
BOOK REVIEW

TOWARD A REPRESENTATIONAL THEORY OF THE EXECUTIVE

THE UNITARY EXECUTIVE:
PRESIDENTIAL POWER FROM WASHINGTON TO BUSH
By Steven G. Calabresi[†] & Christopher S. Yoo.^{††}
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Reviewed by Victoria F. Nourse & John P. Figura***

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INTRODUCTION

In 1994, Northwestern University Professor Steven Calabresi defended the unitary executive theory from charges that it would lead to an imperial presidency.¹ Not so, wrote Calabresi; the power arising from the Article II

[†] Professor of Law, Northwestern University School of Law.

^{††} Professor of Law, University of Pennsylvania Law School.

* Burrus-Bascom Professor of Law, University of Wisconsin Law School. Special thanks to Professor Vicki Jackson for reading and discussing this work with me during my visiting professorship at Georgetown University Law Center. Mr. Figura and I also wish to thank Samantha Groening and the *Boston University Law Review* staff for their invaluable editorial assistance.

** Law Clerk to the Honorable Jack B. Weinstein, Senior District Judge, Eastern District of New York; J.D., with honors, Order of the Coif, Emory University School of Law; M.A., English, The Ohio State University; B.A., Augustana College, Rock Island, Ill.

¹ Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377,

Vesting Clause was not a regal power but merely executive power; after all, it excluded powers allocated to other branches.² The executive power was simply “the power to supervise and control all subordinate executive officials exercising executive power conferred explicitly by either the Constitution or a valid statute.”³ Then came the torture memos, Guantanamo Bay, and what one Harvard Law professor and former aide to President George W. Bush has called “the Terror Presidency.”⁴ Rightly or wrongly, the unitary executive theory has become publicly synonymous with executive overreach and assertions of absolute presidential power.

The Unitary Executive: Presidential Power from Washington to Bush is an attempt to remedy the harm done to the unitary theory’s reputation.⁵ As the authors explain:

[T]he cost of the bad legal advice that [President George W. Bush] received [from John Yoo, author of the controversial torture memos,] is that Bush has discredited the theory of the unitary executive by associating it not with presidential authority to remove and direct subordinate executive officials but with implied, inherent foreign policy powers, some of which, at least, the president simply does not possess.⁶

The book grows out of a project predating the George W. Bush era: a series of articles tracing a history of unitarian practice and belief by each President since George Washington.⁷ Instead of using the unitary theory as the Bush

1392-93 (1994) (using the Vesting Clauses to defend the unitary executive).

² *Id.*

³ Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1177 n.119 (1992).

⁴ See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (describing the author’s experience as head of the Justice Department’s Office of Legal Counsel during the Bush administration).

⁵ STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 429 (2008).

⁶ *Id.*

⁷ See Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 606 (2005) (“[This article] examine[s] the presidencies during the fourth half-century of our constitutional history to see the views expressed by presidents from Harry Truman through George W. Bush regarding the scope of the president’s power to execute the law.”); Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 7 (2004) (“[This article] examine[s] the views of the presidencies during the third half-century of our constitutional history, beginning with Benjamin Harrison and ending with Franklin Delano Roosevelt.”); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667, 667-68 (2003) (examining the presidencies in the nation’s second half-century, from Martin Van Buren’s to Grover Cleveland’s); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1459 (1997) (“This Article will examine the development of the unitary executive over the course of the first fifty years of our constitutional history [from President

lawyers did – to justify a plenary foreign affairs power⁸ – Calabresi and Yoo seek to reinvigorate what they now call the “classic”⁹ or “Reagan era”¹⁰ theory: President as implementer-in-chief, charged with “control[ing] the execution of the laws by subordinates”¹¹ through powers of supervision and removal.¹² The book invites readers to take a fresh look at the theory. Is *The Unitary Executive* a compelling explanation of presidential power? What is the relationship between the purportedly more moderate claims now asserted by Calabresi and Yoo and the more extreme claims of absolute power from which Republicans and Democrats alike now seek distance? In this Review, we aim to clarify the multiple meanings of the “unitary executive,” and suggest that the authors’ “classic” view provides neither clarification nor real moderation. To analyze the authors’ claims, we use a representational theory of the separation of powers, which we believe is more consistent with the whole constitutional text and the Supreme Court’s most recent statement on this issue.¹³

In Part I of this Review, we consider, and reject, the authors’ central claims: that American Presidents have been consistently unitarian and that this alleged historical consensus could achieve constitutional significance through Justice Frankfurter’s conception of inter-branch acquiescence.¹⁴ In Part II, we argue that the authors’ history depends upon a constitutional misreading. The text of the Constitution – the whole text – provides little support for an absolutist view of presidential power. Part III develops a theory of executive power grounded in the separation of powers. Our theory rejects standard liberal and conservative views and insists instead upon the central place of representation, consistent with the constitutional texts that create representation. A representational approach warns against a theory of executive power that fails to appreciate the structural incentives of those who run the branches – incentives that even the Founders understood would lead men to aggrandize power.¹⁵ Finally, in Part IV, we apply this analysis to Calabresi’s and Yoo’s

George Washington through President Andrew Jackson.] focussing especially on the events surrounding President Andrew Jackson’s removal of Treasury Secretary William J. Duane.”).

⁸ CALABRESI & YOO, *supra* note 5, at 18-21.

⁹ *Id.* at 16.

¹⁰ *Id.* at 428.

¹¹ *Id.* at 19.

¹² *Id.* at 419.

¹³ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 08-861, slip op. at 16-17, 33, 561 U.S. ___ (June 28, 2010) (explaining that separation of powers includes “a diffusion of accountability” and that the President must have the power to remove officials who help execute the laws in order to be fully accountable to the electorate).

¹⁴ CALABRESI & YOO, *supra* note 5, at 28, 36, 431.

¹⁵ See V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 846-49 (2004) [hereinafter Nourse, *Constitutional Anatomy*] (discussing the Founders’ concern with understanding and balancing governmental power and the incentives it creates);

claim that the “classic” unitary executive theory’s focus on the removal power – the President’s ability to remove his subordinates – is a moderate thesis.¹⁶ Lurking behind this claim is the often repeated, and we believe immoderate, theory that all independent agencies are unconstitutional.¹⁷ We explain that, from a representational perspective, not all removal questions are alike. Calabresi’s and Yoo’s unitary analysis is incapable of distinguishing between two very different kinds of removal: legislative removal vetoes and good faith removals. The former may cause potentially dramatic shifts in representation and are constitutionally suspect. The latter are not. Good faith removal clauses may operate as simple limits on the abuse of political power (firing persons for no reason at all). In the end, our argument – like much of the Court’s reasoning in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*¹⁸ – seeks to move separation of powers analysis beyond functional essentialism toward a more effective representational view.

I. THE NEW HISTORY OF *THE UNITARY EXECUTIVE*

The Unitary Executive is a history, but a history written with the avowed aim of encouraging future Presidents to assert aggressive claims of executive power.¹⁹ In an unorthodox move, the authors put aside the textualist Vesting Clause thesis on which the unitary theory has long been premised,²⁰ instead adopting – at least for the purposes of this project – what they describe as the Burkean, common-law constitutional perspective implicit in antiunitarian scholarship.²¹ From this stance, they craft a defensive claim, based on an idea

Victoria Nourse, *The Vertical Separation of Powers*, 49 Duke L.J. 749, 759-60 (1999) [hereinafter Nourse, *Vertical Separation*] (explaining that the Founders recognized the importance of personal incentives in structuring political power).

¹⁶ CALABRESI & YOO, *supra* note 5, at 20-21.

¹⁷ See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 581-82 (1994).

¹⁸ *Free Enter. Fund*, No. 08-861, slip. op. at 16-17, 20, 33, 561 U.S. ___ (discussing the important role of the people in the structure of the United States government).

¹⁹ CALABRESI & YOO, *supra* note 5, at 8 (“In developing our argument that presidents have always appreciated the vital importance of the removal power, we intend to set the stage for several legal claims that presidents may want to make in resisting congressional efforts to curtail either the removal power or the parallel presidential power to issue binding orders to executive branch subordinates.”).

²⁰ See *id.* at 14-15 (stating that the unitary theory is grounded in the text of the Constitution); Calabresi & Rhodes, *supra* note 3, at 1165 (explaining the unitary theory’s basis in the Vesting Clause of Article II); see also U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004) (coining the term “Vesting Clause Thesis”).

²¹ CALABRESI & YOO, *supra* note 5, at 15.

posed by Justice Frankfurter in his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence²²:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.²³

This idea merges with the authors’ conception of departmentalism, under which a separation-of-powers question is not settled until there is a long-standing practice by one branch in the face of acquiescence by the other two branches.²⁴ To foreclose a unitary argument, therefore, one would have to show a pattern and practice of acquiescence: “Only if there has been presidential acquiescence in a departure from the unitary executive could such a practice justifiably be regarded as an established part of the structure of our government.”²⁵

The Unitary Executive moves methodically through each presidential administration in United States history. Each President receives a passing grade on the authors’ unitarian scale.²⁶ To Calabresi and Yoo, the accumulated nonacquiescence of every presidential administration in history demonstrates that, “contrary to the misconceptions of many antiunitarians, *no* systematic, unbroken, longstanding practice exists of presidential acquiescence to congressionally imposed limitations on the President’s sole power to execute the laws and remove subordinate officials.”²⁷ Or, more broadly, “[t]his book shows that all of our nation’s presidents have believed in the theory of the unitary executive.”²⁸

A. *A Not-Quite-Unitary History*

Unfortunately, Calabresi and Yoo claim far more from their history than the facts they collect show. At the core of the unitary theory is the idea that *all* executive power is vested in the President – that the President must have complete control over the Executive Branch and all power deemed “executive.”²⁹ This idea forces the conclusion that more specific powers, such

²² 343 U.S. 579 (1952).

²³ *Id.* at 610-11 (Frankfurter, J., concurring).

²⁴ CALABRESI & YOO, *supra* note 5, at 417.

²⁵ *Id.* at 27.

²⁶ *E.g., id.* at 399 (“Although there is always room for disagreement as to the substance of Clinton’s policies, in retrospect his commitment to the unitariness of the executive branch cannot be gainsaid.”).

²⁷ *Id.* at 28.

²⁸ *Id.* at 4.

²⁹ *Id.* at 3-4.

as the removal power, must also be vested in the President.³⁰ To fail to embrace this essentialist view, then, is to be nonunitarian.

Despite their claim that all Presidents have been unitarian, Calabresi and Yoo do not attempt to show that all Presidents have made such categorical claims. They conclude the book with a recap of assertions of executive power, arranged roughly in descending order of historical frequency:

[E]very single president in American history has . . . insist[ed] on the president's constitutional power to remove and direct subordinates [P]residents have issued executive orders, proclamations, and signing statements that go back to the beginnings of our history. Many presidents . . . have defended departmentalism In addition, a large number of presidents have challenged the constitutionality of the legislative veto.³¹

As this passage shows, the authors claim unitariness on the basis of *partial* assertions of power – often the removal power.³² Presidents will of course defend their powers, but nothing indicates that these Presidents entertained the modern unitarian claim that the President must have *all* powers that a unitarian would consider “executive.” Nonetheless, the authors issue sweeping conclusions for each President. We read that “Washington emerged as . . . a strong advocate of executive unitariness;”³³ that “[b]y the time Jefferson had completed his two terms in office, he was as enthusiastic and committed an advocate of the unitary executive as has ever walked the earth;”³⁴ that “[i]t is difficult to imagine how someone could outdo Madison in consistently and vigorously defending the unitary executive;”³⁵ and so on.

Although the authors claim to be talking about the seemingly arcane and mild removal power, they recount facts moving far beyond it. We read that Washington commandeered state militias to quell rebellions;³⁶ Adams “us[ed] military force for law enforcement purposes;”³⁷ Jefferson purchased Louisiana;³⁸ Monroe issued a major foreign policy proclamation;³⁹ Jackson thwarted the Bank of the United States;⁴⁰ McKinley sent the military to stop a strike and to prosecute the Spanish-American war;⁴¹ Teddy Roosevelt ordered

³⁰ *See id.*

³¹ *Id.* at 418.

³² *E.g., id.* at 157 (“Buchanan’s support for the unitary executive was made manifest in his widespread use of the removal power . . .”).

³³ *Id.* at 57.

³⁴ *Id.* at 76.

³⁵ *Id.* at 82.

³⁶ *Id.* at 48.

³⁷ *Id.* at 61.

³⁸ *Id.* at 75.

³⁹ *Id.* at 84.

⁴⁰ *Id.* at 104-05.

⁴¹ *Id.* at 235-37.

investigations into government scandals;⁴² and so on. These assertions of power extend far beyond the proposed “moderation” of the “classic” unitary executive.⁴³

If *The Unitary Executive* does not depict a unitary history, neither does it demonstrate a consistent protection of the President’s power to remove his subordinates – the power at the core of the “classic” unitary theory and the one power that Calabresi and Yoo claim “every single president in American history” has “insist[ed]” upon.⁴⁴ If the authors could argue that Presidents have claimed the absolute power to remove inferior officials in the face of Supreme Court decisions rejecting that position, such as *Humphrey’s Executor v. United States*,⁴⁵ their case would be stronger and limited, as it should be, to the removal power. But many of the Presidents in their survey embraced the power to remove in vague terms or exercised only the uncontroversial, well-settled power to remove cabinet-level officials.⁴⁶ Even more disturbing for their removal thesis, some Presidents made no objection to the creation of independent agencies, which in theory insulate Presidents from absolute removal power.⁴⁷

Despite the authors’ conclusion that “every” President supported the unitary executive, the book confesses counterexamples. Lincoln tolerated numerous incursions into his authority,⁴⁸ but the authors claim that these actions merely demonstrate a massively powerful President tolerating incursions for the sake of maintaining congressional support for his military policies.⁴⁹ The authors

⁴² *Id.* at 241.

⁴³ *See id.* at 20-21, 428 (describing the classic unitary executive theory as granting “modest presidential powers”).

⁴⁴ *Id.* at 418; *see also id.* at 4 (“Big fights about whether the Constitution grants the president the removal power have erupted frequently, but each time the president in power has claimed that the Constitution gives the president power to remove and direct subordinates in the executive branch. And each time the president has prevailed, and Congress has backed down.”); *id.* at 6 (describing the removal power as a “fault line between the tectonic plates represented by the presidency and Congress”).

⁴⁵ 295 U.S. 602, 629-32 (1935) (concluding that the President’s power to remove without cause is limited to officers who perform only executive functions and that removal of officers with duties related to the legislative or judicial powers requires good cause).

⁴⁶ *See, e.g.,* CALABRESI & YOO, *supra* note 5, at 42 (stating that there are no records of President Washington’s exercise of the removal power with regard to inferior officials).

⁴⁷ *See id.* at 217 (observing that between 1889 and 1945 “two institutions generally assumed to be inconsistent with the unitary executive – independent agencies and civil service protections for federal employees – became more widespread”).

⁴⁸ *Id.* at 163, 172 (recounting Lincoln’s silence even as legislation limited his power to remove certain officers, Congress gave courts authority to appoint interim federal prosecutors, and the Joint Committee on the Conduct of the War interfered in battle plans and the retention of generals).

⁴⁹ *Id.* at 172-73; *see also id.* at 163-64 (dismissing Reconstruction-era incursions during Andrew Johnson’s administration as the momentary lapses of a troubled era).

acknowledge an even less explicable counterexample in President Harding, whom they accuse of a “narrow conception of presidential power,”⁵⁰ a failure to object to limits on his power of removal,⁵¹ and a refusal “to defend the unitariness of the executive branch.”⁵² Do not these counterexamples undermine the claim that *all* of our Presidents have been unitarian? The authors’ nonacquiescence framework depends on an unbroken pattern, not a pattern that is broken only for good cause.

Calabresi and Yoo anticipate the objection that they are engaged in the practice of “‘law office history.’”⁵³ The authors reply by stating that their task is “huge and perhaps impossible” and that, at any rate, their work far surpasses the depth of any other treatment of the removal power.⁵⁴ In the authors’ defense, they have provided the most complete history of the removal power available. Their book provides an impressive compendium of otherwise scattered and minor bits of history, invaluable to students of the removal power. This achievement is marred, however, by the authors’ insistence on a brittle, anachronistic conclusion in defiance of the contents of their own book – that every President accepted a position as modern as “the unitary executive.”

B. *Felix Frankfurter and the Acquiescence Problem*

Calabresi’s and Yoo’s historical argument has deeper problems than anachronism. The argument rests upon a legal premise that is decidedly weak: the Frankfurter “gloss” framework on which it is built. None of the pre-*Youngstown* cases the authors cite⁵⁵ supports their novel reading of Frankfurter’s thesis. In *United States v. Midwest Oil Company*,⁵⁶ the Court stated that congressional acquiescence evidenced a presumption of constitutionality, but it cautioned against the idea “that the Executive can by his course of action create a power.”⁵⁷ The Court in *Myers v. United States*⁵⁸ discussed acquiescence, but only to reject the narrower position that Congress

⁵⁰ *Id.* at 261.

⁵¹ *Id.* at 262-63 (stating that Harding did not object to removal restrictions related to the Comptroller General and a commission established to investigate coal strikes).

⁵² *Id.* at 264.

⁵³ *Id.* at 17-18 (citing Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119).

⁵⁴ *Id.* at 18.

⁵⁵ *See id.* at 15 (citing pre-*Youngstown* decisions, including *The Pocket Veto Case*, *Myers v. United States*, *United States v. Midwest Oil Co.*, and *Stuart v. Laird*, that considered inter-branch practices in resolving separation-of-powers disputes).

⁵⁶ 236 U.S. 459 (1915).

⁵⁷ *Id.* at 474.

⁵⁸ 272 U.S. 52 (1926).

could not unilaterally reverse a construction of the Constitution that it had established and to which the other branches had long acquiesced.⁵⁹

In *The Pocket Veto Case*,⁶⁰ the Court observed that its reading of Article I, Section 7, which resulted in upholding the pocket veto, was “confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”⁶¹ But this language does not support Calabresi’s and Yoo’s “gloss” framework. The Court used the word “confirmed,” signaling that it looked to practical construction as supportive authority only, to corroborate other forms of constitutional argument. Furthermore, the Court spoke not of all constitutional provisions but of “constitutional provisions of this character.” The context indicates that “this character” refers to procedural rules, not grand grants of substantive power.

The most explicit support for the “gloss” theory may come from *Stuart v. Laird*,⁶² where the Court, discussing the practice of having Supreme Court justices sit on Circuit Courts of Appeals, stated “that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system . . . has indeed fixed the construction.”⁶³ But it is hard to believe that fourteen years – the time between the passage of the Judiciary Act of 1789⁶⁴ and the decision of *Stuart* – could suffice to develop the sort of long-pursued, unbroken executive practice about which Frankfurter was talking. *Stuart* is probably best thought of not as laying the foundations of a major separation-of-powers doctrine but as expressing an early Court’s adherence to established judicial practice.

Nor has the Court embraced the “gloss” idea even in cases after *Youngstown*. In *Walz v. Tax Commission of New York*,⁶⁵ it rebuked a similar idea in the First Amendment context, stating: “It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.”⁶⁶ In *INS v. Chadha*, the Court indicated that the continuing objections of Presidents to legislative veto provisions foreclosed the assertion that the Executive Branch had acquiesced to that practice.⁶⁷ The Court did not,

⁵⁹ *Id.* at 174-76 (invalidating the Tenure of Office Act of 1867, through which Congress had tried to circumvent the longstanding practice of unfettered presidential removal of executive officers appointed by the President and confirmed by the Senate).

⁶⁰ 279 U.S. 655 (1929).

⁶¹ *Id.* at 688-89.

⁶² 5 U.S. (1 Cranch) 299 (1803).

⁶³ *Id.* at 309.

⁶⁴ Judiciary Act of 1789, ch. 20, 1 Stat. 73 (establishing the federal court system).

⁶⁵ 397 U.S. 664 (1970).

⁶⁶ *Id.* at 678.

⁶⁷ *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (citing *Marbury v. Madison*, 5 U.S. (1

however, suggest that acquiescence would have rendered the practice constitutional. Instead, it appears to have rejected that idea by stating that “[t]he assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.”⁶⁸

In *Dames & Moore v. Regan*,⁶⁹ the Court quoted Frankfurter’s “gloss” language⁷⁰ to support the proposition that, at least in the province of foreign affairs, Congress might authorize executive action implicitly.⁷¹ Even such implicit authorization, the Court observed, was sufficient to enable a President to act at the peak of his powers, in Justice Robert Jackson’s well-received formulation.⁷² There is a great difference, however, between treating acquiescence to a specific policy as a tacit (and presumably revocable) authorization and treating it as a permanent cession of power, as Calabresi and Yoo suggest. Justice Clarence Thomas, dissenting in both *Hamdi v. Rumsfeld*⁷³ and *Hamdan v. Rumsfeld*,⁷⁴ relied on *Dames & Moore* to endorse the notion of tacit congressional consent in national security and foreign affairs,⁷⁵ but he, like the rest of the Court, made no reference to Frankfurter’s “gloss” language.

Cranch) 137 (1803)).

⁶⁸ *Id.*

⁶⁹ 453 U.S. 654 (1981).

⁷⁰ *Id.* at 686 (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).

⁷¹ *Id.* at 680, 686, 688; *see also* *Behring Int’l, Inc. v. Imperial Iranian Air Force*, 699 F.2d 657, 664 (3d Cir. 1983) (citing *Dames & Moore*, 453 U.S. at 684-86); Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 151 (2002) (stating that the *Dames & Moore* Court “rested the President’s authority on grounds of congressional approval rather than implied constitutional authority”). *But see id.* at 144 (arguing that the *Dames & Moore* Court “misused” Frankfurter’s language).

⁷² *See Dames & Moore*, 453 U.S. at 668 (“When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action ‘would be supported by the strongest of presumptions. . . .’”) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

⁷³ 542 U.S. 507 (2004).

⁷⁴ 548 U.S. 557 (2006).

⁷⁵ *Id.* at 679-80 (Thomas, J., dissenting) (stating that in foreign policy and national security, “the fact that Congress has provided the President with broad authorities does not imply – and the Judicial Branch should not infer – that Congress intended to deprive him of particular powers not specifically enumerated” (citing *Dames & Moore*, 453 U.S. at 678)); *Hamdi*, 542 U.S. at 583-84 (Thomas, J., dissenting) (contending that when Congress enumerates presidential powers, it does not foreclose the President from having other national security or foreign affairs powers (citing *Dames & Moore*, 453 U.S. at 678)).

Finally, the cases most probative of the authors' position share a crucial weakness: their holdings and dicta concern *congressional* acquiescence to *executive* action, while the authors are concerned with the reverse scenario. After explaining their reading of Frankfurter's "gloss" language, which discussed congressional acquiescence, the authors assert that "it logically follows that a converse standard should apply in evaluating presidential acquiescence to congressional assertions of power."⁷⁶ This is more than a logical leap; it is by no means self-evident that what may be true of the functioning of one branch must be true of the others as well.

Nor can the authors point to any critical consensus on how to use Frankfurter's "gloss" language.⁷⁷ Some commentators have used the language to support the notion that practice and acquiescence can change the meaning of the Constitution, but they have not adapted it into a specific test, nor suggested it could trump constitutional text or structure.⁷⁸ Others cite the language to support the milder claim that practice and acquiescence are entitled to persuasive authority,⁷⁹ consistent with *Myers* and *The Pocket Veto Case*.⁸⁰

Even if it were true that acquiescence could alter the meaning of the Constitution – a rather dubious proposition in our view – it is by no means clear that this idea would work in the context in which the authors apply it. In *Youngstown*, Frankfurter indicated that a systematic, unbroken pattern of legislative acquiescence to the executive would result in a constitutional exercise of executive power.⁸¹ Frankfurter did not indicate, however, that it would result in a corresponding contraction in congressional power. The power in question in *Youngstown* was the power to authorize the "executive seizure of production, transportation, communications, or storage facilities" – a power that indisputably belonged to Congress.⁸² Had Truman succeeded in adding that power to his portfolio through a Frankfurterian "gloss," he presumably would not have diminished the power of Congress to issue similar

⁷⁶ CALABRESI & YOO, *supra* note 5, at 25.

⁷⁷ Calabresi and Yoo do not cite secondary commentary to support their reading of Frankfurter. *Id.* at 15.

⁷⁸ Mark D. Rosen, *Revisiting Youngstown: Against the View that Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1718 n.48 (2007); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 389-90, 392 (2006).

⁷⁹ Bernard W. Bell, *Marbury v. Madison and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 249 n.343 (2003) (citing *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring)) ("[T]he Court does give weight to traditional practice in addressing constitutional challenges."); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 243 (1997); Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1266 (2003).

⁸⁰ See *supra* text accompanying notes 58-61.

⁸¹ *Youngstown*, 343 U.S. at 610-611 (Frankfurter, J., concurring).

⁸² *Id.* at 598.

authorizations in the future; rather, Congress and the President would have shared the power.

If we are right that Frankfurter's "gloss" language contemplates a power-sharing arrangement, then it follows that Congress and the executive would be unequal partners, with Congress retaining the power to pass legislation to override the President's exercise of congressional authority. If this is the case, then at most, a branch could *lend* power through acquiescence but not *grant* it. In this arrangement, a borrowing branch's exercise of the borrowed power would be constitutional only while the lending branch acquiesces; once the lending branch calls the loan, however, the borrowing branch would be obligated to comply, and any exercise of the borrowed power thereafter would be unconstitutional. This reading brings Frankfurter's language closer to the *Dames & Moore* Court's interpretation,⁸³ and it neutralizes the harsh effect Frankfurter's view might otherwise have; on this reading, practice and acquiescence do not permanently alter the distribution of power but rather enable consensual, practical cooperation among branches.

But this is not how the authors use the "gloss" language. Calabresi's and Yoo's view involves a branch's power to regulate another branch, not merely the power to act on a third party (in *Youngstown*, the steel mills seized by President Truman's order).⁸⁴ More damaging, the authors' view allows for no override – no opportunity for a President to recall a power borrowed by Congress and undo the effect of a statute that impairs his constitutional powers. In this framework, then, executive acquiescence would have the effect of permanently stripping a power from a branch of government, without regard even to the text of the Constitution or a well-established practice at the Founding. It is our view that if the separation of powers means anything at all, it cannot possibly mean that.

Calabresi's and Yoo's reading of Frankfurter, then, is highly strained, to put it in the kindest of terms. What, then, is the impact of their much touted – but disputable⁸⁵ – pattern of presidential nonacquiescence? If we are right, whatever power a President has, he or she cannot permanently waive it by acquiescing to Congress. So when Calabresi and Yoo urge future Presidents to

⁸³ See *supra* notes 69-71 and accompanying text (asserting that the *Dames & Moore* Court used Frankfurter's language as support for implicit congressional authorization of executive action in foreign affairs). On this reading, Frankfurter's view is more conservative than that of the *Dames & Moore* decision, for it suggests that the branches could develop such an overlap only over time, through practice and acquiescence. *Dames & Moore*, by contrast, stands for the proposition that the Constitution allows a President to act under tacit congressional authorization – at least in foreign affairs – even without such a long-standing practice. See *Dames & Moore v. Regan*, 453 U.S. 654, 680, 686 (1981).

⁸⁴ See *Youngstown*, 343 U.S. at 582 ("We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.").

⁸⁵ See *supra* Part I.A.

resist attempts by Congress to regulate their executive power,⁸⁶ they may provide wise political advice; once a branch becomes accustomed to exercising its power over another, it is likely to continue doing so. But in binding constitutional terms, such a habit may mean very little.

II. HISTORY AND THE TEXTUAL ARGUMENT AGAINST THE UNITARY EXECUTIVE THEORY

As discussed above, Calabresi and Yoo do not actually embrace the nonacquiescence theory forming the framework of their book. They are textualists, not “Burkean common law constitutionalists,”⁸⁷ and they believe that the text alone provides the unitary theory all the support it needs.⁸⁸ As ambitious as their eleven-year-long *Unitary Executive* project may be, the book is an argument in the alternative, offered to justify the unitary theory on something besides textual grounds. We turn now to the Vesting Clauses, not to rehash old debates,⁸⁹ but to show that Calabresi’s and Yoo’s seemingly moderate and “classic” unitary theory, which is based on the removal power, relies upon the same erroneous textual approach used by a much more aggressive, no-holds-barred approach to presidential power. In the end, there simply is no way to use history to disentangle the two theories if they depend upon the same fundamental error.

⁸⁶ CALABRESI & YOO, *supra* note 5, at 9.

⁸⁷ *Id.* at 15. In this respect they differ sharply from Frankfurter, who was no textualist. See Philip Bobbitt, *Youngstown: Pages from the Book of Disquietude*, 19 CONST. COMMENT. 3, 12 (2002) (characterizing Frankfurter’s *Youngstown* concurrence as “an attack on the textualism of [Justice Black’s] majority opinion”).

⁸⁸ See CALABRESI & YOO, *supra* note 5, at 419 (“In the absence of a consistent practice in which all three branches have acquiesced, the constitutional issue must be resolved on its textualist and narrative merits.”). See generally Calabresi, *supra* note 1.

⁸⁹ We see the Vesting Clause thesis that forms the basis of the unitary theory not as a close reading of the text’s plain meaning but as a collection of creative extrapolations that fundamentally misunderstand the nature of power under the Constitution. See generally *infra* Part IV (exploring presidential power in the context of a representational constitution). Others have made a variety of arguments about the Vesting Clauses that we do not repeat here. See, e.g., Bradley & Flaherty, *supra* note 20, at 554-55 (providing alternative explanations for the absence of the “herein granted” phrase in the Article II Vesting Clause); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1362-63 (1994) (proposing that contrasting the Constitution with the Articles of Confederation will best reveal the meaning of the Vesting Clauses); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 48 (1994) (rejecting the Vesting Clause thesis as rendering much of Article II superfluous); *id.* at 48 n.195 (“[T]he Vesting Clause does nothing more than show who (*a* President) is to exercise the executive power, and not *what* that power is.”).

A. *The “Classic” Unitary Theory: A Wolf in Sheep’s Clothing, Revisited*

The textualist argument for the unitary executive turns on small differences in language between the Vesting Clauses of the Constitution.⁹⁰ In a noteworthy 1992 article, Calabresi, writing with Kevin Rhodes, argued that the Article II Vesting Clause grants the President all executive power because, unlike the Vesting Clause of Article I, it does not restrict the President’s power to those powers “herein granted.”⁹¹ Article II, by providing that all powers “shall” be vested in a single individual, created “full presidential control over all exercises of executive power.”⁹² As for the rest of Article II, Calabresi explained in a later article that it served not to enumerate powers but merely as an “exemplary list,” as indicated by the absence of “herein granted,” a term present in the Vesting Clause of Article I.⁹³ Here is a theory of the world’s most powerful Constitution and we are being told that it all depends on two seemingly minor words, “herein granted.”

The “Vesting Clause” approach to the separation of powers has never been accepted by the Supreme Court. Rather, it finds support in one of the Supreme Court’s most powerful dissenting opinions. Twenty years ago, in *Morrison v. Olson*,⁹⁴ the independent counsel case,⁹⁵ Justice Scalia wrote a dissent that stands today as a hallmark of unitary thought.⁹⁶ In it, he claimed that the

⁹⁰ See U.S. CONST. art. I, § 1 (“All legislative Powers *herein granted* shall be vested in a Congress of the United States . . .”) (emphasis added); *id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁹¹ See Calabresi & Rhodes, *supra* note 3, at 1196.

⁹² *Id.* at 1188. Calabresi and Rhodes saw the Article III Vesting Clause as similarly creating the judicial power, but not creating plenary power, since it is followed by the restriction that the judicial power “extends to” an enumerated set of cases and controversies. *Id.* at 1196.

⁹³ Calabresi, *supra* note 1, at 1393-94, 1397. Calabresi and Yoo support their textualist argument with extratextual evidence of the Framers’ intent – namely, their frustration with despotic legislatures and weak executives and their preference for a single executive over an executive committee. CALABRESI & YOO, *supra* note 5, at 30-35. That the authors overstate these sentiments is evident from their assertion that the Founders were engaged in a “Thermidorian” reaction – as if they, like their French counterparts, were exhausted with their experiment in democracy and ready to return to autocratic rule. *Id.* at 30. In our view, the Founders’ decision to opt for more executive power cannot be read as a resistance to checks on executive power in general.

⁹⁴ 487 U.S. 654 (1988).

⁹⁵ *Id.* at 659-60 (“This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978. . . . We hold today that these provisions of the Act do not . . . impermissibly interfere with the President’s authority under Article II in violation of the constitutional principle of separation of powers.”).

⁹⁶ CALABRESI & YOO, *supra* note 5, at 411-12.

independent counsel law was a wolf in sheep's clothing.⁹⁷ Professor Nourse has written elsewhere that Justice Scalia was right that the independent counsel law was unconstitutional.⁹⁸ The majority was correct, however, in rejecting a definitional theory of the unitary executive.⁹⁹ As events have shown quite clearly, the true "wolf in sheep's clothing" was not the independent counsel law, which died an easy congressional death. The real wolf was a theory of the unitary executive disconnected from a theory of the separation of powers, a theory used to justify what even the authors believe were unconstitutional assertions of executive power.¹⁰⁰

Calabresi and Yoo argue that the unitary theory in no way "compels" an absolutist model;¹⁰¹ the theory does not define executive power, but asserts only that whatever is an executive power must be under presidential control.¹⁰² But this is precisely the problem. Even Supreme Court Justices find it difficult to define "executive" power.¹⁰³ Absent a strong, general limiting principle to counter power creep, there appears little reason why Calabresi's and Yoo's textualist theory does not provide the opportunity for Presidents to aggrandize

⁹⁷ *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.").

⁹⁸ Nourse, *Vertical Separation*, *supra* note 15, at 772, 774. The independent counsel law was unconstitutional based on a realistic analysis of the risks it presented to impeachment of a sitting President at the instigation of a completely unaccountable agent. Nourse, *Constitutional Anatomy*, *supra* note 15, at 895. Kenneth Starr's investigation of President Clinton demonstrated this possibility. Nourse, *Vertical Separation*, *supra* note 15, at 772.

⁹⁹ *But see Morrison*, 487 U.S. at 698-99, 709-10 (Scalia, J., dissenting) (describing the strength and exclusive power of the President).

¹⁰⁰ *See, e.g., Calabresi & Yoo*, *supra* note 5, at 18-19, 429 ("[T]he administration of George W. Bush has explicitly invoked the theory of the unitary executive as the basis for asserting sweeping implied, inherent emergency powers in waging the War on Terrorism."); Goldsmith, *supra* note 4, at 97-98 (recounting that John Yoo's legal advice to the Bush administration included constitutional support for a President vested with broad military powers unrestrained by Congress).

¹⁰¹ *Calabresi & Yoo*, *supra* note 5, at 430.

¹⁰² *Id.* at 429-30.

¹⁰³ *Compare Bowsher v. Synar*, 478 U.S. 714, 751 (1986) (Stevens, J., concurring) ("Under the District Court's analysis, and the analysis adopted by the majority today, it would therefore appear that the function at issue is 'executive' if performed by the Comptroller General but 'legislative' if performed by the Congress."), *and INS v. Chadha*, 462 U.S. 919, 952 (1983) (describing the legislative veto as a legislative action affecting executive action), *with id.* at 960 (Powell, J., concurring) (describing implementation of the veto as adjudicative action), *and id.* at 1001 (White, J., dissenting) (describing the veto as a legislative exercise countermanding legislative action by an executive agency).

their power by simple assertion that an exercise of power is “executive.”¹⁰⁴ The authors provide no distinguishing principle; they criticize the George W. Bush presidency for taking an “unduly vigorous view of presidential power” and for transgressing “the logical boundaries of the unitary executive,”¹⁰⁵ but they do not state where the limits of due vigor and logic lie.

The authors’ failure to meaningfully distinguish their seemingly moderate conception of the unitary theory from a more aggressive idea puts in perspective the move that Calabresi and Yoo have made to historical argument. For a pair of textualists to write a 400-plus-page book based on a nontextualist argument that they do not embrace is, to be sure, an unconventional choice. The value of their history, though, is that it promises to differentiate their view from a more aggressive position – something that their textualist argument cannot do. Despite its many weaknesses, their historical account demonstrates a general – if inconsistent – tradition of presidential protection of the removal and supervisory powers, and, as the authors observe, only occasional assertion of the expansive military powers claimed by Presidents Lincoln, Truman, and George W. Bush.¹⁰⁶ If that historical difference could be put into a coherent legal framework, the “classic” unitarians could perhaps be vindicated. But because their textual argument fails, so too must their attempt at redeeming an undefined and essentialist unitary theory.

The problem lies in the very concept of a “unitary executive,” which is a modern term the authors have injected into the past. The concept posits by rhetorical flourish a *functional* (emphasis on executive) and *exclusive* (emphasis on unitary) set of powers dubbed “executive.” To support that concept, the authors have sliced and diced the text, particularly the Vesting Clauses, severing them from the rest of the Constitution. This brittle textualism creates grave risks. Detaching constitutional texts from the document as a whole – cutting the Constitution into tiny linguistic pieces – is not a proper way of reading a constitution, a document that was negotiated, and was meant to be read, as a whole and whose structural parts are strongly interrelated.¹⁰⁷

Think of any great work of text – *Moby-Dick* or the *Gettysburg Address* or the Bible. Now consider whether we gain any real understanding of these great texts by picking and choosing friendly phrases from chapter one or ten or the first line on page 320. Detaching individual adjectives (the *executive* power) or even articles (*the* executive power) from related texts and larger

¹⁰⁴ At least one later Bush lawyer has observed the weaknesses of the aggressive, John Yoo-era version of the unitary theory. See GOLDSMITH, *supra* note 4 (asserting, as former head of the Office of Legal Counsel, that Bush’s quest to increase presidential power actually decreased the power of future Presidents and created an atmosphere of distrust).

¹⁰⁵ CALABRESI & YOO, *supra* note 5, at 412.

¹⁰⁶ *Id.* at 20.

¹⁰⁷ See generally Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447 (1996).

structures tends to empty them of meaning.¹⁰⁸ Once emptied of meaning, of course, such fragments are prone to be invested with someone's preferred meaning. To quote Justice Scalia in an entirely different context, "your best shot at figuring out" meaning in such a situation "is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean."¹⁰⁹ The executive power becomes any activity that one thinks ought to fit within the term executive; the exclusivity of that power is then achieved by adding the word "unitary," implying that no other branch shares in the power, even though we know that the document requires power-sharing in a significant number of instances (just think of the confirmation of Supreme Court Justices).¹¹⁰

B. *What the Constitution Constitutes*

The problem is deeper than interpretive methodology: a definitional approach seriously misunderstands the structure and nature of constitutional power. As Justice Holmes once put it:

[W]hen we are dealing with *words* that also are a constituent *act*, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.¹¹¹

Holmes understood the indisputable (although often ignored) fact that the Constitution *constitutes* – it quite literally constructs a representative democracy. Its words are not mere descriptions or commands; they are, as Holmes put it, constituent *acts*.¹¹² As Austin, the philosopher of language, would explain, its words are performative.¹¹³ By performative, we mean the following: When two people get married, the partners say "I do."¹¹⁴ The words

¹⁰⁸ See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79-80, 92-93 (2006).

¹⁰⁹ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17-18 (Amy Gutmann ed., 1997).

¹¹⁰ See U.S. CONST. art. II, § 2, cl. 2 (requiring Senate consent to the presidential appointment of "Judges of the supreme Court").

¹¹¹ *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (emphasis added).

¹¹² See *id.*

¹¹³ J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-7 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (calling a sentence performative when the sentence is itself an action, rather than merely a description or statement about an action).

¹¹⁴ See *id.* at 5.

seal the pact; they accomplish it. No one believes that one can reduce a marriage to those words; nor should we believe that we can reduce our constitutional life to the words “executive,” “legislative,” or “judicial” – much less “herein granted.” The most important way the Constitution acts is by organizing the people into states and a nation, so that they may govern themselves. Every time a citizen votes, every time her representative writes a letter to her, every time the Congress meets, the Constitution performs, and its principal performers are the people and their representatives.

If we want to understand the structure of the Constitution or the power of the branches, the most important words in the Constitution are not those in the Vesting Clauses or even the words “executive,” “legislative,” or “judicial;” they are the words that create government by consent of the governed – that create representation and voting. Indeed, most of Articles I and II are devoted to creating relationships of governed to governing. Article I authorizes people to vote for a House of Representatives and a Senate in lengthy provisions specifying who shall vote for whom.¹¹⁵ Article II authorizes the people to vote for a President, through the Electoral College, again specified in rather lengthy detail.¹¹⁶ Those elected in this way in turn must agree to appoint executive officers and Supreme Court Justices.¹¹⁷ These are central constitutional *doings* that in fact *constitute* our government.

One can appreciate the importance of the Constitution’s representational provisions relative to the Vesting Clauses by conducting an intellectual experiment. Strike the first sentences of the Vesting Clauses, eliminating any reference to “executive” or “legislative” or “judicial” powers. Will the government be without power? Will the President stop issuing executive orders? Will Congress stop making laws? Will the judiciary shut its doors? No. People will still vote, Congress will still convene, the Supreme Court will still issue opinions, and the President will still direct his administration. Now strike the clauses in Article I providing for representation and voting; strike the same clauses in Article II, including those that provide for the appointment of Supreme Court Justices. Now we have no government. It is the representational and appointment provisions, not the Vesting Clauses, that are the most important in our Constitution. Call this the “representational constitution.”

If the Vesting Clauses are as central as Calabresi and Yoo believe, how is it that they can be gutted and almost nothing happens to our government?¹¹⁸ The Constitution belies consistent labeling or functional “unitariness” – for any of

¹¹⁵ See U.S. CONST. art. I, §§ 2-3, *amended by* U.S. CONST. amend. XVII.

¹¹⁶ See U.S. CONST. art. II, § 1, cls. 2-3, *amended by* U.S. CONST. amend. XII.

¹¹⁷ See U.S. CONST. art. II, § 2, cl. 2.

¹¹⁸ Thus our claim is more than an argument about executive power “essentialism.” See Bradley & Flaherty, *supra* note 20, at 572 (arguing that executive-power essentialism “errs . . . in its presumption that America’s constitutional practitioners mechanically applied European political and legal theory”).

the departments, not just the Executive. As a textual matter, there is no unified concept of “the” executive power in the Constitution. The President’s veto power exists, for example, in Article I, not Article II.¹¹⁹ If “all executive power” were to reside in Article II because of its Vesting Clause, then why is the veto power in Article I? If all “the executive power” resides in Article II because of the Vesting Clause, why is it that Article II then “shares” the power to appoint with the Senate?¹²⁰ The same goes for the other departments. Why is it that the power of the Chief Justice to preside over a presidential impeachment appears in Article I and not Article III, with the other “judicial” powers?¹²¹

As these examples make clear, there is a strong *textual* case for concluding that there are no unitary – that is, exclusive – functional divisions decreed by the constitutional text. And, if this is right, it not only affects the Vesting-Clause textualism that the authors prefer, it also affects their history. If the Constitution itself does not provide for a unitary functional definition of the departments, why would one suppose that constitutional practice could yield such a unitary definition? This is history as self-fulfilling prophecy; only if one assumes at the start that there is something like a “unitary executive” is one likely to find a unitary executive over time. The authors’ finding that Presidents have exerted tremendous amounts of power is hardly surprising. As they themselves recognize, “[o]ne important ground on which our book might be criticized is that it is entirely predictable that all forty-three presidents would favor a broad understanding of presidential power.”¹²² But this presidential preference for broad understandings of presidential power does not result from the definition of the term “executive” or a “unitary executive theory.” Rather, it comes from the structure of the Constitution, which creates a real competition for electoral power and representational allegiance, as we will see; in this competitive environment, all the departments seek to maximize their powers relative to the others.

III. THE REPRESENTATIONAL SEPARATION OF POWERS

Traditionally, commentators have taken two theoretical approaches toward the separation of powers: formalism and functionalism. Functionalism has been considered a liberal version of the separation of powers on the theory that it presumes that Congress may alter the balance of power as long as it does not offend major textual provisions. Formalism has been considered a conservative version of the separation of powers on the theory that it militates against shifting power arrangements.¹²³ The Supreme Court, for example, has

¹¹⁹ See U.S. CONST. art. I, § 7, cl. 2.

¹²⁰ See U.S. CONST. art. II, § 2, cl. 2.

¹²¹ See U.S. CONST. art. I, § 3, cl. 6.

¹²² CALABRESI & YOO, *supra* note 5, at 22.

¹²³ For a succinct and careful description of formalism and functionalism, see Kathleen

never settled on an approach; as scholars have noted for at least two decades, neither approach is particularly helpful at predicting outcomes in separation of powers cases or real dangers of structural change.¹²⁴ Indeed, at a conceptual level, these approaches differ little other than in their starting presumptions – in favor of or against structural change.¹²⁵

The Constitution creates as much as it describes power. There is the power granted by the people, organized in a nation and states (we call this “representational power”), and there is the power described in the Constitution to perform various acts such as waging war or enacting laws or deciding cases or controversies (we call this “legal” or “juridical” power). The representational powers provide the incentive for the departments to act. If the people want to retaliate against Al Qaeda, then the President has an electoral incentive to attack Al Qaeda. The legal powers act as judicial “limits” on how the President exercises that power. President Reagan may have wanted a line item veto, and he may have had a national constituency clamoring for such a veto, but the Constitution’s legal powers are in fact juridical limits on that power enforceable both by courts and other branches.¹²⁶

If, as the constitutional text makes quite clear, the branches are created by various political relationships – by voting, by representation, by appointment – then we must pay attention to those relationships in considering power shifts. In one sense, this is obvious: moving the war power to the unelected members of the Supreme Court would significantly weaken the people’s power to decide whether to go to war. Changing constituencies can literally change governmental form. Consider what might have happened if, at the Founding, the Constitution allowed the House of Representatives to elect the Senate. If this proposal had become our constitutional law, Senators would be dependent

M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 92-95 (1995) (comment). On the relationship between formalism and functionalism, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1530 (1991); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488-94 (1987).

¹²⁴ See, e.g., Brown, *supra* note 123, at 1531.

¹²⁵ See Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 596 (1992); see also Sullivan, *supra* note 123, at 92-93.

¹²⁶ President Reagan supported a presidential line item veto, but such legislation was not passed. See George F. Will, *Line-Item Foolishness*, WASH. POST, Oct. 21, 2007, at B7. In 1998, the Supreme Court ruled that a line item veto law enacted during the Clinton administration violated the Presentment Clause of the Constitution. *Clinton v. City of New York*, 524 U.S. 417, 420-21, 448-49 (1998). The Constitution also places juridical limits on the other branches. See *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (“By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.”).

not upon their state constituents (or state legislatures as they were then) but upon House Members. From whom would Senators take their marching orders? The House. Shifting representation, then, shifts real power under our Constitution.

To see the power of structural relationships to shape our Constitution is to see the Constitution entire.¹²⁷ Such a reading attempts to understand the Constitution as a whole, including its representational provisions – the provisions that *create* government by constituting electoral relationships conferring representational power and democratic legitimacy. The 1930s version of legal realism wrongly sought to reduce all law to politics, but settled, in its more mundane doctrinal forms, on ideas lawyers and judges loosely associate with “functionalism.”¹²⁸ This approach is no longer sufficient to understand the Constitution’s structure. The unitary executive theory makes this clear: functional ideals – to “execute,” for example – assume a unity of purpose that may not exist, either as a realistic or juridical matter. One way of thinking of the “unitary executive” is that it is functionalism on steroids – the functional term “executive” is taken not only to be exclusive but all-powerful – an approach that interestingly turns liberal functionalism on its head. To impose functionalist thinking on a document that does not create functional unities¹²⁹ will expand the power branded with the functional label. To borrow a theme of Chief Judge Easterbrook’s, just as inquiries about purpose tend to expand statutes’ domains in the field of statutory interpretation, inquiries about function tend to expand the domain of constitutional powers defined by function.¹³⁰

A President who risks open defiance of a congressional ban risks the wrath of the people and the courts. He risks impeachment by Congress and correction by the Supreme Court. This is the lesson of *Youngstown* and of recent cases, such as *Hamdan*, restraining the President from acting on his own, without congressional approval.¹³¹ The Supreme Court has an incentive to protect its own power to “say what the law is,”¹³² and history has shown that the Court will act to thwart presidential action defying open congressional

¹²⁷ On the importance of this simultaneity ideal, see Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 794-96 (2009); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 124 (2009).

¹²⁸ Nourse & Shaffer, *supra* note 127, at 129.

¹²⁹ See *supra* notes 118-121 and accompanying text.

¹³⁰ See generally Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983).

¹³¹ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹³² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

resistance.¹³³ As Justice Jackson once explained, the President's powers are potentially at the greatest when he has congressional approval, but potentially at the least when Congress registers its opposition.¹³⁴

IV. A REPRESENTATIONAL VIEW OF REMOVAL

What, then, are we to make of Calabresi's and Yoo's attempt to revive a kinder, gentler unitary executive? To the extent that their history depends upon a theory of the Constitution that assumes "the" executive power, it does not prevent and even encourages Presidents to push the limits of that term in unpredictable ways. The authors rightly – if ineffectively – disavow the recent theory of plenary military and foreign affairs power,¹³⁵ but this still leaves their retreat to the removal power. The problem is that this position is hardly uncontroversial and hardly gentle. In plain English, the "removal power" position comes down to the claim that independent agencies are unconstitutional.¹³⁶ We suspect that most people would find the notion that the Securities and Exchange Commission (SEC) or the Nuclear Regulatory Commission (NRC) was suddenly unconstitutional to be an aggressive move. Here, we offer a different view by disaggregating two significantly different removal power questions: good faith removal clauses and legislative removal vetoes.

Calabresi and Yoo insist that Presidents have resisted attempts to restrain the President's removal power. That assertion is true and entirely predictable given the incentives of the representational constitution (even if presidential practice has not been as consistent as the authors claim). It is not true, however, that Congress has acquiesced in attempts to resist its restraints on the removal power. Congress has repeatedly asserted limits on the President's power to remove, in particular asserting that some executive agencies should be independent, dating back to the Nineteenth Century.¹³⁷ As the authors themselves note, Presidents such as Cleveland, Wilson, and Carter did nothing to resist these efforts.¹³⁸ Again, this back and forth is entirely predictable. The Constitution itself does not address the removal question – which is why we see the departments oscillating back and forth on this question, never quite achieving constitutional equilibrium.

¹³³ See, e.g., *Youngstown*, 343 U.S. at 586, 589.

¹³⁴ *Id.* at 635-37 (Jackson, J., concurring).

¹³⁵ See *supra* text accompanying notes 101-105.

¹³⁶ Calabresi & Prakash, *supra* note 17, at 581-82 ("By granting 'the executive Power' exclusively to the President, the Clause forecloses Congress from creating 'independent' executive entities." (footnote omitted)).

¹³⁷ See Lessig & Sunstein, *supra* note 89, at 30 (describing the Second Bank of the United States, established in 1816, as "the first truly independent agency in the republic's history" because the President had the power to appoint and remove only five of its twenty-five directors).

¹³⁸ CALABRESI & YOO, *supra* note 5, at 216, 258, 426.

How then should we analyze the removal problem in the absence of a controlling text? The representational approach posits that the constitutional danger does not lie in shifting functions, whether the hypertrophied functionalism of the unitary executive or the loose agnosticism associated with liberals' "functional" approach toward the separation of powers. Under a representational view, the problem with the Supreme Court sending the nation to war would not be that the Court would perform the wrong "function" but that it would be sending the nation to war without the people. A representational approach would ask whether and how the shifting of tasks among government players affects representation. The risks to be avoided are not descriptive, functional impurities but rather structural incentives likely to change political relationships between the governed and their governors.

We know from our discussion of the representational constitution that if a political incentive to create an independent agency exists, Congress will create an independent agency. If the President feels he has a constituency to resist that independence, he will resist. President Franklin Roosevelt famously removed his Federal Trade Commission chairman, William E. Humphrey, because Humphrey refused to follow Roosevelt's shift in policy.¹³⁹ If Roosevelt had simply given some reason for the removal, he could have easily avoided a constitutional confrontation: rather than asserting plenary power to remove, the President could simply have said that Humphrey was not doing his job. After all, this kind of removal problem (it is not the only kind, as we will see), is about whether the President can find a "good cause" to remove an agency head.

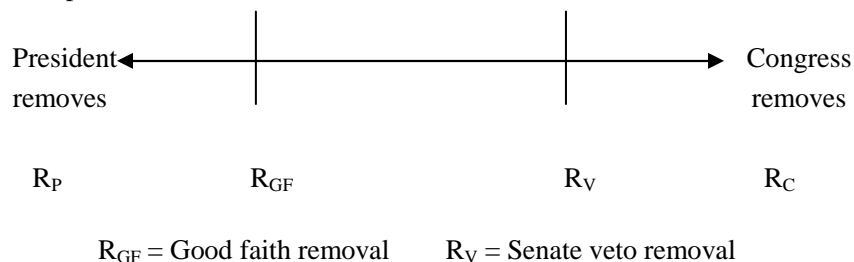
Good-cause limitations are why lawyers dub a particular agency "independent."¹⁴⁰ When Congress enacts a "good cause" or "good faith" clause, it restricts the ability of the President to fire an agency head for "purely" political or arbitrary reasons, for example, that he or she is bald or a poor tennis player. The President must have a reason, and the reason must be plausible. Independent agencies, then – the so-called headless Fourth Branch of the government – are effectively within the control of the President, provided he is willing to assert a reason for the removal. If this reasoning is correct, then the independent agency problem with which Calabresi's and Yoo's "classic" unitary executive is concerned is hardly the danger the authors make it out to be. Indeed, in some cases, the danger may appear in precisely the opposite direction: would one really want the head of the SEC or the NRC to be removed for purely political reasons, without a "good cause" limitation? By the same token, would one really want to prevent a President from firing an NRC head whose conduct led to a nuclear explosion or a Chairman of the SEC who inspired a market crash?

¹³⁹ *Id.* at 283-84.

¹⁴⁰ See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 29-30 (1995).

Not all removal cases are alike, however. Congress may attempt to assert control over removal in different ways. One of the most infamous was the Tenure of Office Act,¹⁴¹ which was passed to allow the Senate to control the removal of officers during the post-Civil War Johnson Administration. The Act aimed to limit President Johnson's power to remove Radical Republicans from his administration; if Johnson removed an officer, then the Senate would have had to approve the removal.¹⁴² Congress wanted to restrain Johnson's hand on substantive policy matters; Johnson acted to prevent Reconstruction in the South, and Congress wanted to inject itself into his administration to ensure Reconstruction continued. This kind of *removal veto* is obviously a more aggressive congressional attack on the executive than the standard good faith clause.

The question remains whether such laws are unconstitutional. Here, we agree with Calabresi and Yoo that congressional veto removals are highly suspect.¹⁴³ Because no text controls removal power questions, the separation of powers comes into play. The representational texts driving the separation of powers tell us to look to representational shifts and measure them against a status quo baseline. As we have shown above, under a representational analysis, the President and the Congress are described most succinctly as holding the power of a particular constituency.¹⁴⁴ Every attempt by Congress to limit removal, whether by good faith clause or veto, means that Congress's constituencies may gain power relative to a baseline where there is no good faith clause or no veto provision. Let us compare the shift in constituency power under three scenarios: (1) where there is no check against the President in removal; (2) where there is a good faith clause; and (3) where the Senate has a veto power.



When the President has complete control over removal (R_P), he can remove for any reason, which means that he may ignore Congress, he may ignore state and local minorities, he may even ignore a latent majority. If Alaska's

¹⁴¹ Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (repealed 1887).

¹⁴² See CALABRESI & YOO, *supra* note 5, at 181-83.

¹⁴³ See *id.* at 431 (concluding that the text of the Constitution, policy, and practice prevent Congress from limiting the President's removal power).

¹⁴⁴ See *supra* text accompanying notes 126-130.

constituents do not like the President's removal decision, they can make their case known, but the President can effectively ignore them. The problem arises when the President, on behalf of a putative majority, removes an officer and a significant risk exists that he is ignoring a latent majority. Presidents take actions in the face of uncertainty; they make judgments that a majority of people across the nation will approve of their actions. It is always possible, however, that the President has made the wrong anticipatory calculus. Public choice theory is correct when it says that the transaction costs of organizing make it far easier for small groups to organize politically and in effect masquerade as majorities.¹⁴⁵ When there is no check on a President's power of removal, the most significant risk is that he will act in the name of a false majority; but that is true of almost every decision a President makes. The only additional representational risk that absolute removal power creates is a risk of removal for arbitrary or unconstitutional reasons.

Now let us consider how constituency power shifts when we add a legislative veto, as was done in the Tenure of Office Act (R_V). This veto shifts power from a branch that serves a national constituency to one, that as a relative matter,¹⁴⁶ is more likely to be driven by state and local concerns.¹⁴⁷ In the absence of the veto, the President could simply do what he wanted, based on his determination that his decision represented a national majority's views, or that it was simply the right thing to do in the circumstances, despite apparent opposition. With the veto, power moves to the Senate and creates the risk that a small minority of the nation may thwart the President and a national majority.¹⁴⁸ Assume that the President has a sincere desire to remove an officer in the interest of the nation and that he is correct that, if polled, the nation would approve the removal. If the Senate must pass legislation to approve the removal, this means that a minority of states, and potentially an extremely small minority of citizens, may veto the President. This is because any single senator may seek to block action on a bill. This action is known, misleadingly, as the filibuster, but it actually reflects the fact that the Senate

¹⁴⁵ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 71-73 (1994).

¹⁴⁶ Emphasis should be placed here on "relative" matters of representation. It is certainly easy to see that the President, relative to a single member of Congress, is a better representative of the nation as a whole.

¹⁴⁷ One might argue the opposite view: that Congress as a whole is a better proxy for the national interest than the President. For example, the six-year terms of senators extend beyond those of Presidents, allowing them less constituent pressure than might appear. But it remains safe to say that even if we aggregate Congress, the House and the Senate and all of its members, state and local concerns are far more likely to be voiced in Congress than in the White House. Of course, this is a mere heuristic; in any individual case, the contrary could occur.

¹⁴⁸ For a devastating portrait of the minoritarian character of the Senate, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 49-54 (2006) and ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 144 (2d ed. 2003).

proceeds by consensus on most matters.¹⁴⁹ Ultimately, the Senate needs sixty votes to overcome a threatened filibuster. If the President's opponents can muster forty-one votes to thwart cloture,¹⁵⁰ they can stop the President's removal. A coalition of forty-one votes requires almost twenty-one states, but it could represent a tiny fraction of the nation's population if formed from low-population states such as Delaware or Montana. As Sanford Levinson has written, "almost a full quarter of the Senate is elected by twelve states whose total population, approximately 14 million, is less than 5 percent of the total U.S. population."¹⁵¹

In short, the representational constitution tells us that allowing Senate control over removal could have serious counter-majoritarian consequences. The real problem, therefore, is not that a removal veto is a legislative veto but that it is potentially a *superminoritarian* veto, with the power to obstruct the President's congressional duty to represent a national majority. This result is not a foregone conclusion; it is always possible that Congress is acting in ways that reflect a truer majority than the President.¹⁵² But the risk of a strong counter-majoritarian shift, coupled with the possibility of increasing the power of just a few states, should be enough. The structure of our government, given the Senate, already renders it far more minoritarian than most voters realize; at the very least, one should be extremely cautious about injecting this influence *within* the Executive Branch. A shift in removal power is not only a shift in power, it is a shift of ongoing incentive and governance. An officer whom the Senate can remove¹⁵³ will look to the Senate for his job approval ratings, and an officer looking to the Senate is not one looking to the President.¹⁵⁴

¹⁴⁹ Senate Rule 22 requires a 3/5 vote to secure cloture. KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 22-23 (1998).

¹⁵⁰ See *id.* at 30.

¹⁵¹ LEVINSON, *supra* note 148, at 51; accord DAHL, *supra* note 148, at 49 (observing that citizens of Nevada have seventeen times the voting power of California citizens because of the configuration of representation in the Senate).

¹⁵² One might argue, for example, that the removal veto could have majoritarian benefits. For example, during Reconstruction, Republican senators might have argued that the removal veto was necessary to support the "nation's" will. In retrospect, we may respect the judgment of the Republican Congress that sought to impeach Johnson, but it would be wrong to suggest that, at this particular time, there was anything like a "majoritarian" position on Reconstruction, particularly given the continued estrangement of Southern states. See CALABRESI & YOO, *supra* note 5, at 174-75. Indeed, there is evidence that Johnson was in fact pursuing a policy that the public ultimately came to accept in the Grant administration, however unattractive we might find that policy today. See *id.* at 190-92 (discussing Grant's fight to repeal the Tenure of Office Act and the Act's eventual partial repeal). Moreover, the appropriate remedy in such a case as ultimately occurred was not a removal veto but impeachment. See *id.* at 178.

¹⁵³ By contrast, the officer subject to a good faith clause cannot be removed by Congress.

¹⁵⁴ This is why a removal veto differs from other minoritarian structural features that enhance the already minoritarian character of the Senate, such as the filibuster.

Now let us compare this result with the “good faith” limits that define independent agencies. These limits increase, to some extent, Congress’s power, but they do so in ways that appear minor relative to the removal veto. Good faith clauses are an attempt to limit the President who makes the wrong guess about his constituency’s – the nation’s – interests. In a system with no check on the President’s removal, there is the risk that his view of the nation’s interest is in fact false or overstated. In short, good faith clauses can be seen as democracy-forcing in the sense that they avoid secret decisions or arbitrary removals. The President cannot remove someone because she is a better golfer or because she insulted him; by forcing him to give a reason, such clauses make him justify his decision in majoritarian terms. If the removal is controversial enough, a good faith removal clause may force a public debate on whether the President’s proffered reason for removal is plausible or not.

Now that we have seen the alternative scenarios, it is possible to understand why all removal problems are not alike. It is our view that if a court were to consider a statute like the Tenure of Office Act today it should adhere to existing precedent and hold the law unconstitutional.¹⁵⁵ This is not because the constitutional text speaks to removal; it does not. Nor is it because removal is an inherently executive power; members of Congress can be removed, and so can judges. It is because such a proposal risks a major shift in the separation of powers. In the absence of a constitutional text on removal, we must refer to the constitutional text on representation. As we have seen, there are potentially very serious representational consequences to a law that allows a Senate veto on removals, injecting congressional power within the Executive Branch, and thus increasing the power of Congress’s local constituencies at the expense of the President’s national constituency.

In matters where the Constitution is silent, the prudent, restrained approach is to maintain the structural status quo. In this limited sense, Calabresi and Yoo are correct; the history of this kind of removal provision has been one of grave instability and even impeachment (it prompted the Johnson impeachment, for example).¹⁵⁶ Presidents and congresses should resist such proposals and, if forced, courts should strike them down. Of course, the very history of instability makes it unlikely that we are going to see a proposal such as the Tenure of Office Act in the near future; in short, if this is the removal problem about which the authors are worried, it is an academic problem, not a real one.

Good faith removal provisions present an entirely different issue but are equally unimpressive as real world problems. It would be an unwise or unresourceful President who could not find a good reason to remove a

¹⁵⁵ Congress, after battling President Cleveland and not the courts, repealed the Tenure of Office Act in 1887. *See id.* at 212 (citing Act of Mar. 3, 1887, ch. 353, 24 Stat. 500). In 1926, the Supreme Court provided its opinion that the defunct Tenure of Office Act was in fact invalid. *Myers v. United States*, 272 U.S. 52, 176 (1926).

¹⁵⁶ *See* CALABRESI & YOO, *supra* note 5, at 185, 210.

subordinate officer. Some removals have been controversial, and they have produced presidential-congressional dialogue, but there is no grand history of constitutional instability produced by good-faith limitations on removal. Roosevelt's removal of Humphrey led to no impeachment.¹⁵⁷ It may be that Presidents have continued to officially reject such limits, and it may be that Congress continues to enact them, a kind of incompletely theorized "agreement to disagree." But history suggests that good faith provisions have by and large failed to elicit major political instability. Indeed, as the authors themselves argue, Presidents who created independent commissions seemed to have ignored good faith removal provisions on the theory that they were insignificant.¹⁵⁸

If this reasoning is correct, it means that the authors' "classic" version of the unitary executive, taken on its own terms – as a question of removal – is largely misconceived. First, the "classic version" confuses two very different kinds of removal problems: the truly problematic and unconstitutional removal veto from the truly unproblematic and banal good faith removal clause. Second, any problem with removal vetoes was largely solved in 1789¹⁵⁹ and later reaffirmed in the wake of the Johnson impeachment.¹⁶⁰ There has been no grand outcry in the Twentieth or Twenty-First Centuries for the return to the Tenure of Office Act. Third, the headless Fourth Branch, as far as history and law are concerned, is not headless in any way that can prevent the most powerful President in the world from having his way, as long as he has a reason for his actions, as the authors' own history shows.¹⁶¹ If this relatively narrow "classic" theory of the unitary executive is misconceived in its approach toward the removal power, the skeptic must wonder whether the authors' purpose is to reach larger – and, in our view, potentially more dangerous – conclusions about the scope of executive power more generally.

Seen in this light, the Court's recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*¹⁶² provides little support for Calabresi's and Yoo's thesis. In *Free Enterprise Fund*, the Court addressed the constitutionality of a provision of the Sarbanes-Oxley Act of 2002 that provided that members of the Public Company Accounting Oversight Board (PCAOB), which regulates the accounting industry, could not be removed

¹⁵⁷ See *id.* at 284.

¹⁵⁸ See *id.* at 424-25 ("The clear role for presidential involvement in [independent] commissions' operations vitiates any suggestion that they were originally meant to be independent of presidential control.").

¹⁵⁹ See *id.* at 42 ("[E]ven the First Congress voted that its institutional rival the president had the removal power in the famous Decision of 1789.").

¹⁶⁰ See *id.* at 189.

¹⁶¹ See *supra* text accompanying notes 139-141.

¹⁶² No. 08-861, slip op. at 2, 33, 561 U.S. ___ (June 28, 2010) (holding that Congress cannot restrict the President's removal power through two levels of good-cause protection).

without “justification.”¹⁶³ The Court held that the statute unconstitutionally created “two levels of for-cause tenure”¹⁶⁴ because the SEC, which governs the PCAOB, is also an independent agency whose members cannot be removed without good cause.¹⁶⁵ In asserting that the statute would “strip[] [the President] of the power” to remove a Board member in the event of an actual removal controversy,¹⁶⁶ the Court failed to make clear how the “two-tier” system posed a significant constitutional threat.

The potential problem in *Free Enterprise Fund* was not simply numerical: two tiers of good faith insulation, rather than one. The problem was representational. Suppose that the President wanted to remove a PCAOB member for failure to pursue his duty and the SEC tried to stop him. In that case, the SEC – an unelected, quasi-independent body with an attenuated representational relationship to the public – could trump the will of the President and the nation. In that respect, *Free Enterprise Fund* is like *Bowsher v. Synar*,¹⁶⁷ where the risk was that the Comptroller General – who represents no one – would decide large budgetary questions contrary to the desires of the President or Congress.¹⁶⁸ To be sure, in a different case, representational theory might compel a different result. If the President tried to remove a PCAOB member because he disapproved the member’s decision in a particular administrative adjudication, as Justice Breyer suggested in dissent,¹⁶⁹ the representational analysis would cut the other way. If this is correct, prudence suggests courts await an actual conflict between the President and an independent agent rather than consider facial challenges to good cause removal provisions. That there is no clear evidence that any President has found a “good cause” removal provision to be a real barrier to dismissal since Franklin Roosevelt¹⁷⁰ supports the notion that removal provisions are more powerful as symbols than as real impediments; they are proxies for academic debates about the nature of administrative government. A more restrained analysis should focus, instead, on representational effects in particular cases.

The *Free Enterprise Fund* Court should be applauded for signaling a move toward a representational theory. True, Justice Roberts begins his analysis by appealing to the Vesting Clause thesis that undergirds Calabresi’s and Yoo’s view:

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.* at 10, 20-21.

¹⁶⁵ *Id.* at 14-15.

¹⁶⁶ *Id.* at 15.

¹⁶⁷ 478 U.S. 714, 732, 734, 736 (1986).

¹⁶⁸ See Nourse, *Vertical Separation*, *supra* note 15, at 794 & n.182 (citing *Bowsher*, 478 U.S. at 717-18, 720).

¹⁶⁹ See *Free Enter. Fund*, No. 08-861, slip. op. at 17-19, 561 U.S. ___ (Breyer, J., dissenting) (discussing the adjudicative role of the PCAOB and the logic in isolating its members “from fear of purely politically based removal”).

¹⁷⁰ See *id.* at 11-12; *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935).

The Constitution provides that “[t]he executive power shall be vested in a President of the United States of America.” As Madison stated on the floor of the First Congress, “if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”¹⁷¹

But the opinion quickly moves beyond functional essentialism, eschewing a reliance on the presence of the words “herein granted” or the definitional power of “executive.” Instead, it points toward a discussion of representational power:

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” They instead look to the President to guide the “assistants or deputies . . . subject to his superintendence.” Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.” This is why the Framers sought to ensure that “. . . the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.”¹⁷²

We should read Justice Roberts’s reference to “the community” as a reminder that what really matters in any inquiry of executive power is the power of the people – for it is only through the Constitution’s connection of executive power to the power of the electorate that the President has any power at all.

CONCLUSION

The unitary executive theory led to major expansions of presidential power now deeply regretted by Republicans and Democrats alike, not to mention the authors of the original theory. Calabresi and Yoo attempt to redeem the unitary executive by suggesting that it is a smaller, more manageable theory focused on the removal power. But the authors offer no real redemption, for

¹⁷¹ *Free Enter. Fund*, No. 08-861, slip. op. at 10-11, 561 U.S. __ (citations omitted); *see also id.* at 2 (“We hold that such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President.”).

¹⁷² *Id.* at 16-17 (citations omitted); *see also id.* at 18 (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”); *id.* at 20 (“The Framers created a structure in which ‘[a] dependence on the people’ would be the ‘primary controul [sic] on the government.’” (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961))); *id.* at 33 (“The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”).

their history ranges well beyond the removal power to exercises of military authority, foreign affairs, and investigatory power. Their history thus provides little comfort to those seeking a more moderate theory because the authors provide few guidelines for limiting the “executive” power. In our opinion, the very idea of the “unitary executive” is misconceived both as a textual and originalist matter if it is taken to mean a functional description that considers presidential power without regard to the Constitution entire, or what we know as “the separation of powers.” Only by attending to a representational theory of the separation of powers can we see that the moderate claims of the book are far from moderate – that they leave in place the empty functional essentialism that led to excess.