

## ARTICLES

### BECOMING THE ADMINISTRATOR-IN-CHIEF: MYERS AND THE PROGRESSIVE PRESIDENCY

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*In a series of recent cases, the Supreme Court has reconfigured the administrative state in line with a particular version of Article II. According to the Court's scheme, known as the theory of the "unitary executive," all of the government's operations must be housed under one of three branches, with the head of the executive branch shouldering unique and personal responsibility for the administration of federal law.*

*Guiding the Court's decisions is Myers v. United States, the famous 1926 case about the firing of a postman. Written by President-turned-Chief Justice William Howard Taft, Myers is used to bolster the Court's jurisprudence as a supposed precedent for the unitary executive theory and an alleged originalist defense of strong executive administration.*

*This Article shows that Myers has been misread. It did not explicate a preexisting tradition of presidential power; it invented one. Claiming to describe the presidency as it had always been, Taft's opinion broke with decades of jurisprudence to constitutionalize a new understanding of the office. This "Progressive Presidency," which (President) Taft himself helped create, made the President the administrator-in-chief on developmental, not originalist, grounds as part of a broader Progressive remaking of government. And it differed from its modern-day unitary counterpart in many important particulars, including respect for administrative independence.*

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*This Article reconstructs the Progressives' transformation of the presidency and shows how Myers wrote it into law. This contextual reading of Myers undermines the Court's recent decisions and highlights the co-constitutive roles of institutional and doctrinal developments in making the modern presidency.*

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*“Inherent power! . . . The partisans of the executive have discovered a [new] and more fruitful source of power.”*

—Sen. Henry Clay, Senate Debate of 1835.<sup>1</sup>

*“We elect a king for four years, and give him absolute power within certain limits, which after all he can interpret for himself.”*

—Secretary of State William Seward.<sup>2</sup>

*“I have an Article [III], where I have the right to do whatever I want as president.”*

—President Donald Trump.<sup>3</sup>

## INTRODUCTION

Since at least 1935, when the Supreme Court countermanded President Franklin Roosevelt’s attempt to remove a Federal Trade Commissioner,<sup>4</sup> administrative independence has enjoyed legal sanction.<sup>5</sup> But the law of the executive is now in flux. The New Deal order is in retreat everywhere, and administrative law is no exception.<sup>6</sup> In the last few years, the Supreme Court has pushed back against bureaucratic autonomy, cabined Congress’s ability to design federal agencies, and enforced

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1. *Myers v. United States*, 272 U.S. 52, 180 (1926) (McReynolds, J., dissenting) (internal quotation marks omitted) (quoting 11 Reg. Deb. 515–16 (1835) (statement of Sen. Henry Clay)).

2. Louis J. Jennings, *Eighty Years of Republican Government in the United States* 36 (London, John Murray 1868) (recounting that Seward once said this to the author in a conversation).

3. President Donald Trump, Remarks at Turning Point USA Teen Student Action Summit (July 23, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-turning-point-usa-teen-student-action-summit-2019/> [<https://perma.cc/E7X9-K75P>]; see also Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him ‘The Right to Do Whatever I Want,’* Wash. Post (July 23, 2019), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/> (on file with the *Columbia Law Review*).

4. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627–29 (1935).

5. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2224 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“[T]he Court has commonly allowed [Congress and the President] to create zones of administrative independence by limiting the President’s power to remove agency heads.”).

6. See generally Gary Gerstle & Steve Fraser, Introduction, *in* *The Rise and Fall of the New Deal Order, 1930–1980*, at ix, ix–x (Steve Fraser & Gary Gerstle eds., 1989) (explaining the New Deal’s disintegration from what was once a “dominant order of ideas”). On the limits of the New Deal Order, see Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* 3–4, 8–10 (1995) (detailing how the New Deal began to encounter a series of political and economic problems that impeded its agenda).

presidential control or supervision of administrative action.<sup>7</sup> Two Justices have flatly suggested that the 1935 decision enshrining administrative independence is no longer good law.<sup>8</sup> The New Deal settlement—which combined presidential policymaking with internal executive branch divisions, expertise, and insulation from political control—is eroding.<sup>9</sup> Unitary presidential administration, once a legally questionable power grab, is rapidly becoming the law of the land.<sup>10</sup>

This unfolding revolution is billed as a restoration. The modern Supreme Court disclaims any pretension of changing the law, professing merely to return it to what it has always been.<sup>11</sup> On the Court's account, our Constitution always conceived of the President as the administrator-in-chief. By separating powers, the text sets the President as the head of the executive branch with unique and particular responsibility for enforcing the law.<sup>12</sup> Under this scheme, all nonjudicial and nonlegislative government actors must report to the President in an unbroken chain of command.<sup>13</sup> Other arrangements are simply unconstitutional. This is the

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7. See *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (finding restrictions on the President's ability to remove the Federal Housing Finance Agency director unconstitutional); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (holding that the structure of the Patent Trial and Appeal Board was incompatible with the President's constitutional responsibilities); *Seila L.*, 140 S. Ct. at 2199–200 (limiting Congress's ability to grant for-cause removal protection); *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2055 (2018) (holding that the appointment of the SEC's administrative law judges was subject to the Appointments Clause); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (finding dual-layer for-cause removal protection to violate Article II).

8. See *Seila L.*, 140 S. Ct. at 2211–12 (Thomas, J., concurring in part and dissenting in part) (discussing and dismissing *Humphrey's Ex'r*, 295 U.S. 602). Justice Neil Gorsuch joined Justice Clarence Thomas's dissent. *Id.* at 2211.

9. See Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 *Colum. L. Rev.* 1, 66 (2022) (“In response to the threat of fascism, the architects of executive control over the administrative state embraced separation of powers, especially internal to the executive branch, as a way to make presidential administration antifascist.”).

10. On the questionable legality of modern presidential administration, see Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *Building Presidential Administration*, 137 *Harv. L. Rev.* (forthcoming 2024) (manuscript at 33) (on file with the *Columbia Law Review*).

11. See, e.g., *Seila L.*, 140 S. Ct. at 2202 (“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.’ Their solution to governmental power and its perils was simple: divide it.” (citation omitted) (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986))); see also Corey Robin, *The Reactionary Mind: Conservatism From Edmund Burke to Donald Trump* 56–57 (2d ed. 2018) (arguing that conservative counterrevolutions are often couched as “restoration[s]”).

12. The theory grounds this claim in an overreading of two clauses of Article II: the Vesting Clause, U.S. Const. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”), and the Take Care Clause, *id.* art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”). See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1165 (1992).

13. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive* 3–4 (2008) (explaining that the “unitary executive eliminates conflicts . . . by ensuring that all of the

theory of the unitary executive, whose major theoretical and doctrinal move is to infer from the fact of three separate branches a constitutional mandate of unimpeded presidential control over the administrative state.<sup>14</sup>

Unitarians—proponents of the unitary executive theory—advance a specific view of political history to justify their doctrinal claim. They assert that for the better part of two centuries, American political institutions embodied unitary arrangements. Only in the mid-twentieth century did the government stray from the original, formalist separated-powers blueprint with the rise of the regulatory state and new forms of independent administration.<sup>15</sup> Against the backdrop of this history, today’s Court presents itself as correcting the New Deal anomaly.<sup>16</sup>

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cabinet departments and agencies that make up the federal government will execute the law in a consistent manner and in accordance with the president’s wishes”).

14. For classic statements of the theory, see *id.* (“[T]he theory of the unitary executive holds that the Vesting Clause of Article II . . . is a grant to the president of all of the executive power, which includes the power to remove and direct all lower-level executive officials.” (citing U.S. Const. art. II, § 1, cl. 1)); Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* 235–41, 341 (2020) (discussing variations on unitary executive theory and describing a “unitary executive” as one in which all executive power resides in the President and all executive officers and agencies serve to carry out the President’s will); Saikrishna Bangalore Prakash, *Imperial From the Beginning: The Constitution of the Original Executive* 33 (2015) [hereinafter Prakash, *Imperial From the Beginning*] (recounting how the federal government drew lessons from early state constitutions, in which “no adequate barriers separated the three powers” and legislatures often “usurped the executive power”); Calabresi & Rhodes, *supra* note 12, at 1165 (“Unitary executive theorists read [the Vesting Clause], together with the Take Care Clause, as creating a hierarchical, unified executive department under the direct control of the President.” (footnote omitted)). For a critical view of the same, see Jeffrey Crouch, Mitchel A. Sollenberger & Mark Rozell, *The Unitary Executive Theory: A Danger to Constitutional Government* 26 (2020) (noting critiques of the unitary executive theory “because of its origin, rationale, and use, and the danger it represents to governmental openness and transparency”); Peter M. Shane, *Democracy’s Chief Executive* 205–07 (2022) [hereinafter Shane, *Democracy’s Chief Executive*] (arguing for a “more democratic reading” of the executive power that emphasizes “the authorities granted to Congress and to the courts to check and balance the president, *should they choose to do so*”); Stephen Skowronek, John A. Dearborn & Desmond King, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive* 71–72 (2021) (contending that “a broadly based party coalition does not comport well with a unitary executive”). On the historical development of unitary executive theory and practice, see generally Ahmed et al., *supra* note 10.

15. Christopher Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 *Notre Dame L. Rev.* 1, 5–8 (2004); see also Richard A. Epstein, *How Progressives Rewrote the Constitution* 2 (2006) (describing how the New Deal Court vindicated expansive federal powers and led to the shift toward the “big government model” that predominates today).

16. See, e.g., *Seila L.*, 140 S. Ct. at 2202 (noting that examples cited in support of agencies with single-director structures are “modern and contested” and “historical anomal[ies]”); *id.* at 2198 (“Rightly or wrongly, the Court [in *Humphrey’s Executor*] viewed the FTC . . . as exercising ‘no part of the executive power.’” (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935))); *id.* at 2199 (stating that *Morrison* “back[ed] away from the reliance in *Humphrey’s Executor* on the concepts of ‘quasi-legislative’ and ‘quasi-

In carrying out this mission, the Court has been guided by one judicial lodestar: *Myers v. United States*.<sup>17</sup> That 1926 case, in which the Supreme Court sided with President Woodrow Wilson in striking down a statute that purported to prevent him from firing a postman, pre-dates the New Deal settlement. Written by President-turned-Chief Justice William Howard Taft, the opinion reprimanded Congress for interfering with the President's duty to "take care that the laws be faithfully executed" and set down a pro-presidential precedent on constitutional (as opposed to statutory) grounds.<sup>18</sup> It claimed to encapsulate timeless principles and vindicate the law of the presidency as it had existed from the Founding. That *Myers* was penned by the only President to later become a Supreme Court Justice has only added to its authority and persuasive power, at least for some judges and commentators.<sup>19</sup>

The current Court has relied on *Myers* to legitimate its supposed restoration in two specific ways. First, *Myers* stands out as an exception in a sparse terrain of twentieth-century separation-of-powers cases, seeming to provide authority for the Court's current theory of presidentialism. Separation-of-powers cases not only were exceedingly rare<sup>20</sup> but also, until recently, mostly rejected unitarism. (The Supreme Court's first statement of modern unitary theory famously occurs in a solo dissent from just forty

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judicial' power" (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1988)); *id.* at 2212 (Thomas, J., concurring in part and dissenting in part) ("The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people."); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495–96 (2010) (describing *Humphrey's Executor* and related cases as permitting "limited restrictions on the President's removal power").

17. See *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) ("The President must be able to remove not just officers who disobey his commands but also those he finds 'negligent and inefficient' . . . ." (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926))); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) ("Conspicuously absent from the dissent is any concern for the President's ability to 'discharge his own constitutional duty of seeing that the law be faithfully executed.'" (quoting *Myers*, 272 U.S. at 135)); *Seila L.*, 140 S. Ct. at 2188, 2190, 2192, 2197–99, 2201, 2205–06 (relying on *Myers* throughout the majority opinion (citing *Myers*, 272 U.S. at 117, 136–39, 142–44, 163–65, 169)); *Free Enter. Fund*, 561 U.S. at 483, 492–93, 494 n.3, 510 (relying on *Myers* throughout the majority opinion (citing *Myers*, 272 U.S. at 117, 119, 127, 164)); see also Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 *Fordham L. Rev.* 2085, 2091–92 (2021) [hereinafter Shugerman, *Presidential Removal*] (explaining how the "line of cases" that accept *Myers's* unitary theory "have become a foundation for other assertions of exclusive executive powers").

18. *Myers*, 272 U.S. at 164 (citing U.S. Const. art. II, § 3).

19. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cinn. L. Rev.* 849, 851–52 (1989) (praising *Myers* as a "prime example" of the originalist method and calling Taft "an extraordinary man" based on his many roles in government).

20. See Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 *Va. L. Rev.* 765, 789–92 (2016) (summarizing the few twentieth-century Supreme Court cases involving congressional limitations of the President's removal power).

years ago.<sup>21</sup>) For the Court to maintain the appearance of restoring the Constitution from its New Deal perversion, the Court needs a pre–New Deal guide of what the law used to be. *Myers* has served that purpose.

Second, the argumentation in *Myers* appears well suited to the Court’s current originalist pretensions.<sup>22</sup> Like today’s originalists, Taft’s opinion speaks in essentialist terms about what Article II of the Constitution does and does not include.<sup>23</sup> Like the originalists, it relies on early-republic sources, seeming to read its conclusions back into the logic of the Constitution as understood by its drafters at or soon after the Founding.<sup>24</sup> This method lends unitary theory a higher democratic pedigree, rooting it not just in history but in the social contract itself.<sup>25</sup> And it further supports the Court’s claim to be doing nothing more than bringing the Constitution back to what it has always meant.

This Article argues that the current Court’s use of *Myers* is unjustified in three ways. First, *Myers* is not originalist. Unlike modern originalists, Taft was unwilling to rely solely on original meaning.<sup>26</sup> Taft struggled with the drafting process, calling it a “kind of nightmare”; he admitted that the final seventy-two-page opinion was “unmercifully long, but it [was] made so by the fact that the question has to be treated historically as well as from a purely legal constitutional standpoint.”<sup>27</sup>

Taft’s history of the removal power does look back to the actions of the first Congress, but not because he presumed that the meaning of the Constitution was decisively settled at the Founding or resolved with the so-

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21. See *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) (arguing that “all of the executive power”—not just “some”—is vested in the President); see also *infra* notes 80–89 and accompanying text. As a historical matter, Justice Scalia’s *Morrison* dissent lies at the root of the modern unitary theory. See Ahmed et al., *supra* note 10 (manuscript at 46–48) (explaining Scalia’s dissent as “a watershed in the development of unitary executive theory”).

22. See *supra* note 19 and accompanying text.

23. See *Myers*, 272 U.S. at 126–27 (“[B]y the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the . . . legislative power of Congress in respect to both [appointment and removal] is excluded . . . .”); see also *id.* at 127–29 (“Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices.”). For a detailed analysis of *Myers*’s argumentation, see *infra* section II.B.

24. See *Myers*, 272 U.S. at 127 (appealing to original intent to discern constitutional meaning).

25. See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 154–56 (1999) (arguing that originalism maintains and perpetuates the popular will).

26. Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, 45 J. Sup. Ct. Hist. 167, 182 (2020) [hereinafter Post, *Unitary Executive*].

27. *Id.* at 181 (internal quotation marks omitted) (first quoting Letter from William H. Taft to Robert A. Taft (Oct. 17, 1926) (on file with the *Columbia Law Review*); then quoting Letter from William H. Taft to Helen Taft Manning (Oct. 24, 1926) (on file with the *Columbia Law Review*)).

called Decision of 1789.<sup>28</sup> Rather, *Myers*'s bulk is explained by long stretches of the opinion devoted to showing that, from the start of the republic through the Civil War, "all branches of the Government," led by the first Congress, "acquiesce[d]" in a certain understanding of presidentialism.<sup>29</sup> According to Taft, during this "period of 74 years, there was no act of Congress, no executive act, and no decision of th[e] [Supreme] Court at variance" with this tradition.<sup>30</sup>

That statement is at least tendentious as a historical matter.<sup>31</sup> But regardless of its truth, it is an appeal to political practice or "historical gloss," not original meaning.<sup>32</sup> For Taft, the actions of the first Congress were just one entry of many in a historical sequence stretching over decades.<sup>33</sup> And it was that history that created legal authority.

The Court's second mistake concerns *Myers*'s substance. The presidency of *Myers* is strong, but it is not a unitary executive. Taft's opinion went out of its way to defend the constitutionality of limits on presidential administrative power. It expressly affirmed Congress's right to set conditions on removal for many government officials.<sup>34</sup> It distinguished ordinary executive branch officers from Article I judges whose terms and tenures were defined by statute, and it disclaimed any pretension to rule on the latter's status or privileges.<sup>35</sup> And it protected the civil service, emphatically asserting that "[t]he independent power of removal by the President alone . . . works no practical interference with the merit

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28. The "Decision of 1789" refers to the First Congress's debate over the creation of the Department of State. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *Cornell L. Rev.* 1021, 1022–23 (2006) (discussing the context of the Decision of 1789).

29. See *Myers*, 272 U.S. at 148.

30. *Id.* at 163.

31. See *id.* at 252–61 (Brandeis, J., dissenting) (cavassing statutes showing the contrary).

32. On this method of constitutional analysis, see generally Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 *Calif. L. Rev.* 1913, 1916 & nn.13–15, 1928–29 (2020) (describing and defending historical gloss as an interpretation method in separation-of-powers adjudication); Alison L. LaCroix, *Historical Gloss: A Primer*, 126 *Harv. L. Rev. Forum* 75, 78 (2012), [https://harvardlawreview.org/wp-content/uploads/2013/01/forvol126\\_lacroix.pdf](https://harvardlawreview.org/wp-content/uploads/2013/01/forvol126_lacroix.pdf) [<https://perma.cc/2RJG-C37N>] ("Embedded within historical gloss analysis is a view of history as a social science providing objective, falsifiable data about the actions and reactions of governmental actors."). Taft's reliance on historical gloss to set the meaning of presidential power helps account for the long stretches of the opinion devoted to explaining away apparent departures from a supposed decades-long tradition of consistent government practice—including, notoriously, the whole of Reconstruction. See *Myers*, 272 U.S. at 136–37, 143–44, 152–53. On the significance of *Myers*'s repudiation of the legacy of Reconstruction, see *infra* sections II.B, V.B–C.

33. *Cf. Myers*, 272 U.S. at 175 (observing that a reading of the Constitution that has been "acquiesced in for a long term of years[] fixes the construction to be given its provisions").

34. *Id.* at 160–61.

35. *Id.* at 157–58.



system.”<sup>36</sup> *Myers* envisioned a powerful presidency. But it also championed the role of independent expertise in policymaking, embraced internal divisions within the executive branch, and welcomed Congress’s power to impose conditions on the government it built out.

This points to the modern Court’s third mistreatment of *Myers*: By ignoring the case’s place in history, it obscures its radicalism.<sup>37</sup> Contrary to what present-day expositors suggest, *Myers* did not merely summarize an existing tradition of presidentialism. The first Supreme Court opinion to invalidate a congressional statute because it violated the President’s inherent Article II power,<sup>38</sup> *Myers* broke with decades of precedent to constitutionalize a new vision of the presidency.

To show how, this Article reconstructs the story of the premodern administrative state *Myers* helped to bury, which was characterized by two arrangements: (1) the primacy of Congress in defining the shape and personnel of the administrative state by statute and (2) the compliance of the President and the Court with these statutes. At the time of *Myers*, courts had over six decades of experience with explicit legislative restrictions on the President’s removal power.<sup>39</sup> These laws tied the President’s hands and gave the legislature sway over executive branch officers.<sup>40</sup>

Such arrangements sprang from and supported the late nineteenth-century party-based governance regime. In that world, the legislature was the nation’s most important governing institution and political parties were the constitutional system’s lifeblood.<sup>41</sup> Parties selected state and national candidates, defined the policy agenda, and doled patronage—cushy federal jobs, that is—back to armies of (mostly unpaid) volunteers who had helped bring them to power.<sup>42</sup> Indebted to party and in practice lacking hiring and firing power over the bureaucracy, the nineteenth-century President was a weak figure.<sup>43</sup>

This arrangement shifted at the turn of the twentieth century. The Progressive Era led to a profound rethinking of the Constitution’s meaning and the President’s role within it.<sup>44</sup> Many communities in an

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36. *Id.* at 173.

37. On the way texts operate not only as documents to be interpreted but as works that do work in the world, see Dominick LaCapra, *Rethinking Intellectual History and Reading Texts*, 19 *Hist. & Theory* 245, 250 (1980).

38. Robert C. Post, 10 *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States—The Taft Court: Making Law for a Divided Nation, 1921–1930*, at xxxv (2024) [hereinafter Post, *History of the Supreme Court*].

39. See *infra* sections III.B–C.

40. See *infra* sections III.B–C.

41. See *infra* section III.A.

42. See *infra* section III.A.

43. See *infra* Part III.

44. See Peri E. Arnold, *Remaking the Presidency: Roosevelt, Taft, and Wilson, 1901–1916*, at 1–7 (2009) [hereinafter Arnold, *Remaking*] (overviewing the changes to the presidency). On Progressive statebuilding, see generally Ballard C. Campbell, *The Paradox*

industrializing, urbanizing, diversifying America clamored for more help from the government.<sup>45</sup> Under sustained pressure from reformers, the federal bureaucracy evolved from a prize to be captured by election winners to a professionalized body charged with realizing the will of the voters.<sup>46</sup> New federal agencies arose to oversee and administer antitrust, labor, and regulatory policy.<sup>47</sup> Along the way, the President transformed from a mere party servant into something different and bigger.

This Article identifies two constituent parts of the new, Progressive presidential “script” of office: the *popular tribune* and the *chief administrator*.

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of Power: Statebuilding in America, 1754–1920 (2021) (tracking American statebuilding with a focus on “all governing units (national, state, local, and special)”); Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (2001) (analyzing the impact of Progressive commissions on public policy); Robert Harrison, *Congress, Progressive Reform, and the New American State* (2004) (uncovering the role of political parties in Progressive reform); William J. Novak, *New Democracy: The Creation of the Modern American State* (2002) (contextualizing the era of Progressive reform in the United States); Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877–1917* (1999) (analyzing farmers’ impact on Progressive policies); Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916* (1988) (examining the relationship between corporate capitalism and Progressive statebuilding); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (1995) (reflecting on the “legacies of the earliest phases of U.S. social provision”); Stephen Skowronek, *Building a New American State* (1982) [hereinafter Skowronek, *American State*] (examining the patchwork history of America’s statebuilding); *Statebuilding From the Margins* (Carol Nackenoff & Julie Novkov eds., 2014) (highlighting the role of “nonstate actors or policy entrepreneurs” in the “narratives of statebuilding”); Robert H. Wiebe, *The Search for Order: 1877–1920* (1967) (highlighting the social and class dynamics that influenced the Progressives’ embrace of bureaucracy and the regulatory state). On the Progressives’ reconsideration of the Constitution, see generally Aziz Rana, *Progressivism and the Disenchanted Constitution*, in *The Progressives’ Century* 41 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016) (explaining the Progressive critique of traditional readings of the Constitution); Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 *Tex. L. Rev.* 679 (2021) (describing “progressive formalism,” a theory that emphasized “strict construction and literal understanding of popular sovereignty over higher law”). On the changed role of the presidency, see *infra* section III.A.

45. See Charles Noble, *Welfare as We Knew It* 36 (1997) (describing the circumstances that spurred the Progressive movement).

46. See Joanna Grisinger, *The (Long) Administrative Century: Progressive Models of Governance*, in *The Progressives’ Century*, *supra* note 44, at 360, 360–61 (describing the Progressives’ changes to the bureaucracy).

47. *Id.* at 361–63. For scholarship on the different regulatory areas, see generally Carpenter, *supra* note 44 (examining the Department of Agriculture, the Department of the Interior, and the Post Office); Samuel Haber, *Efficiency and Uplift: Scientific Management in the Progressive Era, 1890–1920* (1964) (uncovering how “scientific management” affected the movement for Progressive reform); Gabriel Kolko, *Railroads and Regulation: 1877–1916* (1965) (focusing on labor and regulatory policies related to railroads); Sanders, *supra* note 44 (focusing on labor policies related to agrarian workers); Sklar, *supra* note 44 (focusing on antitrust policies); John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2004) (tracing the role of the American industrial-accident crisis in the development of Progressive regulatory schemes).

As popular tribune, the President channeled the will of the nation into a specific policy program. As chief administrator, the President supervised the bureaucracy in its implementation. The performance of Progressive Era Presidents refined and consolidated these two roles.<sup>48</sup> And *Myers* wrote the new script into law. The opinion self-consciously endowed the President with expansive authority to control the implementation of federal law.<sup>49</sup>

Progressives believed that the new presidency embodied a particular role for the officeholder as the people's representative, chief policymaker, and main government administrator.<sup>50</sup> But this was a new, functional theory of the office—one grounded in a new understanding of democracy, not an old, already established constitutional dogma.<sup>51</sup> Taft's opinion may have labored to emphasize the continuities between *Myers* and previous judicial glosses on executive power, but his masterwork only reflects how far-reaching the Progressives' departures really were.

This Article recontextualizes *Myers* to recover this revolution. It resituates *Myers* as part of the Progressive Era transformation of democracy that marked the early decades of the twentieth century.<sup>52</sup> And it relies on close readings of *Myers* and the line of removal cases from which it broke to advance a new, better interpretation of the opinion. In so doing, it builds on and contributes to a growing literature that seeks to understand how law, history, and political development work together to shape institutions of governance.<sup>53</sup> Legal doctrine cannot be read in isolation from wider political change. Conversely, doctrine defines a key dimension of the institutional environment in which political contestation and change take place.

The Article proceeds in five parts. Part I sets up the legal puzzle and explains its stakes. It explicates the doctrinal moves that have rendered *Myers* so central to the current Court's Article II jurisprudence. The Court's recent embrace of the novel theory of the unitary executive has left it scrambling for persuasive precedent that would allow it to root its new theory in American law and history.<sup>54</sup> *Myers* seems to serve the Court's

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48. See *infra* Part V.

49. See *infra* section V.B.

50. See *infra* Part IV.

51. See Post, Unitary Executive, *supra* note 26, at 182 (discussing Justice McReynolds's "long and furious dissent" taking issue with the quintessential spirit of pragmatism underlying Taft's opinion).

52. See *infra* Part V.

53. See *supra* note 44; *infra* note 435. For explorations of the Progressive Era from the field of American Political Development, see generally Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870–1920* (2003) (narrating the history of Progressivism in the twentieth century and investigating that history's relationship with contemporary politics); Marc Stears, *Demanding Democracy* 21–55 (2010) (describing the forms of political action employed by Progressive reformers in enacting their vision of democracy).

54. See *infra* Part I.

many purposes, which explains why it has been a mainstay of unitarist arguments.

The Article then turns to historical excavation. Part II explains where *Myers* came from. A removal case that shouldn't have been, *Myers* arose out of the firing of a low-ranking Democratic official by President Wilson.<sup>55</sup> The case is doubly ironic: Mr. Myers's firing was not only trivial stuff for a constitutional controversy but also may have been based on an order Wilson never issued.<sup>56</sup> When the case was first argued on December 5, 1923,<sup>57</sup> its mysteries and contingencies were of little interest to Chief Justice Taft, who immediately grasped the opportunity the case presented to transform the law of the presidency.<sup>58</sup> Taft was irritated when Justices Oliver Wendell Holmes, Louis Brandeis, and James Clark McReynolds dissented from the majority.<sup>59</sup> As Chief Justice, he assigned himself the opinion and lavished over a year on drafting it, including crafting a vigorous response to the dissenters' "very forcibly expressed" objections.<sup>60</sup>

The three dissenters took issue with Taft's constitutional theory,<sup>61</sup> his account of the debates of the First Congress,<sup>62</sup> and his treatment of decades of legislative and judicial precedent.<sup>63</sup> They were gesturing toward the pre-*Myers* regime of the President's place under the Constitution.

Part III moves backward in time to reconstruct that world and show how radical a departure Taft's *Myers* decision constituted. Analyzing late nineteenth-century political history and jurisprudence, Part III uncovers the workings of the prior judicial-administrative settlement in practice. It shows how the President, then, had neither the political nor the constitutional authority to realize a policy agenda.<sup>64</sup> Legally speaking, Congress could limit the President's authority over the government, and the Court repeatedly deferred to Congress in opinions that resolved apparent constitutional puzzles by looking to the language of statutes.<sup>65</sup> Abstract claims about presidential representation and the nature of

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55. See *infra* section II.A.

56. See *infra* section II.A.

57. *Myers v. United States*, 272 U.S. 52, 52 (1926) (listing the argument, reargument, and decision dates).

58. See *infra* section II.B.

59. *Post*, Unitary Executive, *supra* note 26, at 176, 179.

60. *Id.* at 172, 179–81.

61. See *Myers*, 272 U.S. at 192–93 (McReynolds, J., dissenting) (critiquing the majority's view of executive power).

62. See *id.* at 292–95 (Brandeis, J., dissenting) (providing an alternate reading of the Founding era).

63. See *id.* at 215 (McReynolds, J., dissenting) ("The claim advanced for the United States is supported by no opinion of this Court . . ."); *id.* at 250–54 (Brandeis, J., dissenting) (pointing out the immense legislative precedent contravening the Court's decision).

64. See *infra* section III.A.

65. See *infra* sections III.B–C.

democratic government—hallmarks of the current Court’s jurisprudence—were conspicuously absent.

Part IV looks to how the Progressive Presidents—Theodore Roosevelt, William Howard Taft, and Woodrow Wilson—dramatically changed the presidency in practice and, through Taft’s writings, in theory too. The decisive pivot in the office’s development took place in the first two decades of the twentieth century as Roosevelt, Taft, and Wilson established a durable new understanding of the presidential role.<sup>66</sup> As they worked the office, the American President became the people’s tribune and the government’s chief administrator. As the preeminent representative of the nation with a direct democratic tie to the people, the President claimed a special mandate to implement the people’s policy program.

Doctrine lagged behind, though. Part V returns to the Article’s anchor—*Myers*—to show how the opinion encoded this new “Progressive Presidency” in our Constitution. And it draws out the consequences of this rereading of *Myers* for contemporary law and scholarship.

Taft would spend several fruitful years in academia between his terms as President and Chief Justice elaborating his own understanding of the new Progressive Presidency.<sup>67</sup> That theory would form the basis of his opinion in *Myers*, institutionalizing the President’s new political power as the people’s tribune through expanded legal authority as administrator-in-chief.<sup>68</sup>

This reconstruction of *Myers* changes our understanding of the Court’s current project. Properly read as the translation of the Progressive Era presidency into law, *Myers* is less a return to the Founding than an act of modern invention. Today, the Court is doing something similar. In championing the unitary theory of the executive, the Court purports to be rescuing *Myers* from “the dustbin of repudiated constitutional principles.”<sup>69</sup> While there is a wide gulf between the presidency of *Myers* and that of the Roberts Court,<sup>70</sup> the two Chief Justices’ gambits are the same. What is billed as a constitutional “restoration”<sup>71</sup> is simply the Court imposing one new vision of the President in place of another.<sup>72</sup>

Reconstructing the democratic theory that underlies *Myers*’s Progressive Presidency also undermines the substance of the Court’s current arguments. Modern unitarism claims that structural pluralism and

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66. See *infra* sections IV.A–C.

67. See *infra* section V.A.

68. See *infra* section V.B.

69. *Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting) (characterizing the *Morrison* majority’s treatment of *Humphrey’s Executor*).

70. See *infra* section V.C.

71. Robin, *supra* note 11, at 57.

72. See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 *Yale L.J.* 2020, 2076–78 (2022) (arguing that *Myers* instituted a new version of the presidency that served the interests of reactionaries who were scarred by Reconstruction).

independent administration are incompatible with a strong, constitutional President and that the President is necessarily entitled to a privileged position vis-à-vis other political actors in the name of democracy.<sup>73</sup> This Article's re-reading of *Myers* shows this is not the case.

Finally, this Article contributes to the growing scholarly literature on Article II and the place of history in constitutional interpretation.<sup>74</sup> The Article shows that the law of the presidency is part and parcel of the office of the executive. That office undergoes institutional development as a result of forces only dimly alluded to in the doctrine itself. To understand the presidency and develop a law adequate to it, courts cannot close their eyes to these changes or wish them away through the fantasy of an immutable, unchanging office. As *Myers* itself illustrates, such a project merely masks the inevitability of institutional intercurrency.<sup>75</sup> Law and legal scholarship must attend to the dynamic interplay between doctrine and development or risk becoming a fable.

### I. THE SUPREME COURT'S IMAGINARY PRESIDENCY

The Supreme Court's operating theory of the presidency is remarkably new and rests on surprisingly thin doctrinal foundations. The cases creating the new unitary executive date mostly from the last few years, and they rely centrally on one case, *Myers v. United States*,<sup>76</sup> for authority.

This Part canvasses the startling transformation in the Court's Article II jurisprudence to show its doctrinal weakness and thus the importance of *Myers*. Section I.A briefly reconstructs the rise of unitary executive theory in case law. It shows how, starting thirteen years ago, the Roberts Court began to rehabilitate an argument Justice Antonin Scalia first articulated in a dissent in *Morrison v. Olson*.<sup>77</sup> Section I.B then looks at the limited sources of textual and historical support for the Court's project. Reliance on a particular reading of *Myers*, the section shows, has become an integral part of the Court's current separation-of-powers jurisprudence.

As a whole, the Part shows how the Court's recent opinions lack meaningful support in traditional sources of constitutional authority besides *Myers*. The centrality of *Myers* to the modern Court's unitary turn

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73. See *supra* notes 7–17 and accompanying text.

74. See Andrea Scoseria Katz & Noah A. Rosenblum, Removal Rehashed, 136 Harv. L. Rev. Forum 404, 406 nn.13–14, 411 nn.51 & 55, 413 nn.65 & 74, 423 n.131 (2023), <https://harvardlawreview.org/wp-content/uploads/2023/05/136-Harv.-L.-Rev.-F.-404-1.pdf> [<https://perma.cc/CRU8-CWG7>] (canvassing these sources); see also *infra* note 116.

75. "Intercurrence" describes the "phenomenon of multiple-orders-in-action." Karen Orren & Stephen Skowronek, *The Search for American Political Development* 17, 108–18 (2004).

76. 272 U.S. 52 (1926).

77. See 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (arguing that the Constitution provides for the President to have all of the executive power, not just some of it).

sets the stage for the rest of this Article, which reinterprets *Myers* in light of its historical context<sup>78</sup> with important consequences for Article II jurisprudence today.<sup>79</sup>

A. *Finding an Unfetterable Presidential Removal Power*

The roots of the Court's current Article II jurisprudence lie in an unlikely solo dissent from 1988.<sup>80</sup> A decade before, Congress had passed the Ethics in Government Act, which created the office of the independent counsel, a prosecutor appointed by a panel of the D.C. Circuit Court (upon request of the Attorney General) to investigate alleged wrongdoing in the executive branch.<sup>81</sup> *Morrison v. Olson* arose out of the appointment of independent counsel Alexia Morrison to investigate a controversy involving the Reagan Justice Department's alleged failure to comply with a subpoena.<sup>82</sup> The Reagan Administration, represented by Solicitor General Charles Fried, argued that appointing the independent counsel was an unconstitutional delegation of executive power to an officer neither appointed nor removable by the President.<sup>83</sup>

A 7-1 decision upholding the statute, *Morrison* was not a hard case for the Court. Pursuant to its legislative powers, the Court held, Congress had significant discretion in creating a special prosecutor to investigate presidential wrongdoing and structuring that investigatory office.<sup>84</sup> The provisions of the Ethics in Government Act did not "impermissibly interfere with the President's authority under Article II" and therefore suffered from no constitutional infirmity.<sup>85</sup>

The lone dissenter was Justice Scalia, then just two years into his thirty-year tenure. For Scalia, the 1978 Act had one serious constitutional defect: It vested the appointment of an executive officer in a judicial body and made that prosecutor unremovable by the President.<sup>86</sup> Because investigation was a part of prosecution, Scalia argued, and prosecution a part of the executive power, no federal prosecutor could operate outside

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78. See *infra* Parts II–IV.

79. See *infra* Part V.

80. *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting).

81. Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 601–602, 92 Stat. 1824, 1867–73 (codified as amended at 28 U.S.C. §§ 591–598 (2018)).

82. The controversy centered around whether Assistant Attorney General for the Office of Legal Counsel Ted Olson had lied to Congress about the completeness of the EPA's production of documents in response to a legislative subpoena. *Morrison*, 487 U.S. at 665–67.

83. Brief for the United States as Amicus Curiae Supporting Appellees at 5–6, *Morrison*, 487 U.S. 654 (No. 87-1279), 1988 WL 1031600.

84. See *Morrison*, 487 U.S. at 674–75 (noting that case law and constitutional history show no proscription of interbranch appointments by Congress).

85. *Id.* at 660.

86. *Id.* at 706 (Scalia, J., dissenting) (citing 28 U.S.C. § 594(a) (Supp. V 1982)).

of the President's control.<sup>87</sup> Article II vested the executive power in a single person, the President, Scalia wrote—not “*some of* the executive power, but *all of* the executive power.”<sup>88</sup> Because the 1978 Act vested executive power outside the President's reach, it was unconstitutional.<sup>89</sup>

Although Scalia's reasoning failed to attract even a single additional vote in 1988, his anxiety about a President hamstrung by an executive branch outside the President's control would soon be elevated into a constitutional rule. The doctrinal upheaval began in 2010 with a 5-4 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.<sup>90</sup> In the wake of the Enron accounting scandal, Congress had created a federal accounting board to audit public companies.<sup>91</sup> The Sarbanes–Oxley Act protected the Board's five members from presidential removal, specifying that the SEC's Commissioners could only dismiss them “for good cause shown.”<sup>92</sup> The Court struck the provision down on separation-of-powers grounds.<sup>93</sup>

Chief Justice John Roberts's opinion was ambiguous. It claimed to be doing little more than faithfully applying *Morrison* (albeit with a different result):<sup>94</sup> Congress *could* protect officers from presidential removal so long as these arrangements did not interfere with the President's Article II responsibilities. But the Court felt that the structure of the new Board was unusual and troubling. Not only did the Board members enjoy for-cause removal protection but so did the SEC Commissioners who appointed and could remove them.<sup>95</sup> If two layers of insulation from the President were permissible, why not more? “The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.”<sup>96</sup> Under such a structure, wrote Roberts, the President could not “take Care that the Laws be faithfully executed” since “he [could not] oversee the faithfulness of the officers who execute them.”<sup>97</sup>

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87. See *id.* (arguing that the independent prosecutor was vested with a “quintessentially executive function”).

88. *Id.* at 705.

89. *Id.* at 705–06.

90. 561 U.S. 477 (2010).

91. Sarbanes–Oxley Act of 2002, Pub. L. 107-204, §§ 101–109, 116 Stat. 745, 750–71 (codified at 15 U.S.C. §§ 7211–7219 (2006)).

92. *Free Enter. Fund*, 561 U.S. at 484–86 (internal quotation marks omitted) (quoting 15 U.S.C. § 7211(e)(6)).

93. *Id.* at 484.

94. See *id.* at 494–98 (noting that the Court had previously upheld a single level of protected tenure separating the President and the officer but that the added layer in this case made a constitutional difference).

95. See *id.* at 487 (noting that SEC Commissioners are only removable by the President in cases of “inefficiency, neglect of duty, or malfeasance in office” (internal quotation marks omitted) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935))).

96. *Id.* at 497.

97. *Id.* at 484 (quoting U.S. Const. art. II, § 3).



The Court insisted that its holding was limited to that Board and its two-layer structure.<sup>98</sup> But its logic suggested otherwise: In recognizing that *some* removal protections interfered with the President’s constitutional responsibilities, the Court implied that any statute limiting the President’s ability to “oversee the faithfulness” of executive branch officers might run afoul of the commands of Article II. (And who might say? The Court, of course.)

Ten years later, in *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>99</sup> the Court confirmed this implication. The Consumer Financial Protection Bureau, a relatively new agency created after the 2008 recession, was headed by a single director serving a five-year term and removable by the President only for “inefficiency, neglect of duty, or malfeasance in office.”<sup>100</sup> The Court found the agency’s structure unconstitutional, again by a 5-4 vote.<sup>101</sup> The four dissenters urged the Court to stick with *Morrison*’s “interference” standard, as it had avowedly done in *Free Enterprise*.<sup>102</sup> But Roberts declined. His majority opinion took up the latest constitutional theory of *Free Enterprise* and made it into a new legal rule. Because the “entire ‘executive Power’ belongs to the President alone,”<sup>103</sup> Roberts wrote, the agency’s design “clash[ed] with constitutional structure.”<sup>104</sup> The dissenters pointed out that American history counted many federal agencies led by officials with removal protections.<sup>105</sup> But the majority insisted that everywhere executive officials wielded “significant” authority, that authority had to remain “subject to the ongoing supervision and control of the elected President.”<sup>106</sup>

Since then, the *Seila Law* holding has been extended to undermine the structure of other agencies.<sup>107</sup> In at least one recent case, the new doctrine led the Supreme Court to redraw an agency’s internal reporting

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98. See *id.* at 501 (“The point is not to take issue with for-cause limitations in general; we do not do that.”).

99. 140 S. Ct. 2183 (2020).

100. 12 U.S.C. § 5491(c)(1)–(3) (2018).

101. *Seila L.*, 140 S. Ct. at 2191–92.

102. *Id.* at 2235–36 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

103. *Id.* at 2197 (majority opinion) (quoting U.S. Const. art. II, § 1, cl. 1).

104. *Id.* at 2192.

105. *Id.* at 2231–33 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

106. *Id.* at 2203 (majority opinion).

107. See *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021) (holding that the Federal Housing Finance Agency’s structure, whereby a single Director leads the Agency and can only be removed for cause, “violates the separation of powers”); *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446, 449 (5th Cir. 2022) (holding that “statutory removal restrictions on SEC [administrative law judges] violate the Take Care Clause of Article II”); *Constitutionality of the Comm’r of Soc. Sec.’s Tenure Prot.*, 2021 WL 2981542, at \*4 (O.L.C. July 8, 2021) (concluding that the President has the authority to remove the SSA Commissioner at will).

lines in defiance of precedent, congressional statute, and agency regulations.<sup>108</sup>

This line of cases marks a new epoch in the constitutional theory of the presidency. With *Seila Law*, the Roberts Court decisively shed *Morrison*'s functionalism in favor of the formalist approach advanced by Scalia thirty-two years earlier, according to which the President's presumed constitutional prerogatives supersede Congress's statutory arrangements. There are more rulings to come; this Article arrives in the midst of a tectonic legal shift.

B. *The Unitary Theory's Missing Text and Scant History*

This recent revolution in Article II jurisprudence rests on surprisingly flimsy foundations. The Roberts Court has justified its separation-of-powers formalism with an appeal to originalism, claiming to find, in text and history, a constitutional mandate for the unitary executive.<sup>109</sup> But the textual evidence for this version of the presidency is thin at best. In any case, the formal theory of the unitary executive turns out to be so deeply ahistorical that it simply cannot be squared with the federal government's early operations or the Framers' designs.

Start with the constitutional text. Scalia's *Morrison* opinion admitted what every scholar of the removal power has long known: The Constitution contains "no provision" stating who may remove executive officers.<sup>110</sup> Text is thus a limited guide to the vexed question of removal. And in *Morrison*, seven Justices pointedly rejected Scalia's attempt to read Article II's Vesting Clause to mean "that every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable by him at will."<sup>111</sup> Conservative Chief Justice William Rehnquist, writing for the majority, called this an "extrapolation from general constitutional language which . . . is more than the text will bear."<sup>112</sup>

To fill in the gaps in language, Scalia turned to history.<sup>113</sup> So too, more recently, have the Roberts Court's unitarian opinions. The opinions have relied on the same three episodes to legitimate the unitary theory: the

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108. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985–86 (2021) (invalidating Administrative Patent Judges' unreviewable authority during inter partes review and ordering the Director of the USPTO to review these judges' decisions).

109. See *supra* note 7 (collecting cases).

110. *Morrison v. Olson*, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting).

111. *Id.* at 690 n.29 (majority opinion).

112. *Id.*

113. *Id.* at 723 (Scalia, J., dissenting) ("Before the present decision it was established . . . that the President's power to remove principal officers who exercise purely executive powers could not be restricted . . ." (citing *Myers v. United States*, 272 U.S. 52, 127 (1926))).

Founding, the so-called “Decision of 1789,” and the 1926 *Myers* opinion.<sup>114</sup> But these episodes, far from shoring up unitarism, expose it to further vulnerabilities.

The first two historical moments are simply not good authorities for the theory. Relying on the Decision of 1789 is notoriously fraught. A series of votes taken by the First Congress while designing the Departments of Foreign Affairs, War, and Treasury, the Decision of 1789 has sometimes been taken as evidence for an indefeasible constitutional power of presidential removal.<sup>115</sup> But the meaning of these votes has been contested almost since they were taken.<sup>116</sup> The most recent scholarly investigations of the Decision, which include the most thorough study of the speeches and positions of the members of the First Congress who participated in the debate, conclude that they did not articulate a clear position on the President’s power under Article II.<sup>117</sup> If that scholarship is right, the

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114. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020) (“The President’s power to remove . . . was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*.” (citation omitted)).

115. In fact, this is close to how Taft interpreted the debates and votes. See *infra* notes 580–583. Jed Shugerman argues that these separate votes represent a “series of indecisions rather than a decision on presidentialism.” Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Pa. L. Rev. 753, 757 (2023) [hereinafter Shugerman, *Indecisions*].

116. For the latest entries in this two-century-long debate, see Jonathan Gienapp, *Removal and the Changing Debate Over Executive Power at the Founding*, 63 Am. J. Legal Hist. (forthcoming 2023) (manuscript at 3, 8–9) (on file with the *Columbia Law Review*) [hereinafter Gienapp, *Removal*] (arguing that the 1789 “debate over executive power was not stable and constant”); Shugerman, *Indecisions*, *supra* note 115, at 757–62 (explaining how the Roberts Court has “persistent[ly] misinterpret[ed] . . . Founding-era sources” in creating its unitary executive theory). For additional work on the topic, see generally Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era 154–55* (2018) (recovering the plasticity of the Constitution in the Early Republic’s debates about executive removal); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 Notre Dame L. Rev. 129 (2022) [hereinafter Chabot, *Interring the Unitary Executive*] (introducing a “comprehensive historical record” to reveal “early Congress’s pragmatic recognition of removal’s limited function”); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1 (2020) (arguing that Founding-era precedent supports the constitutionality of the Federal Open Market Committee’s independent structure); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81 (2021) [hereinafter Chabot, *Lost History*] (bringing to light “previously overlooked constitutional debates over delegation in the First Congress”); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019) (exploring the historical origins of the Take Care Clause to find the original meaning of Article II); Shugerman, *Presidential Removal*, *supra* note 17 (“These debates indicate that . . . the [*Marbury*] majority rejected [Madison’s] textual arguments for unitary presidentialism.”); Jed Handelsman Shugerman, *Vesting*, 74 Stan. L. Rev. 1479 (2022) [hereinafter Shugerman, *Vesting*] (arguing that assumptions about vested presidential powers resulted from erroneous historical assumptions). For further sources discussing the unitary executive in general, see *supra* note 14.

117. See Gienapp, *Removal*, *supra* note 116 (manuscript at 7–12) (discussing the uncertainty, indecision, and division that permeated the First Congress’s removal debate);

Decision did not decide anything, really. If it is wrong, the question remains what kind of legal authority the Decision actually has.<sup>118</sup>

Government practice at the time of the Founding offers no better support for the unitary theory. Recent scholarship has uncovered numerous instances in which Congress vested executive authority in independent officers and commissions, apparently in violation of the current Court's understanding of the separation of powers. From customs boards imposing health guidelines on cod fisheries to special administrative courts resolving widows' pension claims after the Revolutionary War, the early republic counted many nonunitary features that apparently aroused no constitutional concerns.<sup>119</sup> And theoretical statements sometimes touted as strongly unitary have turned out, on closer examination, to be ambiguous or even outright opposed to unitarism.<sup>120</sup>

This is not particularly surprising because the theory of the unitary executive was itself only developed two centuries later. The product of a post-Vietnam and post-Watergate presidency fallen into disrepute, the theory aimed to rehabilitate an office that conservatives saw as besieged by an overzealous Congress.<sup>121</sup> Unlike older generations of conservatives, this generation used text-based arguments not to "contain the power of the

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Shugerman, *Indecisions*, supra note 115, at 757 (showing that members of the First Congress were indecisive on matters of presidentialism).

118. See Katz & Rosenblum, supra note 74, at 410–12 (arguing that the Decision of 1789 does not establish executive removal on originalist grounds).

119. See, e.g., Chabot, *Lost History*, supra note 116, at 113–34 (outlining the congressional debates about executive authority following independence); cf. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 *Colum. L. Rev.* 277, 349 (2021) (demonstrating how the First Congress delegated policymaking discretion).

120. See Katz & Rosenblum, supra note 74, at 407–08, 410–14 (demonstrating deficiencies in the textual and historical arguments for unitary scholars' claims); Shugerman, *Presidential Removal*, supra note 17, at 2087–90 (advancing an "anti-unitary" argument on the question of removal power); Shugerman, *Vesting*, supra note 116, at 1483 (pointing out that unitary scholars' "claims are often a series of textual assertions or etymological assumptions without concrete eighteenth-century evidence to support the intuition that 'vesting' connoted exclusivity or indefeasibility"). The *Morrison* dissent makes analogous use of James Madison's statement in Federalist 47 that "[n]o political truth is certainly of greater intrinsic value [than the separation of powers]" to support a separation of powers that was rigid and impermeable. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting *The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)). In fact, the majority of Federalist 47 is spent rejecting any literal understanding of this principle as desirable or attainable in structuring a government. See, e.g., *The Federalist* No. 47, at 241 (James Madison) (Lawrence Goldman ed., 2008) ("If we look into the constitutions of the several States we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate . . .").

121. See Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 *Harv. L. Rev.* 2070, 2098–100 (2009) [hereinafter Skowronek, *Conservative Insurgency*] (discussing the Nixon Administration's efforts to concentrate presidential power when the rest of the government was controlled largely by the opposition).

presidency” but “as a vehicle for more aggressively asserting the President’s independence and freedom of action.”<sup>122</sup> Law schools, think tanks, and policy shops in the ’80s and ’90s began to translate these arguments into potential doctrine.<sup>123</sup> Gradually, the theory made its way to the federal judiciary, and thence into law.<sup>124</sup>

Many things about unitary executive theory betray its newness. Take the term “unitary,” for instance. Before the 1970s, it denoted only a single executive, as distinct from, say, a multimember council of governors. Alexander Hamilton’s Federalist No. 70, a text unitarians commonly marshal in support of their position, warns that plurality in the executive tends to “conceal faults and destroy responsibility.”<sup>125</sup> But Hamilton’s concern was not specialized administrative judges with job protection; it was “multiplication” of the chief executive, of which he supplied two concrete examples: (1) the two-headed Consulate of Rome and (2) a council of advisors whose approval the President was constitutionally required to obtain before taking action<sup>126</sup> (an idea the Framers toyed with, then discarded<sup>127</sup>). The present-day usage of the term, as a constitutional mandate that a single person must wield inalienable control of the administrative state, was unknown until roughly forty years ago.<sup>128</sup>

The political theory on which unitarism relies is new too. As Scalia explained in *Morrison*, the President must have control over the executive branch because “[t]he President is directly dependent on the people, and since there is only *one* President, *he* is responsible.”<sup>129</sup> The current Court has fully embraced this theory of personal responsibility and direct

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122. *Id.* at 2077.

123. See Jeremy Bailey, *The Idea of Presidential Representation* 171–89 (2014) (detailing the political realities that solidified the theory of the unitary executive in the later parts of the twentieth century); Crouch et al., *supra* note 14, at 18–22 (“Many of the fathers of the unitary executive theory were presidential power advocates who worked in Reagan’s Department of Justice.”); Ahmed et al., *supra* note 10 (manuscript at 43–53) (describing the development of unitary theory through legal scholarship in the 1990s); Skowronek, *Conservative Insurgency*, *supra* note 121, at 2073, 2075, 2089 (asserting that the unitary executive theory was a marginal conservative idea in the 1970s and 1980s that became a full-fledged constitutional theory in the 1990s).

124. See Shane, *Democracy’s Chief Executive*, *supra* note 14, at 5–8 (detailing the progression of the unitary executive theory from the Federalist Society to Republican officials to the courts).

125. *The Federalist* No. 70, at 347 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

126. *Id.* at 345–48.

127. Michael J. Klarman, *The Framers’ Coup* 215–18 (2016).

128. In fact, Scalia’s dissent elides the two senses by helping give the word a new meaning. Compare *Morrison v. Olson*, 487 U.S. 654, 698–99 (Scalia, J., dissenting) (“[T]he [F]ounders conspicuously and very consciously declined to sap the Executive’s strength in the same way they had weakened the Legislature: by dividing the executive power.”), with *id.* at 732 (“It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law.”).

129. *Id.* at 729.

popular dependence. Because of how important this argument is to the Court's current Article II jurisprudence, it is worth quoting at some length. The *Seila Law* majority put it as follows:

The Framers deemed an energetic executive essential to “the protection of the community against foreign attacks,” “the steady administration of the laws,” “the protection of property,” and “the security of liberty.” Accordingly, they chose not to bog the Executive down with the “habitual feebleness and dilatoriness” that comes with a “diversity of views and opinions.” Instead, they gave the Executive the “[d]ecision, activity, secrecy, and dispatch” that “characterise the proceedings of one man.”

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President *the most democratic and politically accountable official in Government*. Only the President (along with the Vice President) is *elected by the entire Nation*. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides “a single object for the jealousy and watchfulness of the people.”<sup>130</sup>

In the recent *Arthrex* case, the Court further elaborated: “Today, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.”<sup>131</sup>

The Court's democratic theory cannot be found in the Constitution. The U.S. Constitution fails to guarantee any Americans the right to vote for the nation's highest office.<sup>132</sup> And, as unitary originalists all emphasize, the presidency is a constitutional—rather than political—creation.<sup>133</sup> This point is usually made to distinguish originalism from left-wing constitutional theories, which supposedly supplement the President's constitutional powers with political ones.<sup>134</sup> Originalism, the argument

130. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (some emphasis added) (citations omitted) (quoting *The Federalist* No. 70, at 471–72, 476, 479 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

131. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010)).

132. Alexander Keyssar, *The Right to Vote* 296 (rev. ed. 2009) [hereinafter Keyssar, *The Right to Vote*].

133. See, e.g., Calabresi & Yoo, *supra* note 13, at 3–4 (explaining that the theory of the unitary executive is rooted in the Vesting Clause of Article II); Prakash, *Imperial From the Beginning*, *supra* note 14, at 3–11 (observing that the presidency's powers are defined and limited by the Constitution). On the dualism of the office, see Bailey, *supra* note 123, at 3, 10 (“[E]ven as [unitarians] embraced executive power, they remained ambivalent about grounding executive power in appeals to the people and instead found in Hamilton's argument a President whose power derived from the formal ‘unitary’ structure of the office.”); Skowronek, *Conservative Insurgency*, *supra* note 121, at 2072 (noting that the Framers “created the presidency in large part to check popular enthusiasms”).

134. See Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers* 18 (2020) (“Liberals are essentially picking and choosing among constitutional theories to suit their current policy or constitutional

goes, properly cabins the President's powers by relying on the Constitution alone. Popular legitimacy is legally irrelevant.

History provides equally little support for the idea that the Framers designed the President to be “directly dependent” on the people. The delegates at the Constitutional Convention in Philadelphia would often speak of the “people,” but not to evoke direct popular choice.<sup>135</sup> Citizenship in the early republic did not include the right to vote, and many at Philadelphia looked dimly on the idea of giving suffrage to the unpropertied.<sup>136</sup> The Constitution ultimately left the franchise in the hands of the states, most of which limited that privilege to property-holding white men. *The Federalist Papers* explained the necessity of the compromise: “[O]ne uniform rule[] [of national suffrage] would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention.”<sup>137</sup> When it came to presidential selection, the Framers made the President electable by an Electoral College.<sup>138</sup> A tiny minority of the Convention defended direct popular presidential election, but most believed the broader public too ignorant to familiarize itself with notables outside of their region.<sup>139</sup> And if today the Electoral College is criticized for being insufficiently democratic,<sup>140</sup> it was even wider off the mark in its early years. Estimates suggest that, of an American population of a mere 2.5 million people,<sup>141</sup> very few were

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preferences. Either the Founders' Constitution, including its more constrained presidency, is of historical interest only, or it is the proper foundation of constitutional law.”); see also Prakash, *Imperial From the Beginning*, supra note 14, at 2, 312 (claiming that some living constitutionalists believe that “the Constitution is . . . whatever generates the best policies”).

135. Robert W. Bennett, *Taming the Electoral College* 15–16 (2006).

136. Keyssar, *The Right to Vote*, supra note 132, at 18–19, 36–38, 49–50.

137. *The Federalist* No. 52, at 260 (James Madison or Alexander Hamilton) (Lawrence Goldman ed., 2008).

138. U.S. Const. art. II, § 1, cl. 2–4.

139. See Forrest McDonald, *The American Presidency* 166–67, 170–71 (1994) (“[Roger] Sherman objected [to the proposal that the President be elected by freeholders at large, arguing] that the voters would not be well enough informed to make an intelligent choice . . .”).

140. See, e.g., George C. Edwards III, *Why the Electoral College Is Bad for America* 205 (3d ed. 2019) (arguing that the Electoral College “violates political equality”); Jesse Wegman, *Let the People Pick the President* 5 (2020) (criticizing the Electoral College on these grounds). On the history of the Electoral College and reform movements, see generally Alexander Keyssar, *Why Do We Still Have the Electoral College?* (2020).

141. Derick Moore, *Fun Facts: From Counties Named Liberty to \$368.6M Worth of Fireworks Sold*, U.S. Census Bureau (July 2, 2019), <https://www.census.gov/library/stories/2019/07/july-fourth-celebrating-243-years-of-independence.html> [https://perma.cc/7S3L-R5VL] (citing U.S. Census Bureau, *Historical Statistics of the United States 1789–1945*, at 25 (1949)).

eligible to vote.<sup>142</sup> Many didn't bother: Around 10% of eligible voters cast a ballot in the 1820 presidential election.<sup>143</sup>

The Framers did not see the presidency as the nation's "most democratic and politically accountable" body; that honor (if it was an honor, given the Framers' ambivalent attitudes toward democracy<sup>144</sup>) belonged to the House of Representatives.<sup>145</sup> "The only national [body] for which the Constitution demanded a popular electoral process of any kind," the House was built for representativeness, made up of politicians elected with the mission of channeling their districts' preferences into government.<sup>146</sup>

In the sense of having to carry out the public's wishes, the President, by contrast, was not a "representative" of the people at all. The Framers saw the President as a counterweight to the popular impulse, a trustee utilizing his good judgment and sense to carry out the law, whether his constituents liked it or not.<sup>147</sup> When "the interests of the people are at variance with their inclinations," wrote Hamilton in Federalist No. 71, it was the President's solemn duty "to withstand the temporary delusion in order to give [the people] time and opportunity for more cool and sedate reflection."<sup>148</sup> Indeed, Hamilton viewed a "servile pliancy of the Executive to a prevailing current, either in the community or in the legislature" as a sign of weakness.<sup>149</sup>

This helps explain why neither Scalia in *Morrison* nor the Roberts Court more recently has been able to rely on a thick account of the early republic and its institutions to support their arguments. Simply put, their

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142. See Robert J. Dinkin, Voting and Vote-Getting in American History 29–38 (2016) (discussing the expanding, but still limited, voting population in the early years of the nation).

143. See National Turnout Rates 1789–Present, US Elections Project, <https://www.electproject.org/national-1789-present> [<https://perma.cc/QQ9H-FDJM>] (last visited Oct. 20, 2023).

144. See James W. Ceaser, Presidential Selection 48–49 (1979) (contrasting the President's authority with the theory of "representative democracy" found in the states that based government power "on a claim to immediate representation of the popular will"); Bernard Manin, *The Principles of Representative Government* 94, 102–31 (1997) (describing the "principle of distinction"—"that representatives [ought to] be socially superior to those who elect them"—and its effect on debates over the franchise in the United States); Gordon Wood, *The Creation of the American Republic, 1776–1787*, at 163–73, 393–413, 430–38 (1998) (describing political conditions leading to skepticism about direct democracy in the early United States).

145. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020).

146. Keyssar, *The Right to Vote*, supra note 132, at 18; see also U.S. Const. art. I, § 2, cl. 1 (specifying the composition and election requirements for the House).

147. See Ceaser, supra note 144, at 50–51 (noting that, in contrast to the House, "the executive would be more partial to, and itself embody, certain aristocratic or monarchic elements").

148. *The Federalist No. 71*, at 352 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

149. *Id.* at 351.



theory of the executive is not one that could be found in early America. Not even Hamilton, the great believer in a strong presidency and the Founding Father most frequently invoked by unitarians, shared their view.

The Court's Article II jurisprudence therefore rests on *Myers*. As the rest of this Article shows, that reliance is misplaced.

## II. MYERS VISITED

Lacking textual or historical support from the early republic for its Article II revolution, the Court has turned to *Myers*. This reliance is easy to understand. While neither the Constitution nor the Framers accepted the Court's political theory, *Myers* seems to.<sup>150</sup> The opinion used the language of presidential responsibility and democratic accountability, returning several times to the idea of the President as the privileged national representative charged with implementing a national policy program.<sup>151</sup> And it defended its argument by reference to the Founding, the writings of the Framers, and the so-called "Decision of 1789."<sup>152</sup>

*Myers* has thus been pressed into service as a cornerstone of modern unitarism. It has provided the movement with a citation in case law and with apparent historical legitimacy.

But this reliance on *Myers* is misplaced. Read carefully and in context, it does not establish a unitary presidency. And it does not support the Court's current originalist unitary project. To the contrary, it embodies the presidency of the Progressive Era, which it writes into law. To that extent, it is actually an example of living constitutionalism.

This Part begins the project of reading *Myers* in context. Section II.A recreates the immediate dispute that produced *Myers* to highlight its origins in the patronage politics of the post-Civil War republic. Section II.B reconstructs the *Myers* opinion to show how it used a mine-run removal dispute to reach an extraordinary result. Section II.C analyzes the decision in *Myers* to reveal how it fails to support unitary theory on originalist grounds. Parts III and IV take up the question section II.C sets up: If *Myers* did not advance unitary theory on originalist grounds, what did it do?

### A. *The Removal Case that Shouldn't Have Been*

In April 1913, President Wilson appointed Frank Myers to a four-year term as postmaster of the city of Portland, Oregon.<sup>153</sup> The position—postmaster first class—was a standard patronage appointment. And Myers was a standard patronage appointee: He had helped manage an Oregon

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150. See *infra* section V.B.

151. See *infra* section V.B.

152. See *infra* section V.B.

153. Jonathan L. Entin, *The Curious Case of the Pompous Postmaster: Myers v. United States*, 65 Case W. Rsrv. L. Rev. 1059, 1061 (2015) [hereinafter Entin, *The Curious Case*].

senator's campaign and served as that Senator's personal secretary before Wilson gave him a federal job.<sup>154</sup> Myers spent four uneventful years coordinating Democratic Party patronage matters and overseeing the delivery of the mails from his plum federal perch before being successfully reappointed.<sup>155</sup> In his second term, however, Myers caused problems. He broke with Oregon's senior Democratic Senator, argued with a Portland-based Republican Congressman, and solicited a Department inspection of his own deputy.<sup>156</sup>

The specific act that went too far has been lost to history.<sup>157</sup> Whatever he finally did, Washington officials decided he had to go. On January 22, 1920, the First Assistant Postmaster General, John Koons, wrote to Myers asking for his resignation, "[i]n the interest of the Postal Service," to restore "needed cooperation."<sup>158</sup>

Myers refused, setting in motion an unlikely constitutional showdown. Koons's letter warned that if Myers refused to resign, "the records will show your separation from the service by removal."<sup>159</sup> Myers replied by telegram that he had no intention of resigning and that the law entitled him to his position.<sup>160</sup> Myers also sent a longer letter, posted the same day, which argued that he had "never been presented with the copy of any so-called charges" and that any concerns were trumped up.<sup>161</sup> Absent legitimate reasons for his removal, he argued, he had a "legal right to the office and its emoluments" under the laws of the United States.<sup>162</sup>

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154. *Id.*

155. *Id.* at 1062.

156. *Id.* at 1062–63.

157. See *id.* at 1060 (observing that "it has never been very clear why Frank Myers was removed from his position" and reviewing possible explanations).

158. Letter from J.C. Koons, First Asst. Postmaster Gen., to Hon. F.S. Myers, Postmaster, Portland, Or. (Jan. 22, 1920), in *Power of the President to Remove Federal Officers*, S. Doc. No. 69-174, at 6, 7 (2d Sess. 1926). The letters are all part of the Transcript of Record in Myers's Court of Claims case. Transcript of Record, *Myers v. United States*, 58 Ct. Cl. 199 (1923) (No. 92-A), in *Power of the President to Remove Federal Officers*, *supra*, at 5.

159. Letter from J.C. Koons to Hon. F.S. Myers, *supra* note 158, at 7.

160. Wire from F.S. Myers, Postmaster, Portland, Or., to John C. Koons, First Asst. Postmaster Gen. (Jan. 31, 1920), in *Power of the President to Remove Federal Officers*, *supra* note 158, at 7, 7.

161. Letter from F.S. Myers, Postmaster, Portland, Or., to J.C. Koons, First Asst. Postmaster Gen. (Jan. 31, 1920), in *Power of the President to Remove Federal Officers*, *supra* note 158, at 11, 11–12.

162. *Id.* at 12.

Washington was unpersuaded. Headquarters tried to supplant Myers with a post office inspector,<sup>163</sup> but he refused to leave.<sup>164</sup> He protested vehemently by telegram, reasserting that he had “not resigned and [had] not been removed according to the law.”<sup>165</sup> This, Myers reminded Washington, was the necessary precondition for replacing an appointed postmaster with a postal inspector.<sup>166</sup> Absent Myers’s resignation or legal removal from office, there was no vacancy for a postal inspector to fill.

Myers’s obstreperousness prompted the Postmaster General to follow through on Koons’s earlier threat. “Replying to your telegram,” the Postmaster General wired, “order has been issued by direction of President removing you from office . . . effective January 31st.”<sup>167</sup> The post office inspector took control of the office, and Myers vacated the premises.<sup>168</sup> Eventually, after writing to more people and sending more telegrams, Myers sued, demanding his unpaid salary.<sup>169</sup>

In hindsight, the whole affair has the feel of an accident. As all parties knew, there was an easy way to remove Myers, which likely would have occasioned no controversy. President Wilson could simply have nominated Myers’s successor. The law at the time was clear that first-class postmasters like Myers could only be removed with the Senate’s concurrence.<sup>170</sup> This was neither controversial nor contested. Presidents routinely complied,<sup>171</sup>

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163. See Letter from Robert H. Barclay, Inspector in Charge, Post Off., to Frank S. Myers, Postmaster, Portland, Or. (Jan. 31, 1920), *in* Power of the President to Remove Federal Officers, *supra* note 158, at 13, 13 (“[T]he Postmaster General has ordered . . . that you . . . deliver and surrender to me this post office and all Government property therein . . .”).

164. Letter from Frank S. Myers, Postmaster, to Robert H. Barclay, Post Off. Inspector (Jan. 31, 1920), *in* Power of the President to Remove Federal Officers, *supra* note 158, at 13, 13 (“I am the duly appointed, qualified postmaster of Portland, Oregon, and . . . I have not resigned and do not intend to resign . . .”).

165. Wire from Frank S. Myers, Postmaster, Portland, Or., to A.S. Burleson, Postmaster Gen. (Feb. 2, 1920), *in* Power of the President to Remove Federal Officers, *supra* note 158, at 7, 7.

166. *Id.*

167. Wire from A.S. Burleson, Postmaster Gen., to Frank S. Myers (Feb. 2, 1920), *in* Power of the President to Remove Federal Officers, *supra* note 158, at 7, 7.

168. See Transcript of Record, *Myers v. United States*, 58 Ct. Cl. 199 (1923) (No. 92-A), *in* Power of the President to Remove Federal Officers, *supra* note 158, at 5, 8 (describing the removal of Myers from office and the assumption of the role by Barclay).

169. Entin, *The Curious Case*, *supra* note 153, at 1064–65.

170. See Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80 (“Postmasters of the first . . . class[] shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law . . .”).

171. See, e.g., Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 Ky. L.J. 699, 736 n.166 (1987) (noting that the congressional records of 1909 and 1912 reflect that President Taft sought to remove at least 175 postmasters by submitting the names of replacements to the Senate, whereby “Senate confirmation of the replacement necessarily constituted advice and consent to the removal of the incumbent”).

in part because it was so easy for them to do so. The nomination and confirmation of the new postmaster was understood to constitute the Senate's ratification of the removal of the previous occupant.<sup>172</sup>

Besides, Presidents were invested in giving the Senate a say in the appointment and removal of patronage positions like postmasters. This was the era of the spoilsmen, when party unity was central to effective government operation and government patronage was the cornerstone of party stability.<sup>173</sup> Senators, who led local political machines, needed control over patronage appointments to keep their machines in line.<sup>174</sup> And the Post Office was the richest store of patronage the federal government had to offer.<sup>175</sup> Senate involvement in postmaster appointments and removals was a pragmatic, settled constitutional construction, which had helped make party-centered government work throughout the nineteenth century.

For this reason, the law concerning the appointment, removal, and tenure of postmasters had not aroused concern before. The Wilson Administration had followed it scrupulously for other postmasters.<sup>176</sup> And it embodied the logic of officeholding that was widely shared at the time and had been traditional at common law. As Lev Menand and Jane Manners have shown, under this shared understanding, the occupant of an office defined for a term of years was entitled to hold the position through the length of the statutorily prescribed term, subject only to such "removal permissions" as Congress might detail.<sup>177</sup> The postmaster law was not that different from many other public officer statutes of that time, which imposed a wide range of limitations on the President's removal power.<sup>178</sup>

Neither Myers nor Congress expected the Administration to unsettle that balance. They seemed surprised that Washington did not follow its usual course and replace Myers by nominating a successor rather than

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172. See Entin, *The Curious Case*, supra note 153, at 1066.

173. See Richard Hofstadter, *The American Political Tradition and the Men Who Made It* 169–70 (1948) (describing the centrality of patronage to the party system).

174. See Samuel Kernell & Michael P. McDonald, *Congress and America's Political Development: The Transformation of the Post Office From Patronage to Service*, 43 *Am. J. Pol. Sci.* 792, 792 (1999) ("Those members of Congress whose party controlled the presidency repaid these labor-intensive services with an ample supply of federal patronage. Most of these jobs were located in the post office . . .").

175. *Id.*

176. Entin, *The Curious Case*, supra note 153, at 1070.

177. See Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 *Colum. L. Rev.* 1, 20 (2021) (explaining term-of-years offices).

178. See Supplement to the Brief of George Wharton Pepper, *Amicus Curiae*, Containing Compilation of Statutes Restricting the Power of the President to Appoint or Remove Officers of the United States; *Frank S. Myers v. United States*, reprinted in Lindsay Rogers, *The American Senate* app. A at 257, 262–71 (1926).

seeking to remove him.<sup>179</sup> In the midst of his woes, Myers wrote to Senator Charles E. Townsend, chairman of the Committee on Post Offices and Post Roads, to protest that he had never been properly removed and to request an opportunity to present his side of the case.<sup>180</sup> Townsend, a Republican, might have been expected to jump at the opportunity to embarrass his Democratic Party rivals for overstepping. But his reply was more perplexed than gleeful: “I have not written you to appear before the committee,” he explained to Myers, “because the President has not yet sent in the name of your successor,” and so “there is nothing pending before us of which we could take cognizance.”<sup>181</sup> He promised that the Senate would address Myers’s worries when the President finally nominated a successor, which he assumed Wilson would soon do.<sup>182</sup> Until then, as far as Townsend understood the law, Myers could be removed from his office for a statutory offense but nothing else.<sup>183</sup> Implicitly, Townsend agreed with Myers: The office was his until he was removed or replaced according to the terms of the statute. This was how things had always been.

There is reason to believe that the executive may not have intended to upset that balance either. Why the Wilson Administration chose to ignore the postal law, settled practice, and its own precedent in replacing Myers has never been clear,<sup>184</sup> but it may have related to an exceptional circumstance: President Wilson’s incapacity.<sup>185</sup> In October 1919, Wilson suffered a massive stroke.<sup>186</sup> For the next weeks, “[h]e just lay helpless” and could do little more than be “lifted out of bed and placed in a comfortable chair for a short while each day.”<sup>187</sup> Until well into the next year, his wife “act[ed] as a gatekeeper, restricting access to her husband.”<sup>188</sup>

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179. See Letter from Frank S. Myers, Postmaster, to Charles E. Townsend, Chairman, S. Comm. on Post Offs. & Post Roads (Feb. 18, 1920), *in* Power of the President to Remove Federal Officers, *supra* note 158, at 15, 15; Letter from Chas. E. Townsend, U.S. Sen., to Frank S. Myers (Feb. 23, 1920), *in* Power of the President to Remove Federal Officers, *supra* note 158, at 15, 15–16 (discussing the legality of Myers’s removal and what little both parties can make of it).

180. Letter from Frank S. Myers to Charles E. Townsend, *supra* note 179, at 15.

181. Letter from Chas. E. Townsend to Frank S. Myers, *supra* note 179, at 15.

182. *Id.* at 16.

183. *Id.*

184. See Entin, *The Curious Case*, *supra* note 153, at 1065 (“President Wilson surely could have chosen that course to get rid of Myers, but, for whatever reason, he decided to defy the statute and risk a constitutional confrontation.”).

185. See *id.* at 1065 n.34 (“[T]he chief executive was recovering from a stroke at this time. Therefore, it is not entirely clear to what extent he was engaged in day-to-day decision-making during this period.”).

186. See John Milton Cooper, Jr., *Woodrow Wilson: A Biography* 533–60 (2009) (describing the occurrence and aftermath of Wilson’s stroke).

187. *Id.* at 535 (internal quotation marks omitted) (quoting Irwin Hood Hoover, *The Facts About President Wilson’s Illness*, *in* 63 *The Papers of Woodrow Wilson* 632, 635–36 (Arthur S. Link ed., 1990)).

188. *Id.* at 536–37.

The executive branch operated as a ship without a captain. Wilson's cabinet met without him, and his advisors drafted important documents in his name without consulting him.<sup>189</sup> Wilson suffered further health scares, including a "life-threatening prostate infection" and a urinary blockage, while his staff engaged in elaborate staged performances to hide the extent of his debilitation.<sup>190</sup> Although Wilson recovered somewhat, the left half of his body remained paralyzed, and he suffered a grievous bout with the flu in the winter of 1920.<sup>191</sup>

According to Wilson's biographer, in the period surrounding the Myers affair, Wilson was rarely lucid and was prone to impulsive action and erratic, unmoored thinking.<sup>192</sup> When he did turn his thoughts to government, he remained fixated on the fight over the League of Nations.<sup>193</sup>

Given Wilson's health, it is notable that the record in *Myers* does not include an actual order from Wilson's hand directing Myers's removal.<sup>194</sup> Closest is the communication from the Postmaster General observing that an order "ha[d] been issued" at presidential direction.<sup>195</sup> But not all acts claiming to be from the President at that time actually were. In other words, it is not clear from the Postmaster General's telegram that Wilson actually authorized Myers's removal. And, as Wilson's wife was screening what the President saw, it seems unlikely that she would have allowed a matter as small as a local patronage dispute to reach him.

This would explain why Wilson did not seek to remove Myers by nominating a replacement: He was in no position to nominate one. Myers's removal may have been the accidental improvisation of a group of presidential advisers acting without a plan. This would make the *Myers* case doubly ironic. Not only did it have no reason to occur but the central judicial fact at its heart—the President's removal of an executive branch officer—may never have happened at all.<sup>196</sup>

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189. Scholars now agree that Wilson's veto of the Volstead Act, for example, was drafted without his knowledge. See *id.* at 537.

190. *Id.* Most dramatically, Wilson's staff invited congressmen to meet the President in his bedroom, hiding the paralyzed left side of his body under blankets. *Id.* at 547.

191. *Id.* at 551–52.

192. *Id.* at 544.

193. See *id.* at 542–43 (recounting how, in the midst of recovering from his illness, Wilson threw himself back into treaty negotiations); see also Patrick Weil, *The Madman in the White House* 21–23 (2023) (describing the decline in Wilson's health and effectiveness as he advocated for treaty ratification).

194. This contrasts with other presidential removals. See *infra* section III.C.

195. Wire from A.S. Burluson to Frank S. Myers, *supra* note 167, at 7.

196. To spell out the (possible) irony more clearly: If Wilson had been in good health and nominated Myers's successor in the regular course, then Myers would not have sued, or, if he had, the suit would never have reached the Supreme Court. The case, then, was the result of presidential weakness, born of a nonpresidential act. Yet in current jurisprudence, the case has come to stand for strong executive power. And the decision was rooted in the

B. *The Opinion*

Chief Justice Taft ignored these contingencies. He did not care about the opportunity to embarrass Wilson, expose the shenanigans of the Democratic administration, or undercut his political enemies out West. By December 5, 1923, when the case was first argued before the Court, Calvin Coolidge was in power, and Republicans were riding high.

As a legal matter, the case was unremarkable. It was not infrequent that federal officials who were dismissed from their positions then sued the government for backpay. The Supreme Court had dealt with many such cases in the previous decade.<sup>197</sup> Myers had held his office under an 1876 law providing that postmasters like him would be appointed and removed “by the President by and with the advice and consent of the Senate” and would hold their offices for four years “unless sooner removed or suspended according to law.”<sup>198</sup> His claim was identical to those of past plaintiffs: He alleged that he had not been removed according to law and demanded his unpaid salary.

It soon became clear, however, that the Supreme Court would not treat this case as business as usual. Myers had lost his suit in the Court of Claims in 1923 and died soon thereafter, but his estate pursued an appeal to the Supreme Court.<sup>199</sup> Yet no decision followed the December argument. Instead, the Court set the case for reargument and appointed Senator George Wharton Pepper to argue Myers’s side as amicus.<sup>200</sup> It would be another year and a half before the Court finally issued judgment.<sup>201</sup>

Taft knew from the very beginning that this would be a major decision and devoted himself to its writing as he had for no other case.<sup>202</sup> In his magisterial volume of the *Oliver Wendell Holmes Devise History* on the Taft Court, Robert Post has reconstructed what was happening behind the scenes. The “unusual process of composition” included two full-dress meetings of the six-Justice majority at Taft’s home as well as months of editing and revisions.<sup>203</sup> There was, Post concludes, “nothing analogous during the entire Taft Court era.”<sup>204</sup>

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idea that the removal embodied the President’s unique and personal democratic authority. See *infra* section II.B.

197. See *infra* sections III.B–C.

198. Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80.

199. Post, *History of the Supreme Court*, *supra* note 38, at 402.

200. *Id.* Note that at the initial Supreme Court argument, Myers’s estate did not appear for oral argument. *Id.*

201. *Myers v. United States*, 272 U.S. 52 (1926) (noting that the case was decided on October 25, 1926).

202. See Post, *History of the Supreme Court*, *supra* note 38, at 401, 404–05 (indicating the case’s importance and explaining that Taft resolved to spend the entire summer writing the opinion).

203. *Id.* at 411–12.

204. *Id.* at 411.

Remarkably, when the opinion was finally issued, Taft feigned modesty. It had always been the “earnest desire” of the Court, Taft wrote, “to avoid a final settlement of the question” of the President’s constitutional removal power “until it should be inevitably presented, as it is here.”<sup>205</sup>

The constitutional question was not “inevitably presented,” though. In fact, there existed at least three other paths for resolving the suit without having to consider whether the President enjoyed a removal power under the Constitution. The Court of Claims had relied on the doctrine of laches, finding that Myers had waited too long to sue.<sup>206</sup> Taft could have said the same.<sup>207</sup> Alternatively, Taft could have followed the logic of earlier removal cases that relied on statutory language and congressional intent. For instance, in 1897, the Court had found that a former U.S. Attorney was removable, despite statutory language to the contrary, by use of a variant of the whole code rule. The Court determined that when Congress repealed a form of tenure protection for the Postmaster General in 1887, it had intended that repeal to cover tenure protections applying elsewhere, including to U.S. Attorneys.<sup>208</sup> The Court could have followed that same logic in Myers’s case. Or it could have held, as it did in another prior case, that just because the statute specified conditions under which postmasters “may” be removed, it did not require the President remove postmasters only in such a manner.<sup>209</sup> Any of these three options would have allowed the Court to avoid the constitutional question.<sup>210</sup>

Taft’s refusal to engage in minimalist argument points us toward the kind of break *Myers* effected. The writing swept large: It declared not only that the President enjoyed an inherent constitutional power to remove, which Congress could not abrogate, but that such a power had been

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205. *Myers*, 272 U.S. at 173.

206. See *Myers v. United States*, 58 Ct. Cl. 199, 206 (1923).

207. The government did concede that “it can not sustain this judgment on th[at] ground,” though. *Myers*, 272 U.S. at 88 (quoting the clerk’s summary of oral argument by Solicitor General James M. Beck).

208. *Parsons v. United States*, 167 U.S. 324, 342–43 (1897); see also *infra* section III.B.

209. See *Shurtleff v. United States*, 189 U.S. 311, 316–18 (1903); see also *infra* Part III.

210. The Court could also have revived an earlier tactic from *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1855), a case that involved the removal of a territorial judge who was to have held office for a term of years. The Court sidestepped the removal question, concluding that “[t]he only legitimate inquiry” was whether any court could “command the withdrawal of a sum or sums of money from the treasury of the United States” to pay out claims. *Id.* at 303. The answer was clearly not, for reasons legal and functional. See *id.* at 304–05 (noting that the Court’s mandamus power extends to “purely ministerial” tasks and that the law expressly provides that the Treasury Department makes these discretionary decisions). While this approach seems to have fallen out of fashion in the later nineteenth century, it offered the *Myers* Court a fourth way of avoiding the constitutional question of removal.



recognized by the very first Congress and was “accepted as a final decision of the question by all branches of the Government.”<sup>211</sup>

This was a hard proposition to sustain. To do it, Taft had to weave a textual foundation for the President’s removal power out of the Constitution’s silences, show that it was recognized at the beginning of the republic, and narrate the subsequent century and a half of doctrinal development to bring out the continuity. The very size of the undertaking helps explain why it took Taft so long to draft the opinion and why the finished writing is so long.

Taft recognized that both the Constitution and the debates at the Constitutional Convention were silent on removal.<sup>212</sup> To understand the meaning of the Constitution in practice, then, it was necessary to look to the First Congress, where the removal question presented itself “early in the first session.”<sup>213</sup> Taft treated this debate, the notorious Decision of 1789, as speaking clearly in favor of presidential removal. But he did not find it authoritative simply because “a Congressional conclusion on a constitutional issue is conclusive.”<sup>214</sup> He acknowledged that it was made two years after the Convention by a Congress that still counted among its leaders former delegates to Philadelphia, which gave the Decision some authority.<sup>215</sup> But Taft gave as the first reason the Decision mattered that he “agree[d] with the reasons upon which it was avowedly based”—at least as he reconstructed them.<sup>216</sup> And he claimed that “all branches of the Government” “soon accepted” the Decision as “a final decision of the question”—an “acquiescence” that was “promptly accorded it after a few years” and “universally recognized.”<sup>217</sup>

What were the reasons for the Decision that the rest of the government came to accept? On Taft’s analysis, champions of a constitutional presidential removal authority in the First Congress advanced four principal arguments.

First, they argued from a pure and formal separation of powers. The Constitution had sought to establish three “branches [that] should be kept separate in all cases in which they were not expressly blended.”<sup>218</sup> Executive power was lodged in the President and in general included the power of removal; it should thus be kept free from interference by the other two branches, including Congress.<sup>219</sup> Second, Article II’s “express

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211. *Myers*, 272 U.S. at 136.

212. See *id.* at 109–10. Presidential historian Forrest McDonald has speculated that this omission reflects the unvarnished reality that, by September, the Framers were “tired and irritable and anxious to go home.” McDonald, *supra* note 139, at 180.

213. *Myers*, 272 U.S. at 109.

214. *Id.* at 136.

215. See *id.*

216. *Id.*

217. *Id.*

218. *Id.* at 116.

219. *Id.* at 117–18.

recognition” of the President’s appointment power was an argument for presidential authority over removals “on the well-approved principle . . . that the power of removal of executive officers was incident to the power of appointment.”<sup>220</sup> Third, Congress’s enumerated powers did not include the power to control the removal of noninferior officers.<sup>221</sup> Fourth, “without express provision,” the drafters could not have intended to give Congress, “in case of political or other differences, the means of thwarting the executive in the exercise of his great powers and in the bearing of his great responsibility,” which would follow if Congress could interfere with the President’s ability to remove “subordinate executive officers.”<sup>222</sup>

Taft saw these arguments accepted, or at least not rejected, by the whole subsequent course of American legal and political history. Hamilton had argued for a different conception of the executive in *The Federalist Papers*, Taft conceded.<sup>223</sup> But he “changed his view of this matter during his incumbency as Secretary of the Treasury.”<sup>224</sup> Chief Justice John Marshall, in *Marbury v. Madison*, had seemed to disagree with the Decision of 1789.<sup>225</sup> But he, too, apparently changed his mind, having expressed agreement with the Decision in his biography of George Washington.<sup>226</sup> Further, all court cases and acts of Congress from 1789 onward were at least compatible with the Decision, wrote Taft, notwithstanding some apparently contrary words of Senators Daniel Webster, Henry Clay, and John C. Calhoun and some stray remarks in various Supreme Court opinions.<sup>227</sup>

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220. *Id.* at 119.

221. *Id.* at 127; see also U.S. Const. art. I, § 8 (enumerating the powers vested in the legislative branch).

222. *Myers*, 272 U.S. at 131.

223. See *id.* at 136–37 (explaining that Hamilton advocated for requiring the Senate to consent to the President’s removals in Federalist No. 77 (citing *The Federalist* No. 77 (Alexander Hamilton))).

224. *Id.* at 137.

225. See *id.* at 139, 141 (explaining that Chief Justice Marshall wrote that because “the officer [had] a right to hold [office] for five years, independent of the executive, the appointment was not revocable” (internal quotation marks omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803))). Insofar as it prevented President Thomas Jefferson from withdrawing a judicial commission already provided for by the exiting President and Congress, the famed opinion seemed to stand against unfettered presidential removal.

226. See *id.* at 143–44 (hypothesizing that Marshall “changed his mind” about *Marbury*’s congruence with the Decision of 1789, “for otherwise it [was] inconceivable that he should have written and printed [in his 1807 biography of George Washington] his full account of the [First Congress’s] discussion and decision . . . and his acquiescence in it” (citing 5 John Marshall, *The Life of George Washington* 196–200 (Philadelphia, C.P. Wayne 1807))).

227. See *id.* at 139–44, 158–63, 172–76 (discussing possible complications but ultimately “find[ing] that from 1789 until 1863 . . . there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but there was . . . clear, affirmative recognition of it by each branch of the Government”).

There was one blatant exception that even Taft had to recognize: the Tenure of Office Act of 1867. Passed by the Reconstruction Congress, the Act prevented President Andrew Johnson from firing the Secretary of War, Edwin Stanton, a staunch reconstructionist. The Act was a close relative of the 1876 Act that guaranteed Myers's own job security.<sup>228</sup>

Taft glossed the Act as an anomaly, the product of “a period in the history of the government when both houses of Congress attempted to reverse this constitutional construction [on presidential removal].”<sup>229</sup> According to Taft, the Tenure of Office Act remained on the books as long as it did only out of lingering antipathy towards Johnson.<sup>230</sup> It was a “radical innovation,” inflicting “injury” on the presidency, and so essentially “invalid[.]”<sup>231</sup> In any case, Taft went on, it had never really been accepted. Presidents continuously denied its validity.<sup>232</sup> If they had signed bills into law that suggested otherwise, they did so only out of expediency.<sup>233</sup> For its part, the Supreme Court had never signed off on the constitutionality of such arrangements but had studiously left the question open.<sup>234</sup>

Ultimately, Taft wrote off the Tenure of Office Act—and the related legislation at issue in *Myers*—as a law passed “in the heat of political differences” that drove Congress to “extremes.”<sup>235</sup> It was an unfortunate misadventure, creating no lasting precedent and entitled to little weight.<sup>236</sup>

228. Compare Post Office Act of 1872, ch. 335, § 2, 17 Stat. 283, 284 (stating that the Postmaster General would serve “during the term of the President by whom he is appointed, and for one month thereafter”), with Tenure of Office Act of 1867, ch. 154, § 1, 14 Stat. 430, 430 (providing that the Postmaster General will serve “during the term of the President by whom they may have been appointed and for one month thereafter”), amended by Act of Apr. 5, 1869, ch. 10, sec. 1, 16 Stat. 6, 6 (repealing the cabinet-level provisions of the 1867 Tenure of Office Act). Congress also provided for congressional consent to presidential removals of certain classes of postmasters. See Act of July 12, 1876, ch. 179, sec. 6, 19 Stat. 78, 80 (specifying that first-, second-, and third-class postmasters “may be removed by the President by and with the advice and consent of the Senate”), amending Act of June 23, 1874, ch. 456, sec. 11, § 80, 18 Stat. 231, 233–34 (same), in turn amending Post Office Act of 1872 § 63 (same).

229. *Myers*, 272 U.S. at 164.

230. *Id.* at 168.

231. *Id.* at 167.

232. See *id.* at 172 (“Whenever there has been a real issue in respect of the question of Presidential removals, the attitude of the Executive in Congressional message has been clear and positive against the validity of such legislation.”).

233. See *id.* at 170 (noting that despite the “[i]nstances . . . cited of the signed approval by President Grant and other Presidents of legislation [limiting removal powers],” the Court “think[s] these are all to be explained, not by acquiescence therein, but by reason of the otherwise valuable effect of the legislation approved”).

234. See *id.* at 173 (“This Court has, since the Tenure of Office Act, manifested an earnest desire to avoid a final settlement of the question [of whether to depart from the Decision of 1789] until it should be inevitably presented, as it is here.”).

235. *Id.* at 175. Taft believed this was “now recognized by all who calmly review the history of that episode.” *Id.*

236. See *id.* at 176 (“[W]e are certainly justified in saying that [the Act] should not be given the weight affecting proper constitutional construction to be accorded to that reached

Taft declared the Tenure of Office Act of 1867 invalid, ruled the 1876 law protecting Myers's tenure unconstitutional, and affirmed the President's constitutional right to remove.<sup>237</sup>

C. *The Puzzles of Myers*

In modern unitary executive theory, *Myers* is treated as an originalist opinion offering an accurate account of the Constitution and of the history of the nineteenth-century republic. When Scalia gave his famous lecture on originalism the year after his dissent in *Morrison*, he began his talk with a discussion of *Myers*, calling it “a prime example of what . . . is known as the ‘originalist’ approach to constitutional interpretation.”<sup>238</sup> Recent Roberts Court opinions have followed Scalia's *Morrison* dissent in citing to *Myers* for the idea that presidential removal is constitutionally required, traces back to the Founding, and was widely recognized in the past.<sup>239</sup>

Yet this misreads *Myers*. As section II.B clarified, even by its own terms, *Myers* was not grounded in originalist interpretations of the Constitution. It was based on a theory of constitutional acquiescence.<sup>240</sup> Moreover, as the opinion recognized, that acquiescence was contested. Only by ignoring the Tenure of Office Act and the decades of history that followed could Taft reconstruct a history of congressional agreement to a presidential removal power.<sup>241</sup>

Nor does the opinion stand for the proposition that a constitutional removal power was widely recognized in the past. *Myers* abandoned the logic and the tactics of the Supreme Court's earlier removal cases, which had avoided the constitutional question, as Taft noted.<sup>242</sup> In finding a constitutional removal power, Taft turned to a new, open-ended textualism, purporting to divine what Article II's “executive power” truly meant<sup>243</sup>—an approach his dissenting colleagues found laughable.<sup>244</sup>

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by the First Congress of the United States during a political calm and acquiesced in by the whole Government for three-quarters of a century . . .”).

237. *Id.*

238. Scalia, *supra* note 19, at 851–52.

239. See *supra* section I.A.

240. See *supra* note 217 and accompanying text.

241. See *supra* notes 227–234 and accompanying text.

242. See *supra* notes 205–210 and accompanying text; see also *infra* Part III.

243. See *Myers v. United States*, 272 U.S. 52, 134 (1926) (“The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.”); see also *infra* section V.C.

244. See *Myers*, 272 U.S. at 192 (McReynolds, J., dissenting) (“A discourse proceeding from that premise helps only because it indicates the inability of diligent counsel to discover a solid basis for his contention. The words of the Constitution are enough to show that the framers never supposed orderly government required the President . . . to appoint or to remove postmasters.”).

Most consequentially, Taft's constitutional analysis was grounded in a different understanding of the President than the one that had given rise to the case. As section II.A showed, *Myers* had its roots in a patronage dispute. Yet Taft's analysis ignored this facet of the President's office. Instead, as Taft explained, the "executive power" included the responsibility of "determining the national public interest" and "directing the action to be taken by his executive subordinates to protect it."<sup>245</sup>

This language suggests a particular kind of President: a leader of the people, making policy and directing administration. But that was neither the President of the Founding nor the President of the spoilsmen. Who was *Myers's* President, then? And where did it come from?

### III. PRESIDENTIAL REMOVAL BEFORE PROGRESSIVISM

*Myers* was an anomaly, acknowledged as such in its time.<sup>246</sup> It self-consciously departed from a previous legal tradition to make something new. This Part reconstructs the law of removal before *Myers* to show the world *Myers* left behind and so the change it made.

The most striking feature of pre-*Myers* removal law is a basic difference in the posture of the President. The nineteenth-century President was nothing like today's President or Taft's President in *Myers*. While individual Presidents had made successful bids to represent the nation, the office did not enjoy the status or prestige it is now accorded.<sup>247</sup> Nor, for that matter, did the federal government possess the institutions that would have enabled the President to exercise significant policymaking power even if desired.<sup>248</sup> The presidency was weak.

Nineteenth-century law reflected this. The primacy of Congress and the logic of patronage are key to unlocking the pre-*Myers* law of presidential removal. In case after case, the Supreme Court reaffirmed that, when it came to structuring the government, Congress set the

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245. *Id.* at 134 (majority opinion).

246. See William E. Leuchtenburg, *The Supreme Court Reborn* 65–67 (1996) [hereinafter Leuchtenburg, *The Supreme Court Reborn*] (describing the range of criticism against Taft's opinion from both liberals and conservatives, including those who found his logic unconvincing and likened him to Benito Mussolini); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 *Colum. L. Rev.* 353, 387 (1927) [hereinafter Corwin, *Tenure of Office*] ("[E]ven if [Taft's] interpretation of the decision of 1789 were all that he claims . . . , still his argument would invite the serious criticism that in attempting to settle a constitutional problem of . . . 1926 by such exclusive reference to [1789] . . . he had ignored intervening material of greater pertinence and validity."); George B. Galloway, *The Consequences of the Myers Decision*, 61 *Am. L. Rev.* 481, 485, 491–97 (1927) (analyzing several criticisms of Taft's opinion, including its weak logic, incomplete historical treatment, and failure to distinguish between superior and inferior officers).

247. See Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 339 (Randall W. Bland, Theodore T. Hindson & Jack W. Peltason eds., 5th rev. ed. 1984) (discussing the prestige enjoyed by contemporary Presidents as a modern development); *infra* section III.A.

248. See *infra* section III.A.

terms.<sup>249</sup> The President had little independent constitutional authority to administer the execution of the laws. Indeed, the President's power came from Congress. The Court resolved most cases without asking about the President's constitutional powers at all.

This Part recovers the overlooked law of the weak presidency. It begins, in section III.A, with an analysis of the role of the pre-Progressive presidency to show how ineffectual, venal, and unimportant the office was. Only in rare and exceptional circumstances did the President act as the leader of the nation; most of the time, the President was simply a partisan hack, dispensing spoils pursuant to Senate instruction. Section III.B turns to cases to show how this conception of the "party President" was woven into separation-of-powers law. When an executive branch official other than the President sought to remove an administrative officer, federal courts routinely held that Congress's intent and design controlled. As section III.C describes, this rule held even when the President sought to remove officers of the United States.

The Supreme Court routinely found that Congress's intent and design limited the President's power. In hindsight, these opinions are also striking for what they did not do: rely on or invoke the Constitution or the President's putative role as national leader, administrative chief, or popular representative.

#### A. *The Inconsequential Pre-Progressive President*

To understand just how much of a change the Progressives wrought on the institutions and law of the executive, it helps to recall what the office they inherited looked like. The answer is not much. The late nineteenth-century presidency was awfully weak, at least from a policy-implementing perspective.

This was a matter of contingent institutional development. Abraham Lincoln was famously a strong President,<sup>250</sup> but the impeachment of his successor, Andrew Johnson, confirmed that Congress held the reins of power.<sup>251</sup> The next forty years were what Wilson, then a scholar of political science and not yet a politician, called an era of "congressional government," by which he meant that the American state was firmly in the hands of the federal legislature.<sup>252</sup> Congress set American policy and effectively controlled its implementation.

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249. See *infra* section III.B.

250. David Donald, *Lincoln Reconsidered* 57–59 (1956).

251. See Stephen Skowronek, *The Politics Presidents Make* 36–37, 44 (2d ed. 1997) [hereinafter Skowronek, *Politics*] ("Johnson . . . attempt[ed] to build new, personal bases of political support . . . [b]ut [his] order-shattering portents over-reached [his] repudiative authority.").

252. See Woodrow Wilson, *Congressional Government* 52 (15th ed. 1913) ("[T]he President is . . . but a part of Congress . . ."). Less seriously, but no less accurately, in 1993, *The Simpsons* caricatured this as the era of the "Mediocre Presidents." *The Simpsons*,

Modern historians have shared this assessment.<sup>253</sup> In his recent book on the American presidency, the great political historian William Leuchtenburg concluded that the nineteenth-century executive was frankly pathetic: “Dwarfed by Congress, often denied respect, [postbellum] presidents found elevation to the highest office in the land deeply disappointing.”<sup>254</sup> Presidents themselves agreed. Once former Congressman James Garfield made it to the Executive Mansion, he decried his fate: “My God! What is there in this place that a man should ever want to get into it?”<sup>255</sup>

A weak office attracted undistinguished men. In 1888, British legal scholar James Bryce devoted a chapter of his authoritative study of American democracy to the puzzle of the underwhelming American chief.<sup>256</sup> Why, he wondered, were “great men . . . not chosen president”?<sup>257</sup> Bryce identified several different reasons, but the dispositive factor was the President’s irrelevance.<sup>258</sup> Great men would not want to do the job. “After all,” Bryce quipped, “a President need not be a man of brilliant intellectual gifts.”<sup>259</sup> “Four-fifths of his work is the same in kind as that which devolves on the chairman of a commercial company or the manager of a railway . . . .”<sup>260</sup> Bryce may have been exaggerating, but to the President’s benefit; in fact, at the turn of the twentieth century, the largest American corporations outstripped the government in sophistication. The titans of Gilded Age industry engaged in complex tasks of hierarchical management as they built continent-spanning enterprises.<sup>261</sup> The

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Mediocre Presidents, YouTube (Feb. 20, 2011), <https://www.youtube.com/watch?v=r8N7BSsU5oo> (on file with the *Columbia Law Review*) (excerpting *The Simpsons: I Love Lucy* (Fox television broadcast Feb. 11, 1993)).

253. See, e.g., Sidney M. Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy* 46 (2009) (noting that Congress had a “powerful gravitational pull”).

254. William E. Leuchtenburg, *The American President: From Teddy Roosevelt to Bill Clinton* 15 (2015) [hereinafter Leuchtenburg, *American President*].

255. *Id.* at 16 (internal quotation marks omitted) (quoting Gail Hamilton, *Biography of James G. Blaine* 514 (Norwich, Conn., The Henry Bill Publishing Co., 1895)).

256. 1 James Bryce, *The American Commonwealth* 100–10 (1888) [hereinafter 1 Bryce, *The American Commonwealth*, 1888 ed.].

257. *Id.* at 100–01. On the importance of Bryce’s book, see Noah A. Rosenblum, *A Body Without a Head: Revisiting James Bryce’s American Commonwealth on the Place of the President in the 19th Century Federal Government* 2 (July 13, 2023) (on file with the *Columbia Law Review*) [hereinafter Rosenblum, *A Body Without a Head*] (unpublished manuscript).

258. Some of the reasons included: (1) The United States had less available talent to draw from than Europe; (2) political life in the United States did not give very many “opportunities for personal distinction”; and (3) under the spoils system, parties were more interested in running men who would make good candidates than good Presidents. 1 Bryce, *The American Commonwealth*, 1888 ed., *supra* note 256, at 100–05, 109.

259. *Id.* at 104.

260. *Id.* at 104–05.

261. See Alfred D. Chandler, Jr., *The Visible Hand* 348–68 (1977) (explaining the first great merger movement).

President's work was, by contrast, less complicated and seemingly less important. "In quiet times," Bryce observed, a great man is "not . . . absolutely needed."<sup>262</sup>

Far from an elected monarch, the nineteenth-century President was a glorified human resources manager. The position's main responsibility seems to have been filling offices. According to Bryce, the federal government of the time counted something like 120,000 positions.<sup>263</sup> Of those, perhaps 14,000 were part of the then-new civil service and so less subject to direct presidential patronage.<sup>264</sup> But this left more than 100,000 positions subject to political consideration in appointment.<sup>265</sup> Would-be officeholders besieged Washington demanding jobs for themselves and their allies. Pacifying them constituted a major share of what nineteenth-century Presidents actually did.

It was an exhausting undertaking. Bryce relates a famous anecdote about how, in the middle of the Civil War, someone found President Lincoln looking troubled. "You look anxious, Mr. President; is there bad news from the front?" "No," answered the President, "it isn't the war; it's that post-mastership at Brownsville, Ohio."<sup>266</sup> President Garfield spent essentially his whole time in office consumed with appointments matters, working on nominations from his inauguration until, in a tragic historical irony, he was shot by a disappointed office-seeker.<sup>267</sup>

Appointments took up so much presidential headspace because of their importance. It was not that every office mattered so much to the country; most, in fact, were forgettable positions like the postmastership that so bothered Lincoln. Offices mattered to the political parties, though, to reward their functionaries.<sup>268</sup> And political parties were central to making the nineteenth-century state work.

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262. 1 Bryce, *The American Commonwealth*, 1888 ed., *supra* note 256, at 80.

263. 2 James Bryce, *The American Commonwealth* 484 (1888) [hereinafter 2 Bryce, *The American Commonwealth*, 1888 ed.].

264. *Id.* at 491.

265. Contrast this with today's bureaucracy, in which the President is responsible for appointing about 4,000 offices in a government of more than two million civilian employees—or around 0.2%. See Executive Branch Civilian Employment Since 1940, U.S. Off. of Pers. Mgmt., <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/> [https://perma.cc/8EEC-J4EK] (last visited Aug. 22, 2023) (detailing the size of the civilian workforce); Political Appointee Tracker, P'ship for Pub. Serv., <https://ourpublicservice.org/performance-measures/political-appointee-tracker/> [https://perma.cc/C23C-NFYD] (last visited Sept. 29, 2023) (noting the President's appointment responsibilities).

266. 1 Bryce, *The American Commonwealth*, 1888 ed., *supra* note 256, at 82 n.1 (quoting President Lincoln).

267. *Id.* at 82; see also A Great Nation in Grief, *N.Y. Times*, July 3, 1881, at 1 (noting that the assassin, Charles J. Guiteau, "ha[d] been an unsuccessful applicant for office under the Government").

268. Jon Grinspan, *The Age of Acrimony: How Americans Fought to Fix Their Democracy, 1865–1915*, at 96 (2021).



Party organizations played several essential roles in post–Civil War American governance. They selected candidates for office, including of course for the presidency.<sup>269</sup> They elected those candidates to office by mobilizing constituencies and turning out voters.<sup>270</sup> More surprisingly to modern observers, they ran the actual election, down to the printing of ballots.<sup>271</sup> And after the election was over, the parties helped coordinate the government’s actions.<sup>272</sup> They were one of the only entities cutting across the horizontal and vertical divisions of the American state, bringing government officers together across branches and the state–federal gulf.

Parties were thus central to American democracy. And patronage was the glue that held the parties together.<sup>273</sup> Financially, patronage kept parties solvent. Many campaign workers worked for free, rewarded for their efforts only later, if the party won.<sup>274</sup> Patronage appointees would then kick a fraction of their salary back to party coffers.<sup>275</sup> And parties charged would-be nominees fees on the front end to put their names forward for nomination.<sup>276</sup>

But the tie of patronage was about more than money. Patronage created a functional and psychological link between the party and its functionaries. Men who owed their professional future to the party would work diligently on the party’s behalf.<sup>277</sup> Patronage was thus an inducement to enter party service and a reward to ensure loyalty.

Patronage was so important to parties that they used several constitutional levers to prevent the President from handling it all alone. The Constitution made the President a part of many appointments by assigning the office explicit responsibility for nominating ambassadors, judges, and noninferior officers and by granting Congress the power to vest in the office, at its pleasure, the appointment of lower officers.<sup>278</sup> But it ensured Senate involvement in the most high-profile appointments through the requirement of Senate confirmation.<sup>279</sup> And it gave Congress other tools to shape staffing, including the power to create and define the

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269. *Id.* at 73.

270. *Id.* at 74.

271. *Id.*

272. *Id.* at 77–78.

273. Rosenblum, *A Body Without a Head*, *supra* note 257, at 15–16.

274. See Gary Gerstle, *Liberty and Coercion* 165–66 (2015) (describing these phenomena in the context of New York City).

275. See *id.* at 165 (describing how party bosses raised funds through “assessments levied on state patronage employees”).

276. *Id.* at 162–63.

277. See 2 Bryce, *The American Commonwealth*, 1888 ed., *supra* note 263, at 486 (“[Citizens] whose bread and butter depend on their party may be trusted to work for their party . . .”).

278. U.S. Const. art. II, § 2.

279. *Id.*

government's offices and control over the government's finances.<sup>280</sup> All this informed a tradition known as "courtesy of the Senate,"<sup>281</sup> which kept the President beholden to party wishes. The practice prevented the President from making patronage appointments to any state without the approval of that state's same-party senators. This left the President, in Bryce's judgment, "practically enslaved [to the party] as regards appointments."<sup>282</sup>

Parties used this power aggressively. The deals that party operatives cut to win elections often included promises of future appointments over which presidential candidates might have little say. Republican party boss Matt Quay, who helped arrange President Benjamin Harrison's election, remarked that Harrison "would never know 'how close a number of men were compelled to approach the gates of the penitentiary to make him president.'"<sup>283</sup> To seal the election, Quay and the other operatives promised away the most important posts in Harrison's government. Harrison was caught off guard: "When I came into power, I found that the party managers had taken it all to themselves. I could not name my own Cabinet. They had sold out every place."<sup>284</sup>

Trapped in a small office and hemmed in by party and legislature, Presidents had little left to do after dealing with appointments. There was certainly not enough policy work to keep them busy. According to Leuchtenburg, Ulysses Grant only worked from ten to three, and that was on the days he was in Washington instead of at his Jersey Shore escape.<sup>285</sup> Chester Alan Arthur worked from ten to four but was known to take Mondays off.<sup>286</sup> Benjamin Harrison seems to have broken at midday to play with his grandkids.<sup>287</sup> And Grover Cleveland refused to let the public know about his work habits; he did not think he owed them an account.<sup>288</sup>

There was nothing striking or unusual about this. Grant, Arthur, Harrison, and Cleveland were simply inhabiting the office according to the norms that then governed it. The post-Civil War, late nineteenth-century presidency was not thought to be a policymaking center of

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280. *Id.* art. I, §§ 8–9.

281. See Betsy Palmer, Cong. Rsch. Serv., RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History* 4, 6–7 (2008) (noting that since Washington's presidency, senators from a nominee's home state and belonging to the President's party "can block a nomination to a federal office within their state merely by objecting to it").

282. 1 Bryce, *The American Commonwealth*, 1888 ed., *supra* note 256, at 79.

283. Leuchtenburg, *American President*, *supra* note 254, at 11 (quoting 2 A.K. McClure, *Old Time Notes of Pennsylvania* 573 (1905)).

284. *Id.* (internal quotation marks omitted) (quoting a statement by President Harrison that was printed in 1 Herbert Adams Gibbons, *John Wanamaker* 269 (1926)).

285. *Id.* at 14.

286. *Id.*

287. *Id.*

288. *Id.* at 15.

government.<sup>289</sup> It was hardly a center of government at all. The dominant theory of the executive at the time saw it as limited and tightly reined in by Congress, to whom it was ultimately beholden.<sup>290</sup> The individual men who occupied the office in that time played the largely passive, forgettable role they were assigned.

B. *Congress's Authority: Perkins and the Rule of the Statute*

Congressional primacy and presidential weakness were reflected in the law. Today, some argue that the government's bureaucracy is supposed to be under the President: If the President can fire a government officer, the argument goes, then the President can control how that officer goes about their work by threatening them with removal.

Whatever the abstract merits of this argument today, it was historically a legal nonstarter. Nineteenth-century removal law did not allow the President to remove government officers at will. Rather, it embodied the constrained conception of the presidency elaborated in section III.A. The pre-Progressive government bureaucracy was not a tool for nonexistent presidential policymaking and implementation; it was a loose collection of political sinecures used to reward sympathizers, electioneers, friends, and relatives.<sup>291</sup> The law of removal accepted and reinforced that reality. It clarified that power over removal—and so over the shape and operations of the government—lay not with the President but with Congress.

This, at any rate, is the clear rule of *United States v. Perkins*,<sup>292</sup> one of the leading pre-*Myers* removal cases, and the decisions leading up to it. This line of cases emerged from the transformation of the Navy in the 1880s and was closely connected to Progressive statebuilding and America's rise as a global power.<sup>293</sup> Progressive reformers, sensitive to the development of new military technologies, pushed to modernize the U.S. fleet.<sup>294</sup> By the end of the nineteenth century, they persuaded Congress to

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289. See, e.g., Clinton Rossiter, *The American Presidency 95–96* (1987) (describing the modern policymaking President as a product of the twentieth century).

290. See Sidney M. Milkis & Michael Nelson, *The American Presidency* 205, 219 (6th ed. 2012) (describing tensions between the executive and other branches of government in determining the scope of presidential power).

291. Skowronek, *American State*, supra note 44, at 25–29, 34–35.

292. 116 U.S. 483 (1886).

293. See Colin D. Moore, *American Imperialism and the State, 1893–1921*, at 63–64 (2017) [hereinafter Moore, *American Imperialism*] (describing the Progressives' emphasis on strengthening American foreign policy and improving national reputation overseas).

294. Robert Seager II, *Ten Years Before Mahan: The Unofficial Case for the New Navy, 1880–1890*, 40 *Miss. Valley Hist. Rev.* 491, 492–93 (1953); see also William H. Thiesen, *Professionalization and American Naval Modernization in the 1880s*, *Naval War Coll. Rev.*, Spring 1996, at 33, 34 (describing the U.S. naval fleet's late nineteenth-century technological advances).

authorize the construction of new, state-of-the-art steel steamer ships to replace the country's aging sail-based force.<sup>295</sup>

The new armada would require "a new type of sailor."<sup>296</sup> The service was dominated by officers with obsolete skills; meanwhile, advancement for new commissions with talent and ability could be painfully slow.<sup>297</sup> A technology-driven, steamer-based steel fleet would need new seamen to guide it, trained in engineering and the tactics of open ocean, "blue-water" power.<sup>298</sup>

To meet these staffing needs, the Navy made efforts to revamp its personnel structure.<sup>299</sup> Before 1882, there were two different kinds of students at the Naval Academy: (1) cadet-midshipmen, who went on to serve as officers of the line and (2) cadet-engineers, who ran ships' engine rooms.<sup>300</sup> They had slightly different training. Both spent four years at the Naval Academy in Annapolis followed by two years of service at sea.<sup>301</sup> But midshipmen had to return to the Academy for a final examination by an Academic Board before graduating,<sup>302</sup> while engineers were eligible to be examined for promotion and warranted assistant engineers after their time at sea without returning.<sup>303</sup>

The law then in force provided that "no officer in the . . . naval service shall in time of peace be dismissed from service except . . . [as a result of] a court-martial."<sup>304</sup> This contributed to bloat in the Navy's ranks and slowed the advancement of new service members.<sup>305</sup> With the Naval

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295. Thiesen, *supra* note 294, at 43.

296. *Id.* at 34.

297. See Philip A. Crowl, Alfred Thayer Mahan: The Naval Historian, *in* *Makers of Modern Strategy From Machiavelli to the Nuclear Age* 444, 469 (Peter Paret ed., 1986) (observing that in 1889, the top graduates of the Naval Academy from twenty years before were still only lieutenants).

298. Thiesen, *supra* note 294, at 34–35. On the new naval strategy, see Crowl, *supra* note 297, at 469; see also A.T. Mahan, *The Influence of Sea Power Upon History* 89 (London, Sampson Low, Marston & Co., Ltd. 1890) (describing the call for a crew of seamen capable of managing the new naval armada).

299. See Donald Chisholm, *Waiting for Dead Men's Shoes: Origins and Development of the U.S. Navy's Officer Personnel System, 1793–1941*, at 365–69 (2002) (discussing the Navy's drive to modernize, including through changes to personnel structure).

300. See *United States v. Redgrave*, 116 U.S. 474, 478–79 (1886) (describing the Naval Academy reforms of 1882 (citing Naval Appropriation Act of Aug. 5, 1882, ch. 391, 22 Stat. 284)); *Leopold v. United States*, 18 Ct. Cl. 546, 555, 557 (1883) (explaining the difference between cadet-engineers and cadet-midshipmen).

301. *Leopold*, 18 Ct. Cl. at 555.

302. *Redgrave*, 116 U.S. at 479 (citing 15 Rev. Stat. §§ 1520–1521, 1556 (1874)).

303. *Leopold*, 18 Ct. Cl. at 557.

304. *United States v. Perkins*, 116 U.S. 483, 484 (1886) (internal quotation marks omitted) (quoting 14 Rev. Stat. § 1229 (1874)).

305. See Chisholm, *supra* note 299, at 369–70 (describing how the newly proposed personnel structure would "reduce crowding into the line, and, presumably improve the officer corps by commissioning only higher-ranked graduates").

Appropriation Act of 1882, Congress sought to address this problem.<sup>306</sup> The Act streamlined training by reclassifying all undergraduate cadet-engineers and cadet-midshipmen as “naval cadets” and prescribing a uniform six-year course of study.<sup>307</sup> It also eliminated entry into the service for Naval Academy graduates as a matter of right and specified that, each year, appointments into the service could not exceed the number of vacancies.<sup>308</sup> Surplus graduates would be honorably discharged with a year’s pay.<sup>309</sup> The Act’s frank intention was to restructure the Navy’s officer corps.<sup>310</sup>

The law created a conundrum as applied to some cadet-engineers, though. What was the status of cadet-engineers who had completed their studies at Annapolis before 1882 but had not yet been warranted assistant naval engineers? Had they been removed from the service? And if so, under what authority? The years after the 1882 Act saw a series of court cases, culminating in *Perkins*, in which the Court of Claims and the Supreme Court wrestled with this removal puzzle. In all of them, the courts approached the matter by looking carefully at the terms of the statute. The Constitution, the meaning of executive power, and fundamental questions of separation of powers never entered into the courts’ analyses.

The first issue concerned the matter of pay. In 1883, Harry G. Leopold brought a “test case” to regularize his classification under the new Act.<sup>311</sup> He had entered the Naval Academy as a cadet-engineer in 1878 and received a diploma from the Academy in June 1882.<sup>312</sup> Until December of that year, he had been paid as a cadet-engineer.<sup>313</sup> But after the terms of the Act went into effect, the Navy and the Treasury Department reclassified him as a naval cadet and lowered his pay accordingly.<sup>314</sup> Leopold sued, alleging that he had already graduated from the Naval Academy and so should not have been reclassified.<sup>315</sup>

The Court of Claims agreed. To construe the law, the court used the traditional tools of statutory interpretation, looking to the text of the statute, other uses of the word “graduate,” and other laws passed by

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306. See *id.* at 369–74 (discussing the debates surrounding the bill).

307. *Redgrave*, 116 U.S. at 476 (statement of facts) (internal quotation marks omitted) (quoting Naval Appropriation Act of Aug. 5, 1882, ch. 391, 22 Stat. 284, 285).

308. *Id.* at 476–77.

309. *Id.* at 477.

310. *Leopold v. United States*, 18 Ct. Cl. 546, 554 (1883) (summarizing the United States’ argument).

311. *Id.* at 548 (argument for the claimant).

312. *Id.* at 554 (opinion of the court).

313. *Id.*

314. *Id.* at 554–55.

315. Note that the Act of 1882 had an explicit provision stating that it should not be used to reduce the rank of any already-commissioned officer. *Id.* at 556 (citing Naval Appropriation Act of Aug. 5, 1882, ch. 391, 22 Stat. 284, 286).

Congress.<sup>316</sup> The latter included the Naval Appropriation Act of 1883, which specifically allocated pay for cadet-engineers serving on steamers according to the older, pre-“naval cadet” pay scale.<sup>317</sup> Cadet-engineers, it concluded, were graduates.<sup>318</sup> Congress had the authority to specify their classification, which it had; the administration thus lacked authority to downgrade Leopold.<sup>319</sup>

Two years later, another cadet-engineer brought a similar suit, and the Court of Claims adhered to its earlier decision.<sup>320</sup> This time, the Government appealed, urging the Supreme Court to read the statute anew.<sup>321</sup> But the Court followed the earlier opinion almost exactly, looking to the text of the law and the intent of Congress to determine the cadet-engineer’s entitlements under the relevant statutes.<sup>322</sup> The opinion is notable, again, for its total silence on considerations of government order that would come to be so important in *Myers* and its belated progeny.

With the question of pay settled, the next problem with the law was tenure. This directly raised the removal issue. The Court of Claims had observed in dicta that the Act’s surplus graduate clause was prospective in character, so it should not apply to cadet-engineers no longer in residence at the Academy.<sup>323</sup> Cadet-engineers already embarked on their two years of naval steamer service would, then, be entitled to a position in the Navy and should already enjoy tenure in office.

Whether that dicta was correct was the question in *Perkins*.<sup>324</sup> Lyman Perkins had graduated from the Naval Academy in 1881 as a cadet-engineer; he then entered into his two-year service.<sup>325</sup> In June 1883, at those two years’ conclusion, the Secretary of the Navy notified him that he was not needed to fill any vacancies and was therefore honorably discharged with one year’s pay under the terms of the 1882 Act.<sup>326</sup> Perkins refused the pay and, invoking the Court of Claims’s dicta, argued that he was already in the Navy with tenure and so could not be discharged under the Act in this way.<sup>327</sup>

The Government’s response complicated the legal issue and raised the constitutional question. Although the Secretary of the Navy had relied on the 1882 Act alone for authority to release Perkins, the Government’s lawyers developed a new argument for the legality of the Secretary’s

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316. *Id.* at 558.

317. *Id.*

318. *Id.* at 559.

319. *Id.* at 560.

320. *Redgrave v. United States*, 20 Ct. Cl. 226, 228–29 (1885).

321. *United States v. Redgrave*, 116 U.S. 474, 479–80 (1886).

322. *Id.* at 480–82.

323. *Redgrave*, 20 Ct. Cl. at 229; see also *Leopold*, 18 Ct. Cl. at 559 (stating the same).

324. *Perkins v. United States*, 20 Ct. Cl. 438 (1885).

325. *Id.* at 442.

326. *Id.*

327. *Id.*

actions that implicated the separation of powers.<sup>328</sup> First, they contended that “if the Secretary [of the Navy] otherwise had the right to discharge the claimant,” then “the order of discharge [was] not vitiated” even if the 1882 Act did not grant him the necessary power.<sup>329</sup> The Government next argued that, regardless of the 1882 Act, the Secretary had an *inherent* right to discharge Perkins—an inferior officer—that Congress could not restrict without “infring[ing] upon the constitutional prerogative of the Executive.”<sup>330</sup>

The Court of Claims was not persuaded. It acknowledged that the then-leading removal case stated as a rule that “the power of removal [w]as incident to the power of appointment”;<sup>331</sup> this would seem to give the Secretary the power to fire Perkins. But the Supreme Court had always said that such power might be abrogated by “constitutional provision or statutory regulation.”<sup>332</sup> And, the Court of Claims went on, there was just such an abrogation in the case at bar: a “curtailment of [the Secretary’s] implied power of removal” by the law that provided tenure for officers of the naval service.<sup>333</sup> The government’s attempt to avoid that restriction by appealing to the Constitution was perplexing and unpersuasive. There was simply “no doubt” that, for inferior officers appointed by the head of a department, Congress could “limit and restrict the power of removal as it deem[ed] best for the public interest.”<sup>334</sup> Department heads acquired their authority to appoint inferior officers only from legislation passed by Congress; they had no independent constitutional authority to appoint or remove officers at all.<sup>335</sup> If Congress wanted to limit the circumstances under which the Secretary of the Navy could remove an inferior officer, it had nearly limitless authority to do so. The question of presidential prerogative simply “d[id] not arise . . . and need[ed] not be considered.”<sup>336</sup>

The Court of Claims therefore ruled for Perkins.<sup>337</sup> His graduation had made him an officer.<sup>338</sup> Congress’s laws had granted him removal protection.<sup>339</sup> Those laws were valid.<sup>340</sup> And the Secretary of the Navy was

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328. *Id.* at 443.

329. *Id.*

330. *Id.* at 444.

331. *Id.* at 443 (internal quotation marks omitted) (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

332. *Id.* (internal quotation marks omitted) (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) at 259).

333. *Id.* at 444 (citing 14 Rev. Stat. § 1229 (1874)).

334. *Id.*

335. *Id.* at 444–45.

336. *Id.* at 444.

337. *Id.* at 445.

338. *Id.* at 444.

339. *Id.* at 445.

340. *Id.* at 444.

without statutory power to remove him at will. Perkins was thus entitled to remain in his position.<sup>341</sup> The Government appealed the Court of Claims's ruling, but the Supreme Court accepted the lower court's reasoning, quoting the lower court's opinion and "adopt[ing] [its] views" as the Court's own.<sup>342</sup>

This should not have surprised the government. The principles the Supreme Court and the Court of Claims applied were those the Supreme Court had stated in *Ex parte Hennen*—the "leading case" the Court of Claims had identified from nearly fifty years before.<sup>343</sup> That case, too, had treated inferior officer removal as a fundamentally statutory question. The Constitution hardly entered into it.<sup>344</sup>

*Hennen*, like the *Myers* case to come,<sup>345</sup> had involved a patronage problem. The dispute centered on the removal of a court clerk by a judge who wanted the position for a friend.<sup>346</sup> The legal puzzle was that, while Congress had provided by law for the appointment of court clerks, it never specified the length of their term or the conditions governing their removal.<sup>347</sup> The deposed clerk objected to his firing and sued to keep his job.<sup>348</sup>

The lawyers in *Hennen* waxed eloquent about the Constitution, republicanism, and the (by then already hoary) "Decision of 1789."<sup>349</sup> But the Supreme Court resolved the case through a simple syllogism that ignored most of the lawyers' legal claims. The Court's major premise—which it never justified—was that if neither the Constitution nor a law specified an office's length of tenure, the incumbent held it either for life or at pleasure.<sup>350</sup> The Court's minor premise was that no one could have

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341. *Id.* at 445.

342. *United States v. Perkins*, 116 U.S. 483, 485 (1886).

343. *Perkins*, 20 Ct. Cl. at 443; accord Richard H. Pildes, Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act, 5 N.Y.U. J.L. & Bus. 485, 517 (2009) ("[F]or over a century the Supreme Court has made clear that Congress has the constitutional power to set the terms under which inferior officers of the United States hold their positions.").

344. Compare *Perkins*, 116 U.S. at 484–85 (observing that the Constitution here gave Congress the authority to "limit and restrict the power of removal as it deems best for the public interest" through legislation and declining to recognize other relevant constitutional limits (internal quotation marks omitted) (quoting *Perkins*, 20 Ct. Cl. at 444)), with *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839) (observing that who exercises the power of removal depends "upon the authority of law" and declining, in the instant case, to recognize other relevant constitutional limits).

345. See *supra* Part II.

346. *Ex parte Hennen*, 38 U.S. (13 Pet.) at 256–57.

347. *Id.* at 258–59.

348. *Id.* at 256.

349. *Id.* at 233, 247.

350. *Id.* at 259.



intended for court clerks to hold their positions for life.<sup>351</sup> It naturally followed, then, that they should be removable at will.<sup>352</sup>

The only question left, then, was who should have removal authority. The answer would turn, the Court believed, on “the nature of the power [of removal].”<sup>353</sup> “The execution of the power” to appoint and remove, the Court said, “depends upon the authority of law, and not upon the agent who is to administer it.”<sup>354</sup> In other words, whether a government actor had the power to remove an inferior officer had to do not with the actor’s identity or title but with *the law that created the office* and empowered the actor.<sup>355</sup> Here, Congress had not specified who should have the removal power, so the Court proposed a sensible default rule: When it came to service at pleasure, “[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.”<sup>356</sup>

Armed with that logic, the Court disposed of the puzzle of the clerk’s removal easily. Congress had vested the power to appoint the clerk “exclusively in the District Court.”<sup>357</sup> Since Congress had vested the appointment power in the judge and given that judge the power to appoint a successor, which “would, per se, be a removal of the prior incumbent,” it must have intended to give the judge removal power as well.<sup>358</sup> The default rule made sense here, so the Court applied it. The removal was thus acceptable, and the Supreme Court itself “c[ould] have no control over the appointment or removal, or entertain any inquiry into the grounds of removal” either.<sup>359</sup>

There was a constitutional logic undergirding this statutory ruling, but it actually cut against contemporary Article II sensibilities and the logic Taft would rely on in *Myers*. Suppose, the Court explained, that the court clerk had *not* been removable at pleasure by the judge who had appointed him. This would lead to a horrible reductio ad absurdum: The clerk would have been legally unremovable! Admittedly, this was “a most extraordinary construction of the law,” but it would “inevitably follow,” the Court believed, “unless the incumbent was removable at the discretion of the department.”<sup>360</sup> The implication was that only the department head would have the power to remove an inferior officer they had appointed. The

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351. Id. at 259–60.

352. Id. at 261.

353. Id. at 260.

354. Id.

355. Id.

356. Id. at 259.

357. Id. at 261.

358. Id.

359. Id.

360. Id. at 260.

Court underscored its implication by ruling out the President as a possible firer-in-chief: “[T]he President has certainly no power to remove.”<sup>361</sup>

This analysis brings into view the wholly different world of separation of powers that informed the Court’s pre-*Myers* removal cases involving agents other than the President. From 1839 (*Hennen*) to 1903 (*Perkins*)—from Jacksonian rotation in office to the turn-of-the-century civil service—the Court refused entreaties to turn questions of statutory construction into problems of constitutional law. To be sure, *Hennen* did surmise that “the power of removal [w]as incident to the power of appointment,” but it did so as a statutory matter, based on what it supposed was Congress’s intent, and only as a default rule.<sup>362</sup> Inferior officers were products of Congress’s law. The authority to appoint them flowed from Congress’s acts, so the authority to remove them would have to come from Congress’s acts as well.

None of these nineteenth-century authorities found a free-floating presidential removal power to fire any government employee or inferior officer. The President’s removal power would need a legal foundation as solid as that of any other government agent claiming appointment and removal authority.

C. *Presidential Acquiescence: The Tenure of Office Act and the Revised Statutes of 1874*

According to *Hennen*, presidential involvement in the tenure of inferior officers should be treated no differently than nonpresidential removals: “The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone.”<sup>363</sup> Later nineteenth-century courts agreed, looking to Congress’s intention to determine whether the President could remove particular appointed officers. When the Court did find reason to identify a specific presidential removal power, it analyzed it as a discrete legal (and usually statutory) entitlement.<sup>364</sup>

Consider *McAllister v. United States*, an 1887 case concerning the removal of Ward McAllister, a district judge for the Alaska Territory.<sup>365</sup> Judge McAllister had been appointed by the Republican President Chester A. Arthur in 1884, but, one year later, the new Democratic President, Cleveland, suspended the judge and replaced him.<sup>366</sup> McAllister sued, arguing that Cleveland had no right to suspend him, and demanded his unpaid salary.<sup>367</sup>

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361. *Id.*

362. *Id.* at 259.

363. *Id.* at 260.

364. See *supra* section III.B (discussing some examples of this mode of interpretation).

365. 22 Ct. Cl. 318, 324 (1887).

366. *Id.* at 319–20 (reporters’ statement of the case).

367. *McAllister v. United States*, 141 U.S. 174, 176–77 (1891).

Despite the President's involvement, the Supreme Court analyzed the case just as it had treated the prior cases involving clerks and naval cadets: It looked to the terms of the statutes at issue. The law establishing the judgeship for the District of Alaska specified that the officeholder would serve a term of four years "and until [a] successor[] w[as] appointed and qualified."<sup>368</sup> The statute pointedly did not empower the President to remove or suspend the officeholder. President Cleveland thus sought his authority in—of all places—the Tenure of Office Act, which had a provision permitting the President to, under certain circumstances, suspend "any civil officer appointed by and with the advice and consent of the [S]enate, except judges of the courts of the United States."<sup>369</sup> The question for the Court, then, was whether the District of Alaska territorial judge was a "civil officer" or a "judge" of the United States.<sup>370</sup> If the former, the President was within his rights to suspend McAllister; if the latter, McAllister's "claim to salary, up to, at least, the confirmation by the [S]enate of [his successor] [wa]s well founded."<sup>371</sup>

The Court divided. Six Justices held McAllister to be a civil officer, not a judge, on the grounds that because he served for a limited term, he did not meet the standards for an Article III judgeship, and so did not count as a judge of a court of the United States.<sup>372</sup> The dissenters disagreed, concluding that no judgeship could ever be held at the pleasure of an executive officer and that, in any case, a territorial judgeship surely counted as a United States court.<sup>373</sup> The details of the disagreement matter less than that all nine Justices fundamentally agreed on the nature of the legal question presented: If the President *did* have the power to suspend McAllister, it was because of the authority granted by the Tenure of Office Act. The legal question, again, was one of statutory interpretation.

The dissent did suggest that McAllister's case might raise a constitutional problem. But, as in *Hennen*, it was not the one modern readers expect. The dissenters did not worry about whether Congress could restrict the President's removal power; rather, they surmised that

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368. Id. at 178.

369. Id. at 177 (quoting 19 Rev. Stat. § 1768 (1875)). The statutory language at issue was enacted as part of the 1869 amendments to the Tenure of Office Act and was repealed in 1887. See Act of Apr. 5, 1869, ch. 10, sec. 2, 16 Stat. 6, 7 (amending Tenure of Office Act of 1867, ch. 154, 14 Stat. 430), repealed by Act of Mar. 3, 1887, ch. 353, 24 Stat. 500. On Cleveland's reliance on the Tenure of Office Act to perform the suspension, see *McAllister*, 22 Ct. Cl. at 319 (reporters' statement of the case).

370. *McAllister*, 141 U.S. at 179–80.

371. Id.

372. Id. at 184–87. The position also lacked the guarantee of compensation that could not be diminished. Id. at 187.

373. Id. at 193–94, 200–01 (Field, J., dissenting).

Congress might not be allowed, constitutionally, to empower the President to suspend a territorial judge at all.<sup>374</sup>

There was a further irony in play: The Government's position, which echoed the Court's statute-first view of the case, was briefed and argued at the Supreme Court by none other than Taft, serving at the time as Solicitor General. Strikingly, Taft did not argue that the Tenure of Office Act was void. Rather, he relied on it. "It is not proposed to enter into the question of the right of Congress to limit the power of appointment and removal," Taft opened his brief.<sup>375</sup> "The only point for discussion here is whether the language of [the Tenure of Office Act] applies to a judge of the district court of Alaska . . . ."<sup>376</sup> Taft concluded that it did and that the President's actions were therefore lawful.<sup>377</sup>

After *McAllister*, the Tenure of Office Act would create at least one new headache for the law of presidential removal. The Act specified that the President could suspend civil officers while the Senate was not in session and allowed the Senate to ratify the President's choices by confirming new nominees.<sup>378</sup> In 1887, the Act was repealed through a law that simply struck it from the books.<sup>379</sup> In the interim, though, Congress had completely revised and consolidated the laws of the United States against the backdrop of the Tenure of Office Act.<sup>380</sup> Over several years, a rotating cast of attorneys had combed through the seventeen volumes of the *Statutes at Large* to prune away contradictions and eliminate obsolete provisions.<sup>381</sup> Congress had enacted the new consolidation into law in 1874 as the *Revised Statutes*.<sup>382</sup> It was a heroic undertaking, the first of its kind in the United

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374. See *id.* at 195 ("I cannot believe that under our constitution and system of government any judicial officer invested with these great responsibilities can hold his office subject to such arbitrary conditions. . . . [G]ood behavior during the term of his appointment is the only lawful and constitutional condition to the retention of his office.").

375. Brief of the United States at 3, *McAllister*, 141 U.S. 174.

376. *Id.* at 3–4.

377. *Id.* at 18.

378. Act of Apr. 5, 1869, ch. 10, sec. 2, 16 Stat. 6, 7 (amending Tenure of Office Act of 1867, ch. 154, 14 Stat. 430), repealed by Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

379. 24 Stat. at 500.

380. See Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1012 (1938) (describing how Congress enacted a "complete revision" of all permanent federal public law in 1874).

381. See *id.* at 1012–14 (describing the lengthy process). Note that "[i]t was the opinion of the joint [congressional] committee [overseeing the consolidation] that the commissioners [in charge of doing the compiling] had so changed and amended the statutes that it would be impossible to secure the passage of their revision," and so their first draft was sent to an attorney to "expunge all changes in the law made by the commission"—to imperfect effect. *Id.* at 1013–14.

382. *Id.* at 1014.

States.<sup>383</sup> But it turned out to be full of mistakes.<sup>384</sup> And it had harmonized the existing laws with the no-longer-in-force Tenure of Office Act, stripping away provisions from other laws that the Act had abrogated.

This created confusion, as revealed in *Parsons*, probably the leading pre-*Myers* presidential removal case. Lewis E. Parsons Jr. was three years into his four-year term as U.S. Attorney for the Northern District of Alabama (and acting U.S. Attorney for the Middle District of Alabama) when President Cleveland—back for the second of his two nonconsecutive terms—sought to replace him.<sup>385</sup> Parsons refused to step down and disputed the President’s authority to force him out; he eventually sued for his salary.<sup>386</sup>

Had the Tenure of Office Act still been in force, the Supreme Court opined, Parsons would have had no case.<sup>387</sup> His suspension by the President and the eventual confirmation of his successor by the Senate would have led to his being “legally removed . . . in [just] the way it occurred.”<sup>388</sup> But the repeal of the Act caused a complication. Congress created the office of U.S. Attorney in 1789 without specifying either term lengths or removal conditions.<sup>389</sup> Congress corrected that oversight in 1820 by passing a new law setting the term for U.S. Attorneys at four years and specifying that they were to be “removable from office at pleasure.”<sup>390</sup> But the Tenure of Office Act abrogated the removal-at-pleasure provision, so it was not included in the definition of the office when the laws were consolidated and reenacted as the *Revised Statutes* in 1874.<sup>391</sup> Meanwhile, the repeal of the Act in 1887 did not include any new language on removal; it simply got rid of the Tenure of Office Act.<sup>392</sup> What, then, of the removability of U.S. Attorneys?

Parsons claimed he was unremovable, relying on the text of the *Revised Statutes*. His attorney argued straightforwardly that the repeal of

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383. Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 *Law Libr. J.* 545, 549 (2009).

384. See Dwan & Feidler, *supra* note 380, at 1014 (noting that sixty-nine errors were found in the *Revised Statutes* when it was first published and that 183 errors were found in the following few years).

385. *Parsons v. United States*, 30 Ct. Cl. 222, 223 (1895) (reporters’ statement of the case); *id.* at 237 (majority opinion).

386. *Id.* at 223–25 (reporters’ statement of the case).

387. *Parsons v. United States*, 167 U.S. 324, 341 (1897).

388. *Id.*

389. See Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92–93 (describing the duties and compensation of the person appointed “to act as attorney for the United States” in each judicial district but not providing any term lengths or procedures for the removal of said official).

390. Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582.

391. Compare 13 Rev. Stat. § 769 (1874) (establishing U.S. Attorneys’ term length but not a process for their removal), with ch. 102, § 1, 3 Stat. at 582 (establishing U.S. Attorneys’ term length and specifying that they are “removable from office at pleasure”).

392. See *supra* note 379 and accompanying text.

the Tenure of Office Act did not revive the President's 1820 removal authority because the repeal of the Act did not by itself reenact the earlier statute.<sup>393</sup> "If the law is wrong," they concluded their brief, "the remedy is with Congress."<sup>394</sup> The Government defended by arguing that the President enjoyed a constitutional power to remove executive branch officers, that the law specifying U.S. Attorneys' four-year term was "a limitation . . . not a grant," and that, in any case, the repeal of the Tenure of Office Act in 1887 "was not intended to restrict the powers of the President" to remove but rather "to remove restrictions thereon."<sup>395</sup>

As in its previous cases, the Court was guided by its understanding of what the legislature wanted, despite the Government's invitation to resolve the case on constitutional grounds. It "could never have been the intention of Congress," the Court concluded, "to limit the power of the President more than it was limited before that statute was passed."<sup>396</sup> Before the Tenure of Office Act, under any theory of presidential removal, the President had the power to remove U.S. Attorneys, and the President and Senate acting together could certainly replace them. Repealing the Tenure of Office Act must have aimed to restore that status quo ante—"again to concede to the President the power of removal if taken from him by the original tenure of office act."<sup>397</sup>

In dicta, both the Court of Claims and the Supreme Court recognized that there was a constitutional issue in the background. But it was, again, not quite the issue modern sensibilities expect. The two courts understood Congress's construction of the Constitution as a determining factor to be considered in deciding whether the President had a constitutional power to remove at all.<sup>398</sup>

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393. Appellant's Brief at 14–16, *Parsons*, 167 U.S. 324 (No. 270).

394. *Id.* at 50.

395. Brief for Appellee at 3, 51, 57, *Parsons*, 167 U.S. 324 (No. 270). The government grounded this right, of course, in the Decision of 1789, which it rehearsed at length in its brief. *Id.* at 3–15, 51, 57.

396. *Parsons*, 167 U.S. at 342–43.

397. *Id.* at 343.

398. According to the Court of Claims, from 1789 to 1820 the President's power to remove U.S. Attorneys had existed "by constitutional implication and construction." *Parsons v. United States*, 30 Ct. Cl. 222, 242 (1895). Congress's 1820 decision to recognize that power "is an additional argument in favor of th[at] construction." *Id.* at 243. The Court frankly recognized that the passage of the Tenure of Office Act "establish[ed] a new theory of constitutional law and a new policy of political administration" connected to the "readjustment of our institutions incident to the great civil war." *Id.* But neither that fact nor the Act's repeal in 1887 made it any less "valuable as a legislative construction of the Constitution of the United States in conflict with that theory which had prevailed" before. *Id.* For its part, the Supreme Court curiously began its *Parsons* opinion with a long list of citations to authorities tending to establish the President's inherent constitutional power to remove, *Parsons*, 167 U.S. at 328–34, but disclaimed any intention of deciding that question, *id.* at 334 ("The foregoing references to debates and opinions have not been made for the purpose of . . . arriving at a decision of the question of the constitutional power of the President . . . but simply for the purpose of seeing what the views of the various departments

This focus on Congress, as opposed to the President, persisted even in *Shurtleff*,<sup>399</sup> perhaps the most strongly pro-executive of any of the pre-*Myers* removal cases. Ferdinand Shurtleff had been appointed to the Board of General Appraisers,<sup>400</sup> a predecessor to the Court of International Trade responsible for adjudicating customs disputes.<sup>401</sup> The Board was an unusual institution at the time: It had a strict partisan balance built into the statute because it was quasi-judicial and supposedly above politics.<sup>402</sup> In that spirit, the statute did not specify a term of years for Board members, but instead granted them for-cause removal protection.<sup>403</sup> Contemporary accounts suggest that appointments to the Board were understood to last “for life or during good behavior.”<sup>404</sup>

For reasons that are not entirely clear but may have been connected to a desire to change tariff policy, President William McKinley sought to remove Shurtleff and one of his fellow Board members nine years after

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of the Government have been . . .”). Niko Bowie and Daphna Renan’s pathbreaking article reconstructs the Court’s historical narrative notwithstanding its avowed intentions. See Bowie & Renan, *supra* note 72, at 2072–75 (discussing how Taft mirrored *Parsons*’s historical discussion in *Myers*). The Justices offered a sanitized history in which the President’s removal power had always been recognized, from 1789 until the passage of the Tenure of Office Act. See *Parsons*, 167 U.S. at 337–39 (briefly examining “the course of legislation in regard to the appointment of district attorneys”). The Court then presented the Tenure of Office Act as an aberration, a short and unfortunate parenthesis happily closed by the Act’s repeal and the restoration of harmonious relations between Congress and the Executive. *Id.* at 340–41. This is, of course, the White Redeemer narrative, which framed Reconstruction as a radical and constitutionally tenuous aberration, transposed into administrative law. See *supra* text accompanying notes 229–237; *infra* text accompanying note 656.

399. *Shurtleff v. United States*, 189 U.S. 311 (1903).

400. *Shurtleff v. United States*, 36 Ct. Cl. 34, 35 (1901) (reporters’ statement of the case).

401. See Adam J. Rappaport, Comment, The Court of International Trade’s Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory, 68 U. Chi. L. Rev. 1429, 1431 (2001) (describing the history of the Court of International Trade).

402. See Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136 (requiring that no more than five of the nine assessors be from the same political party); Aditya Bamzai, Taft, Frankfurter, and the First Presidential For-Cause Removal, 52 U. Rich. L. Rev. 691, 717–18 (2018) (discussing the Board’s independence from politics); Rappaport, *supra* note 401, at 1431–32 (describing the Board as “quasi-judicial”); Joseph F. Donohue Jr., A Brief History of the U.S. Court of International Trade, Fed. Law., Feb. 2007, at 30, 30 (tracking the growth of the Board’s judicial character).

403. See § 12, 26 Stat. at 136 (stating that Board members “may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office”).

404. Appraisers Asked to Resign, N.Y. Times, Jan. 24, 1899, at 12; see also Big Customs Fight Predicted, N.Y. Times, Jan. 25, 1899, at 9 (“The members of the board have always supposed that they held life positions. . . . [O]ne member some years ago refused an offer from a business concern [for a higher salary than he made as a board member] because he preferred a life position.”); The Case of the General Appraisers, N.Y. Trib., Jan. 26, 1899, at 6 (“[T]he position of General Appraiser has been considered a life position, not to be taken away for political reasons.”).

their appointment.<sup>405</sup> A minor scandal ensued.<sup>406</sup> Shurtleff filed suit, demanding the remainder of his salary.<sup>407</sup>

The courts did what they had done previously: looked to the terms of the statute to understand Congress's intent.<sup>408</sup> According to the Court of Claims, the law empowered the President to remove Board members like Shurtleff for certain causes and left it to "the President alone to determine whether one of the specified causes furnishe[d] a basis for his action."<sup>409</sup> The court presumed that McKinley had followed the law: Even though he did not tell anyone, he must have determined for himself that Shurtleff had been inefficient, neglected his duty, or engaged in malfeasance in office.<sup>410</sup> This was fine. The removal was therefore legal.

The Supreme Court upheld the Court of Claims's decision on different statutory grounds. As it saw things, any for-cause removal required a hearing.<sup>411</sup> Because Shurtleff was not given a hearing, the Court argued, "[i]t must be presumed that the President did not make the removal for any cause assigned in the statute."<sup>412</sup> The Court of Claims was thus wrong to conclude that the President had removed Shurtleff for one of the causes specified in the law.

Nevertheless, the Supreme Court agreed with the Court of Claims that Shurtleff's removal was proper.<sup>413</sup> The key issue was, as ever, Congress's intent. The Supreme Court conceded that the text of the statute would seem to limit the President to removal for cause only.<sup>414</sup> But this would lead to absurd results. If the President could remove a General Appraiser only for cause, Board members would by default enjoy life tenure unless "found guilty of some act specified in the statute."<sup>415</sup> Yet "no civil officer," excepting Article III judges "ha[d] ever held office by a life tenure since the foundation of the government."<sup>416</sup> The Court refused to conclude that Congress sought "to make such an extraordinary change in the usual rule governing the tenure of office" without more explicit language—especially not here, because the Court could find "no reason for such

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405. On the possible reasons for Shurtleff's removal, see Bamzai, *supra* note 402, at 720–21.

406. *Id.* at 722.

407. *Shurtleff v. United States*, 36 Ct. Cl. 34, 40 (1901).

408. See *id.* at 42 (discussing the purpose of the Customs Administrative Act of 1890 § 12).

409. *Id.*

410. See *id.* (dismissing Shurtleff's claim after finding that the President could remove General Appraisers from office).

411. *Shurtleff v. United States*, 189 U.S. 311, 313–14 (1903).

412. *Id.* at 314.

413. *Id.* at 318–19.

414. See *id.* at 315–16 (evaluating whether Congress's "use of language providing for removal for certain causes thereby provide[s] that the right could only be exercised in the specified causes").

415. *Id.* at 316.

416. *Id.*



action by Congress with reference to this office.”<sup>417</sup> Because the Court could not believe that Congress intended to create a life-tenured office, it concluded that the Board members must be removable by the President at will, at least for causes other than those enumerated.

This ruling did implicitly recognize something like a presidential removal power for officers the President appointed.<sup>418</sup> But, in keeping with the default rule of *Hennen*, the Court observed that it could be “limited by constitution or statute.”<sup>419</sup> Here it just had not been. And the Court’s discussion suggested some serious limits on whatever removal power the President did have: The President must act “under his oath of office” and so “for the general benefit and welfare.”<sup>420</sup> “In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed . . . .”<sup>421</sup>

The Court’s analysis of the President’s power is as notable for its silences as for what it stated. The Court did not consider a presidential power of removal necessary to make democracy work or to embody the President’s democratic authority. Nor did the Court seem to believe that the President should have the power to remove officials in order to realize a personal policy preference or national program. The notion that the President possessed a “mandate” to act independent of Congress’s wishes was also missing. Indeed, the Court closed its eyes to the particular political context, refusing to discuss either popular understanding that these offices were to be held during life or good behavior or how such a tenure might pose a barrier to McKinley’s tariff goals. Nor did the Court believe the question settled by the President’s place in an administrative hierarchy. It did note that the Board was “under the direct supervision of the President.”<sup>422</sup> But it had “no doubt of the power of Congress” to create and organize the office pursuant to congressional goals, responsibilities, and structure.<sup>423</sup>

So committed was the law to congressional primacy that the Court would rather stretch its reading of a statute to reconcile presidential action with congressional intent than find an independent constitutional presidential removal power. According to one interpretation, the statute in *Shurtleff* sought to give the members of the Board of Appraisers tenure

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417. *Id.* at 316–17.

418. See *id.* at 318 (“The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language.”).

419. *Id.* at 316.

420. *Id.* at 318.

421. *Id.* at 317.

422. *Id.* at 315.

423. *Id.* at 313.

during good behavior and render them unremovable except for cause.<sup>424</sup> (Indeed, Congress would later make them into Article III judges.<sup>425</sup>) From this view, McKinley's actions were just as much a violation of the law as Wilson's were in *Myers*.<sup>426</sup> Looking back from *Myers*, the Court's easiest resolution would have been to acknowledge a constitutional presidential removal power. Yet it demurred. Instead, the Justices offered a patently unconvincing interpretation of the statute and congressional intent that would make McKinley's conduct licit.<sup>427</sup> In other words, the Court strained to uphold the President's actions under a theory of legislative removal supremacy, revealing the power of this nineteenth-century way of thinking.

Even a strongly pro-executive case like *Shurtleff*, then, hewed to the same Congress-first pattern of the other removal cases. When the President sought to remove government officers, courts looked to the terms of Congress's laws and gave those laws effect. Litigants regularly raised constitutional arguments, and the Supreme Court occasionally acknowledged constitutional considerations. But courts resolved these disputes on nonconstitutional grounds. If Congress had vested the President with appointment authority, the President might have a removal power under the rule of *Hennen*.<sup>428</sup> And courts might imply the existence of such a power when, in their judgment, Congress must have intended one to avoid an absurd result. But Congress's power to create the government was undisputed. There was no discussion of the President's special obligations (and so attendant) powers as representative, policymaker, or administrator. Why would there be when the President was engaged in removal to realize party patronage ends?

#### IV. THE PROGRESSIVE PRESIDENCY

At the dawn of the twentieth century, the presidential role seemed settled. The President was Congress's errand boy. Presidents did not understand themselves as national leaders, elaborating or implementing a policy for the nation; that was the legislature's job. The law reflected that reality. From the Jacksonian Era through the Spanish–American War, an uninterrupted string of Supreme Court decisions recognized Congress's power to specify the structure of the government and the reach of the President's administrative authority.<sup>429</sup>

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424. See *id.* at 314–16 (rejecting the appellant's contention that the statute reflects Congress's intent to prohibit the President from removing Board members without cause).

425. Patrick C. Reed, *The Origins and Creation of the Board of General Appraisers: The 125th Anniversary of the Customs Administrative Act of 1890*, 11 *J. Fed. Cir. Hist. Soc'y* 91, 92 (2017).

426. See *supra* section II.B.

427. See *supra* notes 413–421 and accompanying text.

428. See *supra* notes 345–362 and accompanying text.

429. See *supra* section III.B.

Yet even as the Court handed down *Shurtleff*, the world was changing. In the first decades of the twentieth century, the presidency was developing into something new. A telling commentary could be found in the revisions Bryce made to his magnum opus, *The American Commonwealth*, which went through multiple editions between 1888 and 1914. The changes were subtle but all tended in the same direction: toward greater presidential power. The President went from having, in Bryce's first edition, no "free hand" in foreign policy to, by the third edition, having one "rarely."<sup>430</sup> During that same timeframe, Bryce recognized that Congress had begun to yield some of the "ground which the Constitution left debatable between the President and itself."<sup>431</sup> The presidential veto was changing too—from a constitutional check to a policy tool.<sup>432</sup> In a 1914 update to his chapter assessing the weaknesses and disappointments of American chiefs past, Bryce added a telling footnote: "Of presidents since 1900 it is not yet time to speak."<sup>433</sup>

Several factors made the moment so open ended. Rising labor unrest and industrial consolidation led to the development of new federal agencies to oversee antitrust, labor, and regulatory policy.<sup>434</sup> A passionate reform impulse called for new public champions against party machines and moneyed interests.<sup>435</sup> A professionalized corps of journalists emerged,

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430. Compare 1 Bryce, *The American Commonwealth*, 1888 ed., supra note 256, at 50, with 1 James Bryce, *The American Commonwealth* 54 (1910 ed.) [hereinafter 1 Bryce, *The American Commonwealth*, 1910 ed.].

431. Compare 1 Bryce, *The American Commonwealth*, 1888 ed., supra note 256, at 223–24 (noting that Congress "has succeeded in occupying *nearly all* the ground which the Constitution left debatable between the President and itself" (emphasis added)), with 1 James Bryce, *The American Commonwealth* 227 (1914 ed.) [hereinafter 1 Bryce, *The American Commonwealth*, 1914 ed.] (changing "nearly all" to "most").

432. Compare 1 Bryce, *The American Commonwealth*, 1888 ed., supra note 256, at 55 (explaining that the President uses the veto "to keep Congress in order"), with 1 Bryce, *The American Commonwealth*, 1910 ed., supra note 430, at 59 (noting that the use of the veto had gone beyond what had been imagined at the Convention, as it had "now come to be used on grounds of general expediency, to defeat any measure which the Executive deems pernicious either in principle or in its probable results").

433. 1 Bryce, *The American Commonwealth*, 1914 ed., supra note 431, at 84 n.2.

434. See supra note 47 and accompanying text.

435. See Amy Bridges, *Democratic Beginnings: Founding the Western States* 103–35 (2015) (describing how both the Democratic and Republican Parties in Arizona and New Mexico embraced Progressivism in response to worker and immigrant activism around the states' foundings); Sean Dennis Cashman, *America in the Gilded Age* 354–80 (3d ed. 1993) (finding the origins of the Progressive Age in the response to big business and mass discontent in the early twentieth century); McGerr, supra note 53, at 160–62 (discussing popular support for food and drug regulations in the early twentieth century). For more background on the era's movements, see generally Nell Irvin Painter, *Standing at Armageddon: A Grassroots History of the Progressive Era* (2d ed. 2008) (describing calls for social change resulting from the concentration of wealth between the 1870s and the 1910s); Charles Postel, *The Populist Vision* (2007) (assessing the rise of the populist movement with a specific focus on farmers and industrial workers).

ready to expose unsavory conditions in cities and industry.<sup>436</sup> Eager for access to the political class, they elevated the very politicians they covered, making them media stars.<sup>437</sup> America's rise as an industrial and imperial power spurred new diplomatic and nation-building efforts abroad (along with the already-discussed growth of a sprawling navy).<sup>438</sup> The country was becoming great—a policy state—and politicians were discovering ways, as individuals, to tap into that greatness. The presidency became an institutional focal point for these developments.<sup>439</sup>

With a new mandate came new roles and new tools. The nineteenth-century “partisan Presidents” had been bound by loyalty to their party, which constrained their direct communications to the public.<sup>440</sup> In the mid-1890s, fixed institutional relationships began to change. The new Presidents spoke directly to the public, thereby setting the terms on which ideological competition and policymaking would take place.<sup>441</sup> The concept of presidential representation came to the fore: As the sole officer elected by the nation as a whole, Presidents enjoyed a stronger claim to democratic representativeness than other elected officials; this afforded them independent policymaking authority separate from Congress.<sup>442</sup> This shift in the conception of the presidency, coupled with decades of civil service reform that had produced a new cadre of professionals,

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436. See Richard L. Kaplan, *Politics and the American Press: The Rise of Objectivity, 1865–1920*, at 2–3 (2002) (explaining how twentieth-century “newspapers elaborated a new occupational ethic and reconstructed their political role in the public arena”); Michael Schudson, *Discovering the News: A Social History of American Newspapers*, 4–7 (1978) (describing the “[s]ensationalism” that developed in newspaper reporting).

437. See Kaplan, *supra* note 436, at 193 (arguing that journalists often embraced and promoted politicians, resulting in greater access and elevation in journalists’ status); see also John Nerone, *The Media and Public Life* 141–42 (2015) (“The journalism of exposé posited a new and different relationship between the news media, the citizen, and the political process.”); Stephen Ponder, *Managing the Press: Origins of the Media Presidency, 1897–1933*, at xvi, 1–3 (1998) (arguing that Presidents from McKinley onward managed the press and increased the prestige of the presidency by granting unprecedented access).

438. See Moore, *American Imperialism*, *supra* note 293, at 1–5 (discussing bureaucrats and politicians’ “quest to transform the United States from a prosperous industrial republic into an imperial power” beginning around the turn of the twentieth century); see also Arthur M. Schlesinger, Jr., *The Imperial Presidency* 82 (1973) (discussing how these developments strengthened executive power); *supra* notes 292–310 and accompanying text.

439. See Arnold, *Remaking*, *supra* note 44, at 10–13 (discussing the great institutional changes that occurred under President Taft).

440. See, e.g., Skowronek, *Politics*, *supra* note 251, at 199–200 (examining this trend in the context of Lincoln’s presidency); Matthew J. Dickinson, *The President and Congress*, *in* *The Presidency and the Political System* 406, 419–21 (Michael Nelson ed., 10th ed. 2014) (discussing how parties developed “mass-based campaigns” that included Congress and the President); cf. Bailey, *supra* note 123, at 3–9 (canvassing the debate over presidential modernity). For a discussion of the pre-Progressive presidency, see *supra* section III.A.

441. See Ponder, *supra* note 437, at 1–3 (explaining how McKinley saw the “press [as] a tool that he could use to shape public opinion”).

442. See Bailey, *supra* note 123, at 3 (noting that modern Presidents claim a popular mandate and the unique right to speak on behalf of the American public).

transformed the bureaucracy into a streamlined apparatus ready to serve the presidential agenda.<sup>443</sup>

This was a new, modern approach to the presidency. These twin roles in the new presidential script—public leadership and presidential administration—appeared to make Presidents more than mere “enforcers of the law”; they were becoming “lawmakers” themselves.<sup>444</sup>

This Part recounts the watershed transformation of the presidency in the Progressive Era. Section IV.A focuses on Teddy Roosevelt to emphasize his account of the President as the people’s representative. Section IV.B turns to Taft to show how he responded to Roosevelt by highlighting the President’s administrative authority. Section IV.C looks to Wilson to bring out his attempt to theorize the office beyond Taft as the nation’s lead policymaker: an American prime minister. And Section IV.D looks to the 1920s to show how the new presidential script survived the “return to normalcy.” Under nominally anti-Wilsonian President Warren Harding, the new Progressive Presidency endured, setting the stage for its constitutionalization in *Myers*.

#### A. *Theodore Roosevelt: The Popular Tribune*

No one embodied this change better than the gallant, buoyant Teddy Roosevelt, who rose improbably to the presidency and then captivated the public’s attention for seven years. He redefined the national agenda with his leadership of his party and the federal agencies, including the Navy, the Forestry Service, and the Department of Justice.<sup>445</sup> After four years out of office, Roosevelt threw “his hat . . . in the ring” once more in 1912, mounting a frontal challenge against his old party from the back of a locomotive.<sup>446</sup> Roosevelt’s 1912 presidential campaign has gone down as a failure,<sup>447</sup> but it left no doubt about the President’s status as celebrity, agenda-setter, and party leader. Roosevelt was “the most striking figure in American life,” per Thomas Edison;<sup>448</sup> “a Superman if there ever was one,”

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443. See Skowronek, *Politics*, supra note 251, at 229–30 (noting that Roosevelt built “new kinds of governing institutions” that enabled him to “seize[] the role of party-builder itself”).

444. Bailey, supra note 123, at 3.

445. See Lewis L. Gould, *The Presidency of Theodore Roosevelt* 5, 189–214 (1991) [hereinafter *Gould, Roosevelt*] (discussing Roosevelt’s leadership of the Navy during his time in the McKinley Administration and his leadership of other federal agencies as President).

446. James Chace, *1912: Wilson, Roosevelt, Taft & Debs—The Election that Changed the Country* 107, 200 (2004).

447. See id. at 238–40 (discussing Roosevelt’s defeat in the 1912 election).

448. Jon Knokey, *Theodore Roosevelt and the Making of American Leadership* 400 (2015) (internal quotation marks omitted) (quoting Corinne Roosevelt Robinson, *My Brother Theodore Roosevelt* 297 (1921)).

according to Arthur Conan Doyle.<sup>449</sup> Influential Progressive editor William Allen White gushed: “Theodore Roosevelt bit me and I went mad.”<sup>450</sup>

When first taking office after McKinley’s assassination, Roosevelt dutifully reassured old-guard Republicans that he would continue his predecessor McKinley’s priorities.<sup>451</sup> But in private, Roosevelt had long criticized McKinley’s leadership as weak and passive.<sup>452</sup> He soon discovered, to his joy, that the constraints on the office “were as much norms internalized by presidents as they were institutional limitations imposed on those presidents.”<sup>453</sup> Un beholden to such norms himself, Roosevelt was free to rewrite the presidential script. He ended up developing the role of the President as popular tribune.

This required, first, reworking the relationship between the presidency and the party. During his first term, Roosevelt was careful not to break openly with Republican congressional leadership, instead setting his administration’s focus on issues of less concern for dedicated Republicans, including antitrust and naval policy.<sup>454</sup>

The freedom this afforded was striking. Roosevelt worked with Congress on new consumer protection laws and railroad regulations.<sup>455</sup> But he did much alone too, bypassing Congress to orchestrate the response to financial panics in 1903 and 1907.<sup>456</sup> Defying isolationists, he built a robust naval power and sent the American battle fleet on a cruise around the world.<sup>457</sup> He also brokered peace in the Russo–Japanese War, defused a European crisis in Morocco, and expanded U.S. presence in Cuba, Panama, and the Philippines.<sup>458</sup> Acting unilaterally, he resolved labor disputes.<sup>459</sup> And, famously, he set aside approximately 230 million

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449. *Id.* (internal quotation marks omitted) (quoting Doyle).

450. Richard J. Ellis, *The Development of the American Presidency* 113 (4th ed. 2022) (internal quotation marks omitted) (quoting Ronald Steel, *Theodore Roosevelt, Empire Builder*, *N.Y. Times* (Apr. 21, 2010), <https://www.nytimes.com/2010/04/25/books/review/Steel-t.html> (on file with the *Columbia Law Review*)). Not everyone was a fan though: Mark Twain thought him “clearly insane.” Knokey, *supra* note 448, at 400 (internal quotation marks omitted) (quoting Dictation of Oct. 18, 1907, *in* 3 *Autobiography of Mark Twain* 172, 173 (Benjamin Griffin, Harriet Elinor Smith, Victor Fischer, Michael B. Frank, Amanda Gagel, Sharon K. Goetz, Leslie Diane Myrick & Christopher M. Ohge eds., 2d ed. 2015)).

451. Sidney Milkis, *Theodore Roosevelt: Domestic Affairs*, Miller Ctr. of Pub. Affs., <https://millercenter.org/president/roosevelt/domestic-affairs> [<https://perma.cc/A237-V2K8>] (last visited Oct. 21, 2023).

452. Knokey, *supra* note 448, at 203.

453. Arnold, *Remaking*, *supra* note 44, at 18, 196.

454. *Id.* at 202.

455. Gould, *Roosevelt*, *supra* note 445, at 100–04, 152–59.

456. *Id.* at 112–14, 238–40.

457. *Id.* at 118–20, 131–32.

458. *Id.* at 167–88.

459. *Id.* at 63–68.

acres of land for conservation via legislation and executive order.<sup>460</sup> By sidestepping his party's central preoccupations, Roosevelt worked out from his own agenda rather than take direction from party bigwigs.

Roosevelt owed at least some of his success to his use of new presidential-leadership tools. Roosevelt was a master of what modern political analysts now call "spin."<sup>461</sup> Ahead of his famous (staged) ride up the San Juan Hill in Cuba during the Spanish–American War, Roosevelt made sure that reporters and photographers followed.<sup>462</sup> As President, he dumped the stuffy, stately title of "Executive Mansion" in favor of the catchier "White House" and invited favored reporters to a daily "shaving hour" during which he would talk "a blue streak," offering "presidential advice, leaks, story ideas, gossip, [and] instructions on how to write their stories."<sup>463</sup> It was no surprise that Roosevelt enjoyed largely favorable publicity.

For Roosevelt, this was less a means of directly influencing his Congress than one of maintaining public support. Roosevelt seems to have anticipated Richard Neustadt's famous maxim that "[a]n image of the office" is "the dynamic factor in a President's prestige."<sup>464</sup> By these lights, Roosevelt's presidency proved that "the intentional construction of presidential image"<sup>465</sup> could be a critical tool of leadership.

Publicity was the outward-facing side of Roosevelt's presidency. The inward reverse was administrative policymaking. On Roosevelt's "neo-Hamiltonian" model, the President's position "as a nationally elected officer" combined with the role of bureaucrat to produce a strong state that legitimized and instantiated his cherished values of nationalism, imperialism, and industrialism.<sup>466</sup> Decades of Progressive civil service reform, which freed agencies from partisan spoils, made such a regime possible.<sup>467</sup>

Roosevelt had implemented administrative reform before his time as President. As Governor of New York, he reorganized the state's canal

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460. Robert Earle Howells, *Revisiting the Tangled Legacy of Theodore Roosevelt National Park*, *Nat'l Geographic* (Aug. 27, 2020), <https://www.nationalgeographic.com/travel/article/theodore-roosevelt-national-park-examining-a-complicated-legacy> [<https://perma.cc/9W3F-2HG6>].

461. Michael Patrick Cullinane, *Performing the Presidency: The Image of Theodore Roosevelt on Stage*, in *The Presidential Image: A History From Theodore Roosevelt to Donald Trump* 17, 19–20 (Iwan Morgan & Mark White eds., 2020).

462. Ellis, *supra* note 450, at 112.

463. *Id.* at 112–13 (alteration in original) (internal quotation marks omitted) (quoting Ponder, *supra* note 437, at 18, 24).

464. See Richard E. Neustadt, *Presidential Power and the Modern Presidents* 80 (rev. ed. 1991).

465. Iwan Morgan & Mark White, *Introduction: The Image of the President: An Overview*, in *Morgan & White, The Presidential Image*, *supra* note 461, at 1, 3.

466. Skowronek, *American State*, *supra* note 44, at 172.

467. See *id.* (explaining how Roosevelt's civil service reforms complemented the development of a "strong bureaucratic state").

system, reformed its correctional institutions, and updated its factory inspection procedures.<sup>468</sup> As President, he followed the same course, locating strategic resources in the federal bureaucracy when possible and consolidating substantive powers in the new administrative machinery.

Roosevelt's muscular use of the 1890 Sherman Anti-Trust Act to prosecute the "bad trusts" is a good illustration of the two faces of Roosevelt's presidential leadership—outward popular publicity and inward administrative management. Seeking to transform antitrust policy and tame corporate power, Roosevelt might have requested new legislation expanding on the Sherman Act. Instead, he "clarified" the old legislation's terms under his own prosecutorial powers and then provoked a public confrontation with powerful industrial interests as an opportunity for moral leadership. Early in 1902, Roosevelt directed his Department of Justice to initiate a lawsuit against Northern Securities, a railroad conglomerate formed in 1901 to a massive public outcry.<sup>469</sup> Rebuffing banker J.P. Morgan's efforts to settle the suit privately, Roosevelt turned to public channels to clarify his Administration's antitrust policy and reassure the American people that he was responding to their anxieties about unchecked corporate power.<sup>470</sup>

The choice to bring the lawsuit was as much about Roosevelt's public image as the judicial process. He publicized the decision widely, relishing the opportunity to cast himself as the people's tribune against conspiratorial financial-sector enemies.<sup>471</sup> At the same time, because he was acting on his own, Roosevelt could stand apart from congressional Republicans and their business clientele, presenting to them a policy fait accompli. It was a typical Rooseveltian mix of public spectacle and bureaucratic unilateralism.

But while Roosevelt was attuned to the two sides of the Progressive Presidency—popular leadership and professionalized administration—he was not equally successful at institutionalizing them. To stylize slightly: He showed the public that the President could be a popular tribune, but he did not manage to make the executive the administrator-in-chief. Roosevelt's most important effort at consolidating administrative power, his famed Keep Commission, was largely ineffectual: Congress ignored its recommendations and even stripped its funds.<sup>472</sup> Roosevelt set in motion the transformation of the presidency, but he did not conclude it.

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468. Oscar Kraines, *The President Versus Congress: The Keep Commission, 1905–1909* First Comprehensive Presidential Inquiry Into Administration, 23 *W. Pol. Q.* 5, 5 (1970).

469. Susan Berfield, *The Hour of Fate: Theodore Roosevelt, J.P. Morgan, and the Battle to Transform American Capitalism* 117 (2020).

470. *Id.* at 122; Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* 294–96 (2013).

471. See Edmund Morris, *Theodore Rex* 91–95 (2001) (describing Roosevelt's decision to bring the suit and his confrontations with financial sector leaders).

472. Harold T. Pinkett, *The Keep Commission, 1905–1909: A Rooseveltian Effort for Administrative Reform*, 52 *J. Am. Hist.* 297, 310–12 (1965).



B. *William Howard Taft: The Chief Administrator*

Taft, Roosevelt's handpicked successor, was an improbable innovator in the presidential role. He wrote to a friend in 1925, "I don't remember that I ever was president."<sup>473</sup> Most historians agree and consider his time in office at best an uneventful lull between Roosevelt and Wilson and at worst a "disaster," as historian Arthur Link summed it up.<sup>474</sup> Taft was no charismatic leader of the people,<sup>475</sup> nor was he a bold maverick on policy,<sup>476</sup> but he advanced where Roosevelt failed by pioneering new dimensions of the President's role as chief administrator, a role in which he found himself quite at home.<sup>477</sup> Taft's problem was not his political ineptitude so much as his inability to escape from the shadow of the larger-than-life Roosevelt.<sup>478</sup> More than anything, Taft's supposed shortcomings, discussed much at the time and still visible in the historiography,<sup>479</sup> speak to a presidential office in transition. The public's rebuke of Taft for his failures of leadership—especially his failure regarding the tariff<sup>480</sup>—only makes sense in light of Roosevelt's example of a President.<sup>481</sup> Taft's tenure

473. Lewis L. Gould, *The William Howard Taft Presidency* 212 (2009) [hereinafter Gould, Taft] (internal quotation marks omitted) (quoting 2 Henry F. Pringle, *The Life and Times of William Howard Taft* 960 (1939)).

474. Compare Peri E. Arnold, *William Taft: Impact and Legacy*, Miller Ctr. of Pub. Affs., <https://millercenter.org/president/taft/impact-and-legacy> [<https://perma.cc/R2GQ-N7T5>] [hereinafter Arnold, Taft's Legacy] (last visited Sept. 30, 2023) (quoting Arthur Link as calling Taft's presidency as "disaster"), with John Morton Blum, *The Progressive Presidents* 9–10, 67–68, 80–81, 83 (1980) (noting that President Wilson reversed many of Taft's policies), and Paolo E. Coletta, *The Presidency of William Howard Taft* 266 (1973) ("When viewed as being president between two progressive presidents, Roosevelt and Wilson, [Taft] is best remembered as a constitutional conservator."), and Gould, Taft, *supra* note 473, at xiii (arguing that Taft was a "credible," if "not an outstanding" President).

475. See Gould, Taft, *supra* note 473, at 72 (describing Taft as "lack[ing] the charisma that Roosevelt possessed").

476. See Coletta, *supra* note 474, at 40–41 (noting that, upon assuming office, Taft endeavored to "assimilate the reforms undertaken by Roosevelt" and pursue incremental change).

477. See Gould, Taft, *supra* note 473, at 121–22 (arguing that Taft "was more of an innovator than Theodore Roosevelt and Woodrow Wilson" in exercising the President's administrative capacities). And Taft appeared to embrace this work of administrative reform. *Id.*

478. See *id.* at 208–09 (describing commentators' characterization of Taft's presidency as unable to emulate Roosevelt's); Arnold, Taft's Legacy, *supra* note 474 (noting how Taft struggled in the face of Roosevelt's legacy).

479. See Gould, Taft, *supra* note 473, at 208–09 (describing contemporary commentary); *id.* at 213 (noting the "scholarly consensus about Taft as a lackluster chief executive").

480. See *infra* notes 493–499 and accompanying text.

481. Arnold believes that Roosevelt, more than the other Progressive Presidents, had a "strong, personalist reform image" that "most closely resembles modern Presidents' plebiscitary performance and ambivalent relationships with their party." Arnold, *Remaking*, *supra* note 44, at 199.

proved, if nothing else, that there was no going backward from the presidency Roosevelt had built.

Taft never aspired to be President.<sup>482</sup> He accepted his role as Roosevelt's heir apparent with mixed feelings but resolved to do the job to the best of his abilities.<sup>483</sup> A loyal Republican, Taft refused to deploy Roosevelt's tools of leadership to advance beyond, much less defy, congressional leaders.<sup>484</sup> The Ballinger–Pinchot Affair, a notorious scandal triggered by Taft's firing of a Roosevelt loyalist in the Department of the Interior, reflected this fundamental difference: Taft may have agreed with Roosevelt on land conservation, but he refused to change policy by executive order, preferring instead to seek statutory authorization, which, at least on this matter, never came.<sup>485</sup>

While Taft struggled to be the people's tribune, he embraced the President's bureaucratic powers, accepting that he should use the tools he deemed properly at his disposal to achieve the people's aims. Under Taft's watch, federal antitrust litigation more than doubled.<sup>486</sup> Taft "placed 35,000 postmasters and 20,000 skilled workers in the Navy under civil service protection."<sup>487</sup> With his approval, the Department of Commerce and Labor was divided into two cabinet departments.<sup>488</sup>

Most importantly, he convened a Commission on Economy and Efficiency, populated by well-known progressives like Frederick Cleveland, William Willoughby, and Frank Goodnow, to propose reforms to streamline administration, especially the federal budget process.<sup>489</sup> And he managed it much better than Roosevelt had managed his Keep

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482. Chace, *supra* note 446, at 23.

483. See Erick Trickey, Chief Justice, Not President, Was William Howard Taft's Dream Job, *Smithsonian Mag.* (Dec. 5, 2016), <https://www.smithsonianmag.com/history/chief-justice-not-president-was-william-howard-tafts-dream-job-180961279/> [<https://perma.cc/GC2Q-AU54>] ("William Howard Taft never really wanted to be president.")

484. Arnold, *Remaking*, *supra* note 44, at 199.

485. See Donald F. Anderson, William Howard Taft: A Conservative's Conception of the Presidency 230–31 (1973) (demonstrating how Taft's "respect for law" overcame "his desire for popularity"); Gould, Taft, *supra* note 473, at 65–68, 75 (explaining the Ballinger–Pinchot Affair and how Taft's approach to conservatism differed from Roosevelt's).

486. Compare Peri E. Arnold, William Taft: Domestic Affairs, *Miller Ctr. of Pub. Affs.*, <https://millercenter.org/president/taft/domestic-affairs> [<https://perma.cc/PCE2-DNAG>] [hereinafter Arnold, Domestic Affairs] (last visited Sept. 30, 2023) (noting that Taft's administration prosecuted ninety-nine antitrust cases), with Robert D. Atkinson & Michael Lind, The Myth of the Roosevelt "Trustbusters", *New Republic* (May 4, 2018), <https://newrepublic.com/article/148239/myth-roosevelt-trustbusters> [<https://perma.cc/4J2P-AC9T>] (noting that Roosevelt's administration brought forty-four antitrust suits).

487. Arnold, *Domestic Affairs*, *supra* note 486.

488. *Id.*

489. The President's Commission on Economy and Efficiency, 5 *Am. Pol. Sci. Rev.* 626, 627–28 (1911); see also Harvey C. Mansfield, Reorganizing the Federal Executive Branch: The Limits of Institutionalization, 35 *Law & Contemp. Probs.* 461, 475–76 (1970) (describing how the Commission focused on the national budget system).

Commission: Taft kept legislators abreast of his Commission's proposals, giving them somewhat greater purchase.<sup>490</sup> While the Taft Commission's most controversial recommendation—that the President, rather than various agencies of government, submit a unified budget to Congress—went unheeded, Taft asserted a right to review the budgets anyway, and his Commission's effort ultimately spurred the creation of the executive budget in the Budget and Accounting Act of 1921.<sup>491</sup>

Taft was not passively aloof from the legislative process either. He worked closely with congressional Republicans to enact a postal banking bill, an income tax amendment, and a bill creating a specialized court to review claims before the Interstate Commerce Commission, whose powers to set rates he also advocated expanding.<sup>492</sup> Tariff reform, the signature issue that would, for better or worse, define Taft's presidency, was one Roosevelt had conspicuously avoided.<sup>493</sup> Taft tackled it at great political risk.<sup>494</sup> In one of his first acts in office, Taft called for a special session of Congress to take up the question.<sup>495</sup> Here, he understood his legislative role not as requiring pure passivity but as guiding reform while remaining loyal to the various sectors of a sharply divided Republican party.

It was a noble but hopeless endeavor. While Congress hammered out the tariff, Taft eschewed public statements that might have clarified his position or exerted pressure for the lower rates he favored.<sup>496</sup> He stood by quietly, too, when high-tariff Republicans spearheaded the addition of 847 amendments, dashing any hope for real reform.<sup>497</sup> When the Payne–Aldrich tariff finally passed, Taft privately admitted that the legislation was

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490. Mansfield, *supra* note 489, at 477, 487–89.

491. See Gould, Taft, *supra* note 473, at 124 (explaining how, inspired by the Commission, Taft created his own federal budget proposal, which Congress forcefully rejected); Mansfield, *supra* note 489, at 476 (“[The Commission’s] report entitled *The Need for a National Budget* later furnished material for the campaign that eventuated in the passage of the Budget and Accounting Act of 1921.”). For the act that created the executive budget, see Budget and Accounting Act of 1921, ch.18, 42 Stat. 20 (codified in scattered sections of 31 U.S.C. (2018)).

492. See Anderson, *supra* note 485, at 108–10, 114–15 (detailing Taft’s role in passing an income tax amendment); Coletta, *supra* note 474, at 125–26 (noting Taft’s role in the development of a postal savings banking system); Gould, Taft, *supra* note 473, at 95–101, 213–14 (describing Taft’s changes to the Interstate Commerce Commission and his creation of a specialized court).

493. See Gould, Taft, *supra* note 473, at 51 (characterizing tariff reform as “[t]he defining moment of William Howard Taft’s presidency”); see also Anderson, *supra* note 485, at 96–97 (describing how Roosevelt avoided the tariff issue while Taft embraced it).

494. Anderson, *supra* note 485, at 96–97.

495. *Id.* at 52, 104.

496. *Id.* at 104–05, 110–11, 115–16, 122.

497. See F.W. Taussig, *The Tariff History of the United States* 374–76 (5th ed. 1910) (noting that Senator Nelson Aldrich, a “protectionist of the most unflinching type,” influenced the addition of many of the 847 amendments to the tariff package); see also Anderson, *supra* note 485, at 204–05 (describing Taft’s failure to mobilize public opinion against the Senate’s version of the tariff package).

not what he had hoped for but still considered it to be the best Congress had ever delivered.<sup>498</sup> As political scientist Peri Arnold puts it, Taft's failure was due not to his lack of policy independence or initiative but to his inability to coordinate Congress's process and understand his stake as President in the legislative outcome.<sup>499</sup> It was a mistake his successors would seek to avoid.

But while the public Taft was a poor advocate for himself and his policies, the private Taft was a consequential figure for the continuing development of the Progressive Presidency. Though he failed to build on Roosevelt's performance of the President as popular tribune, Taft helped lead his party's legislative program and deployed his managerial talents and his commitment to governmental efficiency to strengthen the foundations of presidential leadership, most particularly the President's claims over public administration. In these ways, he developed the role of the President as administrator-in-chief and pointed toward the possibility of the President as congressional policy leader, even though he did not succeed in that role himself. It was a kind of presidential leadership his successor would seize on.

C. *Woodrow Wilson: The Presidential Prime Minister*

Despite having only two years of experience in politics before his election, Wilson won the presidency in 1912, promising to use government to liberate Americans from predatory industry.<sup>500</sup> Wilson may have differed from Roosevelt on race, foreign policy, and trust busting, but once in office, he governed in Roosevelt's image, informed by lessons drawn from Taft's presidency.<sup>501</sup> In this way, Wilson further combined the two sides of the Progressive Presidency: policy leader and administrative head.

Critically, Wilson had a different relationship to his party and Congress than Roosevelt, one more in line with the parliamentarism of Taft's term. Wilson's commitment to "responsible party government" and the goal of broadening the Democratic Party coalition into a viable national party militated against Roosevelt's executive-led strategy.<sup>502</sup> So Wilson explored the promise of greater cooperation between the legislative and executive branches. "You cannot compound a successful government out of antagonisms," he wrote in a famous 1908 critique of the separation of powers.<sup>503</sup> A President who deftly read public opinion

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498. Arnold, *Remaking*, supra note 44, at 199.

499. See *id.* at 199–203 (discussing how Taft's more reserved approach compromised his ability to enact his desired policy initiatives).

500. Arthur S. Link, *Woodrow Wilson and the Progressive Era, 1910–1917*, at 9–11, 21–24 (First Harper Torchbook ed. 1963) (1954).

501. Arnold, *Remaking*, supra note 44, at 196.

502. Skowronek, *American State*, supra note 44, at 174–75.

503. Woodrow Wilson, *Constitutional Government in the United States* 60 (1908) [hereinafter *Wilson, Constitutional Government*].

and marshaled his party into a disciplined policymaking apparatus, he practiced parliamentarism in function, if not in form.<sup>504</sup>

Entering office with a solidly Democratic Congress, he worked closely with his caucus, especially in his first term, to deliver a raft of Progressive legislative victories that proved the envy of reformers in the Progressive Party, not to mention Republicans. By December 1912, even before deciding on his cabinet, Wilson had met with congressional Democrats to devise a strategy for tariff legislation and banking reform.<sup>505</sup> With the Republican Party logjam broken, Wilson succeeded at reducing tariff rates, signing the Underwood–Simmons Tariff Act into law in October 1913.<sup>506</sup> Two months later, he signed the Federal Reserve Act, which comprehensively reformed the nation’s banking system.<sup>507</sup> Successive laws established the Federal Trade Commission, set an eight-hour day for most railroad workers, drastically strengthened antitrust policy, and restricted the use of judicial injunctions against labor.<sup>508</sup> Wilson and his disciplined Congress also passed massive agricultural subsidies and established a banking system for farmers, who had suffered from a lack of credit in recent economic panics.<sup>509</sup>

Not all of Wilson’s accomplishments should be celebrated. He reseggregated the federal bureaucracy, created a wartime committee of propaganda and censorship, and endorsed the 1917 Espionage Act, which made public criticism of the government punishable by fine or up to twenty years in jail.<sup>510</sup> Bitter disappointments, they nevertheless illustrate Wilson’s muscular conception of his role.

Wilson was Rooseveltian, too, in his appreciation for the “bully pulpit,” though he understood his role somewhat differently. Roosevelt emphasized individual leadership, appealing directly to the people.<sup>511</sup>

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504. *Id.* (“[W]e have grown more and more inclined from generation to generation to look to the President as the unifying force in our complex system, the leader both of his party and of the nation.”); see also Arnold, *Remaking*, *supra* note 44, at 200 (“[Wilson] was invested in the possibility of a prime ministerial stance within the American constitutional framework.”).

505. See Arthur Walworth, *Woodrow Wilson* 301–02 (3d ed. 1978) (discussing Wilson’s plans for economic legislation).

506. Link, *supra* note 500, at 43.

507. *Id.* at 52.

508. Woodrow Wilson—Key Events, Miller Ctr. of Pub. Affs., <https://millercenter.org/president/woodrow-wilson/key-events> [<https://perma.cc/DDS6-KCPW>] (last visited Sept. 29, 2023) (citing Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2018)); Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41 et seq.); Adamson Eight-Hour Workday Act, ch. 436, 39 Stat. 721 (1916) (formerly codified at 45 U.S.C. §§ 65–66, repealed in 1996)).

509. Carl R. Woodward, *Woodrow Wilson’s Agricultural Philosophy*, 14 *Agric. Hist.* 129, 134–36 (1940).

510. Woodrow Wilson—Key Events, *supra* note 508 (citing Smith–Lever Act of 1914, ch. 79, 38 Stat. 372 (codified as amended at 7 U.S.C. § 341 et seq. (2018)); Federal Farm Loan Act of 1916, ch. 245, 39 Stat. 360 (repealed 1971)).

511. See *supra* notes 453–460 and accompanying text.

Wilson, however, acted more as a prime minister, working through the intermediary institution of party.<sup>512</sup> Tellingly, a month into his presidency, he appeared before Congress to speak about revising tariffs, the first President to address the legislature in person since John Adams in 1800.<sup>513</sup> Wilson believed that, through the party, he had a lens on the public's values and an electoral mandate to engage in interpretive discourse with public expectations.<sup>514</sup>

Where he differed most significantly from Roosevelt was on the question of presidential administration. Spurning Roosevelt's go-it-aloneism, Wilson forged a cooperative partnership with Congress. Under this model, administrative policy was closely tied to party development.<sup>515</sup> Wilson worked through party channels to personally bridge the constitutional separation of powers and carry out the policy program on which he had run for office.

This enabled Wilson to push a legislative program, but it came at a significant cost. The southern Bourbons who "dominated" the party machinery had "a tremendous thirst for offices" but had little interest in Wilsonian Progressivism.<sup>516</sup> Wilson was forced to beat a retreat from the progressive expansion of the merit-based civil service he favored. The New Freedom's major legislation came stamped with explicit provisos against the merit classification of administrative personnel in the IRS, the FTC, the Tariff Commission, and the Agricultural Credits Administration.<sup>517</sup> Ultimately, the price of Wilson's legislative success was a galling resurgence of the spoils system under congressional control.

The sudden onset of World War I cast this tradeoff in the harshest of lights. Secretary of State William Jennings Bryan's resignation in June 1915 symbolized the splintering of the Democratic-Progressive coalition over the war. To make matters worse, the Democrats' assault on the merit system soon exposed a lack of professionalism in crucial wartime posts. Faced with the burden of preparedness, the national administrative machinery faltered. By 1916, it was obvious to Wilson that "the cooperative party strategy was a luxury America could no longer afford."<sup>518</sup> Wilson reversed course and attempted to regain control over the bureaucracy. He received emergency authority to reorganize the executive branch, but the grant was

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512. See Terri Bimes & Stephen Skowronek, *Woodrow Wilson's Critique of Popular Leadership: Reassessing the Modern-Traditional Divide in Presidential History*, 29 *Polity* 27, 43 (1996) (highlighting Wilson's emphasis on working with other party leaders rather than appealing directly to the public); see also Arnold, *Remaking*, *supra* note 44, at 202 (discussing how Wilson considered party leadership essential to public leadership).

513. See Ellis, *supra* note 450, at 115.

514. See Daniel D. Stid, *The President as Statesman: Woodrow Wilson and the Constitution* 48-49 (1998).

515. Skowronek, *American State*, *supra* note 44, at 175.

516. *Id.* at 194-95.

517. *Id.* at 195.

518. *Id.* at 175.

temporary, and in any case, he no longer had sufficient political capital to push an alternative administrative course. For the U.S. government, it was a humiliating loss of face.

By the time the Democrats suffered a landslide defeat to Republican Warren G. Harding in 1920, Wilson's presidency had come to seem an indictment of his own theory of government. For one so focused on rendering the party a disciplined machine, Wilson's curiously rigid attitude when it came to ratification of the Versailles Treaty was a puzzling anticlimax.<sup>519</sup> The war had exposed the weakened state of American bureaucracy under party government: What Wilson had presented as a cooperative partnership was ultimately exposed as a set of unprincipled bargains and tradeoffs culminating in administrative incoherence and amateurism.

D. *The Republican Presidents: Consolidating the New Presidential Script*

It is somewhat surprising, then, to find that critical aspects of Wilsonian presidentialism endured. The shift in the performance of the presidential office instantiated by Roosevelt, Taft, and Wilson proved durable.

In 1920, Harding handed Democrat James Cox the largest defeat in history, promising the electorate little more than a "return to . . . 'normalcy.'"<sup>520</sup> At his inauguration, President Harding laid out his vision: "Our most dangerous tendency," he lectured, "is to expect too much of government, and at the same time do for it too little."<sup>521</sup> What pressing tasks lay on the presidential agenda? "[P]utting our public household in order," the "efficient administration of our proven system," and building "a rigid and yet sane economy, combined with fiscal justice."<sup>522</sup> Hardly gripping stuff—and as far from the rhetorical flights of Wilson or Roosevelt as imaginable.

Harding and his successor Calvin Coolidge, a fellow moderate Republican, would deliver a return to a traditional Republican platform of lower taxes, higher tariffs, administrative efficiency, and smaller

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519. Some have explained this episode as a result of Wilson's debilitating stroke. See, e.g., John Milton Cooper, Jr., *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* 89–90 (2001); see also *supra* section II.A.

520. William Leuchtenburg, *The Perils of Prosperity 1914–1932*, at 89 (2d ed. 1993) [hereinafter *Leuchtenburg, Perils*] (quoting Warren Harding, U.S. Sen., Address to the Home Market Club of Boston: Back to Normal (May 14, 1920), <https://millercenter.org/the-presidency/presidential-speeches/may-14-1920-readjustment> [<https://perma.cc/U7AR-CC9N>] (last visited Oct. 28, 2023)). Harding's 61% of the popular vote was the largest majority in the history of party competition. *Id.* at 88.

521. Warren G. Harding, U.S. President, Inaugural Address (Mar. 4, 1921), <https://www.presidency.ucsb.edu/documents/inaugural-address-49> [<https://perma.cc/6RLN-BJZW>] (last visited Oct. 19, 2023).

522. *Id.*

government.<sup>523</sup> But if Americans expected “normalcy” to mean that the President would step back from the limelight and defer to the party and Congress, they were mistaken.

For one thing, the 1910s and '20s had witnessed major advances in technologies of mass communication,<sup>524</sup> and however modest a role Harding and Coolidge had embraced on the campaign trail, neither man seemed to believe in practice that proper behavior in office required cutting down on presidential publicity.<sup>525</sup> After Harding died of a heart attack during a cross-country speaking tour in 1923,<sup>526</sup> the man who earned the nickname “Silent Cal”<sup>527</sup> became the first President to use the tools of mass communications to broadcast his image and message to the American people.

Coolidge was fluent on the radio. His 1925 inaugural address reached up to 25 million Americans, more than had ever “heard Wilson or [Roosevelt] speak on tour in eight years in office.”<sup>528</sup> Coolidge appeared in “talkies” and in newsreels cavorting with celebrities; he was so accommodating of photo ops that the posse of photographers who followed him around joked that he “would don any attire or assume any pose that would produce an interesting picture.”<sup>529</sup> Unlike Wilson, who abandoned presidential press conferences midway through his first term, Silent Cal stuck to a twice-a-week schedule, delivering 407 press conferences during his five and a half years in the White House, more than any other President then or since.<sup>530</sup> Progressives who had celebrated the “bully pulpit” under Wilson and Roosevelt now fretted that Coolidge’s publicity machine would deceive and mislead the American people. In 1926, the *New Republic* pronounced Coolidge’s “government by publicity” a dangerous innovation: “No ruler in history,” its editors concluded, “ever had such a magnificent propaganda machine as Mr. Coolidge[.]”<sup>531</sup>

Presidential administration also survived the “return to normalcy”; Progressive-era administrative innovations had consolidated into a new politics organized around administrative power and avid use of executive

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523. Arnold, *Remaking*, supra note 44, at 206.

524. See David Greenberg, *Republic of Spin* 157 (2016) (discussing advances in radio broadcasting).

525. See id. at 154–55 (stating that Coolidge was “profil[ed] in major magazines” using “evocative photographs” that “exploited the new president’s style”).

526. Id. at 155.

527. See Peter Clements, ‘Silent Cal’, 46 *Hist. Rev.* 15, 15 (2003) (noting that the nickname derived from “Coolidge’s apparent inactivity” and his “taciturn” disposition).

528. Ellis, supra note 450, at 118.

529. See Greenberg, supra note 524, at 164–65 (internal quotation marks omitted) (quoting Jay Hayden of the *Detroit News*).

530. Presidential News Conferences, Am. Presidency Project (Sept. 1, 2021), <https://www.presidency.ucsb.edu/statistics/data/presidential-news-conferences> [<https://perma.cc/Y5Q5-5STU>].

531. *Government by Publicity*, *New Republic*, Sept. 22, 1926, at 110, 110–11.



prerogatives.<sup>532</sup> Republicans' traditional laissez-faireism did not entail a rejection of administration. Far from it: Party leaders grasped that new economic and social complexities required guidance from the top. Secretary of Commerce Herbert Hoover, for example, earned wide praise for spurring the formation of trade associations and encouraging standardization and efficiency throughout industry.<sup>533</sup>

Republicans had another reason to favor executive solutions to national economic problems: The Party still harbored plenty of Progressives who were hostile to business-friendly legislation.<sup>534</sup> Republicans helped to put civil service merit classification back on the agenda—less out of zeal for reform than because the spoils system had now come to be associated with corruption and the southern Democrats.<sup>535</sup> It didn't hurt that reclassification allowed Republicans to pack agencies, the courts, and regulatory commissions with conservative appointees. Despite a reduction in the scope of government, the Harding–Coolidge years were a boom time for the new professional-managerial ethos in Washington. Harding largely made good on his campaign promise to nominate the “best men in the nation” to run the federal agencies.<sup>536</sup> That included the young Hoover, a brilliant engineer and rising star in the Republican Party; Andrew Mellon, a Pittsburgh titan of industry, as Secretary of the Treasury; and Charles Evan Hughes, the former presidential candidate and future Supreme Court Chief Justice, at State.<sup>537</sup> All three stayed on into the Coolidge Administration; Mellon and Hoover would remain through the end of the decade.

Major pieces of legislation reflected the new professional-managerial ethos, too. Perhaps most importantly, the 1921 Budget and Accounting Act was directly patterned on the Taft Commission's blueprint. In 1913, the Commission's endorsement of presidential management of the federal budget had been viewed as an obnoxious intrusion upon the House's prerogatives. But by 1921, Congress had no objection to vesting such power in the President, and the bill passed with little opposition in either house.<sup>538</sup> Harding himself was a great supporter of the bill, and Coolidge,

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532. See Skowronek, *American State*, supra note 44, at 175–76.

533. See Ellis W. Hawley, *The Great War and the Search for the Modern Order* 55–57 (2d ed. 1992) (listing Hoover's successes while in office and tracking the impact of this success on other areas of government).

534. Leuchtenburg, *Perils*, supra note 520, at 97.

535. See Skowronek, *American State*, supra note 44, at 195–96, 204 (describing the reemergence of the spoils system during the Wilson Administration and the Republicans' response); Jesse Tarbert, *When Good Government Meant Big Government* 28–29, 147–48 (2022) (same).

536. Eugene P. Trani, Warren G. Harding: Domestic Affairs, Miller Ctr. of Pub. Affs., <https://millercenter.org/president/harding/domestic-affairs> [<https://perma.cc/Q5KW-2Q36>] (last visited Aug. 22, 2023).

537. John W. Dean, Warren G. Harding 93 (2004).

538. John A. Dearborn, The “Proper Organs” for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921, 31 *J. Pol'y Hist.* 1, 20–21 (2019).

however much a “minimalist,” was no foe of bureaucratic initiative in policymaking. Coolidge once said, “The way I transact the cabinet business is to leave to the head of department the conduct of his own business.”<sup>539</sup> That left energetic administrators like Hoover and Mellon plenty of room to maneuver.

The conservative interval of the 1920s was thus hardly a retreat from the presidency of the Progressive Era. Indeed, it saw the further institutionalization of the presidency’s powers.<sup>540</sup> Conservatives found the new managerialism conducive to running the boom economy, and while they repudiated many of Progressivism’s aims, they did not abandon a presidential script of public persuasion, policy leadership, and presidential administration. It was a presidency amply predicted by the Progressive theory of presidential representation.<sup>541</sup> From this new performance of the office, there was no going back.

#### V. MYERS REVISITED

Bryce’s first edition of *The American Commonwealth* in 1888 claimed that the presidency had not grown in “dignity and power” since Andrew Jackson.<sup>542</sup> By the 1914 edition, the presidencies of Roosevelt, Taft, and Wilson had forced him to reconsider.<sup>543</sup> Wilson had been right, it turned out, when he wrote in 1907 that nothing in the Constitution would stop a bold leader occupying the office from being “as big a man as he can.”<sup>544</sup>

Still, the new Progressive Presidency was not yet law. The Budget and Accounting Act of 1921 embodied aspects of the new vision but was not, on its own, a legal reconstruction of the office. When Wilson relinquished the presidential seat to Harding, he left him a position loaded with new expectations.<sup>545</sup> The formal doctrine that bound the executive, however, reflected the pre-Progressive presidency.<sup>546</sup>

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539. Clements, *supra* note 527, at 16 (internal quotation marks omitted) (quoting Calvin Coolidge, U.S. President, Remarks by the President to Newspaper Correspondents (Apr. 15, 1927), <https://coolidgefoundation.org/wp-content/uploads/2020/07/4-15-27.pdf> [<https://perma.cc/E9W6-ZY98>]).

540. See Arnold, *Remaking*, *supra* note 44, at 205 (noting that it would “miss the most important implication” to see the Progressive Presidency “as a mere interlude of activism within the long period of Republican control, small presidents, and limited national government”).

541. See *id.* at 204 (“Of course, [Roosevelt, Taft, and Wilson] also fascinated the Progressive Era public and shaped its perception of the presidency . . . [t]hrough their language, initiatives, and shaping of press coverage . . .”).

542. 1 Bryce, *The American Commonwealth*, 1888 ed., *supra* note 256, at 84.

543. See 1 Bryce, *The American Commonwealth*, 1914 ed., *supra* note 431, at 66 (stating that the “dignity and power of the presidential office . . . did not greatly grow between the time of Andrew Jackson . . . and the death of President McKinley in 1901”).

544. Wilson, *Constitutional Government*, *supra* note 503, at 70.

545. See *supra* section IV.C.

546. See *supra* sections III.B–C.

This was the backdrop against which *Myers* transformed the law of the presidency. This Part returns to *Myers* to explain how it changed the law. It also reflects on what those changes mean for law and scholarship today.

The key actor was Taft. Once he left office, he continued to follow the development of the presidency and theorized it in a legalistic direction. Section V.A looks to Taft out of power to explore how he conceptualized the project of presidential transformation he had helped initiate.

Taft eventually returned to power as Chief Justice, which gave him the opportunity to write his new theory of the presidency into law. This, of course, was *Myers*. Section V.B shows how *Myers* translated the Progressive Presidency Taft had helped shape into a constitutional rule.

Section V.C explains how this Article's contextualized rereading of *Myers* undercuts the Supreme Court's current use of the case. To put it bluntly: *Myers* does not stand for the expansive vision of presidential power the Court claims it does.

This story has consequences for more than court watchers. The Court's misunderstanding of *Myers* is emblematic of a broader ignorance about the growth of the American presidency—one Taft contributed to with his misleading opinion. Section V.D elaborates how this Article's new account of *Myers* contributes to scholarly debates about law and the presidency. To understand the law of the executive, scholars must attend to institutional transformations and not merely changes in formal legal doctrine.

#### A. *The House that Taft Built*

Conventional wisdom on Taft has emphasized how the cramped legalism of his thinking produced a cramped, legalistic presidency.<sup>547</sup> Some of this is the result of contrast: Roosevelt's outsized personality overshadowed Taft's reticence and moderately conservative politics, while the astonishing productivity of the Wilson Administration made Taft's output look inconsequential.<sup>548</sup> Roosevelt also helped, rather cruelly, to popularize this view. While on the 1912 campaign trail, the Progressive Party candidate called his old friend a reactionary "fathead" who was "useless to the people."<sup>549</sup> In 1913, fresh off defeat, Roosevelt published a bestselling autobiography that skewered Taft's leadership in scarcely veiled

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547. See Anderson, *supra* note 485, at 294–306 (“[S]till oblivious to the requirements of rhetoric, Taft was inclined to express his views in the technical language of the law, which emphasized the limitations rather than the opportunities of power.”); Gould, Taft, *supra* note 473, at 45–46 (“Unlike Theodore Roosevelt, who was convinced that the president should do anything that the Constitution did not explicitly forbid, Taft was sure that the chief executive had to remain within the boundaries of the Constitution itself.”).

548. Gould, Taft, *supra* note 473, at xi.

549. William R. Nester, Theodore Roosevelt and the Art of American Power 256–57 (2019) (internal quotation marks omitted) (quoting Edmund Morris, Colonel Roosevelt 187 (2010)).

terms. Presidential greatness, wrote Roosevelt, was hardly compatible with “the negative merit of keeping [one’s] talents undamaged in a napkin.”<sup>550</sup>

Taft, who had taken a post as Kent Professor of Law and Legal History at Yale Law School, countered Roosevelt in his 1916 monograph *The President and His Powers*. The book is often remembered for its rejection of Roosevelt’s belief in an “undefined residuum of power [the President] can exercise because it seems to him to be in the public interest.”<sup>551</sup> This has contributed to the mistaken notion that Taft was not committed to strong presidential power and rejected Roosevelt’s approach to the presidency. Taft, the story goes, insisted that the President had no power except what the Constitution specifically granted. Roosevelt, by contrast, defended the opposite view: The President’s powers were limited only by “specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers.”<sup>552</sup>

In fact, the Taft–Roosevelt schism has obscured the many ways in which the two men’s views were quite similar.<sup>553</sup> While they would not reconcile until just before Roosevelt’s death in 1919, their views on presidential power were much closer than has usually been appreciated. Considering what Taft believed the Constitution empowered the President to do, his “legalistic” presidency was gargantuan, indeed even Rooseveltian. As political scientist Stephen Skowronek put it, Taft’s presidency may have “trimm[ed] the abrasive edges off [Roosevelt’s] stewardship theory, but it did not imply a return to the governmental order of the late nineteenth century.”<sup>554</sup> Taft insisted that the prerogatives of the Congress, the judiciary, and the presidency had to be respected, protected, and promoted within their proper sphere. But he never rejected executive prerogative or believed that Presidents should refrain from using administration to carry out the tasks the public expected of them.<sup>555</sup>

Ironically, one of the drivers of Taft’s expansive idea of the presidency was an obsession with the survival and independence of the judiciary. The macroeconomic changes industrialization wrought in the nineteenth

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550. Theodore Roosevelt, *An Autobiography* 389 (1913).

551. William Howard Taft, *The President and His Powers*, reprinted in 6 *The Collected Works of William Howard Taft* 11, 104 (David H. Burton, W. Carey McWilliams & Frank X. Gerrity eds., 2003) [hereinafter *Taft, President and Powers*].

552. Compare *id.* at 104 (“[T]he President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.”), with Roosevelt, *supra* note 550, at 388–89 (arguing that the executive powers are limited only by the Constitution or additional Congress-imposed restrictions).

553. Accord Anderson, *supra* note 485, at 289, 291 (arguing that, because the two men were reacting to each other, the alleged differences between the theories “should be read skeptically,” and that “the similarities between the two conceptions are actually greater than the apparent differences”).

554. Skowronek, *American State*, *supra* note 44, at 173.

555. *Id.* at 173–76 (characterizing Roosevelt as a “neo-Hamiltonian” and Taft as a “neo-Madisonian”).

century had manifested as new political demands—first among credit-strapped farmers, then among disgruntled laborers, then among well-heeled city residents—for government intervention into the economy. But time and again, turn-of-the-century courts, clinging to natural law ideas about the inalienability of property, invalidated Progressive legislation.<sup>556</sup> By the time the Supreme Court struck down a New York labor law in its notorious 1905 *Lochner* decision,<sup>557</sup> anti-judiciary sentiment had reached a fever pitch.<sup>558</sup> Alarmed, Taft spent years trying to defend the courts from charges of politicization.<sup>559</sup> As President, he vetoed populist Arizona’s 1913 draft constitution, which he deemed “destructive of the independence of judges.”<sup>560</sup> Once he left office, Taft turned to the lecture circuit to set the record straight against Progressive insurgents and defend a judiciary bound by law.

The argumentative strategy Taft developed in these lectures and writings underscored his commitment to the Progressive Presidency. Taft argued that, under a proper understanding of the U.S. Constitution, the President must be responsive to the electorate so the judiciary could take the countermajoritarian positions required of it by law. During one March 1912 speech before the Ohio Bar Association, Taft admitted that, regrettably, courts had on occasion invalidated “useful statutes.”<sup>561</sup> But it was a “complete misunderstanding of our form of government” to think that judges were bound to follow the will of the majority in deciding legal

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556. See, e.g., *Adair v. United States*, 208 U.S. 161, 180 (1908) (holding that Congress could not criminalize the termination of an employee who joins a labor organization by an employer engaged in interstate commerce); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that state legislation restricting the number of hours that bakery employees could work violated the Constitution); *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897) (holding that state legislation could not force people to insure their property with an insurer licensed in that state); *United States v. E.C. Knight Co.*, 156 U.S. 1, 17–18 (1895) (holding that legislation could not prevent monopolies where the business had no direct relation to interstate commerce). For a classic treatment of this era of jurisprudence, see Morton J. Horowitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 65–168 (1992).

557. 198 U.S. at 58.

558. William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937*, at 20, 49 (1994).

559. See, e.g., William H. Taft, U.S. President, Address in Toledo, Ohio: The Judiciary and Progress (Mar. 8, 1912), in S. Doc. No. 62-408, at 8 (1912) [hereinafter Taft, *Judiciary and Progress*] (arguing against reactionary measures to remove judges whose actions conflict with popular opinion); William Howard Taft, *Liberty Under Law* 28–29 (1922) (calling a more direct democracy in which judges could be easily removed “expensive” and unsuccessful); William Howard Taft, *Popular Government* 165 (1913) (arguing that the courts are necessary to keep Congress from infringing on the Constitution); see also William Howard Taft, Judge, 6th Cir., Address Delivered to the American Bar Association Meeting, Detroit, Michigan: Criticisms of the Federal Judiciary (Aug. 28, 1895), in 29 *Am. L. Rev.* 641, 644 (1895) (arguing that “hostility to the Federal courts” is “without foundation”).

560. David H. Burton, Commentary, in 4 *The Collected Works of William Howard Taft* 1, 2 (David H. Burton ed., 2002).

561. Taft, *Judiciary and Progress*, supra note 559, at 5.

questions.<sup>562</sup> The judge’s task was to protect rights (including, importantly, property rights), not to follow public opinion. If the public wanted accountability, they should look elsewhere. Where, exactly? Taft’s answer was clear: not Congress, but the President. The President was “elected by his constituents” to carry out “discretionary policy”; “[i]n that sense he represents the majority of the electorate.”<sup>563</sup>

For one who viewed himself as a “strict constructionist” of the President’s powers,<sup>564</sup> this was a striking position. For most of American history, critics of presidential power had made “arguments from law” against opponents’ “arguments from opinion” to emphasize textual limitations on that power.<sup>565</sup> The nineteenth-century Whigs viewed themselves as defenders of the Constitution against the populist “King Andrew Jackson,”<sup>566</sup> whose leadership they viewed as illegally supplementing the President’s constitutional powers with rhetorical—that is, *political*—powers.<sup>567</sup> Whig hero General William Henry Harrison was elected President in 1840 on a promise to return the office to its narrower constitutional dimensions.<sup>568</sup> Harrison rejected the idea that the President could exercise any independent will in the lawmaking process at all, calling it “preposterous” to imagine the President as somehow more representative of the people than “their own immediate representatives, who spend a part of every year among them, living with them, often laboring with them, and bound to them by the triple tie of interest, duty, and affection.”<sup>569</sup>

562. *Id.* at 5.

563. *Id.* at 4.

564. See Taft, *President and Powers*, *supra* note 551, at 104–05 (describing his accord with strict constructions of the President’s implied powers).

565. Compare Bailey, *supra* note 123, at 9–10 (“[C]onstitutional democracy pits two foundational arguments into opposition, namely, arguments from law and arguments from opinion.”), with Skowronek, *Conservative Insurgency*, *supra* note 121, at 2077 (“Whereas the progressives revamped American government in general, and the presidency in particular, in a concerted ‘revolt against formalism,’ today’s conservatives insist on a close reading of constitutional stricture.” (footnote omitted) (citing Morton G. White, *Social Thought in America: The Revolt Against Formalism* (1949))).

566. This was a common slur the Whigs wielded against Jackson. See Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848*, at 383 (2007) (mentioning the term’s presence in a famous political cartoon).

567. See Daniel Carpenter & Benjamin Schneer, *Party Formation Through Petitions: The Whigs and the Bank War of 1832–1834*, 29 *Stud. Am. Pol. Dev.* 213, 220–21 (2015) (describing the view of Senator Henry Clay, a Whig party leader, that Jackson demonstrated “lawlessness and constitutional disrespect”).

568. See William Henry Harrison, U.S. President, *Inaugural Address* (Mar. 4, 1841), [https://avalon.law.yale.edu/19th\\_century/harrison.asp](https://avalon.law.yale.edu/19th_century/harrison.asp) [<https://perma.cc/FZ5B-6M3D>] (last visited Aug. 22, 2023) (“I should take this occasion to repeat the assurances I have heretofore given of my determination to arrest the progress of [the] tendency [of the executive power to grow] if it really exists and restore the Government to its pristine health and vigor . . .”).

569. *Id.* Another famous episode in the development of Whig theory is Senator Clay’s message to the Senate after Jackson’s infamous Bank Veto. Clay argued that the veto was

Needless to say, Taft stood at a great remove from this view of the Constitution. Taft consistently described the President as a leader stamped by supporters with a mandate to act independently of Congress.<sup>570</sup> The Presidents' authority to take discretionary action derived from their status as leaders of public opinion—not the opinion of Americans at large but that of their “constituents”: the followers of their political party.<sup>571</sup>

This claim to leadership dovetailed with Taft's commitment to presidential administration. Like the conservative presidential administrations of the 1920s, Taft mistrusted majorities clamoring for wealth redistribution and legislatures prone to pork-barrel spending, but he was a staunch believer in the President's power to help achieve the goals of “economy and efficiency” by streamlining the federal administrative state.<sup>572</sup> For the same reason, he proposed amending the Constitution to give the President the power to prepare a budget.<sup>573</sup>

This idea reflected more than a concern with housekeeping. He grasped how, with such a power, the President could dictate the policy agenda. In one section of *The President and His Powers*, he compared the British Prime Minister with the American President, who seemingly lacked the power to propose, draft, and debate legislation. This was a disadvantage, he felt.<sup>574</sup> Taft concluded on an optimistic note, however, arguing that once party ties united the political branches, American government had nothing to envy the British.<sup>575</sup> After all, the President's powers were “not rigidly limited” by the Constitution but ebbed and flowed according to practice and construction.<sup>576</sup>

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merely a tool for filtering out unconstitutional legislation; for a President to use it on partisan grounds of policy disagreement was “totally irreconcilable” with the genius of republican government. 8 Reg. Deb. 1265 (1832) (statement of Sen. Clay).

570. See Anderson, *supra* note 485, at 294–306 (describing Taft's broad “notions of power and duty”).

571. Taft, *Judiciary and Progress*, *supra* note 559, at 4. Several political scientists have established that modern Presidents act in “particularistic” ways, targeting co-partisans, not the whole nation. E.g., Douglas L. Kriner & Andrew Reeves, *The Particularistic President: Executive Branch Politics and Political Inequality* 29–30 (2015); see also B. Dan Wood, *The Myth of Presidential Representation* 19–20 (2009) (summarizing some scholars' view that, except for immediately before elections, Presidents generally pursue partisan goals rather than centrist ones).

572. This was not only the formal title of the committee Taft convened in 1910 to reform administration of the government; it was also the name of his final message to Congress in April 1912 calling for the legislature to grant the President enhanced power to recommend a federal budget. See *Message of the President of the United States on Economy and Efficiency in the Government Service*, H. Doc. 62-670, reprinted in 48 Cong. Rec. 4280, 4280–82 (1912). On the “managerial” impulse in the 1920s, see Leuchtenburg, *American President*, *supra* note 254, at 60–61.

573. On this proposal, Congress could accept the proposed budget or revise it downward, but not increase it! See Taft, *President and Powers*, *supra* note 551, at 16.

574. *Id.* at 18.

575. *Id.* at 8, 11–12.

576. *Id.* at 13.

Out of office, Taft became only more committed to presidential leadership, particularly as he reflected on legislators' motives. As President, he had suffered frequent indignities at the hands of his Republican Congress. He had broken from party orthodoxy to advocate for a graduated federal income tax because the Republicans' pending tariff bill threatened to leave irresponsibly large budget deficits.<sup>577</sup> The political wounds Taft suffered from taking this stand help make sense of his self-serving observation in *The President and His Powers* that only the President possessed the perspective to save the nation from a Congress "unlimited in its extravagance, due to the selfishness of the different congressional constituencies."<sup>578</sup> Taft devoted several pages of the book to recounting congressional bad behavior.<sup>579</sup>

B. *Myers as the Statement of Taft's Progressive Presidentialism*

These sentiments would find expression in his famous opinion in *Myers*. The presidency he reconstructed there bore a greater intellectual debt to Progressive political thought than to the eighteenth-century science of politics or the Court's actual nineteenth-century jurisprudence on the administrative state.

To begin: In *Myers's* reconstruction of the arguments of the First Congress in favor of presidential removal, Taft rendered them as sustained by a core commitment to the idea of presidential responsibility. The Constitution's division of the government into three branches with separate powers was important because it gave the President alone the duty to "take care that the laws be faithfully executed."<sup>580</sup> This in turn implied a removal power because the President would otherwise be forced to rely on "those for whom he c[ould] not continue to be responsible."<sup>581</sup> Besides, Taft reasoned, if Congress had the power to condition presidential removal, then it could interfere in "the operation of the great independent executive branch of government."<sup>582</sup> Congress would be able to "fasten[] upon [the President] . . . men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible."<sup>583</sup>

Skeptics could argue that the Senate already had the power to control the approval of some executive officers and so control the President's

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577. Gould, Taft, *supra* note 473, at 55–56.

578. Taft, *President and Powers*, *supra* note 551, at 16.

579. *Id.* at 21, 25, 27–29.

580. *Myers v. United States*, 272 U.S. 52, 117 (1926) (quoting U.S. Const. art. II, § 3).

581. *Id.* (citing 1 *Annals of Cong.* 474 (1789) (Joseph Gales ed., 1834) (statement of Rep. Ames)).

582. *Id.* at 127.

583. *Id.* at 131.



staff.<sup>584</sup> But there was a difference between picking officers *ex ante* and retaining them *ex post*.<sup>585</sup> The President, Taft wrote (echoing the bureaucratic managerialism of his age), would be much better informed than the Senate about an officer's actual performance and ability to do the job.<sup>586</sup> Presidential removal was a simple, functional necessity that allowed the President to fulfill their responsibilities.<sup>587</sup>

There was something a little monarchic about all this, Taft recognized. "In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers . . ." <sup>588</sup> Taft believed that the Framers included such removal power in their conception of executive power.<sup>589</sup> But this did not make the Framers, Taft, or the *Myers* Court into monarchists.<sup>590</sup> The crucial difference was the President's representativeness. "[I]n the discussions had before this Court," Taft explained, there was a "fundamental misconception," that the House and Senate were the people's "only defender in the Government" and that the President was somehow their enemy, a would-be tyrant waiting to abuse the office's powers.<sup>591</sup>

Per Taft, this was wrong. The President was no less considerate of popular concerns than Congress: "The President is a representative of the people just as the members of the Senate and of the House are."<sup>592</sup> In fact, "at some times, on some subjects" the President was "rather more representative" of the people than the Congress, because "the President [was] elected by all the people" while "the Legislature[']s . . . constituencies are local and not countrywide."<sup>593</sup>

As the national representative, the President was in charge of national issues. "The extent of the political responsibility thrust upon the President" was vast.<sup>594</sup> His concerns ranged from dealing with foreign governments to overseeing the mail to protecting the public.<sup>595</sup> Sometimes he was in charge of running the government wholesale, particularly in the

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584. See *id.* at 121 ("It has been objected[,] that the Senate have too much of the executive power even, by having control over the President in the appointment to office." (internal quotation marks omitted) (quoting 1 *Annals of Cong.* 380 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison))).

585. See *id.* at 121–22.

586. *Id.* at 122.

587. See *id.* at 132 ("Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal.").

588. *Id.* at 118 (citing *Ex parte Grossman*, 267 U.S. 87, 110 (1925)).

589. *Id.*

590. See *id.* (noting that "the association of removal with appointment of executive officers is not incompatible with our republican form of Government").

591. *Id.* at 123.

592. *Id.*

593. *Id.*

594. *Id.* at 133 (citing *In re Neagle*, 135 U.S. 1, 63 (1890)).

595. See *id.* at 133–34 (discussing the President's responsibilities).

age of the racialized American empire, as Taft knew from experience. The “possible extent of the field of the President’s political executive power may be judged by the fact that the quasi civil governments of Cuba, Porto Rico and the Philippines, in the silence of Congress, had to be carried on for several years solely under his direction as commander-in-chief.”<sup>596</sup> “In all such cases,” Taft went on, “the discretion to be exercised is that of the President in determining the national public interest . . . .”<sup>597</sup> The President was uniquely in charge of realizing the nation’s policy.

To do that, he needed control over government actors. Critics might object that the government’s staffers were “bound by the statutory law[] and are not [the President’s] servants to do his will.”<sup>598</sup> But to Taft, these critics missed the point. Government servants engaged in all manner of actions. And sometimes, particularly when engaged in some of their “highest and most important duties”—what the Court had in the past called “political” duties—they were simply acting as stand-ins for the President. In those cases, the government’s staffers were “exercising not their own [discretion] but [the President’s]”; they were simply “act[ing] for him.”<sup>599</sup> It was the President who was the representative of the people and had a unique charge in national affairs. It was the President who held the executive power and had the duty to take care that the laws be faithfully executed. The other actors in the executive branch were ultimately his assistants and subordinates, there to help the President realize the office’s duty and exercise its power.<sup>600</sup> “Each head of a department is and must be the President’s *alter ego*” on the most important matters of law and policy.<sup>601</sup>

Taft then added a functional corollary. It was not enough for Presidents to have power in the abstract. They needed to be able to use it.<sup>602</sup> If the President had no direct removal power over officers, Congress could frustrate the “unity and co-ordination in executive administration” that was “essential to effective action.”<sup>603</sup> It was simply not possible to distinguish between those moments when executive branch actors were exercising the President’s discretion, wherein they should be absolutely accountable to the President, and those when they were discharging their

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596. *Id.* at 134.

597. *Id.*

598. *Id.* at 132.

599. *Id.*

600. See *id.* at 117 (suggesting that the role of executive appointees is to act on behalf of the President in executing the nation’s laws).

601. *Id.* at 133 (emphasis added).

602. See *id.* at 134 (“The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay.”).

603. *Id.*

ordinary duties.<sup>604</sup> For pragmatic reasons alone, then, the President should have removal power over all executive officers all the time.

This, Taft believed, was in keeping with the President's responsibility to run an efficient government. He asserted that the President enjoyed "general administrative control" by virtue of the vesting of executive power in the President alone.<sup>605</sup> Pursuant to that administrative authority, the President could and should supervise the federal government's staff to ensure that they did not act negligently or inefficiently.<sup>606</sup> The President could also "supervise and guide their construction of the statutes under which they act" in the interest of ensuring the "unitary and uniform execution of the laws."<sup>607</sup> The President should judge subordinates' judgment, evaluate their ability, and take account of their "energy" and capacity for motivating their workforce.<sup>608</sup> To Taft's eyes, the President was already the general manager of the federal government. To give the President removal authority over executive actors was a natural extension of already existing powers and responsibilities.

These were the explicit "merits" grounds of the *Myers* decision.<sup>609</sup> The President enjoyed "general administrative control of those executing the laws," which included the power of removal, pursuant to the Vesting Clause of Article II.<sup>610</sup> That power enabled the President to realize "his obligation to take care that the laws be faithfully executed."<sup>611</sup> To that end, it would be better to keep Congress out of removal; otherwise it might interfere with the President's constitutional responsibilities.<sup>612</sup> According to that vision, the President was the great national spokesperson, uniquely charged with realizing the national interest. The President was the people's representative, the state's chief policymaker, and the government's administrator—all rolled into one.

The full reach of the Progressive nature of this vision is evident in the limits and carveouts that Taft built into it. Detractors of presidential removal worried that a constitutional right to executive removal would "open the door to a reintroduction of the spoils system."<sup>613</sup> Taft recognized that the defeat of the spoils system and the creation of the civil service were some of the great accomplishments of modern government.<sup>614</sup> He had no desire to reverse them (or be associated in any way with their recent

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604. *Id.*

605. *Id.* at 135.

606. See *id.* (explaining that administrative control includes removing officers if the President "[f]ind[s] such officers to be negligent and inefficient").

607. *Id.*

608. *Id.*

609. *Id.* at 163.

610. *Id.* at 164.

611. *Id.*

612. *Id.*

613. *Id.* at 173.

614. Taft, *President and Powers*, *supra* note 551, at 51.

reintroduction at Wilson's hands). He thus explained that, as long as the civil service remained confined to inferior officers, "[t]he independent power of removal by the President alone . . . works no practical interference."<sup>615</sup> In fact, the merit system could even be extended.<sup>616</sup> Under *Perkins*, which *Myers* claimed not to disturb, Congress could control the conditions of inferior officers' appointment and removal by vesting the appointment in the heads of departments rather than the President.<sup>617</sup>

In the same spirit, a presidential removal power did not, for Taft, endanger adjudicative independence within administrative agencies. (Note, here, Taft's twinned interest in presidential representation and judicial insulation.) Taft stated baldly that whether the President alone could remove administrative judges or members of executive tribunals "present[s] considerations different from those which apply in the removal of executive officers."<sup>618</sup> And while he sought to avoid addressing the question, he did suggest that such officers could enjoy greater protection without raising constitutional problems.<sup>619</sup> In these cases, Taft thought the President might be able to remove them after the fact if they had not been "intelligent[] or wise[]" in the exercise of their discretion.<sup>620</sup> But they should be free to act in the moment pursuant to law, without executive interference.

Taft's vision of the executive was thus not unbounded. In the end, it was a quintessentially Progressive executive. As the people's representative, the President would act to realize the nation's interests. And as the leader of the people's government, the President would run it efficiently and efficaciously. The removal power would be a tool to perform this presidential role. In Taft's hands, it would not threaten the great accomplishments of Progressive state-building, including the civil service and the creation of Article I judges.<sup>621</sup>

More generally, Taft saw presidential removal as compatible with the emerging administrative state. Both served the same purpose: efficient and effective presidential government. Removal was a tool of administration,

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615. *Myers*, 272 U.S. at 173.

616. *Id.*

617. See *id.* at 162 ("The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate."); see also *supra* notes 324–342 and accompanying text.

618. *Myers*, 272 U.S. at 158.

619. Officers who might properly enjoy protection included those who exercised "duties of a quasi-judicial character," members of "executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control," or those with duties "so peculiarly and specifically committed to the[ir] discretion . . . as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." *Id.* at 135.

620. *Id.*

621. See *supra* notes 615–620 and accompanying text.

which was the President's constitutional duty. That this was the First Congress's vision, as Taft claimed, is unlikely.<sup>622</sup> It was certainly not the vision embodied in the removal jurisprudence before *Myers*.<sup>623</sup> It did, however, belong to Taft—and to the new Progressive conception of the office of the President, which he had helped create.

C. *Assessing the Contemporary Court's Use of Myers*

This is not how the current Supreme Court has read *Myers*. In its recent opinions constructing the unitary executive relying on *Myers*, today's Court has relied on the case—implicitly and explicitly—for the following propositions:

1. The President's Article II mandate to faithfully execute the law includes a removal power that is only narrowly constrained.<sup>624</sup>
2. Congress oversteps its constitutional powers insofar as it tries to insulate executive officers from presidential control by law, save under narrow circumstances.<sup>625</sup>
3. Dividing the executive power among officers who are not politically accountable threatens the President's ability to carry out the duties of the office.<sup>626</sup>
4. The President has a unique “national” vantage point that makes them in some way “more representative” of the People than Congress and therefore justifies the removal power.<sup>627</sup>
5. The President is elected by the people to get things done, that is, to achieve a certain set of policies.<sup>628</sup>

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622. See *supra* section V.B.

623. See *supra* Part III; see also *supra* note 117 and accompanying text.

624. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary.”). The opinion also cited *Myers* for the proposition that the Constitution confers upon the President “the general administrative control of those executing the laws,” *id.* at 492–93 (internal quotation marks omitted) (quoting *Myers*, 272 U.S. at 164), and that the “traditional default rule” is that “removal is incident to the power of appointment,” *id.* at 509 (citing *Myers*, 272 U.S. at 119).

625. See *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (“[A]s we explained last Term, the Constitution prohibits even ‘modest restrictions’ on the President’s power to remove the head of an agency with a single top officer.” (quoting *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2205 (2020))).

626. *Free Enter. Fund*, 561 U.S. at 495–98.

627. *Seila L.*, 140 S. Ct. at 2203 (claiming that the Founders counterbalanced unitary executive power by making the President “the most democratic and politically accountable official in Government”).

628. *Collins*, 141 S. Ct. at 1784 (noting that the removal power helps to ensure that executive branch subordinates “serve the people effectively and in accordance with the policies that the people presumably elected the President to promote” (citing *Myers*, 272 U.S. at 131)).

6. The foregoing conclusions are a necessary inference from the Constitution, the Framers' writings, the Decision of the First Congress of 1789, and the landmark opinion *Marbury v. Madison*.<sup>629</sup>

This Article's recovery of *Myers* in context casts these propositions "into constitutional shadow."<sup>630</sup> *Myers* does not establish all six. And insofar as it stands for any of them, it does so as a judicial construction by a Supreme Court under the sway of a pro-presidentialist political philosophy rather than a logical inference from text and history.<sup>631</sup>

To begin with, however colorable as an interpretation of Article II, Claims 1 to 3 are quite weak empirically. As a veritable pile of scholarship has established, American government has never been without government actors insulated from direct presidential control; indeed, such actors were plentiful in the earliest American governments.<sup>632</sup> And the Supreme Court tolerated countless such arrangements, even when those arrangements encoded explicit removal limits in statute.<sup>633</sup>

More to the point, *Myers* offers no support for Claims 1 to 3 either. Taft recognized that Congress *could* insulate government actors from presidential removal, particularly in the civil service.<sup>634</sup> And he took it as obvious that Congress could prescribe the duties of executive branch officers in a way that deprives the President of meaningful control.<sup>635</sup> Taft believed that Presidents could fire subordinates whose judgment they no longer trusted.<sup>636</sup> Still, even then, the President could not legally control that subordinate if the statute vested discretion in the agency heads rather than in the President.<sup>637</sup>

This was not because *Myers* subscribed to the Congress-first vision of governance dominant in the nineteenth century though. Taft and the Progressive Presidents rejected the spoilsmen's state and believed firmly in the notion of the President's superior representation and leadership

629. *Seila L.*, 140 S. Ct. at 2191–92, 2197 (explaining that the President's removal power "follows from the text of Article II, was settled by the First Congress, and was confirmed" in *Myers* and then describing *Myers* as authoritative on "the First Congress's determination in 1789, the views of the Framers . . . , historical practice, and our precedents" (citing *Myers*, 272 U.S. at 163–64)).

630. Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 490 (1987).

631. See *supra* section V.B.

632. E.g., Chabot, *Interring the Unitary Executive*, *supra* note 116, at 132; see also Jerry L. Mashaw, *Creating the Administrative Constitution* 34–35, 81–82 (2012) (describing early Congresses' creation of a sophisticated, independent administrative state).

633. See *supra* Part II.

634. See *supra* notes 615–617 and accompanying text.

635. See *Myers v. United States*, 272 U.S. 52, 135 (1926) (noting that officers may have duties "so peculiarly and specifically committed to the[ir] discretion . . . , the discharge of which the President can not . . . properly influence or control").

636. *Id.* at 134–35.

637. See *id.* at 162.

(Claims 4 and 5).<sup>638</sup> But precisely for this reason, Progressive presidentialists—like Taft himself—were committed to administrative independence (contrary to Claim 2).<sup>639</sup> A President who was to get the people’s work done (Claim 5) would need a professional civil service, immune from the dangers of political interference.<sup>640</sup>

The Court’s reliance on *Myers* for Claim 6—the originalist unitary President—is perhaps the crowning irony in a story full of them. As strong as the Progressives’ President was, that President fell short of the modern unitary executive’s audacious sweep and supposed textualism. The key discrepancies: Taft’s canny (if questionable) use of early republic sources did not make *Myers* an originalist opinion; at most Taft used them to make a point about constitutional acquiescence by the political branches.<sup>641</sup>

More problematically for originalist unitarism, *Myers* relied on bad history. Most contemporary scholars agree that Taft’s account of the Decision of 1789 is tendentious and historically inaccurate, glossing over irreducible ambiguities.<sup>642</sup> And from the moment Taft’s opinion appeared, scholars and jurists attacked its historical arguments.<sup>643</sup> Constitutional

638. See *supra* notes 588–597 and accompanying text.

639. See *supra* notes 618–620 and accompanying text.

640. See *supra* notes 613–617 and accompanying text.

641. See *Myers*, 272 U.S. at 136 (noting that the First Congress’s decision on the question of presidential power of removal “was soon accepted as a final decision of the question by all branches of the government”); see also *supra* notes 29–33 and accompanying text. For an explanation of this sort of precedential mode of interpretative authority, see *Myers*, 272 U.S. at 170–71 (“In the use of Congressional legislation to support . . . a particular construction of the Constitution by acquiescence, its weight for the purpose must depend . . . upon the attitude . . . of the executive and judicial branches[] [and] . . . the number of instances . . . in which opportunity for objection . . . is afforded.”). In other words, political practice—not just original meaning—was a source of authority on constitutional interpretation.

642. See, e.g., Katz & Rosenblum, *supra* note 74, at 412 n.57 (noting the problems with Taft’s use of the Decision of 1789 in *Myers*); Shugerman, *Indecisions*, *supra* note 115, at 757 (“Once a series of misreadings and omissions are corrected, it is unclear what evidence remains for the Taft/Roberts interpretation of the Decision of 1789.”); *supra* note 116. For the contrary view, see Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 *Harv. L. Rev.* 1756, 1801 (2023) (arguing that the Decision of 1789 was not ambiguous and “rest[ed] upon a reading of the President’s constitutional powers”). But see Katz & Rosenblum, *supra* note 74, at 415–25 (criticizing the article’s methodological weaknesses (citing Bamzai & Prakash, *supra*)).

643. See, e.g., James Hart, *Tenure of Office Under the Constitution* 220 (1930) (“The Chief Justice utterly ignores the fact that the views of ‘Mr. Madison and his associates,’ upon which he relies, were held by only half the ex-Convention members.”); Galloway, *supra* note 246, at 491–92 (criticizing Taft’s use of historical evidence); T.R. Powell, *Spinning Out the Executive Powers*, *New Republic*, Nov. 17, 1926, at 369, 370 (“The Chief Justice’s treatment of history is not impeccable. His logic also is not above suspicion. The weaknesses of both are made painfully plain by the detailed dissenting opinions . . .”). According to William Leuchtenburg, most law reviews that pronounced on *Myers* expressed support for the decision, but some, like the *Michigan Law Review*, immediately cabined its significance. Leuchtenburg, *The Supreme Court Reborn*, *supra* note 246, at 67, 270 nn.53 & 56. That journal expressed certainty that members of the Federal Trade Commission were not

scholar Edward Corwin was particularly savage: “[W]hat a judge cannot *prove* he can still *decide*. Viewed purely as history, the Chief Justice’s interpretation of the decision of 1789 is without validity.”<sup>644</sup>

Taft’s colleagues on the bench at the time understood his references to the Founding as a feint.<sup>645</sup> Among other reasons Taft gave for his ruling, he emphasized that a presidential right of removal was supported by the executive branch’s greater familiarity with the job performance of executive officers.<sup>646</sup> This made Justice McReynolds furious. Convenience did not a constitutional rule make. Between 1789 and 1836, the appointment of postmasters had been vested in the Postmaster General, not the President, he observed in dissent.<sup>647</sup> Was it therefore correct to say that for forty-seven years the President had failed to meet the duty to “take care that the laws be faithfully executed”?<sup>648</sup> McReynolds thought not.<sup>649</sup>

The dissenters expressed the same skepticism for Taft’s freewheeling construction of the bare language of Article II. Brandeis declared: “[A]n uncontrollable power of removal in the Chief Executive ‘is a doctrine not to be learned in American governments.’”<sup>650</sup> McReynolds concluded: “I think the supposed necessity and theory of government are only vapors.”<sup>651</sup> Justice Holmes referred to the same readings of the text as “spiders’ webs inadequate to control the dominant facts.”<sup>652</sup> The *American Law Review* pointed out that “implications are quite commonly intellectual devices for making plugs fit holes.”<sup>653</sup> Not even in its own time, then, did

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“subject to the President’s pleasures or caprice.” *Id.* at 270 n.56 (internal quotation marks omitted) (quoting E.H.A., *Constitutional Law: The President’s Power of Removal*, 25 Mich. L. Rev. 280, 287 (1927)).

644. Corwin, *Tenure of Office*, *supra* note 246, at 369. Corwin also questioned Taft’s treatment of past jurisprudence: “[T]he Chief Justice’s opinion in the case at bar finds surprisingly little support in anything that the Court itself has previously said with regard to the power of removal.” *Id.* at 380. He further deemed *Myers*’s reliance on Chief Justice John Marshall’s *Life of Washington* to overturn *Marbury* only the oddest of Taft’s many strange moves. See *id.* at 372–73 (explaining that Marshall’s *Life of Washington* doesn’t provide adequate proof that Marshall changed his mind).

645. Justice Louis Brandeis, in dissent, marshaled dozens of statutes and judgments upholding removal restrictions in defiance of Taft’s “settled” construction. *Myers*, 272 U.S. at 242–44, 250–55 (Brandeis, J., dissenting). Brandeis also demonstrated that removal restrictions preceded Reconstruction by thirty years, despite Taft’s assertion that such restrictions stemmed from the clashes between President Johnson and Congress and represented a constitutional anomaly. *Id.* at 279.

646. *Id.* at 122 (majority opinion).

647. *Id.* at 192 (McReynolds, J., dissenting).

648. *Id.*

649. *Id.*

650. *Id.* at 292 (Brandeis, J., dissenting) (quoting 1 *Annals of Cong.* 513 (1789) (Joseph Gales ed., 1834) (statement of Rep. White)).

651. *Id.* at 192 (McReynolds, J., dissenting).

652. *Id.* at 177 (Holmes, J., dissenting).

653. Galloway, *supra* note 246, at 491.



others believe that Taft's view of the presidency could be sustained as a creation of 1789.

There is evidence that Taft himself recognized his subterfuge. While still in the throes of crafting *Myers*, he wrote in a letter to a friend:

I am very strongly convinced that the danger to this country is in the enlargement of the powers of Congress, rather than in the maintenance in full of the executive power. Congress is getting into the habit of forming boards who really exercise executive power, and attempting to make them independent of the president after they have been appointed and confirmed. This merely makes a hydra-headed Executive, and if the terms are lengthened so as to exceed the duration of a particular Executive, a new Executive will find himself stripped of control of important functions, for which as the head of the Government he becomes responsible, but whose action he can not influence in any way. It was exactly this which the two-thirds majority of the Republicans in the Congress after the War attempted to with the Tenure of Office Act [of 1867]. They attempted to provide that Cabinet officers who had been appointed by Lincoln, and who differed with Johnson as to the policy to be pursued in respect to dealing with reconstruction questions should be retained in office against his will.<sup>654</sup>

Taft here says explicitly what *Myers* does implicitly: The republic should shift power away from Congress and toward the President. What the Founders thought is beside the point.

The contemporaneity of *Myers* appears on its surface. Taft's retelling of Reconstruction history fairly seethes with late nineteenth-century contempt for Congress. Siding with Andrew Johnson against the Radical Republicans, Taft accused the legislative bloc of seeking to paralyze "the executive arm and destroy the principle of executive responsibility and separation of the powers, sought for by the framers of our Government."<sup>655</sup> This was not good history. But it was a fairly accurate paraphrase of the then-dominant Dunning School of historiography, as Niko Bowie and Daphna Renan have powerfully shown.<sup>656</sup> For the Dunning School, Reconstruction was not a moment of redemption for a slaveholding America, but a cautionary tale in which a fanatical Congress unconstitutionally "emasculate[d] [the executive's] power just as it had

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654. Post, Unitary Executive, *supra* note 26, at 186–87 (internal quotation marks omitted) (quoting Letter from William Howard Taft, C.J., to Thomas W. Shelton (Nov. 9, 1926)); see also Brief of Appellant, *Myers*, 272 U.S. 52, reprinted in 272 U.S. 60, 65 (interpreting Taft's transmission of the recommendations of the Commission of Economy and Efficiency, 48 Cong. Rec. 8500–01 (1912), to mean that "there must be checks on the usurpation of power by the executive departments").

655. *Myers*, 272 U.S. at 167. The Solicitor General, James M. Beck, had described Congress's efforts to stop Andrew Johnson from dismantling Reconstruction as "one of the most discreditable chapters" in American history. Oral Argument of Solicitor General James M. Beck, for the United States, *Myers*, 272 U.S. 52, reprinted in 272 U.S. 88, 95.

656. See Bowie & Renan, *supra* note 72, at 2062–63.

emasculated the power of the white South.”<sup>657</sup> On this view, Taft’s invocation of an “original” constitutional model of three separated branches forbidden from intermingling is a smokescreen designed to prevent a repeat of the Johnson affair.<sup>658</sup> His judicialization of a longstanding political question reflected not just naked judicial activism but also his political conservatism. Congress might act rashly and unwisely in support of extreme policy aims, but the President would be more circumspect.

To advance his project, Taft appealed to history. This, of course, is exactly what today’s Supreme Court does.<sup>659</sup> *Myers* thus stands as a successful example of how to smuggle a contemporary conservative legal project into the language of historical analysis. But it is not, actually, a historical authority at all.

#### D. *The Law of the President in Historical Time*

So what? Despite formal doctrine that claims to rely ever more on history,<sup>660</sup> the current Court has shown a remarkable disregard for historical accuracy<sup>661</sup> (or even factual accuracy<sup>662</sup>). Someday, perhaps, judges will be interested in what *Myers* really said.<sup>663</sup> When that day comes, this Article will have implications for doctrine.

Until then, the Article’s main contributions are scholarly. Getting the history right matters most for understanding the executive. This

657. *Id.* at 2063.

658. See *Myers*, 272 U.S. at 116 (discussing the Framers’ intention to keep the three branches separate).

659. See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (invoking American history and tradition to assess a Second Amendment claim); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSblog (June 27, 2022), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [<https://perma.cc/H9A6-8XYG>] (criticizing *Bruen* for invoking history but presenting a version of the past that resembles fantasy).

660. *Bruen*, 142 S. Ct. at 2131 (asserting that the test to identify violations of the Second Amendment “requires courts to assess whether modern firearms regulations are consistent with [that Amendment’s] . . . historical understanding”).

661. See *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2625 n.6 (2022) (Gorsuch, J., concurring) (“In the course of its argument, the dissent leans heavily on two recent academic articles. But if a battle of law reviews were the order of the day, it might be worth adding to the reading list.” (citation omitted)); Katz & Rosenblum, *supra* note 74, at 426 (criticizing Justice Gorsuch’s failure to seriously respond to the *West Virginia v. EPA* dissent’s historical arguments (citing *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. at 2625 n.6)).

662. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (revealing that the majority inaccurately represented the facts of the case).

663. See Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, N.Y. Rev. Books (Nov. 18, 1971), <https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/> (on file with the *Columbia Law Review*) (“Men who act, to the extent that they feel themselves to be the masters of their own futures, will forever be tempted to make themselves masters of the past as well.”).

understanding in turn shapes thinking about the law of the presidency and potential reforms.

Studies of constitutional law in general, and the law of the executive in particular, have often remarked on the strange flip-flopping in the law between formalist and functionalist approaches.<sup>664</sup> *Myers* is alive today as the main case law authority for a separation-of-powers formalism quick to strike down legislation for violating implied limits on Congress's power to structure the executive branch.<sup>665</sup> Such formalism tends to surface in the Supreme Court cyclically through the decades, coinciding with certain clear ideological postulates.

Explaining the rise of formalism on purely internal, doctrinal terms has never succeeded, though.<sup>666</sup> This Article's account offers another explanatory variable in the story of formalism's ascendance: the evolution of the office of the presidency itself.

This attention to institutional development makes the unitary executive a constitutional paradox. Today, most unitarians are committed originalists.<sup>667</sup> But far from endorsing presidential leadership, the Framers feared what contemporary political scientists call "issue arousal,"<sup>668</sup> and they separated executive and legislative power in hopes that the President would provide a "counterweight to impulsive majorities" likely to channel their energies through Congress, the most popular branch.<sup>669</sup>

Taft agreed with Hamilton that the executive could be a conservative counterweight to rash, ill-conceived policy by supplying the government with stability, unity, and competence. Taft believed, for instance, that the President should have a six- or seven-year term with no reelection to discharge duties with "greater courage and independence" and maintain "the efficiency of administration" free from the distractions of campaigning.<sup>670</sup> Taft's longstanding support for a presidential budget was similarly grounded in the notion that the President's national "method of

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664. See, e.g., William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 Harv. J.L. & Pub. Pol'y 21, 29 (1998) (discussing how formalism and functionalism are both necessary and related forces in constitutional law).

665. Today's Court adopts Taft's version of the history of the removal power almost in total, including Taft's treatment of the Reconstruction Republican Congress as an overzealous and meddlesome body that adopted a removal statute "'without discussion' during the heat of the Civil War." See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (quoting *Myers v. United States*, 272 U.S. 52, 165 (1926)).

666. See Strauss, *supra* note 630, at 526 (attributing the rise of formalism to skepticism about the judiciary's ability to perform functionalist analyses).

667. Peter M. Shane, The Originalist Myth of the Unitary Executive, 19 U. Pa. J. Const. L. 323, 325 (2016).

668. See Ceaser, *supra* note 145, at 56 (defining issue arousal as "the effort of an aspiring leader to win power by putting himself at the head of a broad movement based on some deeply felt issue or cause which he may have played a role in creating or arousing").

669. Skowronek, *Conservative Insurgency*, *supra* note 121, at 2072.

670. Taft, *President and Powers*, *supra* note 551, at 4.

choice and . . . range of duties” provided the vision and independence to resist irresponsible spending, unlike short-sighted legislators pillaging the Treasury for pork to benefit their constituencies.<sup>671</sup>

But Taft was a modern President living with a modern office. The Hamiltonian executive may have been unitary, but it was only an executive, not a lawmaker by virtue of some claim to superior representativity.<sup>672</sup> By contrast, *Myers* cast the President as the leader of the nation, elected to carry out a national policy agenda. In postulating that the faithful execution of the law entitles the President to “determin[e] the national public interest” and direct subordinates to carry it out, *Myers* fatefully transformed a duty imposed by the text into a power vested by virtue of popular opinion—a fact that dissenters, then and today, have not missed.<sup>673</sup>

This transformation happened in practice before it happened in law. The law did not evolve according to its own logic. Rather, it was self-consciously pushed to accommodate intellectual and political developments in the office of the presidency.<sup>674</sup> The law and the office were never fully independent, but they changed according to different imperatives and on different timelines. It is little surprise, then, that the modern presidency combines democratic legitimacy and textual authority in an often unwieldy admixture.<sup>675</sup>

*Myers* was not simply reactive. It was also productive. The law of the executive affects the continuing development of the office of the President. It makes some things easier and forecloses others. The developments *Myers* set in motion remain ongoing.

Consider, in closing, *Myers*’s discussion of the civil service. As discussed, Taft believed that the civil service was an essential component of the modern state and an ally to the Progressive Presidency; the holding in *Myers* was not supposed to threaten it.<sup>676</sup>

But judicial opinions have a power beyond their author’s control. If “effective enforcement of the law” is a value worthy of constitutional protection, and if effectiveness requires that the President have a

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671. *Id.* at 14. See generally Dearborn, *supra* note 538, at 12–13 (discussing Taft’s preference for a presidential budget given executive power and independence).

672. See *supra* section I.B, especially notes 125–128 and accompanying text.

673. Compare *Myers v. United States*, 272 U.S. 52, 134 (1926) (articulating the majority’s approach), with *id.* at 177 (Holmes, J., dissenting) (responding that the duty to see that the laws be executed does not create new presidential powers), *id.* at 184 (McReynolds, J., dissenting) (same), *id.* at 292 (Brandeis, J., dissenting) (same), and *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (noting that the Take Care Clause “speaks of duty, not power”).

674. See *supra* section IV.D.

675. See Bailey, *supra* note 123, at 3 (highlighting the challenging relationship between the President’s political authority and legal authority).

676. See *supra* section V.B.

“disciplinary influence upon those who act under him,” then why tolerate a civil service (or Article I judges, or any independent officers at all)?<sup>677</sup> In an internal memorandum to Taft during the *Myers* drafting process, a young Justice Harlan Fiske Stone underscored exactly this point. He insisted that the functional argument undergirding *Myers*’s formalism be taken to its logical conclusion.<sup>678</sup> The President would then enjoy an unrestricted removal power over all executive subordinates, irrespective of their function or who had appointed them.<sup>679</sup> Taft pragmatically refused to “intimate that the Civil Service was constitutionally infirm” in any way, and he became angry with his dissenting colleague, Justice McReynolds, for indicating that the opinion suggested the contrary.<sup>680</sup>

But considering how strongly McReynolds pressed Taft on this point, *Myers*’s failure to specify the conditions under which Congress could lawfully trench on the President’s removal authority left the decisional rationale “curiously suspended and unsatisfying.”<sup>681</sup> A few months after the decision came down, the *Nation* commented that it would make it “impossible for Congress” to give any fixed tenure to “quasi-judicial offices” and that “the fear of removal w[ould] henceforth operate to bow hitherto independent officials to the will of the President or of his party speaking through him.”<sup>682</sup>

Nearly 100 years later, the constitutional rule adumbrated in *Myers* has taken on a life of its own. It has swallowed up Chief Justice Taft’s carefully traced-out exceptions, as Justice Stone (approvingly) and the *Nation* (critically) deduced it would. Writing in 2021 to dismantle tenure protections for the head of a regulatory agency, the Court concluded that the Constitution “prohibits even ‘modest restrictions’ on the President’s power to remove the head of an agency with a single top officer” regardless of the officer’s function or the manner of their appointment.<sup>683</sup> For support, this sweeping conclusion reached back to its own holding a year prior in *Seila Law* and, of course, to *Myers*.<sup>684</sup>

It is not a correct reading of *Myers*. But *Myers* left itself open to this interpretation. More, it constitutionalized a strong President that would,

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677. *Myers*, 272 U.S. at 132.

678. See Post, Unitary Executive, *supra* note 26, at 175 (“[T]he power is conferred and the duty imposed on [the President] to exercise the power of removal, and that, to my mind, is just as controlling in the case of officers with little or no discretion as in the case of a cabinet member.” (internal quotation marks omitted) (quoting Letter from Harlan Fiske Stone, J., to William Howard Taft, C.J. (Nov. 13, 1925))).

679. *Id.*

680. *Id.* at 183, 186.

681. *Id.* at 183.

682. *Id.* at 186 (internal quotation marks omitted) (quoting The Supreme Court as Revolutionary, *The Nation*, Nov. 10, 1926, at 468–69).

683. *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (quoting *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2205 (2020)).

684. *Id.*

predictably, continue to develop in strength. The law of the President set in motion institutional developments that have now come back to transform the law. Taft would have been scandalized at what the Court has done with his opinion. But modern unitarism has real roots in the Progressive Presidency nonetheless.

#### CONCLUSION

The theory of the unitary executive is the dominant theory guiding the separation-of-powers jurisprudence of the Roberts Court. This theory holds that a faithful reading of Article II of the U.S. Constitution requires an executive branch insulated from most forms of congressional interference and control. The theory has been put into practice in a series of recent cases invalidating statutes attempting to define administrative arrangements, insulate civil servants and technocratic expertise from presidential direction, and, indeed, check the President.

These recent cases have overwhelmingly relied on a single case for their originalist theory of the presidency: *Myers*, a 1926 opinion written by Taft, not coincidentally the only Chief Justice of the Supreme Court ever to have been President himself. *Myers* appears to contain the main ingredients of today's unitarism: a formalist reading of Article II, the elevation of abstract principles of constitutional "structure" over statutes, and the invalidation of a congressional enactment mandating bureaucratic independence. Most usefully for the Court, *Myers* seems to root its presidentialism in the Founding.

Yet this reading is mistaken. *Myers* is not originalist. It does not explicate a long extant tradition of presidential administrative supremacy. In fact, just the opposite: It broke with decades of Supreme Court precedent that had firmly established the primacy of Congress's statutes in setting the bounds of presidential control of the administrative state. Nor did the *Myers* opinion rely on originalist methodology. It defended its theory of the executive on functional grounds and arguments from acquiescence.

At the heart of *Myers* was a theory of presidentialism rejected at the Founding and unknown in nineteenth-century case law: the theory of presidential representation. The theory had various roots in American history but reached its flowering in the Progressive Era. Early in the twentieth century, the Progressive Presidents gave the theory expression as Roosevelt, Taft, and Wilson explored what the presidency could be. By the time they were done, the President was looked to as the people's lead policymaker, head government administrator, and privileged champion. The change was durable enough that it survived into the 1920s, reflected in the period's conservative administrations and Taft's own post-presidential writings.

With *Myers*, Taft wrote this new theory into law. On its own terms, the opinion imagined a strong executive with far-reaching powers that would

have upset the Founders. But even Taft's executive fell far short of the unitarian fantasy. *Myers* recognized the necessity of the civil service, the propriety of insulating executive branch officials from presidential control, and ultimately the power of Congress to structure the government.

Recovering this more contextually adequate reading of *Myers* has important consequences for doctrine and scholarship today. Doctrinally, it undercuts the Supreme Court's current reliance on *Myers*. The case does not stand for the Founders' view of the presidency. Nor does it support presidential control over all executive branch officials. Nor does it aggressively cabin congressional creativity in the design of the executive branch.

At the level of scholarship, this new reading of *Myers* highlights the necessary imbrication of law and institutional development, especially for the study of the presidency. *Myers* did not endorse the unitary executive. But by writing the strong Progressive Presidency into law, it helped legitimate the development of stronger executives down the line. Law reflects institutional realities. And law helps create new institutional relationships, as modern unitarists illustrate when they rely on *Myers* to champion their own new presidentialist projects.

Unitarians may think they are simply restoring the Constitution to its original state. But as our return to the case has shown, *Myers* was practically the opposite of the text-based, pre-political, ahistorical totem the Roberts Court now venerates. It was a period-specific manifestation of early twentieth-century political thought. In this way, the current conservative Supreme Court is doing just what *Myers* did: writing a new theory of the office of the President into law by reaching back to the Founding to construct continuity.

*Myers* is thus the correct progenitor for the Court's unitary project, but not for the reason it thinks. The real story of how the President became the administrator-in-chief is one of institutional innovation and judge-led legal development. Today, with its unitary revolution, what the Court once made one way, it is trying to make anew. That is the kind of judicial revolution *Myers* itself engaged in. Taft would reject the presidency the current Court is creating. But the judicial project of the Roberts Court? That, he would understand. It was what he himself had done.

