[154] *See* Currie, *supra* note 151, at 541–42.

[155] *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

[156] *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (Ackerman's theory of "constitutional moments" is unique). For examples of scholars who argue that Justice Owen Roberts's "switch in time" of 1937 was a drastic change, see Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); and PETER H. IRONS, THE NEW DEAL LAWYERS (1982).

[157] *See generally* ACKERMAN, *supra* note 156; Kalman, *The Constitution, the Supreme Court, and the New Deal*, *supra* note 156; KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM, *supra* note 156; IRONS, *supra* note 156.

[158] *Compare* JACK M. BALKIN, LIVING ORIGINALISM (2011) (arguing that the Framers understood federal powers to reach any matter on which the states were incompetent to legislate), *with* Schmitt, *supra* note 118 (arguing that the history of slavery and sectionalism necessarily dictates a narrow scope of congressional power as a matter of original meaning, and any other reading is ahistorical).

[159] *See generally* United States v. Lopez, 514 U.S. 549 (1995).

[160] *See id.*; *see also* Printz v. United States, 521 U.S. 898 (1997); United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997). In *Boerne*, the Court struck down the Religious Freedom Restoration Act as applied to the states, holding that a remedy for a constitutional violation must be "congruen[t] and proportional[]" to the alleged violation. *Boerne*, 521 U.S. at 520.

[161] *See* BALKIN, *supra* note 158, at 171.

[162] *See* Morrison v. Olson, 487 U.S. 654 (1988) (declining to strike down the Ethics in Government Act of 1978). Despite a vigorous dissent from Justice Scalia, the Court upheld the constitutionality of the independent counsel, deploying a multi-factor balancing test to determine that the independent counsel did not interfere with the President's executive power. *See id.*

Indeed, despite the anticipated reining in of congressional power, the Rehnquist Court generally remained deferential to Congress's use of the Necessary and Proper Clause to carry into execution "all other Powers vested by [the] Constitution in the Government . . . ."[163] In other words, the Rehnquist Court largely adhered to what had become settled practice regarding Congress's power to structure the federal government.[164]

The Roberts Court has not been so deferential, as it has continued the Rehnquist Court's agenda of striking down laws as violative of general federalism principles.[165] But, it has also been more aggressive in policing Congress in its capacity to structure the federal government.[166] Under the leadership of Chief Justice Roberts, the Court has utilized a "freestanding" separation of powers principle to place limits on Congress in "horizontal" separation of powers cases.[167] This practice is peculiar, especially given the increased presence of originalist justices on the Court. There is no explicit "textual hook" on which to place such a freestanding principle.[168] Instead, the Justices have *inferred* a structural separation of powers principle from the various provisions of the Constitution.[169] This approach to "structural" issues is diametrically opposed to the Court's "textualist" approach to statutory interpretation.[170] For example, in *Free Enterprise Fund*, the majority invalidated "dual" for-cause limitations on the President's removal power, holding such limitations "contravene the Constitution's separation of powers."[171] However, as John Manning has aptly illustrated, there is no "separation of powers" clause in the Constitution.[172] Instead, the Roberts Court has cut this doctrine from whole cloth.[173] This same principle clearly applies to the Court's removal jurisprudence, and the majority's opinion in *Seila Law* fails to recognize it.

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[163] U.S. CONST. art. I, § 8, cl. 18.

[164] *See generally* ACKERMAN, *supra* note 156 (detailing the expansion of the executive branch during the New Deal, and the Court's acquiescence therewith).

[165] *See generally* Shelby County v. Holder, 570 U.S. 529 (2013) (striking down Section 5 of the Voting Rights Act of 1965). The Court relied on the principle of "equal state sovereignty" to strike down Section 5, which spurred a flurry of scholarly criticism. *See id.* For a defense of that principle, see Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209 (2016).

[166] *See generally* Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

[167] *See generally* Manning, *supra* note 31.

[168] *Id.* at 1992.

[169] *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (wherein Professor Black eloquently articulates the method of structural inference).

[170] *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

[171] *Free Enterprise Fund*, 561 U.S. at 492.

[172] Manning, *supra* note 31, at 2011.

[173] *Id.*

2. The Necessary and Proper Clause and Congressional Power over the State

We have seen how the Necessary and Proper Clause grants Congress the vertical power to, among other things, regulate commerce among the several states.[174] But, the Necessary and Proper Clause also grants Congress broad horizontal discretion to structure the federal government through offices "establish[ed] by Law . . . ."[175] As some scholars have argued, the power to establish offices combined with the Necessary and Proper Clause grants Congress plenary power to define the duties and powers of much of the federal bureaucracy.[176] Indeed, the First Congress created both the Department of Foreign Affairs and the Department of Treasury, and the statutes which created them differed in important ways.[177] For example, the secretaries in the Department of Foreign Affairs were explicitly denominated "executive departments," subject to the control and direction of the President.[178] Conversely, the Treasury Secretary was more insulated from presidential control and did not expressly provide for presidential oversight.[179]

For decades, the perceived orthodoxy was that the early American state was one of "courts and parties."[180] The courts and parties were the central organizing feature of the American state, and these two entities together provided a workable, functioning government.[181] For Skowronek and others, the real advent of American administrative law was in the late nineteenth century, and by 1920, "[t]he new American state emerged with a powerful administrative arm . . . ."[182] In the traditional interpretation, the wake of the Civil War combined with increasing industrialization precipitated the need for broader authority for the federal government.[183] But, subsequent scholars have proffered evidence to refute the claim that the early American Republic was a state of dispersed—rather than centralized—power.[184]

Indeed, from the earliest days of the American Republic, Congress regularly delegated broad rule-making authority to administrative officers and

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[174] *See* discussion *supra* Part II.B.1.

[175] *See* West, *supra* note 2, at 171; *see also* U.S. CONST. art. II, § 2, cl. 2.

[176] *See generally* West, *supra* note 2; U.S. CONST. art. II, § 2, cl. 2; DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997 (2003) (describing the growth of administrative capacities in the twentieth century and how political insulation of bureaucrats affects policy outcomes).

[177] GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 42 (1997).

[178] *Id.*

[179] *Id.*

[180] STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 24 (1982).

[181] *Id.*

[182] *Id.* at 16.

[183] *Id.*

[184] *See id.* at 16–17.

armed them with coercive enforcement mechanisms.[185] In the first congresses, legislators delegated broad authority to the executive branch to, among other things, collect taxes and oversee monetary matters.[186] In addition, the "direct tax" of 1798 involved significant delegations of rule-making authority.[187] The 1798 tax was the first use of a "direct" tax, meaning that the tax was levied against property.[188] The federal boards tasked with collecting the tax were creatures of delegation, subject to a "just and equitable" statutory standard.[189] As Nick Parrillo notes, Hamilton and the authors of *The Federalist* regarded the power to tax as quintessentially legislative in nature.[190] It is curious, then, that Congress saw fit to delegate some of its power regarding taxation.[191] If the Framers saw the delegation of legislative power as a threat to the separation of powers, they presumably would have been extraordinarily cautious about delegating the power to tax. As Parrillo has shown, Congress was not so concerned. The evidence in favor of delegation is relevant here because it shows Congress's authority under the Necessary and Proper Clause to design and specify the operation of administrative agencies.

Congress also has the power to create those departments to which legislative power was delegated.[192] This is apparent from the text of the Appointments Clause.[193] Combined with the Necessary and Proper Clause, the Appointments Clause grants Congress plenary power to legislate departments into existence.[194] But, as West explains, plenary congressional power is not immediately apparent from the plain text of the Constitution.[195] Indeed, if the Article II Vesting Clause is, in fact, a residual grant of powers, then congressional power over office creation must be at least somewhat curtailed.[196] But, as scholars have persuasively shown, the Article II Vesting Clause was *not* a residuum of powers.[197] Instead, the Vesting Clause was merely the power to execute the laws enacted

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[185] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 4–5 (2012).

[186] *Id.* at 44–45.

[187] Parrillo, *supra* note 11, at 1302.

[188] *See id.* at 1302–03.

[189] *Id.* at 1309.

[190] *Id*. at 1316; *see also* THE FEDERALIST NO. 33, at 179-74 (Alexander Hamilton) (Am. Bar Ass'n 2009).

[191] Parrillo, *supra* note 11, at 1311.

[192] *See generally* West, *supra* note 2, at 177.

[193] U.S. CONST. art. II, § 2, cl. 2.

[194] West, *supra* note 2, at 177.

[195] *Id.* at 178.

[196] Originalist scholars have long argued that the Vesting Clause is indeed a residuum of traditionally executive powers, among those the power to create new offices. *See, e.g.*, PRAKASH, *supra* note 88, at 95–96.

[197] Mortenson, *supra* note 16, at 1173.

by Congress.[198] The important takeaway, then, is that Congress's plenary power over office creation and agency design grants it the power to specify removal limitations.[199]

Congress began to exercise its authority ever more assertively at the turn of the twentieth century, as progressivism rose to prominence in the face of a rapidly industrializing nation.[200] Though there is reasonable debate concerning the pervasiveness of centralized bureaucratic control prior to the twentieth century, there is little debate that things changed after the century's turn. For example, the post office began as somewhat localized.[201] Indeed, the post office was highly influential, as it was responsible for mass communication of information.[202] The post office was not alone, however, as local governments enjoyed broad authority under the police power to regulate for the public welfare.[203] But, as the twentieth century wore on, regulation became less of a local matter and more of a federal, centralized one.[204] At the center of this movement was Congress, utilizing its plenary authority to create offices. This history is therefore instructive, as it establishes a long line of congressional practice in constructing the federal government.

III. SUPREME COURT JURISPRUDENCE AND REMOVAL POWER

Removal power has been a topic of contentious debate at the Supreme Court. Unfortunately, the Court's jurisprudence has been anything but uniform, spawning exceptions and now, exceptions to exceptions. This Part will discuss key Supreme Court cases that address the removal question. The Author's aim is not to be exhaustive but rather to provide context for the current moment in the Court's jurisprudence regarding presidential power generally and removal power more specifically.

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[198] *Id.*

[199] West argues that the Constitution disaggregates office creation from the power to appoint and remove officers, arguing that the power to create offices is vested solely to Congress, whereas the power to appoint and remove officers is vested in the President. West, *supra* note 2, at 172–73. West, therefore, argues that for-cause removal limitations are unconstitutional. *Id.* at 173.

[200] *See* Stephen Skowronek & Stephen M. Engel, *Introduction: The Progressives' Century*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 3 (Stephen Skowronek et al. eds., 2016).

[201] *See* Daniel P Carpenter, *From Patronage to Policy: The Centralization Campaign and the Iowa Post Offices, 1880–1915*, 58 ANNALS IOWA 273, 274 (1999); *see generally* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928 (2001).

[202] Carpenter, *From Patronage to Policy*, *supra* note 201, at 274.

[203] *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (detailing localities' use of the police power to regulate for the general welfare).

[204] Carpenter, *From Patronage to Policy*, *supra* note 201, at 275.

A. Myers v. United States

The Court's first encounter with removal manifested itself in the *Myers* case. In that case, Chief Justice William Howard Taft—a former President himself—held that the removal power was a part of the "executive power" of the Article II Vesting Clause.[205] Chief Justice Taft embarked on an extensive exploration of the "Decision of 1789," which refers to the First Congress's debate concerning the removal power.[206] In 1917, Frank Myers was appointed first-class postmaster of Portland, Oregon, by President Woodrow Wilson.[207] Myers's tenure was to last four years, but he was subsequently removed by President Wilson in 1920.[208]

Following his removal by President Wilson, Myers filed suit in the Court of Claims to recover his remaining salary.[209] The Court of Claims ruled against Myers, holding that he did not timely file suit, and his claim was therefore barred.[210] Myers died prior to the Supreme Court's decision, but his widow and executor continued the litigation on behalf of his estate.[211] At issue was the constitutionality of an 1876 statute, which mandated "Postmasters of the first, second, and third classes shall be appointed and *may be removed by the President by and with the advice and consent of the Senate*. . . ."[212] The Senate had not consented to the removal of Myers.[213] Therefore, the constitutional question could be stated as such: does the President, by way of Article II, wield the sole power to remove officers of the United States? If the answer to this question were "yes," the statute would be unconstitutional, and Myers's estate would be barred from recovery.[214] The lower court had attempted to avoid the constitutional question presented, but the Supreme Court knew that it could not avoid providing an answer.[215]

Chief Justice Taft, writing for the majority, answered the question in the affirmative.[216] "The vesting of the executive power in the President was essentially a grant of the power to execute the laws."[217] Taft further reasoned that the President alone could not possibly oversee the operations

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[205] Myers v. United States, 272 U.S. 52, 161 (1926).
[206] *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 193 (1990).
[207] *Myers*, 272 U.S. at 106.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 107.
[211] Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of* Myers v. United States, 45 J. SUP. CT. HIST. 167, 168 (2020).
[212] Act of July 12, 1876, ch. 179, §6, 19 Stat. 78, 80 (1876) (emphasis added).
[213] *Myers*, 272 U.S. at 107.
[214] *Id.* at 108.
[215] Post, *supra* note 211, at 167–68.
[216] *Myers*, 272 U.S. at 117.
[217] *Id.*

of the Executive Branch, and so he must be able to supervise his subordinates through the power of removal.[218] Taft also drew upon the Take Care Clause, which mandates that the President "shall take Care that the Laws be faithfully executed . . . ."[219] In other words, the President—through his power to remove officers at will—may control the execution of the laws enacted by Congress.[220] The Court's decision in *Myers* represented an embrace of what scholars would now call the "unitary executive."[221] The decision represents a formalistic approach to separation of powers disputes: any executive branch officer must be removable by the President as an "incident of the power to appoint them . . . ."[222] With the advent of the New Deal, the Court's formalistic approach would change soon thereafter, when the Court added an additional wrinkle to its separation of powers analysis.

B. Humphrey's Executor v. United States

The Court's decision in *Humphrey's Executor* represented a movement away from *Myers'* relatively formalistic reasoning of Article II. As discussed above, *Myers* sought to provide a straightforward answer to a complex question: does the President, by way of Article II, possess the prerogative to remove officers of the United States?[223] Chief Justice Taft answered in the affirmative.[224] However, by the 1930s, the federal government continued to expand under the leadership of Franklin Delano Roosevelt and his efforts to reorganize the Executive Branch.[225] Roosevelt's expansion of the presidency raised fundamental questions about the President's power under Article II.[226] Such a question presented itself in *Humphrey's Executor v. United States*.[227]

In 1931, William Humphrey was nominated to serve on the Federal Trade Commission ("FTC") by President Herbert Hoover.[228] Humphrey's commission under Hoover was to last for a term of seven years, but Franklin Roosevelt defeated Hoover in the election of 1932.[229] Thereafter, President Roosevelt asked for Humphrey's resignation from his position on the FTC, to which Humphrey declined, and Roosevelt then

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[218] *Id.*
[219] U.S. CONST. art. II, § 3.
[220] *Myers*, 272 U.S. at 117.
[221] *See* MCCONNELL, *supra* note 18, at 247.
[222] *Myers*, 272 U.S. at 161.
[223] *See id.*
[224] *Id.* at 117.
[225] *See generally* RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936–1939 (1966); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022).
[226] *See generally* STEPHEN SKOWRONEK ET AL., PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (2021) (detailing the effect of the New Deal on presidential power).
[227] 295 U.S. 602, 618 (1935).
[228] *Id.*
[229] *Id.*

addressed a letter summarily removing him from office.[230] Section One of the Federal Trade Commission Act—the statute establishing the commission—held that a commissioner was removable by the President for "inefficiency, neglect of duty, or malfeasance in office" or "for cause."[231] The statute thus presented two questions: (1) did the statute limit the President's power of removal, and (2) if so, was such a limitation constitutional?

In an opinion by Justice Sutherland, the Court answered both questions in the affirmative.[232] Regarding the first question, the Court considered the perceived need for independence in making judgments requiring expertise on certain subjects.[233] The statute purported to create a board of experts intended to be "independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance" of any other government official.[234]

Moving to the second question, the Court distinguished the postmaster at issue in *Myers* from the FTC Commissioner at issue in the present case.[235] The postmaster exercised purely *executive* power and was thus essentially a unit of the executive branch such that the President must have independent control over him.[236] Alternatively, the members of the FTC were tasked with exercising "quasi-legislative" and "quasi-judicial" power.[237] This was the constitutional line in the sand drawn by the Court.

C. Morrison v. Olson

Humphrey's Executor represented a movement away from formalism toward functionalism in separation of powers disputes, and the Court's decision in *Morrison* solidified that movement in the legal doctrine, though not without disagreement.[238] The Court's decision in *Morrison* is the epitome of the current debate on the removal power and its proper situation in the Constitution's system of separated powers.[239]

The dispute in *Morrison* arose under the Ethics in Government Act of 1978.[240] That statute was enacted in the wake of the Watergate Scandal to

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[230] *Id.* at 618–19.
[231] *Id.* at 619.
[232] *Id.* at 632.
[233] *Id.* at 624–26.
[234] *Id*. at 625–26 (emphasis added).
[235] *Id.* at 627–28.
[236] *Id.*
[237] *Id.* at 628.
[238] *See generally* Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).
[239] *Id.*
[240] *Id.* at 659. For additional information, see ETHICS IN GOVERNMENT ACT OF 1978, Pub. L. No. 95-521, § 592(c)(1), 92 Stat. 1868 (codified at 28 U.S.C. § 592).

promote lawful behavior in the government, and it provided certain mechanisms to enforce its goals; one such provision was the establishment of the independent counsel.[241] Under the statute, the independent counsel could only be appointed by a panel of federal judges upon request by the Attorney General, and once appointed, only the Attorney General could remove the independent counsel for cause.[242]

In 1982, Theodore Olson was Assistant Attorney General for the Office of Legal Counsel and refused to turn over certain documents subpoenaed by a subcommittee of the House of Representatives.[243] That refusal came pursuant to President Ronald Reagan's order to assert executive privilege over the documents.[244] Following that refusal, Olson and several high-level officials testified before Congress; and several documents were uncovered that led the Chairman of the Judiciary Committee to submit a request for the appointment of an independent counsel to the Attorney General, which was granted.[245]

The Court of Appeals for the D.C. Circuit held that the statute was unconstitutional because the independent counsel performed core executive tasks and was appointed by a court of law rather than the President.[246] The Court of Appeals also held that the removal restrictions placed on the Attorney General by the statute violated the separation of powers, and the independent counsel itself interfered with the Executive Branch's mandate under the Take Care Clause.[247] In a 7–to–1 opinion written by Chief Justice Rehnquist, the Supreme Court reversed the lower court and upheld the constitutionality of the independent counsel.[248]

In upholding the statute, the Court employed a multi-factor test and continued the functionalist approach of *Humphrey's Executor*.[249] The majority held that the independent counsel was an inferior officer "to some degree" because she *could be* removed by the Attorney General, an officer removable at will by the President.[250] Next, the Court pointed to the independent counsel's limited duties; she could investigate and perhaps

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[241] Andrew B. Pardue, Note, *"When the President Does It": Why Congress Should Take the Lead in Investigations of Executive Wrongdoing*, 61 WM. & MARY L. REV. 573, 578–79 (2019). For more discussion on the Watergate scandal, see generally CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN: THE GREATEST REPORTING STORY OF ALL TIME (1974).

[242] ETHICS IN GOVERNMENT ACT OF 1978, Pub. L. No. 95-521, § 592(c)(1), 92 Stat.1868, § 596(a)(1), 92 Stat. 1872.

[243] *Morrison*, 487 U.S. at 665.

[244] *Id.*

[245] *Id.* at 665–66.

[246] *Id.* at 668–69. The Appointments Clause of Article II mandates that the President must appoint principal officers, subject to the advice and consent of the Senate; the Clause also dictates that Congress may vest appointments of certain "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2.

[247] Matter of Sealed Case, 838 F.2d 476, 503–04 (D.C. Cir. 1988).

[248] *Morrison*, 487 U.S. at 696–97.

[249] *Id.* at 694–95.

[250] *Id.* at 671.

prosecute crimes but possessed no policy-making or administrative role within the Executive Branch.[251] Finally, the independent counsel was limited in tenure and jurisdiction, meaning she could only serve in that capacity until her task was complete and could only investigate those matters prescribed by the appointing documents.[252]

IV. ANALYSIS: *SEILA LAW* AND THE FUTURE OF REMOVAL POWER

This section will first discuss the tension exemplified by the majority and dissenting opinions in the Supreme Court's decision in *Seila Law*. Next, it will discuss why the legal positions espoused by Unitary Executive theorists make no sense as a matter of constitutional structure. This section will also discern when (and if) the Court will further its embrace of the Unitary Executive in future cases. Finally, this section will argue that the Court should not extend its holding in *Seila Law* to future cases and draw on doctrine and history as support for that proposition.

A. Seila Law *and the Embrace of the Unitary Executive*

In the wake of the financial crisis of 2008, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or "the Act").[253] The Act established the CFPB, a federal agency to oversee various aspects of the financial and consumer markets, such as banks, lenders, credit unions, and debt collectors.[254] The CFPB was to be headed by a single director.[255] Perhaps predictably, the CFPB was to be met with constitutional challenges.[256]

The first such challenge came in *PHH Corp. v. Consumer Financial Protection Bureau* before the United States Court of Appeals for the D.C. Circuit.[257] There, the Court of Appeals upheld the constitutionality of the CFPB, but then-Judge Brett Kavanaugh authored a dissent in which he criticized the Agency (and by implication, the entire administrative state) as violative of the separation of powers.[258] The CFPB was safe, but Judge Kavanaugh's dissent garnered support from conservative and originalist legal academics who had been making the same general point for decades.[259]

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[251] *Id.*
[252] *Id.* at 672.
[253] SKOWRONEK ET AL., *supra* note 226, at 146.
[254] *Id.* at 147.
[255] *Id.*
[256] *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (2018).
[257] *Id.*
[258] *Id.* at 164–65 (Kavanaugh, J., dissenting).
[259] *See, e.g.*, Calabresi & Prakash, *supra* note 28.

Enter *Seila Law*. The case arose in 2017 when the CFPB issued a "civil investigative demand" on Seila Law, a California-based law firm, on the belief that the firm had engaged in unlawful practices with regard to debt-related matters.[260] Rather than complying with the civil investigative demand—which is essentially a subpoena—the firm refused compliance on the grounds that the CFPB's lone director violated the separation of powers.[261] The District Court and the Ninth Circuit disagreed with the firm's contention and ordered compliance; the Supreme Court thus granted the petition for writ of certiorari to resolve the constitutional issue.[262]

Writing for the majority, Chief Justice Roberts struck down the directorship of the CFPB.[263] In this decision, the Chief Justice encompassed—in a single sentence—the view of Unitary Executive theorists: "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[264] That sentence encompasses the central flaw in the unitarian view; the Vesting Clause does *not* include "all of it." The majority thus embraced the central theme of *Myers* that the President is generally vested with the unfettered power to remove executive branch officers at will.[265] The majority's view can fairly be characterized as formalistic in that it is a supposedly concrete rule to be applied to the separation of powers disputes.[266] Unfortunately, the majority ignores the role of Congress while simultaneously making assumptions about the structure of the government.

B. Congress's Role in Shaping the Executive Branch

The *Seila Law* majority takes the liberty of inserting the words "all of it" into the Vesting Clause of Article II.[267] The assumption that the majority makes is not new; Justice Scalia famously enunciated the same principle.[268] However, the flaw in relying on such simplified logic simultaneously rewrites Article II while ignoring the deference shown by the Court in Congress's construction of the federal government.

The fundamental tension in *Seila Law* is between competing textual provisions discussed above: The Necessary and Proper Clause and the Vesting Clause of Article II.[269] If "the executive Power" vested in

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[260] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2194 (2020).
[261] *Id.* at 2194–95.
[262] *Id.*; *see also* Consumer Fin. Prot. Bureau v. Seila Law LLC., 923 F.3d 680, 682 (9th Cir. 2019).
[263] *Seila Law*, 140 S. Ct. at 2192.
[264] *Id*. at 2191 (quoting U.S. CONST. art. II, § 1, cl. 1.; *id.* § 3).
[265] *See* discussion *supra* Part III.A.
[266] For the keystone exposition of formalism, compare ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), with ROBERT A. KATZMANN, JUDGING STATUTES (2014).
[267] *Seila Law*, 140 S. Ct. at 2191.
[268] Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).
[269] *See* discussion *supra* Part III.A–B.

the President by Article II includes the power to remove officers, it seems that the Necessary and Proper Clause is rendered a dead letter, at least insofar as it allows Congress to structure the federal government.

As discussed above, the Court has, in recent decades, been much more aggressive in striking down laws on federalism grounds rather than in horizontal separation of powers disputes.[270] Conversely, the Court's removal jurisprudence has been deferential to Congress's use of the Necessary and Proper Clause to specify, via statute, the composition of administrative agencies.[271] This Court's federalism jurisprudence thus exemplifies a narrow reading of the Necessary and Proper Clause.

The Court's relatively narrow interpretation of the Necessary and Proper Clause in federalism disputes does not preclude broad congressional power over administrative agencies. As discussed above, those interpretations are somewhat opposed. Why would the Court—in decisions such as *Humphrey's Executor* and *Morrison*—give deference to the Clause in separation of powers disputes, but not federalism disputes as in *United States v. Lopez* and *NFIB*?[272] The answer lies in the specificity of facts and the ways in which that specificity is ignored by Unitary Executive theorists. Discussion of upcoming cases is illustrative of these flaws.

C. Collins v. Yellen

During its October term of 2020, the Supreme Court heard arguments in *Collins v. Yellen* ("*Collins*"), a challenge to the constitutionality of the Fair Housing Finance Agency ("FHFA").[273] That case raises a constitutional challenge to the Director of the FHFA, whose statutory structure is virtually identical to that of the CFPB directorship struck down by the Court in *Seila Law*.[274] On June 23, 2021, the Court handed down its decision, striking down the structure of the FHFA Director as violative of the separation of powers.[275] The Court's failure to acknowledge distinguishing factors between the FHFA from the CFPB effectively disregards certain fundamental features of the two agencies. As this section will show, the adoption of the Unitary Executive by the Court risks the failure to take important differences into account.

The Court granted certiorari in *Collins* so that it could determine whether the differences between the directors of the CFPB and FHFA were

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[270] *See* discussion *supra* Part III.B; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
[271] *See* discussion *supra* Part III.A–C.
[272] United States v. Lopez, 514 U.S. 549 (1995); *Nat'l Fed'n of Indep. Bus.*, 567 U.S. 519.
[273] Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).
[274] *See* discussion *supra* Part IV.A.
[275] *Collins*, 141 S. Ct. at 1770.

constitutionally significant.[276] Writing for the majority, Justice Alito held that the structure of the FHFA was so similar to the CFPB that the decision in *Seila Law* dictated the result in *Collins*.[277] The Court declined to consider the differences between the FHFA and the CFPB, even though, *inter alia*, the FHFA is responsible for enforcing one federal statute compared to the CFPB's nineteen.[278]

In his brief as court-appointed *amicus curiae*, Aaron Nielson pointed out the necessary distinction between the FHFA *acting* and *appointed* directors.[279] Similar to the language at issue in *Seila Law*, the Director of the FHFA serves for a term of five years "unless removed before the end of such term for cause by the President."[280] Thus, the chief argument in distinguishing the two directors was that the *acting* Director of the FHFA is removable at will.[281] The text of the statute establishing the removal permissions applicable to the confirmed FHFA Director and the acting director are separate.[282] The inclusion of removal permissions for the *confirmed* director, but not the *acting* director is convincing evidence that the acting director is removable at will by the President.[283] In other words, the Director of the CFPB exercised significant executive power, unaccountable to the President, whereas the acting Director of the FHFA *is* accountable to the President via removal. Despite the importance of the "significant executive power" inquiry to the *Seila Law* decision, the majority in *Collins* surreptitiously abandoned it.[284] Instead, the majority declared that "the nature and breadth of an agency's authority is not dispositive" when determining the acceptability of a removal permission.[285] This argument is convincing and correct in the Author's view. However, the analysis could rest on separate grounds regarding Congress's power under the Necessary and Proper Clause.

The Necessary and Proper Clause allows Congress to take note of the complexities inherent in separation of powers disputes. The power to carry into execution the powers vested in departments and officers of the United States government gives Congress *sole* legislative power over those officials.[286] The Unitary Executive Theory is attractive as it purports to confer an easily administrable rule. But, as Professor Nielson pointed out, the FHFA

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[276] *Id.* at 1775.
[277] *Id.* at 1784.
[278] *Id.*
[279] Brief for New Civil Liberties Alliance as Amicus Curiae Supporting Petitioners at 7, Collins v. Yellen 141 S. Ct. 1761 (2021) (No. 19-422).
[280] 12 U.S.C. § 4512(b)(2).
[281] Brief as Amicus Curiae, *supra* note 279, at 7.
[282] *See* 12 U.S.C. § 4512(b).
[283] *See* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 691–92 (2020).
[284] *See generally* Collins v. Yellen, 141 S. Ct. 1761 (2021).
[285] *Id.* at 1784.
[286] *See, e.g.*, West, *supra* note 2 (arguing that Congress has the sole power over office creation through the Appointments Clause and Necessary and Proper Clause).

does not wield "significant executive power" as defined in *Seila Law*.[287] Though the Court's decision in *Seila Law* fails to comport with precedent, there is certainly a distinguishing factor between the single Director of the CFPB and the acting Director of the FHFA. The CFPB Director was vested with the authority to nineteen federal statutes.[288] Additionally, the FHFA does not act directly on *individual persons*.[289] Whereas the CFPB has broad power to impose penalties, the FHFA is only able to issue subpoenas if certain statutory reporting requirements are not being met.[290]

The foregoing evidence establishes the problem with adopting overly formalistic rules such as the Unitary Executive Theory. As prominent scholars have argued, the Necessary and Proper Clause does "not grant Congress the power to strip the President of his constitutional authority and obligation to supervise and control the executive branch."[291] But, this argument misses the very essence of Congress's role. Congress possesses the necessary resources to make certain judgments and distinguish certain agencies' statutory authority. The idea of a federal court stepping in and interfering with the considered judgments of Congress is repugnant to democratic values. The courts should therefore be more deferential to Congress's judgments henceforth.

D. The Supreme Court and the Future of Removal

The Court's decision in *Seila Law* was somewhat predictable. Its recent precedent indicated a movement towards broader presidential control over the bureaucracy, with *Morrison* and *Humphrey's Executor* quietly fading into the jurisprudential background.[292] The removal limitations in *Free Enterprise Fund* were somewhat unique and potentially odious for separation of powers purposes. *Seila Law* represented a significant step forward and further relegated *Morrison* and *Humphrey's Executor* to exceptions, confined to their facts. Indeed, the Author believes that *Morrison* and *Humphrey's Executor* are essentially dead letters, overruled by narrowing decisions by the Supreme Court.[293]

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[287] Seila Law v. Consumer Fin. Prot. Bureau, 140 U.S. 2183, 2192 (2020).
[288] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018).
[289] Brief as Amicus Curiae, *supra* note 279, at 7.
[290] *Id.* at 38.
[291] Calabresi & Prakash, *supra* note 28, at 593.
[292] *See generally* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010). *Free Enterprise Fund* involved "double for-cause" removal limitations. *Id.* at 484–85. The President could only remove commissioners of the Securities and Exchange Commission ("SEC") for cause. *Id.* at 487. Still, further, the commissioners of the SEC could only remove members of the Public Company Accounting Oversight Board for cause. *Id.* at 486.
[293] *See generally id*.

The Court will continue to encounter opportunities to further its embrace of the Unitary Executive. On June 21, 2021, the Court decided *United States v. Arthrex*, which presented an Appointments Clause challenge to federal administrative patent judges.[294] Though the constitutional provision at issue was the Appointments Clause, Supreme Court precedent mandates that removal power is a significant factor in determining which officers are "principal" or "inferior."[295] Additionally, lower courts are hearing and deciding similar cases.[296] Outside of the courts, the Executive Branch has continued to take advantage of the theory in the wake of the Supreme Court's decisions in *Seila Law* and *Collins*.[297] The Office of Legal Counsel opinion, issued on July 8, 2021, embraces the legal positions taken in *Seila Law* and *Collins*, offering further legitimacy to the theory.[298] The influence and pervasive importance of removal power are thus quite profound.

Following oral argument, there was some belief that the Court would not reach the constitutionality of the removal limitation in *Collins*.[299] But, as the decision makes apparent, that notion is cold comfort. The Court will not always have access to (or willingness to) take the jurisdictional "off-ramp" in the important separation of powers cases, and it does not appear that the Court is willing to do so even when available. Further, the Court's removal power jurisprudence is inconsistent and often contradictory.[300] As the jurisprudence sits now, Congress may use the Necessary and Proper Clause to insulate executive branch officers only with respect to multi-member commissions, as in *Humphrey's Executor*, or officers who do not interfere with the President's executive power too much.[301] In short, the doctrine is one riddled with exceptions and leaves Congress (and the People) in the dark as to whether certain agencies are consistent with the Constitution. This is no way to adjudicate the separation of powers so integral to the American Republic.

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[294] United States v. Arthrex, 141 S. Ct. 1970, 1976 (2021).

[295] Edmond v. United States, 520 U.S. 651 (1997).

[296] *See generally* Fleming v. U.S. Dep't of Agric., 987 F.3d 1093 (D.C. Cir. 2021).

[297] *See* Constitutionality of the Commissioner of Social Security's Tenure Protection to Deputy Couns. of the President, 45 Op. O.L.C. slip op. (July 8, 2021).

[298] *Id.* at 1 ("We think the best reading of *Collins* and *Seila Law* leads to the conclusion that, notwithstanding the statutory limitation on removal, the President can remove the SSA Commissioner at will.").

[299] *See generally* Amy Howe, *Argument Analysis: "Very hard questions" in dispute over Fannie Mae, Freddie Mac shareholder suit*, SCOTUSBLOG, (Dec. 9, 2020, 7:05 PM), https://www.scotusblog.com/2020/12/argument-analysis-very-hard-questions-in-dispute-over-fannie-mae-freddie-mac-shareholder-suit/.

[300] *See, e.g.*, MCCONNELL, *supra* note 18, at 168–69 (criticizing *Morrison* and *Humphrey's Executor* as "wrong, illogical, and undemocratic" but nonetheless "firmly established by precedent and practice.").

[301] Morrison v. Olson, 487 U.S. 654 (1988); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

V. CONCLUSION

The removal debate has raged since the First Congress.[302] What is more, the debate has no intention of resolving itself.[303] Yet, this Comment has sought to provide a prospective diagnosis of the issue moving forward. The Supreme Court will doubtlessly continue to hear disputes that present challenges to the Administrative State and its statutory structures.[304] This Comment shows that the history surrounding the removal debate is complex and labyrinthine in nature.[305] Given the complexity of the history, it is unacceptable for the Supreme Court—in purporting to take history seriously—to adopt such a simplistic approach to its separation of powers jurisprudence. As such, the Court's recent decision in *Seila Law* represents a disturbing and ahistorical assault on public administration as it has existed for decades. Today, institutional authority is not merely political and legal but knowledge-based.[306] Acknowledging this fact requires a separation of powers jurisprudence that accommodates—rather than dismisses—knowledge-based institutional dialogue. The Supreme Court and adherents to the Unitary Executive theory ought to take notice.

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[302] *See generally* ALVIS ET AL., *supra* note 71.

[303] *See* GIENAPP, *supra* note 87, at 135–42.

[304] *See, e.g.*, Jarkesy, *supra* note 11 (holding that removal protections on SEC Administrative Law Judges violate the separation of powers and citing approvingly to *Free Enterprise Fund*, *Myers*, *Seila Law*, and *Collins*.

[305] *See* discussion *supra* Part III.A.

[306] SKOWRONEK ET AL., *supra* note 226, at 6.