Becoming the Administrator-In-Chief: Myers and the Progressive Presidency

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BECOMING THE ADMINISTRATOR-IN-CHIEF:  
*Myers* and the Progressive Presidency

forthcoming in *COLUM. L. REV.* (2023-2024)

Andrea Scoseria Katz &  
Noah A. Rosenblum*

In a series of recent cases, the Supreme Court has mounted an assault on the administrative state, guided by a particular vision of Article II. According to the Court’s scheme, known as the theory of the unitary executive, all of government’s operations must be housed under one of three branches, with the single head of the executive branch shouldering a unique and personal responsibility for the administration of federal law. The Constitution is thus said to require that the President have expansive authority to supervise or control the government’s many agencies.

Guiding each of the Court’s recent decisions is *Myers v. U.S.*, the famous 1926 case about the firing of a postman. Written by President-cum-Chief-Justice William Howard Taft, *Myers* bolsters the Court’s jurisprudence as a supposed precedent for the unitary executive theory and alleged evidence for a deep tradition of strong executive administration.

This Article shows that *Myers* has been misread. It did not explicate a pre-existing tradition of presidential power; rather, it invented one. While claiming to describe the role of the chief magistrate as it had always existed, Taft’s opinion broke with decades of jurisprudence to constitutionalize a new understanding of the office. This “Progressive Presidency,” which (President) Taft himself helped create, envisioned the president as administrator-in-chief. But it did so as part of a broader Progressive remaking of government, and so—unlike its modern-day unitary counterpart—carved out important independence for adjudicators and civil servants.

This Article reconstructs the Progressives’ transformation of the presidency and shows how *Myers* wrote it into law. Recovering this more historically accurate reading of *Myers* undermines the Supreme Court’s recent decisions, sets the administrative state on firmer foundations, and highlights the co-constitutive roles of institutional and doctrinal developments in making the modern presidency.

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BECOMING THE ADMINISTRATOR-IN-CHIEF:  
Myers and the Progressive Presidency

Andrea Scoseria Katz &  
Noah A. Rosenblum

“Inherent power! . . . The partisans of the executive have discovered a [new]  
and more fruitful source of power.”
Sen. Henry Clay, Senate Debate of 1835 (quoted in Myers, dissenting opinion of Justice  
McReynolds)

“We elect a king for four years, and give him absolute power within certain limits,  
which after all he can interpret for himself.”
Secretary of State William Seward (quoted in Edward Corwin, The President)

“I have an Article II where I have the right to do whatever I want as president.”
President Donald Trump

INTRODUCTION

The law of the executive is in flux. Since at least 1935, when the Supreme  
Court countermanded President Franklin Roosevelt’s attempt to remove a  
Federal Trade Commissioner, administrative independence has enjoyed  
legal sanction.1 But the New Deal order is in retreat everywhere, and admin-  
istrative law is no exception.2 In the last few years, the Supreme Court  
has pushed back against bureaucratic independence, cabined Congress’s  
ability to design federal agencies, and enforced presidential control or su-  
 pervision of administrative action.3 Two Justices have flatly suggested  
that that 1935 decision enshrining administrative independence is no  
 longer good law.4 The New Deal settlement, which combined presidential  
policymaking with internal executive branch divisions, expertise, and in-  
sulation from political control, is being eroded.5 Unitary presidential ad-  
ministration, once a legally questionable power grab, is rapidly becoming  
the law of the land.6

1 See Humphrey’s Executor, 295 U.S. 602 (1935) and Seila Law LLC v. Consumer Financial  
2 See STEVE FRASER AND GARY GERSTLE, RISE AND FALL OF THE NEW DEAL ORDER (1990);  
3 See Seila Law, supra n. 1, Free Enterprise Fund v. Public Company Accounting Oversight  
4 See Seila Law, slip op. at 43 (THOMAS, J., concurring, joined by GORSUCH, J.).
5 See Noah A. Rosenblum, The Antifascist Roots of Presidential Administration, 122 COLUM. L.  
REV. 1 (2022).
6 On the questionable legality of modern presidential administration, see Ash Ahmed, Lev Me-  
nand, and Noah Rosenblum, The Tragedy of Presidential Administration.
This unfolding revolution is billed as a restoration. The modern Supreme Court disclaims any pretension of changing the law, professing merely to return the law to what it had always been. On the Court’s account, our Constitution always conceived of the president as the administrator-in-chief. By dividing the government into three branches, the text set the president as the head of the executive, with unique and particular responsibility for enforcing the law. Under this scheme, all non-judicial and non-legislative government actors must report to the president in an unbroken chain of command. Other arrangements are simply unconstitutional. This, in brief, is the theory of the unitary executive, whose major theoretical and doctrinal move is to infer from the fact of three separate branches a constitutional mandate of unimpeded presidential control over the administrative state.

Unitarians advance a specific view of political history to justify their doctrinal claim. They assert that for the better part of two centuries, American political institutions embodied unitary arrangements. Only during the latter half of the twentieth century did the government stray from the original, formalist separated-powers blueprint, with the rise of a massive regulatory state and new forms of independent administration. Against the backdrop of this history, today’s Court presents itself as correcting the New Deal anomaly, restoring the harmony and continuity of the presidentialist tradition, giving the essential truth of the Founding full life again.

In carrying out this mission, the Court has been guided by a judicial lodestar: Myers v. United States. That 1926 case, in which the Supreme Court sided with former president Woodrow Wilson in striking

7 See, e.g., Seila Law, supra n. 3, slip op. at 21 (“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Their solution to governmental power and its perils was simple: divide it.”). Arguing that conservative counterrevolutions are often couched as “restorations,” see COREY ROBIN, THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO DONALD TRUMP 24-25 (2nd ed. 2011).
8 The theory grounds this claim on what we believe to be an overreading of two clauses of Article II: the “Vesting Clause” (“The executive Power shall be vested in a President of the United States of America…”), U.S. Const. art. II, §1, and the “Take Care Clause” (“[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States”), U.S. Const. art. II, §3.
down a statute that purported to prevent him from firing a postman, pre-
dates the New Deal divergence. The opinion claimed to encapsulate time-
less principles and vindicate the law of the presidency as it had existed
from the Founding. Written by Chief Justice William Howard Taft, it re-
primanded Congress for interfering with the president’s duty to “take care
that the laws be faithfully executed” and set down a pro-presidential prec-
edent on constitutional (as opposed to statutory) grounds. That Myers
was penned by the only president to later become a Supreme Court justice
has only added to its authority and persuasive power, at least for some
judges and commentators. The current Court has relied on Myers to legitimize its restoration
in two specific ways. First, the opinion stands out in a sparse terrain of
twentieth-century cases commenting on the separation of powers as an ap-
parent authority for the Court’s current theory of presidentialism. Until
recently, most separation of powers cases had rejected unitarism. Fa-
mously, the first statement of the unitary theory occurs in a solo dissent
just forty years ago. For the Court to maintain the appearance of restor-
ing the Constitution from its New Deal perversion, it needs a pre-New
Deal statement of what the law used to be, to serve as guide and precedent. Myers has served just that purpose.

Second, the argumentation in Myers is surprisingly suited to the
Court’s current originalist pretensions. Taft’s opinion relies in part on
erly Republic sources. It seems to read its conclusions about the presi-
dency back into the logic of the Constitution as understood by its drafters
at or soon after the Founding. This method lends unitary theory a higher
democratic pedigree, rooting it not just in historical sources but in the so-
cial contract itself. And it further supports the Court’s claim to be doing
nothing more than bringing the Constitution back to what it had always
been.

This article argues that the current Court’s use of Myers is unjusti-
ified, in three ways. First, it misunderstands Myers’ method. While Taft’s history of the removal power does look back to the actions of the
first Congress, it is not originalist. Myers does not presume that the mean-
ing of the Constitution was decisively settled at the Founding or conclu-
sively resolved with the so-called “Decision of 1789,” referring to the First
Congress’ debate over the creation of the Department of State. Rather, it
argues that a certain understanding of presidentialism, elaborated by the

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14 See, e.g., Richard Pierce, The Scope of the Removal Power is Ripe for Reconsideration, 58
15 Morrison v. Olson, 487 U.S. 654 (1988), and see infra, text accompanying note XX. As a
historical matter, that dissent lies at the root of the modern unitary theory. See Ahmed, Menand, and
Rosenblum, supra, at XX.
16 See Antonin Scalia, Originalism: The Lesser Evil, 57 CINN. L. REV. 849, 851-52 (1989) (prais-
ing Myers as a “prime example” of the originalist method).
first Congress, came to be shared by “all branches of the Government.” Long stretches of the opinion are devoted for this reason to explaining away apparent departures from Taft’s gloss on the first Congress’s understanding and from a supposed decades-long tradition of consistent government practice—including, notoriously, the whole of Reconstruction. According to Taft, from the start of the Republic through the Civil War, “a period of 74 years, there was no act of Congress, no executive act, and no decision of the Supreme Court at variance with the declaration of the First Congress[.]” That statement is at least tendentious as a historical matter. But regardless of its truth, it is an appeal to tradition and “acquiescence,” not original public meaning. The supposed continuity of government practice is what gave Taft the confidence to invalidate, for the first time in the history of the nation, a congressional statute based on the notion that it violated an inherent Article II power of the president. And it makes the actions of the first Congress just one entry of many in a historical sequence stretching over decades, not a self-contained proof of intent in itself. In short, the Myers opinion is not originalist.

The Court’s second mistake concerns Myers’ substance. The presidency of Myers is strong, but it is not a unitary executive. Far from it: Taft’s opinion went out of its way to defend the constitutionality of many limits on presidential administrative power. It expressly affirmed Congress’s right to set conditions on removal for many government officials. It distinguished ordinary executive branch officers from Article I judges whose terms and tenures were defined by statute, and disclaimed any pretension to rule on the latter’s status or privileges. And it protected the civil service, asserting emphatically that “[t]he independent power of removal by the President alone . . . works no practical interference with the merit system.” Myers envisioned a powerful presidency. But it also championed the role of independent expertise in policymaking, embraced internal divisions within the executive branch, and welcomed Congress’s power to impose conditions on the government it built out.

17 See Myers 272 U.S. at 136.
18 See, e.g., id. at 137, 143-44, 152-53. On the significance of Myers’ repudiation of the legacy of Reconstruction, see infra Part I.C, V.A.
19 Id.
20 Id. at 163.
22 Cf. 272 U.S. at 175 (observing that a reading of the Constitution which has been "acquiesced in for a long term of years, fixes the construction to be given its provisions.").
23 272 U.S. at 160-61.
24 Id. at 157-58.
25 Id. at 173.
This points to the third way in which the modern Court misreads *Myers*: by ignoring its place in history, it obscures *Myers’* radicalism.26 Contrary to what present-day expositors would have us believe, *Myers* did not merely summarize an existing tradition of presidentialism. Rather, it constitutionalized a new vision of the presidency that broke with decades of precedent.

This Article reconstructs the story of the pre-modern administrative state *Myers* helped to bury, which was characterized by two arrangements: the primacy of Congress in defining the shape and personnel of the administrative state by statute, and the compliance of the President and the Court with these statutes.

At the time *Myers* was written, the courts had over six decades of experience with explicit statutory restrictions on the president’s removal power. These laws tied the president’s hands and gave the legislature sway over executive branch officers. Such an arrangement sprang from and helped support the party-based governance regime of the second half of the nineteenth century.27 In that world, the legislature was the federal government’s most important governing institution, and political parties the animating force of the constitutional system. Massive assemblages of localized machines, the parties selected in-state and national candidates, defined the policy agenda, and, of course, doled out patronage back to the armies of (mostly unpaid) volunteers who had helped bring them to power. Executive branch patronage was the coin of the realm, and it was largely Congress, as the site of party, that decided who would fill these positions. Indebted to his party for his job, and lacking hiring and firing power over the bureaucracy in practice, the nineteenth-century president was a weak and inconsequential figure.

This arrangement shifted at the turn of the twentieth century. The Progressive Era led to change at all levels of American government, not least of which was a profound rethinking of the meaning of the Constitution and the president’s role within it.28 The societal dislocations undergone by an industrializing, urbanizing, diversifying America led to clamors from many quarters for more presidential leadership.29 Public demands were channeled into academic theory, and eventually into political

26 On the way texts operate not only as documents to be interpreted, but works in the world that do work in the world, see DOMINIC LACAPRA, RETHINKING INTELLECTUAL HISTORY AND READING TEXTS (1983).

27 See infra Part II.


29 See Andrea Scoseria Katz, All Roads Lead to the White House: The Late-Nineteenth Century Roots of the Modern President (manuscript on file with author).
After the 1901 assassination of William McKinley, Theodore Roosevelt’s assumption of the presidency inaugurated a decisive break in the presidential role. Over the next few decades, the president would go from faithful party operative to the leader of the nation. Meanwhile, under sustained pressure from reformers, the federal bureaucracy was evolving from a prize to be captured by election winners into a professionalized body charged with and capable of realizing the will of the voters and the public good. A long-time anti-corruption reformer, Roosevelt did not miss the fact that a civil service insulated from politicians’ “thirst for offices” could be a useful tool for advancing his own policy preferences.

The popular tribune and the chief administrator: the two constituent parts of what we call the Progressive presidential “script” arose and were refined and consolidated in the period. Fateful, this script was also memorialized in doctrine in Myers. The opinion self-consciously endows the president with expansive authority to control the implementation of federal law, and primarily on the basis of the Progressive Era commonplace of the president as America’s foremost democratic leader. Progressives believed that this structural position entailed a certain role for the officeholder: the people’s representative, chief policymaker, and main government administrator. But this was a new, functional theory of the office, grounded on a new understanding of democracy, not an old and already established constitutional dogma. Taft’s opinion may have labored to emphasize the continuities between Myers and previous judicial glosses on executive power, but his masterwork only reflects how far-reaching the Progressives’ departures really were.

This Article recontextualizes Myers to uncover this intervention. Drawing on recent work in history and American Political Development, it resituates Myers as part of the Progressive Era transformation of democracy that marked the early decades of the twentieth century. And it relies on close readings of Myers and the line of removal cases from which it broke to advance a new, better interpretation of the opinion. So doing, it builds on and contributes to a growing literature that seeks to understand how law, history, and political development work together to shape the institutions of governance. Legal doctrine cannot be read in isolation from wider political change. Conversely, doctrine defines the institutional environment in which political contestation and change take place.

Part I sets up the legal puzzle and explains its stakes. We begin by explicating the doctrinal moves that have rendered Myers so central to the current Court’s Article II jurisprudence. We show how the Court’s

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30 Early progressive theorists of the modern president included political scientists Henry Jones Ford and Woodrow Wilson, the editor William Allen White, and public intellectual Herbert Croly. But perhaps it is no coincidence that two men were See infra Pt. II, at XX.

recent embrace of the novel theory of the unitary executive has left it scrambling for persuasive precedent, which would let it root its new theory in American law and history. Myers, we show, seems to serve the Court’s many purposes, which explains why it has been a mainstay of unitarist arguments.

Part II turns to the opinion itself. “The removal case that shouldn’t have been,” Myers arose out of the firing of a low-ranking Democratic official by President Woodrow Wilson. The case is doubly ironic: not only was Mr. Myers’ firing trivial stuff for a constitutional controversy, but it was also carried out based on a mysterious order that Wilson, bedridden at the time by a crippling stroke, may never have issued at all. These mysteries and contingencies of history were of little interest to Chief Justice Taft, who immediately grasped the opportunity the case presented when it was first argued on December 5, 1924. As Chief Justice, Taft assigned himself the opinion and lavished unusual time and attention on it, working on the draft for over a year. Taft took deep personal offense when Justices Holmes, Brandeis, and McReynolds dissented from the majority, and much of the 72-page opinion’s length (even Taft called the draft “outrageously long”32) went to replying to their biting criticisms. Even so, the dissenters were right about one thing: Taft’s opinion went well beyond what was required to simply resolve the case.

The three dissenters took issue with Taft’s constitutional theory, his account of the debates of the First Congress, and his treatment of decades of legislative and judicial precedent. They were gesturing towards the pre-Myers regime of the president’s place under the Constitution. Part III reconstructs that world. Through a careful analysis of late-nineteenth political history and removal jurisprudence, we show the workings of the prior arrangement in practice. The late nineteenth-century presidency had neither the political nor the constitutional authority to realize a policy agenda. Legally speaking, Congress could limit the president’s authority over the government, and time and again, the Court deferred to that authority in opinions that resolved what we might now consider constitutional puzzles by looking to the language of statutes. Abstract claims about presidential representation or the nature of democratic government—hallmarks of the current Court’s jurisprudence—were conspicuously absent.

Part IV looks to how the Progressive Era presidents rewrote the 19th century presidential script. The decisive pivot in the office’s development took place in the first two decades of the twentieth century, as the presidencies of Roosevelt, Taft, and Wilson established a durable new understanding of the presidential role. As they worked the office, the American president became the preeminent representative of the nation, with a

32 POST, supra n. XX at 59.
direct democratic tie to the people and a special mandate permitting him to deploy administrative powers to implement the people’s policy program.

Doctrine lagged behind though. Part V takes up the way the Progressive Presidency changed the law, through *Myers*, and draws out its consequences for contemporary law and scholarship. As we show, Taft would spend several fruitful years in academia after leaving the presidency but before joining the bench. During this time, he laid down in writing his (perhaps surprisingly) progressive theory of the presidency. That very same theory would form the basis of his opinion in *Myers*.

Understanding *Myers* this way changes how we think about the Court’s current project. Properly read as the translation of the Progressive Era presidency into law, *Myers* is less a return to the Founding than an act of modern invention. Today, the Court appears to be doing something similar. In championing the unitary theory of the executive, the Court purports to be rescuing *Myers* from “the dustbin of repudiated constitutional principles” and restoring the law to some longstanding conception of democracy from which we fell away in the New Deal. While there is a wide gulf between the presidency of *Myers* and that of the Roberts Court, as we show, the two chief justices’ gambit is the same. What is billed as a constitutional “restoration” is simply the Court imposing one new vision of the president in place of another.

Reconstructing the democratic theory that underlies *Myers*’ Progressive presidency also undermines the substance of the Court’s current arguments. Modern unitarism claims that structural pluralism and independent administration are incompatible with the original constitutional design and that the president is necessarily entitled to a privileged position vis-à-vis other political actors in the name of democracy. Our re-reading of *Myers* in light of 140 years or so of early American political practice and doctrine show this is not the case.

Finally, this Article contributes to the growing scholarly literature on Article II and the place of history in constitutional interpretation. The law of the presidency, we show, is part and parcel of the office of the executive. That office undergoes institutional development as a result of forces only dimly alluded to in the doctrine itself. To understand the presidency and develop a law adequate to it, courts cannot close their eyes to these changes or wish them away through the fantasy of an immutable, unchanging office. Such a project merely masks the inevitability of

33 487 U.S. at 725 (SCALIA, J., dissenting).
34 See Niko Bowie & Daphna Renan, *The Separation of Powers Counterrevolution*, 131 YALE L.J. (2022); and see ROBIN, supra XX.
institutional intercurrence, as *Myers* itself illustrates. Law and legal scholarship must attend to the dynamic interplay between doctrine and development, or risk becoming a fable.

I. THE SUPREME COURT’S IMAGINARY PRESIDENCY

The Supreme Court’s new theory of the presidency is remarkably recent and rests on surprisingly thin doctrinal foundations. The cases creating the new unitary executive date mostly from the last few years. And they rely centrally on *Myers* for authority.

This Part canvasses the startling transformation in the Court’s Article II jurisprudence to show its doctrinal weakness and so the importance of *Myers*. Section A briefly reconstructs the rise of unitary executive theory in case law. It shows how, starting 12 years ago, the Roberts Court began to rehabilitate an argument Scalia first articulated in a dissent in *Morrison v. Olson*. Section B then looks at the limited sources of textual and historical support for the Court’s project.

As a whole, the Part shows how the Court’s recent opinions lack meaningful support in traditional sources of constitutional authority besides *Myers*. The centrality of *Myers* to the modern Court’s unitary turn sets the stage for the rest of this Article, which reinterprets *Myers* in light of its historical context with important consequences for Article II jurisprudence today.

A. Finding an Unfetterable Presidential Power to Remove

The roots of the Court’s current Article II jurisprudence lie in an unlikely solo dissent from 1988, in *Morrison v. Olson*. A decade before, Congress had passed the Ethics in Government Act, which created the office of the independent counsel, a prosecutor appointed by a court, upon request of the Attorney General, to investigate alleged wrongdoing in the executive branch. *Morrison* arose out of the appointment of independent counsel Alexia Morrison to investigate a controversy involving the Reagan Justice Department’s alleged failure to comply with a subpoena. The administration, represented by Solicitor General Ted Olson, argued that the

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37 See Parts II, III, and IV.
38 See Part V.
independent counsel was an unconstitutional delegation of executive power to an officer neither appointed, nor removable, by the president.

A 7-1 decision in favor of the statute, *Morrison v. Olson* was not an especially hard case for the Court. Pursuant to its legislative powers, the Court held, Congress had significant discretion in creating a special prosecutor to investigate presidential wrongdoing and to structure the investigatory office as it wished.\(^{41}\) The provisions of the Ethics in Government Act did not “impermissibly interfere with the authority of the President under Article II,” and therefore suffered from no constitutional infirmity.\(^{42}\)

The lone dissenter was Justice Scalia, just two years into his thirty-year tenure. For Scalia, there were several constitutional problems with the 1978 Act. For one, it vested the appointment of an executive officer in a judicial body and made that prosecutor untouchable by the president. Investigation is a part of prosecution, Scalia reasoned, and prosecution is a part of the executive power. That power, however, was vested by Article II in a single person, the President: “This does not mean some of the executive power, but all of the executive power. \(\text{[I]}\)t is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are.”\(^{43}\) Because the statute vested some of the executive power in an officer other than the president, it was, Scalia argued, unconstitutional.\(^{44}\)

Although it failed to attract even a single additional vote in 1988, Scalia’s anxiety about a president hamstrung by an executive branch outside his control, and his call to resolve separation-of-powers questions by parsing officer functions, would eventually be elevated into constitutional rules.

The doctrinal upheaval started in 2010, with a 5-4 decision in *Free Enterprise Fund* that invalidated a portion of the Sarbanes-Oxley Act of 2002.\(^{45}\) In the wake of the Enron accounting scandal, Congress had created a federal accounting board to perform audits on public companies. The Sarbanes-Oxley Act protected the Board’s five members from presidential removal, specifying that they could only be removed by officers of the SEC “for good cause shown.”\(^{46}\) In striking down this provision of the law, Chief Justice Roberts seemed to be doing little more than faithfully applying *Morrison*. Congress could protect officers from presidential removal, so long as these arrangements did not interfere with the president’s

\(^{41}\) Id. at 674-675.
\(^{42}\) Id. at 660.
\(^{43}\) Id. at 754.
\(^{44}\) Id at 705.
\(^{45}\) 561 U.S., supra n. XX.
\(^{46}\) Id. at 11 (slip op.)
Article II responsibilities. But the structure of the new board was unusual. Not only did the PCOAB commissioners enjoy for-cause removal protection, so did the SEC officers who appointed them.\textsuperscript{47} This troubled the Court. If two layers of insulation from the President were permissible, why not more? “The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people’s name.”\textsuperscript{48} In such a structure, wrote Roberts, the President could not “‘take Care that the Laws be faithfully executed’” since “he [could not] oversee the faithfulness of the officers who execute them.”\textsuperscript{49}

The Court insisted that its reasoning was limited to this Board and its two-layer structure.\textsuperscript{50} But its logic suggested otherwise: in recognizing that some removal protections interfered with the President’s constitutional responsibilities, the Court implied that any statute limiting the President’s ability to “oversee the faithfulness” of her officers might fall afoul of the commands of Article II.

Ten years later, in \textit{Seila Law v. CFPB}, the Court confirmed this implication. The case involved the Consumer Financial Protection Bureau, a relatively new agency created following the 2008 recession. The Bureau was headed by a single director serving a five-year term and removable by the President only for “inefficiency, neglect of duty, or malfeasance in office.”\textsuperscript{51} The Court found the agency’s structure unconstitutional, again by a 5-4 vote. The four dissenters urged the Court to stick with Morrison’s “interference” standard, as it had claimed to do in \textit{Free Enterprise}.\textsuperscript{52} Roberts, again writing for the five-justice majority refused to do so, following not the rule of \textit{Free Enterprise}, but the constitutional theory that lay behind it. Because the “entire ‘executive Power’ belongs to the President alone,” the agency’s design “clashes with constitutional structure.”\textsuperscript{53} The dissenters pointed out that American history counted many federal agencies led by officials with removal protections.\textsuperscript{54} But the majority insisted that everywhere executive officials still wielded “significant” authority, that authority had to remain “subject to the ongoing supervision and control of the elected President.”\textsuperscript{55}

\textsuperscript{47} Under the statute, the PCAOB was to be headed by five commissioners appointed by the Securities and Exchange Commission (SEC) and removable by the SEC only “for good cause shown.” \textit{Id.} at 5. For their part, SEC commissioners are only removable by the president in cases of “inefficiency, neglect of duty, or malfeasance in office.” \textit{Id.} (citing Humphrey’s, 295 U.S., at 620).

\textsuperscript{48} \textit{Id.} at 16.

\textsuperscript{49} \textit{Id.} at 15.

\textsuperscript{50} \textit{See id.} at 20. (“The point is not to take issue with for-cause limitations in general; we do not do that.”)

\textsuperscript{51} 12 U. S. C. §§5491(c)(1)(3).

\textsuperscript{52} \textit{Id.} at 20 (KAGAN, J., dissenting).

\textsuperscript{53} \textit{Id.} at 11, 3.

\textsuperscript{54} \textit{Id.} at 13-16, 29-31.

\textsuperscript{55} \textit{Id.} at 23.
Since then, the Seila Law holding has been extended to undermine the structure of other agencies.\(^{56}\) In at least one recent case, the new doctrine led the Supreme Court to redraw an agency’s internal reporting lines in defiance of precedent, congressional statute, and agency regulations.\(^{57}\)

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

B. The Unitary Theory’s Missing Text and Scant History

The recent revolution in Article II jurisprudence rests on surprisingly flimsy foundations. The Roberts Court has justified its separation-of-powers formalism with an appeal to originalism, claiming to find, in text and history, a constitutional mandate for the unitary executive.\(^{58}\) The textual evidence for this version of the presidency is thin, at best. But in any case, the formal theory of the unitary executive turns out to be so deeply ahistorical it simply cannot be squared with the operations of the early federal government or the Framers’ designs.

Start with the constitutional text. Scalia’s Morrison opinion admitted what every scholar of the removal power has long known: the Constitution contains “no provision” stating who may remove executive officers.\(^{59}\) Text is thus a limited guide to the vexed question of removal. And in Morrison, seven justices pointedly rejected Scalia’s attempt to read Article II’s Vesting Clause to mean “that every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable by him at will.” None other than conservative Chief Justice William Rehnquist, writing for the majority, called this an “extrapolation from general constitutional language which we think is more than the text will bear.”\(^{60}\)

To fill in the gaps in language, Scalia turned to history. So too, more recently, have the Roberts Court’s unitary opinions. Both rely on the same three episodes to legitimate the unitary theory: the Founding, the

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\(^{56}\) See Collins v. Yellen, supra n. XX; Constitutionality of the Commissioner of Social Security’s Tenure Protection, 45 Op. O.L.C. ___ (July 8, 2021); Jarkesy v. Sec. & Exch. Comm’r, 34 F. 4th 446 (5th Cir. 2022).

\(^{57}\) See Arthrex v. Collins, supra n. XX.

\(^{58}\) See supra n. 3.

\(^{59}\) 487 U. S. at 721.

\(^{60}\) Id. at 690, n. 29.
so-called “Decision of 1789,” and the 1926 Myers opinion. But these episodes, far from shoring up unitarism, expose it to further vulnerabilities.

The first two sources are simply not good authorities for the theory. Voluminous recent scholarship has shown that neither the Decision of 1789 nor American government at the time of the Founding stand against vesting partial executive authority in independent officers and commissions. In fact, from customs boards imposing health guidelines on cod fisheries to special administrative courts resolving widows’ pension claims from the Revolutionary War, scholars have identified numerous non-unitary independent agencies at the Founding and in the early republic that did not arouse any constitutional concerns. Even sources claimed by supporters to be unequivocally or strongly unitary have turned out, on closer examination, to be at least ambiguous if not opposed.

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

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61 Id. at 723 (SCALIA, J., dissenting) (“Before the present decision it was established [that] the President’s power to remove principal officers who exercise purely executive powers could not be restricted, see Myers”) and Seila Law, 591 U.S. at 2 (“The President’s removal power . . . was recognized by the First Congress in 1789, confirmed by this Court in Myers v. United States, and reiterated in Free Enterprise Fund”).


63 See, e.g., Chabot, Lost History, supra n. 57 at 113-134, Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 COLUM. L. REV. 277, 349 (2021).

64 See Shugerman, Presidential Removal, Shugerman, Vesting, supra n. 57. By the same token, the Morrison dissent’s use of James Madison’s classic Federalist No. 47 to support a rigid separation of powers is misleading. See 487 U.S. at 723 (quoting Madison’s Federalist No. 47, “No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty [than the separation of powers.”]). In fact, the majority of Federalist 47 is spent rejecting any literal understanding of this principle as desirable or attainable in structuring a government, e.g. “If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unequivocal terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.” Federalist No. 47.

presidency,” but “as a vehicle for more aggressively asserting the President’s independence and freedom of action.”

Law schools, think tanks, and policy shops in the ‘80s and ‘90s began to translate these arguments into potential doctrine. Gradually, the theory made its way to the federal judiciary, and thence into law.

Many things about unitary executive theory betray the “newness” of its origins. Take the term “unitary,” for instance. Prior to the 1970s, it denoted only a single executive, as distinct from, say, a multi-member council of governors. Alexander Hamilton’s Federalist No. 70, a text commonly marshaled by unitarians in support of their position, warns that plurality in the executive tends to “conceal faults and destroy responsibility.” But Hamilton’s concern was not specialized administrative judges with job protection; it was “multiplication” of the chief executive, of which he supplied two concrete examples: the two-headed Consulate of Rome, and a council of advisors whose approval the President was constitutionally required to obtain before taking action (an idea found in some State constitutions that the Framers toyed with, then discarded).

The present-day usage of the term, a constitutional mandate that a single person must wield inalienable control of the administrative state, was unknown until roughly forty years ago.

The political theory on which unitarism relies is new too. As Scalia explained in Morrison, the President must have control over the executive branch because “[t]he President is directly dependent on the people, and since there is only one President, he is responsible.” The current Court has fully embraced this theory of personal responsibility and direct popular dependence. Because of how important this argument is to the Court’s current Article II jurisprudence, it is worth quoting at some length. The Seila Law majority put it as follows:

The Framers deemed an energetic executive essential to “the protection of the community against foreign attacks,” “the steady administration of the laws,” “the protection of property,” and “the security of liberty.” Accordingly, they chose not to bog the Executive down with the “habitual feebleness

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66 Id. at 2077; and see infra n. 360-62.
67 Id. at 2073, 2075, JEREMY BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION: AN INTELLECTUAL AND POLITICAL HISTORY 171-189 (2014), CROUCH ET AL, supra n. 9 at 18-22, Rosenblum, Menand and Ahmed, supra n. XX.
68 SHALE, supra n. 9 at 5-8.
69 Federalist No. 70.
70 Id.
71 In fact, Scalia’s dissent elides the two senses by helping give the word a new meaning. C.f. 487 U.S. at 698-99 (SCALIA, J., dissenting) (“[T]he Founders conspicuously and very consciously declined to sap the Executive’s strength in the same way they had weakened the Legislative: by dividing the executive power”), with id. at 732 (“It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law”).
72 591 U.S. at 729 (emphasis in original).
and dilatoriness” that comes with a “diversity of views and opinions.” Instead, they gave the Executive the “[d]ecision, activity, secrecy, and dispatch” that “characterise the proceedings of one man.” To justify and check that authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President’s political accountability is enhanced by the solitary nature of the Executive Branch, which provides “a single object for the jealousy and watchfulness of the people.”

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

The Court’s democratic theory cannot be found in the Constitution. No serious originalist account of the presidency believes that the office acquires its power from “its legitimacy and accountability to the public,” as Arthrex put it. The U.S. Constitution fails to guarantee any Americans the right to vote for the nation’s highest office. And, as unitary originalists all emphasize, the presidency is a constitutional, not a political creation. This point is usually made to distinguish originalism from constitutional theories found on the left, which supposedly supplement the president’s constitutional powers with political ones, for reasons of convenience. Originalism, the argument goes, properly cabins the President’s powers to the formal ones; theories that tolerate the President exercising powers adhering to the office over the years through popular acclaim do violence to the Constitution.

History provides equally little support for the idea that the Framers designed the president to be “directly dependent” on the people. Often at Philadelphia, the delegates would speak of the “people,” but not to characterize direct popular choice. Citizenship in the early republic did not

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73 Id. at 23 (citations omitted, emphasis added).
74 594 U.S. at 7 (quoting Free Enterprise Fund).
75 Id. at 7.
76 ALEXANDER KEYSSAR, THE RIGHT TO VOTE 62 (2nd ed. 2009).
77 See, e.g., CALABRESI & YOO, supra n. XX at 3-4, PRAKASH, supra n. XX at 3-11, and on the dualism of the office, see BAILEY, supra n. 62 at 3, 10 (“[E]ven as [unitarians] embraced executive power, they remained ambivalent about grounding executive power in appeals to the people and instead found in Hamilton’s argument a president whose power derived from the formal ‘unitary’ structure of the office); Skowronek, supra n. XX at 2093.
78 See generally SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020); PRAKASH, supra n. XX at 2, 312.
include the right to vote, and many at Philadelphia looked dimly on the idea of giving suffrage to the illiterate and unpropertied.  

The Constitution ultimately left the franchise in the hands of the states, most of which limited that privilege to property-holding white men. In The Federalist, Madison explained the necessity of the compromise: “One uniform rule [of national suffrage] would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention.” When it came to presidential selection, as every schoolchild learns, the Framers made the President electable by an Electoral College. A tiny minority of the Convention defended direct popular presidential election, but most believed the broader public too ignorant to familiarize itself with notables outside of their region. And if today the Electoral College is criticized for being insufficiently “democratic,” it was even wider of the mark in its early years. Estimates suggest that, of an American population of a mere 2.5 million adults, perhaps 18% were eligible to vote. Many didn’t bother: fewer than 1 percent of white males cast a ballot in the 1820 presidential election.

The Framers did not see the presidency as the nation’s “most democratic and politically accountable” body; that honor (if it was an honor, given the Framers’ ambivalent attitudes toward democracy) belonged to the House of Representatives. The only national offices for which the Constitution provided a popular electoral process of any kind, the “lower House” was built for representativeness, made up of politicians elected by with the mission of channeling their districts’ preferences into government.

In the sense of having to carry out the public’s wishes, the president, by contrast, was not a “representative” of the people at all. The

80 KEYSSAR, supra n. 72 at 36-38, 49-50.
81 Federalist No. 52, quoted in id. at 61.
87 U.S. Const. art. 1, § 2; see KEYSSAR, supra n. 72 at 37, 53, 58-63 (discussing “bicameral compromise[s]” that lowered suffrage requirements for voting for the House, not the Senate).
Framers saw the president as a counterweight to the popular impulse, a trustee utilizing his good judgment and sense to carry out the law, whether his constituents liked it or not. When “the interests of the people are at variance with their inclinations,” wrote Alexander Hamilton in Federalist 71, it was the President’s solemn duty “to withstand the temporary delusion, in order to give [the people] time and opportunity for more cool and sedate reflection.” Indeed, Hamilton viewed a “servile pliancy of the Executive to a prevailing current, either in the community or in the legislature” as a sign of weakness.

This helps explain why neither Scalia in Morrison, nor the Roberts Court more recently has been able to rely on a thick account of the early republic and its institutions to support their arguments. Simply put: their theory of the executive is not one that could be found in early America. Not even Hamilton, the great believer in a strong presidency and the Founding Father most frequently invoked by unitarians, shared their view. This leaves the Court’s Article II jurisprudence resting on Myers. That reliance is misplaced, as the rest of this Article shows.

II. Myers Visited

Lacking textual or historical support from the early republic for its Article II revolution, the Court has turned to Myers. This reliance is easy to understand. While neither the Constitution nor the Framers accepted the Court’s political theory, Myers seems to. It used the language of presidential responsibility and democratic accountability, returning several times to the idea of the president as the great national representative, charged with implementing a national policy program. And it elaborated its argument by reference to the Founding, the writings of the Framers and debates in the First Congress, the so-called “Decision of 1789.”

Myers has thus been pressed into service as a cornerstone of modern unitarism. It has provided the movement with a citation in case law and apparent historical legitimacy. No wonder it is a darling of the recent Article II jurisprudence.

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

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88 CEASER, supra n. 81 at 50-51.
89 Federalist No. 71.
90 Id.
91 See infra Part IV.C.2.
92 Id.
93 See id.
This Part begins the project of reading *Myers* in context. Section A recreates the immediate dispute that produced *Myers* to highlight its origins in the patronage politics of the post-Civil War republic. Section B reconstructs the *Myers* opinion to show how it used a mine-run case to reach an extraordinary result. Section C analyzes the decision in *Myers* to reveal how it fails to support unitary theory on originalist grounds.

Parts III and IV take up the question Section C sets up: if *Myers* did not advance unitary theory on originalist grounds, what did it do?

A. The Removal Case That Shouldn’t Have Been

In April 1913, President Woodrow Wilson appointed Frank Myers to a four-year term as postmaster of the city of Portland, Oregon.\(^4\) The position—postmaster first class—was a standard patronage appointment, and Myers a standard patronage appointee: he had helped manage an Oregon senator’s campaign and served as that senator’s personal secretary before Wilson gave him a federal job.\(^5\) Myers spent four uneventful years coordinating Democratic Party patronage matters and overseeing the delivery of the mails from his plum federal perch before being successfully reappointed.\(^6\) In his second term, however, Myers caused problems. He broke with Oregon’s senior Democratic senator, argued with a Portland-based Republican congressman, and solicited a Department inspection of his own post office deputy.\(^7\)

The specific act that went too far has been lost to history. Myers made enough enemies and caused enough scandals to countenance several different theories.\(^8\) Whatever it was he finally did, officials in Washington decided he had to go. On January 22, 1920, the First Assistant Postmaster General, John Coons, wrote to Myers asking for his resignation, “[i]n the interest of the Postal Service,” to restore “needed cooperation.”\(^9\)

Myers refused, setting in motion an unlikely constitutional showdown. Coons’ letter warned that, if Myers refused to resign, “the records will show your separation from the service by removal.”\(^10\) Myers replied by telegram that he had no intention of resigning and that the law entitled

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\(^5\) See id. at 1066, 1061.

\(^6\) See id. at 1062.

\(^7\) See id. at 1062-63.

\(^8\) See id. at 1060 (observing that “it has never been very clear why Frank Myers was removed from his position” and reviewing possible explanations).


\(^10\) Id.
him to his position.\textsuperscript{101} Myers also sent a longer letter, posted the same day, which argued that he had “never been presented with the copy of any so-called charges” and that any concerns about his management of the post office in Portland were trumped up.\textsuperscript{102} In the absence of any legitimate reasons for his removal, he had a “legal right to the office and its emoluments” under the laws of the United States.\textsuperscript{103}

Washington was unpersuaded. Headquarters tried to supplant Myers with a post office inspector, but Myers refused to leave.\textsuperscript{104} He protested vehemently by telegram, reasserting that he had “not resigned and [had] not been removed according to the law.”\textsuperscript{105} This, Myers reminded Washington, was the necessary precondition for replacing an appointed postmaster with a postal inspector. Absent Myers’ resignation or legal removal from office, there was no vacancy to be filled by a postal inspector.

Myers’ obstreperousness prompted the Postmaster General to follow through on Koons’ earlier threat. “Replying to your telegram,” the Postmaster General wired, “order has been issued by direction of President removing you from office . . . effective January 31st.”\textsuperscript{106} Myers continued his protest, but to no avail. The post office inspector took control of the office, and Myers vacated the premises.\textsuperscript{107} But Myers continued to assert his entitlement to the office. Eventually, after writing to more people and sending more telegrams, he sued, demanding his unpaid salary.\textsuperscript{108}

In hindsight, the whole affair has the feel of an accident to it. As all parties knew, there was an easy way to remove Myers, which would have occasioned no controversy at all. President Wilson could simply have nominated Myers’ successor. The law at the time was clear that first-class postmasters like Myers could only be removed with the Senate’s concurrence.\textsuperscript{109} This was neither controversial, nor contested. Presidents routinely complied, in part because it was so easy for them to do. The

\textsuperscript{103} Id. at 12.
\textsuperscript{105} Wire from Frank S. Myers to Hon. A.S. Burleson (Feb 2, 1920), reprinted in S. Doc. No. 69-174, supra note XX, at 7.
\textsuperscript{106} Wire from Burleson to Frank S. Myers (Feb. 2, 1920), reprinted in S. Doc. No. 69-174, supra note XX, at 7.
\textsuperscript{107} See S. Doc. No. 69-174, supra note XX, at 8.
\textsuperscript{108} See Entin, supra note XX, at 1064-65.
\textsuperscript{109} See Act of July 12, 1876, Chapter 179, 19 Stat. 80 (“Postmasters of the first . . . class[] shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law[.]”)
nomination and confirmation of the new postmaster was understood to constitute the Senate’s ratification of the removal of the previous occupant.  

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

For this reason, the law concerning the appointment, removal, and tenure of postmasters had not aroused concern before. The Wilson administration had followed it scrupulously with regard to other postmasters. And it embodied the logic of officeholding that was widely shared at the time and had been traditional at common law. As Lev Menand and Jane Manners have recently shown, under this shared understanding, the occupant of an office defined for a term of a years was entitled to hold the position through the length of the statutorily prescribed term, subject only to such “removal permissions” as Congress might itself elaborate. The postmaster law was not that different from many other public officer statutes of that time, which imposed a wide range of limitations on the president’s power to remove, and were widely followed by Congress and the Executive.

Neither Myers nor Congress expected the Administration to unsettle that balance. They seemed surprised that Washington did not follow its usual course and replace Myers by nominating a successor rather than seeking to remove him. In the midst of his woes, Myers wrote to Senator Charles E. Townsend, chairman of the Committee on Post Offices and Post Roads, to protest that he had never been properly removed, and to request an opportunity to present his side of the case. Townsend, a Republican,

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110 See Entin, supra note XX, at 1066.
113 See Entin, supra note XX, at 1070.
114 See Menand & Manners, supra n. XX.
115 See Lindsay Rogers, The American Senate, App’x A, 262-271 (1926) (reprinting George Wharton Pepper’s Amicus Brief from Myers).
might have been expected to jump at the opportunity to embarrass his Democratic Party rivals for overstepping. But his reply was more perplexed than gleeful. “I have not written you to appear” before the Senate committee, he explained to Myers, “because the President has not yet sent in the name of your successor” and so “there is nothing pending before us of which we could take cognizance.”\(^{117}\) When the President finally did nominate a successor, as he assumed he must soon, he promised that the Senate would have the opportunity to address Myers’ worries.\(^{118}\) Until then, as far as Townsend understood the law, Myers could be removed from his office for a statutory offense, but nothing else. His concerns could thus wait. Implicitly Townsend agreed with Myers: the office was his until removed or replaced according to the terms of the statute. This was how things had always been.

There is reason to believe that the executive may not have intended to upset that balance either. Why the Wilson administration chose to ignore the postal law, settled practice, and its own precedent in replacing Myers has never been clear,\(^ {119}\) but it may have connected with an exceptional circumstance: President Wilson’s incapacity.\(^ {120}\) In October 1919, Woodrow Wilson suffered a massive stroke.\(^ {121}\) For the next weeks, “he just lay helpless,” and could do little more than be “lifted out of bed and placed in a comfortable chair for a short while each day.”\(^ {122}\) From then on, and “until well into 1920,” his wife “act[ed] as a gatekeeper, restricting access to her husband,” and only allowing selected matters to reach him.\(^ {123}\) Wilson was isolated and incapable of governing.

The Executive Branch operated as a ship without a captain. Wilson’s cabinet met without him, and his advisors drafted important documents in his name without showing them to him.\(^ {124}\) Wilson suffered further health scares, including a “life-threatening prostate infection” and a urinary blockage, while his staff engaged in elaborate staged performances to hide the extent of his debilitation.\(^ {125}\) Although Wilson recovered somewhat, the left half of his body remained paralyzed, and he suffered a grievous bout with the flu in the winter of 1920.\(^ {126}\)

\(^{117}\) Letter from Chas. E. Townsend to Frank S. Myers (Feb. 23, 1920) reprinted in S. DOC. NO. 69-174, supra note XX, at 15.

\(^{118}\) Id.

\(^{119}\) See Entin, supra note XX, at 1065.

\(^{120}\) Accord id. at n. 34.

\(^{121}\) See JOHN MILTON COOPER JR., WOODROW WILSON: A BIOGRAPHY, Ch. 23 (2013).

\(^{122}\) Irwin Hood Hoover, “The Facts about President’s Wilson Illness,” quoted in COOPER, supra note XX, at XX.

\(^{123}\) COOPER, supra note XX, at XX.

\(^{124}\) See id. at XX. Scholars now agree that Wilson’s veto of the Volstead Act, for example was drafted without Wilson’s own knowledge. See id. at XX.

\(^{125}\) Id. Most dramatically, Wilson’s staff invited Congressmen to meet the president in his bedroom, hiding the paralyzed left side of Wilson’s body under blankets. See id. at XX.

\(^{126}\) See id. at XX.
According to Wilson’s biographer, in the period leading up and surrounding the Myers affair, Wilson was rarely lucid, prone to impulsive action and erratic, unmoored thinking.\(^\text{127}\) When he did turn his thoughts to government, he remained fixated on the fight over the League of Nations, and his fanciful plan to demand that Senators resign to put the ratification of the treaty directly to people through an election-as-referendum.\(^\text{128}\)

Given Wilson’s health, and his wife and cabinet’s practice after his stroke, it is notable that the record in *Myers* does not include an actual order from Wilson’s hand directing Myers’ removal.\(^\text{129}\) The closest we have is the communication from the Postmaster General observing that an order “ha[d] been issued” at presidential direction.\(^\text{130}\) However, as we know, not all acts claiming to be from the President at that time were actually ordered by Wilson. In other words, we do not know from the Postmaster General’s telegram that Wilson actually authorized Myers’ removal. And, as Wilson’s wife was restricting what the President saw to only important matters, and Wilson was then embroiled in the fight over the League of Nations, it seems unlikely that she would have allowed a matter as small as a local patronage dispute to reach him.

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

**B. The Opinion**

When the case reached the Supreme Court, however, Chief Justice William Howard Taft ignored these contingencies. Taft did not care about the opportunity to embarrass Wilson, expose the shenanigans of the Democratic administration, or undercut his political enemies out West. By December 5, 1924, when the case was first argued before the Court, Calvin Coolidge was in power and Republicans were riding high.

As a legal matter, the case was unremarkable. It was not infrequent that federal officials were dismissed from their positions and then sued the government for backpay. The Supreme Court had long dealt with

\(^{127}\) See id. at XX.

\(^{128}\) See id. at XX.

\(^{129}\) This is by contrast with other presidential removals. See infra section 2.b.

such cases during the nineteenth century, as we discuss below.\textsuperscript{131} Myers had held his office pursuant to an 1876 law providing that postmasters like him would be appointed and removed “by the President, by, and with the advice and consent of the Senate,” and would hold their offices for four years “unless removed or suspended according to law.”\textsuperscript{132} His claim was identical to those of past plaintiffs: he alleged that he had not been removed according to law and demanded his unpaid salary.

It soon became clear, however, that the Supreme Court would not be treating this case as if it were business as usual. Myers lost his suit in the Court of Claims in 1923 and died soon thereafter, but his estate pursued an appeal to the Supreme Court, which was heard in 1924.\textsuperscript{133} No decision followed. Instead, the Court set the case for reargument in April of the next year, and appointed Senator George Wharton Pepper to argue Myers’ side as Amicus.\textsuperscript{134} It would be another year and a half before the Court finally issued judgment.\textsuperscript{135}

Taft knew from the very beginning that this would be a major decision and devoted himself to its writing as he had for no other case.\textsuperscript{136} In his magisterial Oliver Wendel Holmes Devise History of the Taft Court, Robert Post has reconstructed what was happening behind the scenes. The “unusual process of composition” included two full-dress meetings of the six-justice majority at Taft’s home as well as months of editing and revisions.\textsuperscript{137} There was, Post concludes, “nothing even remotely analogous during the entire Taft Court era.”\textsuperscript{138}

Remarkably, when the opinion was finally issued, Taft feigned modesty. It had always been the “earnest desire” of the Court, Taft wrote, “to avoid a final settlement on the question” of the President’s constitutional removal power “until it should be inevitably presented, as it is here.”\textsuperscript{139}

The removal question was not “inevitably presented” though. In fact, there existed at least three other paths for resolving the suit. The Court of Claims had relied on the doctrine of laches, finding that Myers had waited too long to sue.\textsuperscript{140} Taft could have said the same.\textsuperscript{141}

\textsuperscript{131} See infra Part III.B, C.
\textsuperscript{132} 19 Stat. 80 (1876).
\textsuperscript{133} See Robert Post, Part III, at 34.
\textsuperscript{134} See id. at 36. Note that, at the initial Supreme Court argument, Myers’s estate had not appeared for oral argument. See id. at 35.
\textsuperscript{135} See Myers v. U.S. 272 U.S. 52, 52 (1926) (observing that the case was decided on Oct. 25, 1926).
\textsuperscript{136} See id. at 35, 45.
\textsuperscript{137} Post, Part III, at 61.
\textsuperscript{138} Id.
\textsuperscript{139} See Myers, 272 U.S. at 173.
\textsuperscript{140} See 58 Ct. Cl. 199, 206 (1923).
\textsuperscript{141} The government did concede that “it can not sustain this judgment on th[at] ground” though. See Myers, 272 U.S. at 88 (clerk’s summary of oral argument by Solicitor General James M. Beck).
Alternatively Taft could have followed the logic of earlier removal cases and tracked statutory language to determine Congress’s intentions. For instance, in 1897, the Court held that when Congress repealed a form of tenure protection for the Postmaster General in 1887, it had intended that repeal to cover tenure protections applying elsewhere, including to the plaintiff, a former district attorney.\(^{142}\) The Court could have followed that same logic in Frank Myers’ case. Or it could have held, as it did in another prior case, that just because the statute specified conditions under which postmasters “may” be removed, it did not require the President remove postmasters only in such a manner.\(^{143}\) Any of these three options were available to the Court. They would have allowed it to avoid the constitutional question by emphasizing the primacy of congressional intent.\(^{144}\)

Taft’s refusal to engage in minimalist argument points us towards the kind of break Myers effected. The writing swept large: it declared not only that the president enjoyed an inherent constitutional power to remove, which Congress could not abrogate, but that such a power had been recognized by the very first Congress and was “accepted as a final decision of the question by all branches of the Government.”\(^{145}\)

This was a hard proposition to sustain. To do it, Taft would have to not only weave, out of the Constitution’s silences, a textual foundation for the president’s removal power and show that it was recognized from the beginning of the republic, but also narrate the subsequent century-and-a-half of doctrinal development to bring out the continuity. The very size of the undertaking helps explain why it took Taft so long to draft the opinion and why the finished writing is so long.

For a starting place, Taft admitted that both the Constitution and the debates at the Constitutional Convention were silent on removal.\(^{146}\) To understand the meaning of the Constitution in practice, then, it was necessary to look to the First Congress, where the removal question presented itself “early in the first session.”\(^{147}\) Taft treated this debate, the so-called Decision of 1789, as speaking clearly in favor of presidential removal. He treated it as authoritative, not because “a Congressional conclusion on a

\(^{142}\) See Parsons v. U.S., 167 U.S. 324 (1897). See infra, Part III.B.
\(^{143}\) Shurtleff v. U.S., 189 U.S. 311 (1903). See infra, Part III.
\(^{144}\) The Court could also have revived an earlier tactic from U.S. ex rel. Goodrich v. Guthrie, 58 U.S. 284 (1854), a case which involved the removal of a territorial judge who was to have held office for a term of years. The Court sidestepped the removal question, concluding that “[t]he only legitimate inquiry” was whether any court could “command the withdrawal of a sum or sums of money from the treasury of the United States” to pay out claims. Id. at 302. The answer was clearly not, for reasons legal and functional. While this approach seems to have fallen out of fashion in the later nineteenth century, it offered the Myers Court yet a fourth way of avoiding the constitutional question of removal.
\(^{145}\) 272 U.S. at 136.
\(^{146}\) Id. at 109, 111. Presidential theorist Forrest McDonald has speculated that this omission reflects the unvarnished reality that, by September, the Framers were “tired and irritable and anxious to go home.” McDonald, supra n. XX, at 180.
\(^{147}\) Id. at 109.
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constitutional issue is conclusive,” but because it was made within two years after the Convention, by a Congress that still counted among its leaders former delegates to Philadelphia.148 It thus held special significance as a privileged gloss on the meaning of the Constitution. Besides, Taft explained, he “agree[d] with the reasons upon which [the Decision of 1789] was avowedly based,” at least as reconstructed in the majority opinion.149

What were those reasons? On Taft’s analysis, four principal arguments were both advanced and carried. First, champions of presidential removal authority in the First Congress argued that the Constitution had sought to establish three “branches [that] should be kept separate in all cases in which they were not expressly blended.”150 Executive power was lodged in the President, and in general included the power of removal; it should thus be kept free from interference by the other two branches, including Congress.151 Second, Article II’s “express recognition” of the President’s appointment power was an argument for presidential authority over removals “on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment.”152 Third, Congress’s enumerated powers did not include the power to control the removal of non-inferior officers.153 Fourth and finally, “without express provision,” it could not have been the drafters’ intent to give Congress, “in case of political or other differences, the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility,” which would follow if Congress could interfere with the president’s ability to remove “subordinate executive officers.”154

Taft believed these arguments compelling on their own terms. He also saw them accepted, or at least not rejected, by the whole subsequent course of American legal and political history. Hamilton had argued for a different conception of the executive in The Federalist, Taft conceded.155 But he “changed his view of this matter during his incumbency as Secretary of the Treasury.”156 Chief Justice John Marshall, in Marbury v. Madison, had seemed to disagree with the Decision of 1789.157 But he, too, apparently changed his mind, having expressed agreement with the

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148 Id.
149 Id.
150 Id. at 116.
151 See id. at 118.
152 Id. at 119.
153 See id. at 127, and see U.S. Const. art. 1, sec. 8.
154 Id. at 131.
155 See id. at 136-37.
156 Id. at 137.
157 See id. at 139, 141. Insofar as it prevented President Jefferson from withdrawing a judicial commission already provided for by the exiting president and Congress, the famed opinion seemed to stand against unfettered presidential removal.
Decision in his 1803 biography of George Washington.”\footnote{158 Id. at 143-44.} Further, all court cases and acts of Congress from 1789 onward were at least compatible with the Decision, notwithstanding some apparently contrary words of Senators Webster, Clay, and Calhoun, or some stray remarks in various Supreme Court opinions.\footnote{159 See 163, 172-173, 174-76.}

There was one blatant exception: the Tenure of Office Act of 1867. Passed at the nadir of the Reconstruction Congress’s stormy relationship with Andrew Johnson, the Act sought to prevent the President from firing the Secretary of War, Edwin Stanton, a staunch reconstructionist. The Act was a close relative of the 1876 Act that guaranteed Frank Myers’ own job security.\footnote{160 Compare 17 Stat. 284 § 2 (1872) (stating that the Postmaster General would serve “during the term of the President by whom he is appointed, and for one month thereafter”) and 14 Stat. 430 § 1 (1867) (providing that the Postmaster General will serve “during the term of the President by whom they may have been appointed and for one month thereafter”) with 16 Stat. 6 (1869) (repealing the cabinet-level provisions of the 1867 Tenure of Office Act). \textit{And see} 19 Stat. 80 § 6 (1876) (specifying that first, second, and third-class postmasters “may be removed by the President by and with the advice and consent of the Senate) amended 18 Stat. 233 § 80 (1874) (doing the same), which in turn had amended 17 Stat. 292 § 63 (doing the same). 17 Stat. 292 § 63 was one part of the comprehensive Post Office Act of June 8, 1872, § 2 of which provided tenure of office protection for the Postmaster General and three assistant postmasters-general.}

Taft glossed the Act as an anomaly, the product of “a period in the history of the Government when both Houses of Congress attempted to reverse this constitutional construction [on presidential removal].”\footnote{161 Id. at 164.} According to Taft, the Tenure of Office Act only remained on the books as long as it did out of lingering antipathy towards Johnson.\footnote{162 Id. at 168.} It was a “radical innovation” inflicting “injury” on the presidency, and so essentially “invalid.”\footnote{163 Id. at 172.} In any case, Taft went on, it had never really been accepted. Presidents continuously denied its validity.\footnote{164 See id. at 170.} If they had signed bills into law that denied the chief executive a sole hand in removals, it was only out of expediency.\footnote{165 See id. at 173.} For its part, the Supreme Court had never signed off on the constitutionality of such arrangements but had studiously left the question open.\footnote{166 Id. at 175.}

Ultimately, Taft wrote off the Tenure of Office Act—and the related legislation at issue in \textit{Myers}—as the product of a “heated political difference of opinion” which drove the Congress to “extremes,” as Taft believed was “now recognized by all who calmly review the history of that episode.”\footnote{167 Id. at 175.} It was an unfortunate misadventure, creating no lasting
precedent and entitled to little weight at all.\textsuperscript{168} He ruled the Act unconstitutional and then affirmed the president’s Constitutional right to remove.\textsuperscript{169}

C. The Puzzles of Myers

In modern unitary executive theory, Myers is treated as an originalist opinion offering an accurate account of the Constitution and the history of the 19th century Republic. When Scalia gave his famous lecture on originalism, the year after his dissent in Morrison, he began his talk with a discussion of Myers, calling it “a prime example of what . . . is known as the ‘originalist’ approach to constitutional interpretation.”\textsuperscript{170} And recent Roberts Court opinions have followed Scalia’s Morrison dissent in citing to Myers for the idea that presidential removal is constitutionally required, traces back to the Founding, and was widely recognized in the past. Yet this misunderstands Myers. As Section B clarified, even by its own terms Myers was not grounded in originalist interpretations of the Constitution. It was based on a theory of constitutional acquiescence. Moreover, as the opinion itself recognized, that acquiescence was contested. Only by ignoring the Tenure of Office Act and the decades of history that followed could Taft reconstruct a history of Congressional agreement to presidential removal.

Nor does the opinion stand for the proposition that a constitutional removal power was widely recognized in the past. Myers abandoned the logic and the tactics of the Supreme Court’s earlier removal cases, which had avoided the constitutional question, as Taft noted. In finding a constitutional removal power, Taft turned to a new, open-ended textualism, purporting to divine what Article II’s “executive power” truly meant—an approach his dissenting colleagues found laughable.\textsuperscript{171}

Most consequentially, Taft’s constitutional analysis was grounded in a different understanding of the president than the one that had given rise to the case. As Section A showed, Myers had its roots in a patronage dispute. Yet Taft’s analysis ignored this facet of the President’s office. Instead, as Taft explained, the “executive power” included the responsibility of “determining the national public interest” and “directing the action to be taken by his executive subordinates to protect it.”\textsuperscript{172}

The president of Myers was a leader of the people, policymaker-in-chief, and the administrative head of the government. This was neither  

\begin{itemize}
  \item \textsuperscript{168} See id. at 176.
  \item \textsuperscript{169} See id. at 176.
  \item \textsuperscript{171} See 272 U.S. at 134; \textit{Id.} at 192 (McReynolds and Holmes, JJ., dissenting)
  \item \textsuperscript{172} \textit{Id.} at 134 (emphasis added).
\end{itemize}
the president of the founding, nor the president who picked a postman. Who was it then? And where did it come from?

III. PRESIDENTIAL REMOVAL BEFORE PROGRESSIVISM

Myers was an anomaly, acknowledged as such in its time.173 It self-consciously departed from a previous legal tradition in order to make something new. To see how Myers departed from prior law, we need to understand what that prior law. This Part reconstructs the law of removal before Myers, to show the world Myers left behind.

The most striking feature the pre-Myers removal law is a basic difference in the posture of the president. The nineteenth century president was nothing like the president of today or Taft’s president in Myers. While individual presidents had made successful bids to represent the nation, the office did not enjoy the status or prestige it is now accorded. Nor, for that matter, did the federal government possess the institutions that would have enabled the president to exercise significant policy-making power even if she had wanted to. The presidency was weak.

Nineteenth-century law on the administrative state reflected this. The primacy of Congress and the logic of patronage are keys to unlocking the pre-Myers law of presidential removal, the main domestic presidential administrative power. In case after case, the Supreme Court reaffirmed that, when it came to structuring the government, Congress set the terms. The president had little independent constitutional authority to administer the execution of the laws. Indeed, as the Court repeatedly held, what power the president did have came from Congress. The Court resolved most cases without asking about the president’s Constitutional powers at all.

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

that Congress’s intent and design limited his power. In hindsight, these opinions are striking for what they did not do: rely on or invoke the Constitution or the president’s putative role as national leader, administrative chief, or popular representative.

A. The Inconsequential Pre-Progressive President

To understand just how much of a change the Progressives wrought on the institutions and law of the executive, we have to start by recovering what the office they inherited looked like. The answer: not much. The late nineteenth century presidency was awfully weak, at least from the perspective of developing and implementing policy.

This was a matter of contingent institutional development. Abraham Lincoln had famously been a strong president (albeit one constrained by the oppressive norms of office), but the impeachment of his successor, Andrew Johnson, confirmed that Congress ultimately held the upper hand. The next forty years were what Woodrow Wilson, then a scholar of political science and not yet a politician, called an era of “congressional government,” by which he meant that the American state was firmly in the hands of the federal legislature. It was Congress that set American policy and effectively controlled its implementation.

Modern historians have shared this assessment. In his recent book on the American presidency, the great political historian William Leuchtenburg concluded that the nineteenth-century executive was frankly pathetic: “Dwarfed by Congress, often denied respect, postbellum presidents found elevation to the highest office in the land deeply disappointing.” Leuchtenburg catalogued some of their reactions. Once James Garfield made it to the White House, he decried his fate: “My God! What is there in this place that a man should ever want to get into it!” President Grover Cleveland was just as depressed. When he met a five-year-old Franklin Delano Roosevelt through New York friends, Cleveland “patted [him] on the head and . . . mad[e] a strange wish for [him:] that he never be president of the United States.”

175 See Woodrow Wilson, Congressional Government, XX (1885). Less seriously, but no less accurately, in 1993, The Simpsons caricatured this as the era of the “Mediocre Presidents.” See https://www.youtube.com/watch?v=r8N7BS6sUso.
178 Quoted in id. at 16.
179 Id. (internal quotation marks omitted).
A weak office attracted undistinguished men. In 1888, the British legal scholar James Bryce devoted a chapter of his authoritative study of American democracy to the puzzle of the underwhelming American chief. “Why,” he wondered, were “great men . . . not chosen president”? Bryce identified five different reasons: the United States had less available talent to draw from than Europe, and the crude tenor of campaigns tended to discourage first-rate politicians from seeking or obtaining the office. Political life in the United States did not give very many “opportunities for personal distinction.” And, in any case, under the spoils system, parties were more interested in running men who would make good candidates than good presidents.

But the most important reason why great men were not elected president in the United States was that the presidency was simply not that big a deal. Great men would not want to do the job. “After all,” Bryce quipped, “a President need not be a man of brilliant intellectual gifts.” “Four-fifths of his work is the same in kind as that which devolves on the chairman of a commercial company or the manager of a railway.” Bryce may have been exaggerating, but not to the president’s benefit; in fact, at the turn of the twentieth century, the largest American corporations outstripped the government in sophistication. The titans of Gilded Age industry engaged in complex tasks of hierarchical management as they built continent-spanning enterprises. The president’s work was, by contrast, less complicated and seemingly less important. “In quiet times,” Bryce observed, a great man is “not . . . absolutely needed.”

Far from an elected monarch, the nineteenth century president was a glorified HR manager. His main responsibility seems to have been filling offices. According to Bryce, the federal government of the time counted something like 120,000 positions. Of those, perhaps 14,000 were part of the then-new civil service. This left over 100,000 positions subject to political consideration in appointment. Figuring out staffing

181 See BRYCE, supra note XX, at 101 (“Eminent men make more enemies, and give those enemies more assailable points, than obscure men do.”)
182 Id.
183 See id. at 103.
184 Id. at 104.
185 Id. at 104-05.
186 See Morton Keller and Alfred Chandler, XX, on the first great merger movement.
188 See JAMES BRYCE, 2 THE AMERICAN COMMONWEALTH 484 (1888).
189 See id. at 491.
190 Contrast this with today, where the president is responsible for appointing about 4000 offices in a government of over 2 million employees—or less than 0.002%. For size of civilian non-military workforce, excluding postal employees, see https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/.
constituted a major share of what nineteenth century presidents actually did.

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

Appointments took up so much presidential headspace because of their importance. It was not that every office mattered so much to the country: most, in fact, were forgettable positions like that post-mastership that so bothered Lincoln. Offices mattered to the political parties, though, even the minor ones, and political parties were central to making the nineteenth-century state work.

Party organizations played several essential roles in post-Civil War American governance. They selected candidates for office, including of course for the presidency. They elected those candidates to office by mobilizing constituencies and turning out voters. More surprisingly to modern observers, they ran the actual election, down to the printing of ballots. Without the parties, there would be not only no candidates but also no electoral process for them to compete in. And, after the election was over, the parties helped coordinate the government’s actions. They were one of the only entities cutting across the horizontal and vertical divisions of the American state, bringing government officers together across branches and the state/federal gulf.

Parties were thus central to American democracy. And patronage was the glue that held the parties together. Financially, patronage kept parties solvent. Most campaign workers worked for free, rewarded for their efforts only later, if the party won. Patronage appointees would then kick a fraction of their salary back to party coffers. And parties charged would-be nominees fees on the front end to put their names forward for nomination. But the tie of patronage was about more than money. Patronage created a functional and psychological link between the party and its functionaries. Men who owed their professional future to the party would work diligently on the party’s behalf. Patronage was thus an inducement to enter party service and a reward to ensure loyalty.

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191 JAMES BRYCE, supra n. 106, at 82 n.1.
192 See id. at 81.
194 See GARY GERSTLE, LIBERTY AND COERCION, Ch. 5 (2015)
195 See Bryce, supra note [vol 2], at 486 ("[Citizens] whose bread and butter depend on their party may be trusted to work for their party").
Patronage was so important to parties that they refused to let the president handle it all himself. The Constitution made the president a part of many appointments, by assigning him explicit responsibility for nominating ambassadors, judges, and non-inferior officers, and granting Congress the power to vest in him, at its pleasure, the appointment of lower officers. But it ensured Senate involvement in the most high-profile appointments through the requirement of Senate confirmation. And it gave Congress other tools to shape staffing, including the power to create and define the government’s offices and control over the government’s finances. The result of all this was a tradition known as “courtesy of the senate,” which kept the President beholden to party wishes. The practice prevented the President from making patronage appointments to any state without the approval of that state’s same-party senators. If the President refused, the senators would deploy their various constitutional prerogatives, on their own or in collaboration with their colleagues in the House, to thwart the President and assert the party’s will. This left the President, in Bryce’s judgment, “practically enslaved [to the party] as regards appointments.”

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

Trapped in a small office, hemmed in by party and legislature, Presidents lolled about. According to Leuchtenburg, Ulysses Grant only worked 10-3—and that was on the days he was in Washington instead of his escape at the Jersey shore. Chester Alan Arthur worked 10-4, but was known to take Mondays off. Harrison seems to have broken at

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196 See U.S. Const. art. II, s. 2.
197 See id.
198 See U.S. Const. art I, s. 8 and 9.
200 BRYCE, supra note 106, at 79.
201 LEUCHTENBURG, supra note 103, at 11.
202 Id.
203 See id. at 14.
204 See id.
midday to play with his grandkids.\textsuperscript{205} And Cleveland refused to let the public know about his work habits; he did not think he owed them an account.\textsuperscript{206}

There was nothing striking or unusual about this. Grant, Arthur, Harrison and Cleveland were not especially lazy. They were simply inhabiting the office according to the norms that then governed it. The post-Civil War, late nineteenth century presidency was not thought to be a policy-making center of government.\textsuperscript{207} It was hardly a center of government at all. The dominant theory of the executive at the time saw it as limited and tightly reined in by Congress, to whom it was ultimately beholden.\textsuperscript{208} The individual men who occupied the office in that time played the largely passive, forgettable role they were assigned.

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

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

Whatever the abstract merits of this argument today, it is a historical legal non-starter. Nineteenth-century removal law did not allow the president to remove government officers at will. Rather, it embodied the constrained conception of the presidency elaborated in Section A. The pre-Progressive government bureaucracy was not a tool for non-existent presidential policy-making and implementation; it was a loose collection of political sinescures used to reward sympathizers, electioneers, friends and relatives, an integral part of party operations.\textsuperscript{209} The law of removal accepted and reinforced that reality. It made it clear that power over removal—and so over the shape and operations of the government—lay not with the president, but with Congress.

*United States v. Perkins*, one of the leading removal cases before *Myers*, was in this respect typical.\textsuperscript{210} The case emerged from the transformation of the Navy in the 1880s, so closely connected to progressive statebuilding theories and America’s imminent rise as a global superpower.\textsuperscript{211} In the years after the Civil War, the Navy had languished, even

\textsuperscript{205} See id.
\textsuperscript{206} See id. at 15.
\textsuperscript{208} See SYDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY 219 (6th ed. 2012); see also id. at 205.
\textsuperscript{209} SKOWRONEK, BUILDING, supra n. XX at 25-29, 34-35.
\textsuperscript{210} 116 U.S. 483 (1886).
\textsuperscript{211} See COLIN MOORE, AMERICAN IMPERIALISM AND THE STATE, 1893-1921, 63-65 (2017).
as other global powers engaged in a nascent seafaring arms race. Progressive reformers, sensitive to the development of new military technologies, pushed to modernize the U.S. fleet. By the end of the nineteenth century, they began to succeed, eventually persuading Congress to authorize the construction of new, state-of-the-art steel ships to replace the country’s aging sail-based naval force.

This new armada would require “a new type of sailor.” The service had been dominated by officers formed in old ways with increasingly obsolete skills; meanwhile advancement for new commissions with talent and ability could be painfully slow. A technology-driven, steamer-based steel fleet would need new seamen to guide it, trained in engineering and the tactics of open ocean, “blue-water” power.

To meet these staffing needs, the Navy made efforts to revamp its personnel structure. Before 1882, there were two different kinds of students at the Naval Academy, which trained the service’s core officers: cadet-midshipmen, who went on to serve as officers of the line, and cadet-engineers, who ran ships’ engine rooms. They had slightly different training. Cadet-midshipmen pursued a six-year course of study before graduating, which included four years at the Naval Academy in Annapolis, followed by two years of service at sea, after which they returned to the Academy for a final examination by an Academic Board. Cadet-engineers, on the other hand, spent four years at the Academy at Annapolis, followed by “two years’ service in naval steamers,” after which they were eligible to be examined for promotion and warranted assistant engineers. All cadet-engineers who graduated from their studies became Naval officers with tenure. The law then in force provided that “no officer in the . . . naval service shall in time of peace be dismissed from service except [as a result of] a court martial.” This contributed to bloat in the Navy’s ranks and slowed the advancement of new service members.

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212 Robert Seager II, Ten Years Before Mahan: The Unofficial Case for the New Navy, 1880-1890, 40 MISS. VALLEY HIST. REV. 491, 492-93 (1953); Thiesen, supra note XX, at 34.
213 See Id. at 43.
214 Thiesen, supra note XX, at 34.
215 See Philip A. Crowl, Alfred Thayer Mahan: The Naval Historian, in MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE (Peter Paret, ed. 1986) (observing that, in 1889, the top graduates of the Naval Academy from 20 years before were still only lieutenants).
216 Thiesen, supra note XX, at 34-35. On the new naval strategy, see Crowl, supra n. 143, at 469; see also Alfred Thayer Mahan, The Influence of Sea Power Upon History (1890).
220 See Leopold, 18 Ct. Cl. at 557. It seems they also were required to be, on average, two years older than cadet-midshipmen before they could begin their studies at Annapolis. See Redgrave, 116 U.S. at 445.
With the Naval Appropriation Act of 1882, Congress sought to address this problem. The Act streamlined training by reclassifying all undergraduate cadet-engineers and cadet-midshipmen as “naval cadets” and prescribing a six-year course of study for the lot of them. The Act eliminated entry into the service for Naval Academy graduates as a matter of right, and instructed that, each year, appointments into the service could not exceed the number of vacancies. Surplus graduates would be honorably discharged with a year’s pay. The Act’s frank intention was to restructure the Navy’s officer corps.

The law created a conundrum as applied to some cadet-engineers, though. What was the status of cadet-engineers who had completed their studies at Annapolis before 1882 but had not yet been warranted assistant naval engineers? How should the law treat them? The years after the 1882 Act saw a series of court cases in which the Court of Claims and the Supreme Court wrestled with these puzzles. In all of them, the courts approached the matter by looking carefully at the terms of the statute. The Constitution, the meaning of executive power, and fundamental questions of separation of powers never entered into it.

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

The Court of Claims agreed. To construe the law, the Court used the traditional tools of statutory interpretation, looking to the text of the statute, other uses of the word “graduate,” and other laws passed by Congress, including the Naval Appropriation Act of 1883, which specifically allocated pay for cadet-engineers serving on steamers according to the older, pre-“naval cadet” pay scale. Cadet engineers, it concluded, were graduates. Two years later, another cadet-engineer brought a similar suit, and the Court of Claims adhered to its earlier decision. This time the

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222 See Redgrave, 116 U.S. at 476-77 (quoting 22 St. 284 c. 391).
223 Id. at 477
224 See Leopold, 18 Ct. Cl. at 554.
225 Id. at 548.
226 See id. at 554.
227 Id. at 554-55.
228 Note that the Act of 1882 had an explicit provision stating that it should not be used to reduce the rank of any already commissioned officer. See id. at 556.
229 See id. at 558.
Government appealed, urging the Supreme Court to read the statute anew. But the Court followed the earlier opinion almost exactly, looking to the text of the law and the intent of Congress to determine the cadet-engineer’s entitlements under the relevant statutes.231 The opinion is notable, again, for its total silence about allegedly fundamental considerations of government order.

With the question of pay settled, the next problem with the law was tenure. The Court of Claims had observed in dicta that the Act’s surplus graduate clause was prospective in character, and so should not apply to cadet-engineers no longer in residence at the Academy.232 Cadet-engineers already embarked on their two years of naval steamer service would, then, be entitled to a position in the Navy, and should already enjoy tenure in office.

Whether that dicta was correct was the question in Perkins. Lyman Perkins had graduated from the Naval Academy in 1881 as a cadet-engineer; he then entered into his two years’ service.233 In June 1883, at those two years’ conclusion, he received notice from the Secretary of the Navy that he was not needed to fill any vacancies and was therefore honorably discharged with one year’s pay, pursuant to the terms of the 1882 Act.234 Perkins refused the pay and, invoking the Court of Claims’ dicta, argued that he was already in the Navy with tenure and so could not be discharged under the Act in this way.235

The government’s response complicated the legal issue and introduced the constitutional question. Although the Secretary of the Navy had relied on the 1882 Act alone for authority to release Perkins, the government’s lawyers developed a new argument for the legality of his actions, which implicated the separation of powers. First, they contended that “if the Secretary [of the Navy] otherwise had the right to discharge the claimant,” then “the order of discharge is not vitiated” even if the 1882 Act did not grant him the necessary power.236 The government next argued that the Secretary had an inherent right to discharge Perkins as an inferior officer, regardless of the 1882 Act, and that that right could not be restricted by Congress without “infringing upon the constitutional prerogative of the Executive.”237

The Court of Claims was not persuaded. It acknowledged that the then-leading case on removal stated as a rule that “the power of removal

231 See U.S. v. Redgrave, 116 U.S. at 480-82 (following the Court of Claims’ analysis in an identical, later case).
232 See Leopold, 18 Ct. Cl. at 559; Redgrave, 20 Ct. Cl. at 229.
234 See id.
235 See id.
236 Id. at 443.
237 Id. At 444.
[w]as incident to the power of appointment," as would seem to give the Secretary the power to fire Perkins. But the Supreme Court had always said that such power might be abrogated by “constitutional provision or statutory regulation.” And, the Court of Claims went on, there was just such an abrogation in the case at bar: a “curtailment of [the Secretary’s] implied power of removal” by the law that provided tenure for officers of the naval service. The government’s attempt to avoid that restriction by appeal to the Constitution was almost laughable. There was simply “no doubt” that, when it came to inferior officers appointed by the head of a department, Congress could “limit and restrict the power of removal as it deems best for the public interest.”

Department heads only acquired their authority to appoint inferior officers from legislation passed by Congress. They had no independent constitutional authority to appoint or remove any officers at all. If Congress wanted to limit the circumstances under which the Secretary of the Navy could remove an inferior officer, it had nearly limitless authority to do so. The question of presidential prerogative simply “d[id] not arise . . . and need not be considered.”

The Court of Claims therefore ruled for Perkins. His graduation had made him an officer. Congress’s laws had granted him removal protection. Those laws were valid. And the Secretary of the Navy was without statutory power to remove him at will. Perkins was thus entitled to remain in his position. The Government appealed the Court of Claims’ ruling, but the Supreme Court followed the lower court’s reasoning exactly, quoting its opinion and “adopt[ing its] views” as its own.

This should not have surprised the government. The principles the Supreme Court and the Court of Claims applied were those the Supreme Court had stated in Ex Parte Hennen—the “leading case” the Court of Claims had identified from nearly fifty years before. That case treated removal of inferior officers as fundamentally a statutory question. The Constitution was almost a sideshow.

Hennen, like the Myers case to come, had involved a problem of patronage. The dispute centered on the removal of a court clerk by a judge who wanted the position for a friend. The legal puzzle was that, while

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238 Id. at 444 (citing Ex Parte Hennen, 38 U.S. 230, 256-57 (1839)).
239 Id.
240 Id. (citing § 1229 of the Revised Statutes).
241 Id.
242 See id. at 444-45.
243 See id. at 444.
244 Id.
245 Perkins, 116 U.S. at 485.
247 Ex Parte Hennen, 38 U.S. 230, 256-57 (1839).
Congress had provided by law for the appointment of court clerks, it never specified the length of their term or the conditions governing their removal. The deposed clerk objected and sued to keep his job.

The lawyers in *Hennen* waxed eloquent about the Constitution, republicanism, and the (by-then-already-hoary) “Decision of 1789.” But the Supreme Court resolved the case through a simple syllogism, which ignored most of the lawyers’ legal claims. The Court’s major premise (never justified), was that, if neither the Constitution nor a law specified an office’s length of tenure, the incumbent either held it for life or subject to removal at pleasure. The Court’s minor premise was that no one could have intended for court clerks to hold their positions for life. It naturally followed, then, that they should be removable at pleasure.

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

Armed with such logic, the Court disposed of the puzzle of the clerk’s removal easily. Congress had vested the power to appoint the clerk “exclusively in the District Court.” That power, under the statute, was a “continuing power,” which included the power to appoint a successor. Since it had vested the power of appointment in the judge and given that judge the power to appoint a successor, which “would, per se, be a removal of the prior incumbent,” it must have intended to give the power of removal to the judge as well. The default rule made sense here, so the Court applied it. The removal was thus acceptable, and the Supreme Court

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248 *See id.* at 258-59.
249 *See, e.g., id.* at 233, 247.
250 *Id.* at 259.
251 *See id.*
252 *Id.* at 260.
253 *Id.*
254 *See id.*
255 *Id.* at 259.
256 *Id.* at 261.
257 *Id.*
258 *Id.*
259 *Id.*
itself “c[ould] have no control over the appointment or removal, or entertain any inquiry into the grounds of removal” either.\(^{259}\)

There was a constitutional logic undergirding this statutory ruling, but it cuts against contemporary Article II sensibilities and the logic Taft would rely on in *Myers*. Suppose, the Court explained, that the court clerk had *not* been removable at pleasure by the judge who had appointed him. This would lead to a horrible *reductio ad absurdum*: the clerk would have been legally unremovable! Admittedly, this was “a most extraordinary construction of the law,” but it would “inevitably follow,” the Court believed, “unless the incumbent was removable at the discretion of the department.”\(^{260}\) The implication was that no one else would have the power to remove an inferior officer appointed by a department head, except the department head himself. The Court underscored its implication by ruling out the president as a possible firer-in-chief: “the President has certainly no power to remove.”\(^{261}\)

We see here the wholly different world of separation of powers that informed the Court’s pre-*Myers* removal cases involving agents other than the president. From the 1839 *Hennen* to the 1903 *Perkins*—from Jacksonian rotation in office to the turn-of-the-century civil service—the Court refused repeated entreaties to turn questions of statutory construction into problems of constitutional law. To be sure, *Hennen* did surmise that “the power of removal [w]as incident to the power of appointment,” but it did so as a statutory matter, based on what it supposed was Congress’s intent, and only as a default rule.\(^{262}\) Inferior officers were products of Congress’s law. The authority to appoint them flowed from Congress’ acts, so the authority to remove them would have to come from Congress’s acts as well.

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

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

According to *Hennen*, presidential involvement in the tenure of inferior officers should be treated no differently than non-presidential removals: “The same rule, as to the power of removal, must be applied to offices

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\(^{259}\) *Id.*

\(^{260}\) *Id.* at 260.

\(^{261}\) *Id.*

\(^{262}\) *Id.* at 259.
where the appointment is vested in the President alone.”

Later nineteenth-century courts agreed, looking to Congress’s intention to determine whether the president could remove particular officers that he had appointed. Where the Court did find reason to identify a specific presidential removal power, it analyzed it as a discrete legal (and usually statutory) entitlement.

Of course, there was undeniably something more dramatic, and more troubling, in the idea of Congress tying the President’s own hands. That issue arose in one of the greatest removal controversies in American history, the impeachment of President Andrew Johnson in 1868. In the eyes of a staunchly Unionist, unified Republican Congress, the racist Southerner Johnson’s transgressions were legion. But what actually lit the spark was Johnson’s attempt to fire his Secretary of War Edwin Stanton (a Lincoln holdover) in violation of the Tenure of Office Act of 1867. The Act, passed over Johnson’s veto, denied the President power to fire any officer appointed with the advice and consent of the Senate, unless the Senate approved the removal. The first attempted presidential impeachment in the nation’s history, the episode was fraught with ambiguities. Many doubted whether the president’s behavior warranted this harshest of remedies.

It was not clear whether the firing violated the law in the first place, as Johnson had never appointed Stanton, and the terms of the Act did not clearly apply to the Cabinet. Besides, even in 1868, the Act itself was unpopular, considered by some to raise constitutional dilemmas. Perhaps, in light of these ambiguities, the appropriate course of action would have been for the deposed Secretary to sue for backpay, as other federal officials had done. In any case, the Supreme Court never had occasion to pass judgment, as the Act was repealed in 1887. However stirring these events, removal protections related to the Tenure of Office Act remained on the books for decades after that, and for the most part, the controversies they occasioned were treated by the Court as run-of-the-mill affairs. Consider McAllister v. United States, an 1887 case concerning the removal of a district judge from Alaska named Ward McAllister. Judge McAllister had been appointed by the Republican Chester A. Arthur, and when the Democrats took the White House in 1884, the incoming Grover Cleveland suspended the judge and replaced him

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263 Id.
264 14 Stat. 430 (1867).
266 Bowie & Renan, supra n. XX at 2051-55 (discussing the legal issues surrounding the Act and the Johnson impeachment).
with an officer of his own choosing. McAllister sued, arguing that Cleveland had no right to suspend him, and demanded his unpaid salary.

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

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

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

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269 See id. at 319-20.
271 See 16. Stat. 6., 41 Cong. Ch. 10, S. 2 (1869), quoted in id. at 177; on Cleveland’s contemporaneous reliance, see McCallister, 22 Ct. Cl. at 319.
272 See McAllister, 141 U.S. at 179.
273 Id. at 179-80.
274 See id. at 184-85, 187. The position also lacked the guarantee of a compensation that could not be diminished. See id.
275 See id. at 193-4, 200 (FIELD, J., dissenting).
might not be allowed, constitutionally, to empower the President to suspend a territorial judge at all!  

There was a further irony in play: the government’s position, which echoed the Court’s statute-first view of the case, was briefed and argued at the Supreme Court by none other than William Howard Taft, serving at the time as Solicitor General. At the time, Solicitor General Taft did not argue that the Tenure of Office Act was void. Rather, he relied on it. “It is not proposed to enter into the question of the right of Congress to limit the power of appointment and removal,” Taft opened his brief.277 “The only point for discussion here is whether the language of [the Tenure of Office Act] applies to a judge of the district court of Alaska.” Taft concluded that it did, and that the president’s actions were therefore lawful.279

After McAllister, the Tenure of Office Act would create at least one new headache for the law of presidential removal. The Act had specified that the president could suspend civil officers while the Senate was not in session, and allowed the Senate to ratify the president’s choices by confirming new nominees.280 The law repealing it simply struck the Act from the books.281 In the interim, though, Congress had completely revised and consolidated the laws of the United States against the backdrop of the Tenure of Office Act.282 Over several years, a rotating cast of attorneys had combed through the seventeen volumes of the Statutes-at-Large to prune away contradictions and eliminate obsolete provisions.283 Congress had enacted the new consolidation into law in 1874 as the Revised Statutes.284 It was a heroic undertaking, the first of its kind in the United States.285 But it turned out to be full of mistakes.286 And in any case it had harmonized the existing laws with the no-longer-in-force Tenure of Office Act, stripping away provisions from other laws that the Act had abrogated.

276 See id. at 195 (“I cannot believe that under our constitution and system of government any judicial officer invested with these great responsibilities can hold his office subject to such arbitrary conditions. In my judgment good behavior during the term of his appointment is the only lawful and constitutional condition to the retention of his office.”).
277 Brief of the United States, McAllister v. United States, at 3.
278 Id. at 3-4.
279 See id. at 18.
283 See id. at 1013-14. Note that “[i]t was the opinion of the joint [Congressional] committee [overseeing the consolidation] that the commissioners [in charge of doing the compiling] had so changed and amended the statutes that it would be impossible to secure the passage of their revision,” and so their first draft was sent back to a DC attorney to “expunge all changes in the law made by the commission,” to imperfect effect. Id.
284 See 18 Stat. 1085 (1874).
286 See Dwan & Feidler, supra note XX, at 1014; Whisner, supra note XX, at 549-550.
What kinds of powers of appointment and removal remained now that the Act was repealed? This was the question raised in Parsons, probably the leading presidential removal case before *Myers*. Lewis E. Parsons Jr. was three years into his four-year term as U.S. Attorney for the District of Alabama when President Cleveland—back for the second of his two non-consecutive terms—sought to replace him.²⁸⁷ Parsons refused to step down and disputed the President’s authority to force him out; he eventually sued for his salary.²⁸⁸

Had the Tenure of Office Act still been in force, the Supreme Court opined, Parsons would have had no case.²⁸⁹ His suspension by the President and the eventual confirmation of his successor by the Senate would have led to Parsons’ being “legally removed . . . in [just] the way it occurred.”²⁹⁰ But the repeal of the Act caused a complication. The office of U.S. Attorney had been created by Congress in 1789 without specifying either a term or conditions of removal.²⁹¹ Congress corrected that oversight in 1820 by passing a new law setting the term for U.S. Attorneys at four years and specifying that they were to be “removable from office at pleasure.”²⁹² But the removal at pleasure provision had been abrogated by the Tenure of Office Act and so was not included in the definition of the office when the laws were consolidated and reenacted as the Revised Statutes in 1874.²⁹³ Meanwhile, the repeal of the Tenure of Office Act in 1887 did not include any new language on removal; it simply got rid of the Tenure of Office Act. What, then, of the removability of U.S. Attorneys?

Parsons claimed he was unremovable, relying on the text of the Revised Statutes. His attorney argued straightforwardly that the repeal of the Tenure of Office Act did not revive the president’s 1820 right of removal, since the repeal of the Act did not by itself re-enact the earlier statute.²⁹⁴ “If the law is wrong,” they concluded their brief, “the remedy is with Congress.”²⁹⁵ The government defended by arguing that the president enjoyed a constitutional power to remove executive branch officers, that the law specifying U.S. Attorneys’ four-year term was “a limitation . . . not a grant,” and that, in any case, the repeal of the Tenure of Office

²⁸⁷ *See* Parsons v. U.S., 30 Ct. Cl. 222, 237.
²⁸⁸ *Id.* at 237-38.
²⁸⁹ *See* Parsons v. U.S. 167 U.S. 324, 341 (1897).
²⁹⁰ *Id.*
²⁹¹ *See* Act of September 24, 1789, 1 Stat. 72-93 § 35.
²⁹² *Act* of May 15, 1820, 3 Stat. 582.
²⁹³ *See* Revised Statutes § 3769 (1874).
²⁹⁴ *See* Brief of Appellant, Parsons v. United States, at 15.
²⁹⁵ *Id.* at 50.
Act in 1887 “was not intended to restrict the power of the President” to remove, but rather “to remove restrictions thereon.” 296

Ultimately, as in its previous cases, the Court was guided by its understanding of what the legislature wanted, despite the Government’s invitation to resolve the case on constitutional grounds. It “could never have been the intention of congress,” the Court concluded, “to limit the power of the president [to remove] more [by repealing the Tenure of Office Act] than it was limited before that statute was passed.” 297 Before the Tenure of Office Act, under any theory of presidential removal, the president had the power to remove U.S. attorneys, and the president and Senate acting together could certainly replace them. Repealing the Tenure of Office Act must have aimed to restore that status quo ante—“to again concede to the president the power of removal, if taken from him by the original tenure of office.” 298

In dicta, both the Court of Claims and the Supreme Court recognized that there was a constitutional issue in the background. But it was, again, not quite the issue modern sensibilities would expect: the two courts understood Congress’s construction of the Constitution as a determining factor to be considered in deciding whether the president had a constitutional power to remove at all. 299

This focus on Congress, as opposed to the president, persisted even in Shurtleff, perhaps the most strongly pro-executive of any of the pre-Myers removal cases. Ferdinand Shurtleff had been appointed to the Board of General Appraisers, a predecessor to the Court of International

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296 The government grounded this right, of course, in the Decision of 1789, which it rehearsed at length in its brief. See Brief of Appellee, Parsons v. United States, at 3-15, 51, 57.
297 Parsons, 167 U.S. at 343, 342.
298 Id. at 343.
299 According to the Court of Claims, from 1789 to 1820 the President’s power to remove U.S. Attorneys had existed “by constitutional implication and construction” (at 242). Congress’s decision in 1820 to recognize that power “is an additional argument in favor of that construction” (at 243). The Court frankly recognized that the passage of the Tenure of Office Act “establish[ed] a new theory of constitutional law and a new policy of political administration” connected to the “readjustment of our institutions incident to the great civil war” (id.). But neither that fact, nor the Act’s repeal in 1887, made it any less “valuable as a legislative construction of the Constitution of the United States in conflict with that theory which had prevailed” before (id.). For its part, the Supreme Court curiously began its Parsons opinion with a long list of citations to authorities tending to establish the president’s inherent constitutional power to remove (at 328-334), but disclaimed any intention of deciding that question. “The foregoing references to debates and opinions have not been made for the purpose of assisting us in ourselves arriving at a decision of the question of the constitutional power of the president . . . but simply for the purpose of seeing what the views of the various departments of the government have been” (334). In light of Renan and Bowie’s pathbreaking article, we can reconstruct the work the Court’s historical narrative did notwithstanding its avowed intentions. The Justices offered a sanitized history in which the President’s power to remove had always been recognized, from 1789 until the passage of the Tenure of Office Act. The Court then presented the Tenure of Office Act as an aberration, a short and unfortunate parenthesis happily closed by the Act’s repeal and the restoration of harmonious relations between Congress and the Executive (see id. at 340-41). This is, of course, the White Redeemer narrative transposed into administrative law, see infra Part 3.E.
Trade with responsibility for adjudicating customs disputes. The Board was an unusual institution at the time, with a strict partisan balance built into the statute, on the grounds that it was quasi-judicial and supposed to be above politics. In that spirit, the statute did not specify a term of years for Board members, but instead granted them for-cause removal protection. Contemporary accounts suggest that appointments to the Board were understood to last “for life or during good behavior.”

For reasons that are not entirely clear but may have been connected to a desire to change tariff policy, President William McKinley sought to remove Shurtleff and one of his fellow Board members nine years after their appointment. A minor scandal ensued, according to the press. Shurtleff brought suit, demanding the remainder of his salary.

The courts did what they had done previously: they looked to the terms of the statute to understand Congress’s intent. For the Court of Claims, Shurtleff’s removal did not even raise a real problem of statutory interpretation. The law clearly empowered the president to remove Board members for certain causes and left it to “the President alone to determine whether one of the specified causes furnished[d] a basis for his action” without requiring that he follow a specific procedure or provide any evidence of his conclusion. The Court thus presumed that McKinley had followed the law. The President must have determined for himself that Shurtleff had been inefficient, neglected his duty, or engaged in malfeasance in office, and simply elected not to tell anyone. This was fine. The removal was therefore legal.

The Supreme Court disagreed with the Court of Claims’ analysis. As it saw things, any removal for-cause required a hearing. As Shurtleff was not given a hearing, “[i]t must be presumed that the President did not make the removal for any cause assigned in the statute.”

302 See 26 Stat. 1316 sec. 12 (stating that Board members “may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office”).
303 Appraisers Asked to Resign, NY TIMES, 24 Jan. 1899, at 12; see also Big Customs Fight Predicted, NY TIMES 25 Jan. 1899 at 9 (“The members of the board have always supposed that they held life positions. . . . [O]ne member some years ago refused an offer from a business concern [for a higher salary than he made as a board member] because he preferred a life position.”); The Case of the General Appraisers, NY TRIB. 26 Jan. 1899 at 6 (“[T]he position of General Appraiser has been considered a life position, not to be taken away for political reasons.”)
304 On the possible reasons for Shurtleff’s removal, Bamzai, supra note XX, at 720-21.
305 See Bamzai, supra note XX, at 722.
306 Shurtleff v. US, 36 Ct. Cl. 34, 42 (1901).
307 See id.
309 Shurtleff, 189 U.S. at 313-314.
Nevertheless, the Supreme Court agreed with the Court of Claims that Shurtleff’s removal was proper. The key issue was, as ever, the intent of Congress. The Supreme Court conceded that the text of the statute would seem to limit the president to removal for cause only.\textsuperscript{310} But this would lead to absurd results. If the President could only remove a General Appraiser for cause, by default Board members would enjoy tenure for life or unless “found guilty of some act specified by the statute.”\textsuperscript{311} Yet “no civil officer” excepting Article III judges “has ever held office by a life tenure since the foundation of the government.”\textsuperscript{312} The Court refused to conclude that Congress sought “to make such an extraordinary change in the usual rule governing the tenure of office” without more explicit language—especially not here, where the Court could find “no reason for such action by Congress with reference to this office or the duties connected with it.”\textsuperscript{313} Since the Court could not believe that Congress intended to create a life-tenured office, the Board members must be removable by the president at will.

The Court did implicitly recognize something like an inherent presidential removal power for officers that he appointed. After all, it was only because the president already had some authority to remove officers that he might be able to exercise it here.\textsuperscript{314} But even in recognizing the right, the Court observed that it could be “limited by constitution or statute,” recalling the default rule of Hennen.\textsuperscript{315} And the Court’s discussion of the president’s removal power suggested some already present inherent limits. The President must act “under his oath of office” and so “for the general benefit and welfare;”;\textsuperscript{316} “[i]n making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed.”\textsuperscript{317}

The Court’s analysis of the president’s power is as notable for its silences and absences as for what it did state. The Court did not consider a presidential right of removal necessary in order to make democracy work or to embody the president’s democratic authority. Nor did the Court seem belief that the president should have the power to remove officials in order to realize a personal policy preference. The notion that the president possessed a ”mandate” to act independent of Congress’s wishes was also missing. Indeed, the Court closed its eyes to the particular political context, refusing to discuss either the popular understanding that these offices were to be held during life or good behavior or the way such a tenure might

\textsuperscript{310} See id. at 315-316.
\textsuperscript{311} Id.
\textsuperscript{312} Id. at 315.
\textsuperscript{313} Id. at 315, 316. 317.
\textsuperscript{314} See id. at 316.
\textsuperscript{315} Id.
\textsuperscript{316} Id. at 318; 317. Id. at 317.
pose a barrier to McKinley’s tariff goals. Nor did the Court believe the question settled by the president’s place in an administrative hierarchy. It did note that the Board was “under the direct supervision of the President.” But there was “no doubt of the power of Congress” to create and organize the office with its goals, responsibilities, and structure. So committed was the law to Congressional primacy that the Court would rather stretch its reading of a statute to reconcile presidential action with Congressional intent than find an independent presidential power over the government.

Even a strongly pro-executive case like Shurtleff, then, hewed to the same Congress-first pattern of the other removal cases. Where the President sought to remove government officers, courts looked to the terms of Congress’s laws, and gave those laws effect. Litigants regularly raised constitutional arguments, and the Supreme Court occasionally acknowledged constitutional considerations. But courts resolved these disputes on non-constitutional grounds. Where Congress had vested the president with appointment authority, he might have a removal power pursuant to the rule of Hennen. But that power would be limited by the president’s obligations. Courts might imply the existence of such a power where, in their judgment, Congress must have intended one to avoid an absurd result. But the power of Congress to create the government was undisputed. There was no discussion of the president’s special obligations (and so attendant) powers as representative, policy-maker, or administrator. Why would there be, when the president, as we saw, was engaged in removal to realize party patronage ends?

IV. The Progressive Presidency

At the dawn of the 20th century, the presidential role seemed settled. The president was Congress’s errand boy. Presidents did not understand themselves as national leaders, elaborating or implementing a policy for the nation; that was a job for the legislature. The law reflected this reality. From the Jacksonian era through the Civil War, an uninterrupted string of Supreme Court decisions recognized Congress’s power to specify the structure of the government and the reach of the president’s administrative authority.

Yet, even as the Court handed down Shurtleff, the world was changing. In the first decades of the 20th century, the presidency was developing into something new. A telling commentary could be found in the revisions the scholar James Bryce made to his magnum opus, The American Commonwealth, which went through three editions between 1888 and

318 Id. at 315.
319 Id. at 314.
The President went, in Bryce’s first edition, from having no “free hand” in foreign policy to, by the third edition, having one “rarely.”321 During that same timeframe, Congress had begun to yield some of the “ground which the Constitution left debatable between the President and itself.”322 The veto was changing from a constitutional check to a policy tool.323 To his chapter assessing the weaknesses and disappointments of American chiefs past, Bryce added a telling footnote: “Of presidents since 1900 it is not yet time to speak.”324

Several factors made the moment so open-ended. Rising literacy rates and mass urbanization produced a professionalized corps of journalists ready to expose unsavory conditions in cities and industry. Eager for access to the political class, they elevated the very politicians they covered, making them media stars.325 A passionate reform impulse called for new public champions against party machines and moneyed interests.326 Rising labor unrest and industrial consolidation led to the development of new federal agencies to oversee antitrust, labor, and regulatory policy.327 America’s rise as an industrial and imperial power spurred new diplomatic and nation-building efforts abroad (along with the already discussed growth of a sprawling navy).328 The country was becoming great—a policy state—and politicians were discovering ways, as individuals, to tap into that greatness. The office of the president became an institutional focal point for these developments. Progressive presidents did not miss the possibilities inherent to the moment.329

With a new mandate came new roles and new tools. The nineteenth-century “partisan presidents” had been bound by loyalty to their party, their direct communications to the public constrained by formality and their policy agendas prescribed for them by party heads.330 Beginning

320 See supra notes XX-XX and accompanying text.
321 Compare vol. 1 of 1888 ed. at 68, with vol. 1 of 1910 ed. at 49.
322 Compare vol. 1 of 1888 ed. at 304 (Congress “has succeeded in occupying nearly all the ground which the Constitution left debatable between the President and itself”) (emphasis added) with vol. 1 of 1910 ed. at 203 (changing “nearly all” to “most”).
323 Compare vol. 1 of 1888 ed. at 75 (on the president using the veto “to keep Congress in order”) with vol. 1 of 1910 ed. at 53 (noting that the use of the veto had gone beyond what had been imagined at the Convention as it had “now come to be used on grounds of general expediency, to defeat any measure which the executive deems pernicious either in principle or in its probable results”).
324 Vol. 1 of 1910 ed. at 75 n. 3.
in the mid-1890’s, fixed institutional relationships began to change. The new presidents spoke directly to the public, permitting them to set the terms on which ideological competition and policymaking would take place. The concept of presidential representation came to the fore: as the sole officer elected by the nation as a whole, the argument went, presidents enjoyed a stronger claim to democratic representativeness than other elected officials, which in turn afforded them independent policymaking authority separate from Congress. Coupled with decades of civil service reform that had produced a new cadre of professionals, the bureaucracy was transformed into a streamlined apparatus ready to be deployed in service of the presidential agenda.

This was a new, modern theory of the president. These twin roles in the new presidential script—public leadership and presidential administration—appeared to make presidents more than mere “enforcers of the law”; they were “lawmakers” themselves.

This Part recounts the watershed transformation of the presidency in the Progressive Era. Section A focuses on Roosevelt, emphasizing his account of the president as the people’s representative. Section B turns to Taft, to show how he responded to Roosevelt by highlighting the president’s administrative authority. Section C looks to Wilson, to bring out his attempt to theorize the office beyond Taft as the nation’s lead policy maker, an American prime minister. And Section D looks to the 1920s to show how presidential representation survived the “return to normalcy.” Under nominally anti-Wilsonian President Warren Harding, we show, the new twin roles of the presidential script were codified in practice, setting the stage for their subsequent constitutionalization in Myers.

A. Theodore Roosevelt: The Popular Tribune

No one embodied this change better than the gallant, buoyant Teddy Roosevelt, who rose improbably to the presidency, then captivated the public’s attention for seven years while redefining the national agenda with his leadership of his party and the federal agencies—the Navy, the Forestry Service, and the Department of Justice. Throwing “his hat in the ring” once more in 1912, Roosevelt mounted a frontal challenge to his old party from the back of a locomotive. At the Republican Party nominating convention in Chicago, he addressed a crowd of five thousand and thundered, “We stand before the gates of Armageddon and battle for our
souls.” Roosevelt’s 1912 presidential campaign has gone down as a failure, but it left no doubt about the president’s status as celebrity, agenda-setter, and leader of party. “[T]he most striking figure in American life,” per Thomas Edison, Sir Arthur Conan Doyle called TR “a Superman if there ever was one.” The influential Progressive editor William Allen White gushed, “Theodore Roosevelt bit me and I went mad.”

Twelve years prior, with President McKinley dying in the hospital, felled by an assassin’s bullet, the 42-year-old Vice President had dutifully reassured old-guard Republicans in McKinley’s cabinet and Congress that he would continue his predecessor’s priorities.

In hindsight, it is hard to deny that Roosevelt lied. In private, Roosevelt had long found McKinley’s leadership to be weak and passive. He soon discovered, to his joy, that the constraints on the office “were as much norms internalized by presidents as they were institutional limitations imposed on those presidents.” Unbeheld to such norms himself, Roosevelt was free to rewrite the presidential script.

One norm Roosevelt shattered was fidelity to party on policy. During his first term, he was careful not to break openly with Republican congressional leadership, but instead set his administration’s focus on issues like antitrust, naval policy, and conservation, which were of little concern for standpat Republicans.

The freedom this afforded him was striking. Over the wishes of the business community, Roosevelt created a new antitrust policy and shepherded consumer protection laws and railroad regulation through Congress. Bypassing Congress, he reached out to the business community and orchestrated the government’s response to financial panics in 1903 and 1907. Defying the isolationists, he built a robust naval power, brokered peace in the Russo-Japanese War, defused a European crisis in Morocco, sent the American battle fleet on a cruise around the world, and expanded U.S. presence in Cuba, Panama, and the Philippines. Acting unilaterally, he resolved labor disputes and, famously, set aside approximately 230 million acres of land for conservation via executive order. For the most part, Roosevelt began with his own agenda and then calculated whether and how he could gain support of his party’s leaders for his preferences.

336 Richard J. Ellis, The Development of the American Presidency 106 (3rd ed. 2018). Not everyone was a fan though: Mark Twain thought him “clearly insane.” KNOKEY, supra n. XX at 400.
338 KNOKEY, supra n. XX at 203.
339 ARNOLD, REMAKING at 18, 196.
340 Id. at 202.
At least some of Roosevelt’s success owed to his use of new tools of presidential leadership. Roosevelt was a master of what modern political analysts now call “spin.”\(^341\) As a young politician, he had parlayed spectacle and expertise into appointment after desirable appointment: the New York state assembly, the U.S. Civil Service Commission under President Harrison, McKinley’s Assistant Secretary of the Navy, then the governorship of New York and the presidency. Ahead of his famous (staged) ride up the San Juan Hill in Cuba during the Spanish-American War, Roosevelt had made sure that he was followed by a throng of reporters and photographers.\(^342\) As a young politician, he had parlayed spectacle and expertise into appointment after desirable appointment: the New York state assembly, the U.S. Civil Service Commission under President Harrison, McKinley’s Assistant Secretary of the Navy, then the governorship of New York and the presidency. Ahead of his famous (staged) ride up the San Juan Hill in Cuba during the Spanish-American War, Roosevelt had made sure that he was followed by a throng of reporters and photographers.\(^342\) As president, he dumped the stuffy, stately title of “Executive Mansion” in favor of the catchier “White House,” and invited favored reporters to a daily “shaving hour” during which he would talk “a blue streak,” offering “presidential advice, leaks, story ideas, gossip, [and] instructions on how to write their stories.”\(^343\) It was no surprise that Roosevelt enjoyed largely favorable publicity. For Roosevelt, this was less a means of directly influencing his Congress than of maintaining public support and authority. Roosevelt seems to have anticipated Richard Neustadt’s famous maxim that “an image of the office” is “the dynamic factor in a President’s prestige.”\(^344\) By these lights, Roosevelt’s presidency proved that “the intentional construction of presidential image” could be a critical tool of leadership.\(^345\)

Publicity was the outward-facing side of Roosevelt’s presidency. The inward reverse was administrative policymaking. On Roosevelt’s “neo-Hamiltonian” model, the President’s position as a nationally elected officer could be coupled with the professional discipline of the bureaucrat to produce a strong state that legitimized and instantiated his cherished values of nationalism, imperialism, and industrialism.\(^346\) Decades of progressive civil service reform, which freed agencies from partisan spoils, made such a regime possible.\(^347\)

Roosevelt had been interested in administrative reform long before taking office, having reorganized the canal system, state correctional institutions and factory inspection procedures as governor of New York.\(^348\) As president, he followed the same course, locating strategic resources in the federal bureaucracy where possible and consolidating substantive powers in the new administrative machinery. Asserting presidential


\(^{343}\) Id.

\(^{344}\) Richard Neustadt, Presidential Power 79 (1991 [1960])

\(^{345}\) Morgan & White, The Presidential Image at 3.

\(^{346}\) Stephen Skowronek, Building at 172.

\(^{347}\) Id.

Responsibility over administration, Roosevelt convened a commission to study how to improve government administration.\footnote{Id.} He called for the construction of a great antitrust body, the Department of Commerce and Labor, a proposal his party was cool to until Roosevelt’s appeals to the public persuaded them to support the bill. He used the power of the pen to protect massive tracts of forestry land by executive order. Roosevelt transformed naval policy through administrative means, too, reaching down into the navy’s ranks to acquire expert information, then going public with arguments for a great navy to strengthen his hand vis-à-vis Congress.

Roosevelt’s muscular use of the 1890 Sherman Anti-Trust Act to prosecute the “bad trusts,” as he would explain to the public, is a good illustration of the two faces of Roosevelt’s presidential leadership—outward-popular-publicity and inward-administrative-management.\footnote{350} Seeking to transform antitrust policy and tame corporate power, Roosevelt might have requested new legislation expanding upon the Sherman Act. Instead, he “clarified” the old legislation’s terms under his own prosecutorial powers, then provoked a public confrontation with powerful industrial interests as an opportunity for moral leadership. Early in 1902, Roosevelt directed his Department of Justice to initiate a lawsuit against Northern Securities, a railroad conglomerate formed in 1901 to a massive public outcry. Rebuffing the efforts of banker J.P. Morgan to settle the suit in private, Roosevelt turned to public channels to clarify his administration’s antitrust policy and reassure the American people that he was responding to their anxieties about unchecked corporate power.\footnote{351} That summer, he also filled a Supreme Court vacancy with the nomination of Oliver Wendell Holmes, whom he hoped would stand with him in the Court’s eventual decision on the case.\footnote{352}

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

B. William Howard Taft: The Chief Administrator

William Howard Taft wrote to a friend in 1925, “I don’t remember that I was president,” and most historians agree, considering his time in office an uneventful lull between Roosevelt and Wilson at best; a “disaster,” as Wilson biographer Arthur Link summed it up, at worst.\(^{353}\) True, Taft was no charismatic leader of the people, nor a bold maverick on policy, but he did continue to pioneer new dimensions of the president’s role as Chief Administrator, a role in which he found himself quite at home. Taft’s problem was not that he was faint-hearted, indecisive, or inept as a politician so much as his inability to escape from unflattering comparisons to the larger-than-life Roosevelt, compounded with a refusal to seize the new tools of leadership his predecessor had bequeathed him. More than anything, Taft’s supposed shortcomings, discussed much at the time and still visible in the historiography, speak to a presidential office in transition. The public’s rebuke of Taft for his failures of leadership—especially, his failure to make his own views on the tariff understood to the public and to drag his party along behind him—only makes sense in light of Roosevelt’s example of a president using the bully pulpit to direct policy, his party, and the people.\(^{354}\) Taft’s tenure proved, if nothing else, that there was no going backward from the presidency that Roosevelt had built.

Taft never aspired to be president. His dream was to be a judge, and he gave up his seat on the Sixth Circuit in 1900 only reluctantly when Elihu Root, William McKinley’s Secretary of State, insisted that he take the position of Governor-General of the Philippines. Reportedly, the older man hauled Taft into a meeting and demanded: “You may go on holding the job you have in a humdrum, mediocre way. But here is something that will test you; something in the way of effort and struggle, and the question is, will you take the harder or the easier task?”\(^{355}\) Taft had his doubts about his suitability for public life, but he took to the task with vigor, eventually coming to enjoy the work of solving complex problems of governance, diplomacy and development.\(^{356}\) Cut off from the turmoil and intrigues of


354 Of the three progressive presidents, Roosevelt’s strong, personalist reform image most closely resembles modern presidents’ plebiscitary performance and ambivalent relationships with their party. Arnold, *Remaking* at 199.

355 Moore, *supra* n. XX at 86.

congressional politics, Taft enjoyed a kind of benign neglect, and shone in the gubernatorial role. Taft returned to DC in late 1903 and joined Roosevelt’s cabinet as the Secretary of War. As rising political stars in the Republican party, the two men had become fast friends, and Roosevelt enthusiastically picked Taft to be his successor, writing, “Taft as President will rank with any other man who has ever been in the White House.” Taft accepted his role as Roosevelt’s heir apparent with mixed feelings, but resolved to do the job to the best of his abilities. He campaigned vigorously in 1908 and promised to carry on Roosevelt’s course of progressive reform.

Yet, once he became president, his taste for public performance greatly diminished, and he shunned the office’s possibilities for public outreach. A loyal Republican, he refused to deploy Roosevelt’s tools of leadership to advance beyond, much less defy, congressional leaders. The Ballinger-Pinchot Affair, triggered by Taft’s firing of a Roosevelt loyalist in the Department of the Interior, reflected this fundamental difference: Taft agreed with Roosevelt on land conservation, but he refused to change policy by executive order, preferring instead to seek statutory authorization, which, at least on this matter, never came.

Yet Taft hardly shied away from the president’s new bureaucratic powers. He accepted that the president should use the tools properly at his disposal to achieve the people’s aims. Under his watch, federal antitrust litigation more than doubled from Roosevelt’s time, the Taft DOJ scoring crucial victories against Standard Oil and the American Tobacco Company at the Supreme Court. Taft placed 35,000 postmasters and 20,000 skilled workers in the Navy under civil service protection. With his approval, the Department of Commerce and Labor were divided into two cabinet departments to better rationalize their missions. He convened a Commission on Economy and Efficiency, populated by well-known progressives like Frederick Cleveland, William Willoughby, and Frank Goodnow, to propose reforms to streamline administration, especially the federal budget process. Unlike Roosevelt and his Keep Commission, whose recommendations had been ignored by Congress, Taft worked to keep legislators abreast of the Commission’s proposals, which gave them

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357 Id. at 6, 20, 25 (on American executive-branch officials’ success at using public-private partnerships to operate independently of a skeptical Congress in the Philippines).
359 ANDERSON, TAFT at 60.
360 ARNOLD, REMAKING at 199.
361 ANDERSON, TAFT at 230.
362 While the Department of Justice had initiated 40 antitrust lawsuits during Roosevelt’s two terms in office, under Taft, 70 lawsuits were brought in 40 years, including the landmark Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) and United States v. American Tobacco Company, 221 U.S. 106 (1911).
363 Arnold, supra n. XX.
somewhat greater purchase. While the Taft’s Commission’s most controversial recommendation—that the President, rather than various agencies of government, submit a unified budget to Congress—went unheeded by Congress in 1913, Taft asserted a right to review the budgets anyway, and the effort foreshadowed the creation of the executive budget in the Budget and Accounting Act of 1921, which did give the President the requested capacities.

Taft was no standpatter passively aloof from the legislative process, either. He worked closely with congressional Republicans to enact a postal banking bill, an income tax amendment, and a bill creating a specialized court to review claims before the Interstate Commerce Commission, whose powers to set rates he also advocated expanding. Tariff reform, the signature issue that, for better or worse, would define Taft’s presidency, was one that Roosevelt had conspicuously avoided. Taft tackled it at great political risk because he believed it to be good policy, and because he believed that the American people called for progress on this score. In one of his first acts in office, Taft called for a special session of Congress to take up the question. Here, he understood his legislative role, not as requiring pure passivity, but as guiding reform while remaining loyal to the various sectors of a sharply divided Republican party.

It was a noble, but hopeless position. While Congress hammered out the tariff, Taft eschewed public statements that might have clarified his position or exerted pressure for the lower rates he favored. He stood by quietly, too, when high-tariff Republicans added 847 amendments to the tariff package, dashing any hope for real reform. When the Payne-Aldrich tariff finally passed, Taft privately admitted that the legislation was not what he had hoped for, but dutifully proclaimed it to be the best ever passed by Congress. As political scientist Peri Arnold puts it, Taft’s failure with the Payne-Aldrich Act was not due to his lack of policy independence or initiative, but rather to his failure to coordinate Congress’s tariff-making process and to understand his stake as president in the legislative outcome. It was a mistake his successors would seek to avoid.

If Taft was a poor advocate for himself and his policies, he was no inconsequential figure when it came to the development of American presidential power. Though he failed to grasp the presidency’s new possibilities for visibility and autonomy, he achieved a good deal without them, deploying his managerial talents and his commitment to governmental

366 ARNOLD, REMAKING, at 199.
367 Id. at 202.
efficiency to strengthen the foundations of presidential leadership, most particularly the president’s claims over public administration. Ironically, perhaps Taft’s greatest oversight was failing to apprehend that presidential spectacle could be used, not as Roosevelt had, for personalism and showmanship, but to further the values of administrative rationality in government that he so favored.

C. Woodrow Wilson: The Presidential Prime Minister

In the summer of 1912, sensing that his own presidential campaign was flagging, a furious Roosevelt wrote to a friend to vent about his opponent Woodrow Wilson’s platform, which many compared to his own. “It is, to my mind, one of the worst platforms that any party has put out,” Roosevelt complained. “It is not progressive at all. It represents partly an unintelligent rural Toryism, and partly an utterly insincere willingness to promise the impossible, with cynical indifference to perform anything whatever.”

This was spiteful exaggeration. Today, the 1912 election is viewed as a four-way contest between candidates promising different versions of progressivism, and Wilson’s victory the result of his portraying himself as the best choice to continue the Progressive project. With only two years of experience in politics prior to the election, Wilson won with a platform promising to use government to liberate the individual from predatory industry. Wilson may have differed with Roosevelt on race, foreign policy and trust-busting. But once in office, he governed in Roosevelt’s image and extended ideas Roosevelt himself had introduced.

To be sure, Wilson had a different relationship to his party and Congress than Roosevelt. His commitment to “responsible party government” and the goal of broadening the Democratic Party coalition into a viable national party militated against Roosevelt’s executive-led strategy. Wilson had long been fascinated with British parliamentarism’s fusion of legislation and executive policymaking, and flirted as a young man with reforming the Constitution to make it more parliamentary.

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368 Quoted in Brands. The Selected Letters, supra n. XX at 565.
370 Arnold, Remaking at 196.
371 Skowronek, Building at 174.
Wilson eventually abandoned his interest in revising the Constitution, but never his faith in the productive possibilities of a regime where the legislature and executive cooperated to make policy. “You cannot compound a successful government out of antagonisms,” he wrote in a famous 1907 critique of the separation of powers. If constitutional reform would not unify America’s separated-powers government, skillful leadership could. A president who deftly read public opinion and marshaled his party into a disciplined policymaking apparatus: it was parliamentarism in function, if not in form.

As president, Wilson put these convictions into practice. Entering office with a solid Democratic Congress, he worked closely with his caucus, especially in his first term, to deliver a raft of progressive legislative victories that proved the envy of reformers in the Progressive Party, not to mention among Republicans. Many of these joined the Democratic fold for the first time. By December 1912, even before deciding on his cabinet, Wilson had met with congressional Democrats to devise a strategy for tariff legislation and banking reform. With the Republican Party logjam broken, Wilson succeeded at reducing tariff rates, signing the Underwood-Simmons Tariff Act into law in October 1913. Two months later, he signed the Federal Reserve Act, which comprehensively reformed the nation’s banking system, creating a level of governmental control of the monetary supply unheard of in American history. Successive laws established the Federal Trade Commission, set an eight-hour day for most railroad workers, and drastically strengthened antitrust policy by prohibiting predatory pricing, inter-corporate directorates and stock holding, and restricting the use of the judicial injunction against labor. Wilson and his disciplined congress passed massive agricultural subsidies and established a banking system for farmers, who had suffered from a lack of credit in recent economic panics. Wilson also appointed longtime ally and progressive hero Louis B. Brandeis to the Supreme Court, the first Jewish Justice in history.

There were less than laudatory moments, too. Among his many faults, Wilson resegregated the federal bureaucracy, created a wartime committee of propaganda and censorship, and endorsed the 1917 Espionage Act, which made public criticism of the government punishable by fine or up to twenty years in jail. Bitter disappointments, they nevertheless
illustrate Wilson’s muscular conception of his role and the way he used his position as president to realize a policy program.

Wilson was Rooseveltian, too, in his appreciation for the possibilities of the “bully pulpit,” though he understood his role somewhat differently. Roosevelt, as we saw, emphasized individual leadership. Wilson acted more as a prime minister, working through the intermediary institution of party rather than as a plebiscitary leader appealing directly to the people. Tellingly, a month into his presidency, he appeared before Congress to speak about revising tariffs, the first president to address the legislature in person since John Adams in 1800. Wilson believed that through party he had a lens on the public’s values and needs, an electoral mandate to engage in interpretive discourse with public expectations. Arguably, Wilson saw public leadership not as a matter of performing for, or leading, the public, but as interpreting its needs and values through his party.

In practice, it was difficult to tell the difference between Wilson leading the people and Wilson following his party—that is, between direct and mediated public leadership. Wilson’s much-quoted words in Constitutional Government suggest a bit of both:

For he [the president] is also the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. . . . He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon his irresistible; and the country never feels the zest of action so much as when its President of such insight and calibre. Its instinct is for unified action, and craves a single leader.

We hear, here, some of Roosevelt’s popular tribune standing apart from party, much as Wilson might have disclaimed it. In practice, the Wilsonian presidency represented an elaboration of Rooseveltian project, a formalization and perfectioning of the theory of presidential representation. Wilson would have not put it this way, but he, too, seemed to view himself as the “steward” of the nation.

378 STID, STATESMAN, supra n. XX at 48-49.
380 WILSON, CONSTITUTIONAL GOVERNMENT at 68.
Where the two presidencies differed most significantly was on the question of presidential administration. Spurning Roosevelt’s go-it-aloneism, Wilson forged a cooperative partnership between Congress. Under this model, national administrative policy became an extension of party development.\(^{381}\) Wilson worked through party channels to personally bridge the constitutional separation of powers and carry out the policy program on which he had run for office.

This enabled Wilson to push a legislative program, but it came at a significant cost. The southern Bourbons who dominated the party machinery had “a tremendous thirst for offices,” but little interest in Wilsonian progressivism.\(^{382}\) Wilson was forced to beat a retreat from the progressive expansion of the merit-based civil service that he favored. The New Freedom’s major legislation came stamped with explicit provisos against the merit classification of administrative personnel in the internal revenue service, the FTC, the Tariff Commission, and the Agricultural Credits Administration.\(^{383}\) Ultimately, the price of Wilson’s legislative success was a galling resurgence of the spoils system under congressional control.

The sudden onset of World War I cast this trade-off in the harshest of lights. Secretary of State William Jennings Bryan’s sudden resignation in June 1915 symbolized the splintering of the Democratic-Progressive coalition over the war. To make matters worse, the Democrats’ assault on the merit system soon exposed a lack of professionalism in crucial wartime posts. Faced with the burden of preparedness, the national administrative machinery faltered. By 1916, it was obvious to Wilson that the cooperative party strategy was a luxury America could no longer afford.\(^{384}\) Wilson reversed course and attempted to regain control over the bureaucracy. He received emergency authority to reorganize the executive branch, but the grant was temporary, and in any case he no longer had sufficient political capital to push an alternative administrative course. Makeshift arrangements were improvised for the duration of the war, leaving the government heavily dependent on voluntary cooperation by the industrial sector. For the US government, it was a humiliating loss of face.

By the time the Democrats suffered a landslide defeat to the Republican Warren G. Harding in 1920, Wilson’s presidency had come to seem an indictment of his own theory of government. For one so focused on rendering party a disciplined machine, Wilson’s curiously rigid attitude when it came to ratification of the Versailles Treaty was a puzzling

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\(^{381}\) SKOWRONEK, BUILDING at 175.
\(^{382}\) Id. at 194-95.
\(^{383}\) Id. at 195.
\(^{384}\) Id. at 175.
anticlimax. The war had exposed the weakened state of American bureaucracy under party government: what Wilson had presented as a cooperative partnership was ultimately exposed as a set of unprincipled bargains and tradeoffs culminating in administrative incoherence and amateurism.

D. The Republican Presidents: Consolidating the New Presidential Script

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

The end of the Great War was a time of crushing disillusionment. Warren Harding handed the Democrat James Cox the largest defeat in history, promising the electorate little more than a “return to normalcy.” At his inauguration, President Harding laid out his vision: “Our most dangerous tendency,” he lectured, “is to expect too much of government, and at the same time do for it too little.” What pressing tasks lay on the presidential agenda? “Putting our public household in order.” The “efficient administration of our proven system.” Building “a rigid and yet sane economy, combined with fiscal justice.” Gripping stuff—and as far from the rhetorical flights of Wilson or Roosevelt as imaginable.

Harding and his successor Calvin Coolidge, a fellow moderate Republican, would deliver a return to a traditional Republican platform of lower taxes, higher tariffs, administrative efficiency, and smaller government. But if Americans expected “normalcy” to mean that the president would step back from the limelight and return to a state of deference to the Republican Party and to Congress, they were mistaken. For all that Harding and Coolidge seemed, in their repudiation of Wilsonianism, to augur a turn away from progressivism’s political heroics, a return to the nineteenth-century presidency was not in the cards.

For one thing, the 1910s and ‘20s had witnessed major advances in technologies of mass communication, and whatever modest role Harding and Coolidge had seemed to aspire to on the campaign trail, in practice neither man seemed to believe that proper behavior in office required cutting down on presidential publicity. Ironically, Woodrow Wilson, the “rhetorical president” himself, had been stubbornly resistant to utilizing new technologies of mass communications like movies, newsreels, and

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385 Some have explained this episode as a result of Wilson’s debilitating stroke, e.g., JOHN MILTON COOPER, BREAKING THE HEART OF THE WORLD: WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS, 90 (2001). And see supra Part II.A.

386 Harding’s 61% of the popular vote was the largest majority in the history of party competition. WILLIAM LEUCHTENBERG, THE PERILS OF PROSPERITY 1914-1932 88 (2d ed. 1993)

387 ARNOLD, REMAKING at 206.
When Hollywood producers approached Wilson about filming cabinet meetings Wilson rejected the idea, believing his “self-consciousness in the face of the camera” would “make the whole thing awkward and ineffective.” Harding and Coolidge had no such reservations. After Harding died of a heart attack during a cross-country speaking tour in 1923, the man who earned the nickname “Silent Cal” became the first president to use the tools of mass communications to broadcast his image and message to the American people.

Fluent on the radio, Coolidge’s inaugural address in 1925 reached as many as 25 million Americans, more than ever heard Wilson or TR speak on tour in eight years in office. Coolidge appeared in “talkies” and in newsreels cavorting with celebrities; he was so accommodating of photo ops that the posse of photographers who followed him around joked that Coolidge “would don any attire or assume any pose that would produce an interesting picture.” Unlike Wilson, who abandoned presidential press conferences midway through his first term, Silent Cal stuck to a twice-a-week schedule, delivering 407 press conferences during his five and a half years in the White House, more than any other president then or since.

Progressives who had celebrated the “bully pulpit” under Wilson and Roosevelt now fretted that Coolidge’s publicity machine would deceive and mislead the American people. In 1926, the New Republic pronounced Coolidge’s “government by publicity” a dangerous innovation: “No ruler in history,” its editors concluded, “ever had such a magnificent propaganda machine as Mr. Coolidge.”

Presidential administration also survived the “return to normalcy,” with Progressive-era administrative innovations consolidated into a new politics organized around administrative power and avid use of executive prerogatives. Republicans’ traditional laissez faireism did not entail a rejection of administration. Far from it: party leaders grasped that new complexities in economy and society required guidance from the top. Secretary of Commerce Herbert Hoover earned wide praise for helping to spur the formation of trade associations and encouraging greater standardization and efficiency throughout industry. Republicans had another reason to favor executive solutions to national economic problems: despite Harding’s landslide victory, the Party still harbored plenty of progressives who were hostile to business-friendly legislation.

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388 See TULIS, RHETORICAL PRESIDENT, passim.
389 ELLIS, DEVELOPMENT at 111.
390 DAVID GREENBERG, REPUBLIC OF SPIN 163-165 (2016).
392 PONDER, MANAGING THE PRESS, supra n. XX, at 147.
393 SKOWRONEK, BUILDING, supra n. XX, at 175.
395 LEUCHTENBERG, PERILS, supra n. XX, at 97.
Republicans helped to put civil service merit classification back on the agenda, too, less out of a zeal for reform than because the spoils system had now come to be associated with corruption, amateurism, and the Southern Democrats. It didn’t hurt that reclassification helped Republicans pack agencies, the courts, and regulatory commissions with conservative appointees. Despite a reduction in the scope of government, the Harding/Coolidge years were a boom time for the new professional-managerial ethos in Washington. Perhaps professionalism and integrity are not easily associated with the scandal-prone administration of President Harding, a man who once gambled away the entire White House china set and whose inner circle, “the Ohio Gang,” was later charged with defrauding the government. But Harding still made good on his campaign promise to nominate the “best minds in the United States” to run the federal agencies.\(^{396}\) That included the young Hoover, a brilliant engineer and rising star in the Republican Party, Pittsburgh titan of industry Andrew Mellon as Secretary of the Treasury, and at State, former presidential candidate and future Supreme Court Chief Justice Charles Evans Hughes.\(^{397}\) All three stayed on into the Coolidge administration; Mellon and Hoover would remain through the end of the decade.

Major pieces of legislation reflected the new professional-managerial ethos, too, perhaps the most important the 1921 Budget and Accounting Act, which was directly patterned on the Taft Commission’s blueprint. In 1913, the Commission’s endorsement of presidential management of the federal budget had been viewed as an obnoxious intrusion upon the House’s prerogatives. But by 1921 Congress had no objection to vesting such power in the President, and the bill passed with little objection in either house.\(^{398}\) Harding himself was a great supporter of the bill, and Coolidge, however much a “minimalist,” was no foe of bureaucratic initiative in policymaking. He once said, “The way I transact the cabinet business is to leave to the head of department the conduct of his own business.”\(^{399}\) With energetic administrators like Hoover and Mellon, that left plenty of room to maneuver.

The conservative interval of the 1920s was thus hardly a retreat from the presidency of the Progressive Era. Indeed, it saw the further institutionalization of its powers. Conservatives found the new managerialism congenial to running the boom economy, and while they repudiated many of progressivism’s aims, this did not include abandoning a


\(^{397}\) JOHN W. DEAN, WARREN G. HARDING (THE AMERICAN PRESIDENTS SERIES) 79 (2004).


\(^{399}\) Peter Clements, “Silent Cal,” 46 HIST. REV. 15, 16 (Sept. 2003).
presidential script of public persuasion, policy leadership, and presidential administration. It was a presidency amply predicted by the progressive theory of presidential representation. 400 From this new performance of the office, there was no going back.

V. MYERS REVISITED

James Bryce’s first edition of The American Commonwealth in 1888 had claimed that the presidency had not grown “in dignity or power” since Andrew Jackson. 401 By the publication of the third edition, in 1910, the presidencies of Roosevelt, Taft, and Wilson had forced him to change his mind. 402 Woodrow Wilson had been right, it turned out, when he wrote in 1907 that nothing in the Constitution would stop a bold leader occupying the office from being “as big a man as he can.” 403

Still, the new Progressive presidency was not yet law. The Budget and Accounting Act of 1921 embodied aspects of the new vision but was not, on its own, a legal reconstruction of the office. When Wilson relinquished the presidential seat to Harding, he left him a position loaded with new expectations. But the formal doctrine that bound the executive was largely the same that had preceded the Progressive transformation.

This was the backdrop against which Myers transformed the law of the presidency. This Part explains how Myers changed the law and what those changes mean for law and scholarship today.

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

Taft eventually returned to power, as Chief Justice, where he had the opportunity to write his new theory of the presidency into law. This, of course, was Myers. Section B shows how Myers translated the Progressive presidency Taft had helped shape while in office and theorized after he left into a constitutional rule.

Section C explains how our contextualized re-reading of Myers undercuts the Supreme Court’s current use of the case. To put it bluntly: Myers does not stand for the expansive vision of presidential power the Court claims it does.

Our story has consequences for more than court watchers. The Court’s misunderstanding of Myers is emblematic of a broader ignorance about the growth of the American presidency—one Taft contributed to with his misleading opinion. Section D elaborates how our new account of

400 ARNOLD, REMAKING at 204.
401 BRYCE vol. 1 of 1888 ed. at 84.
402 BRYCE vol. 1 of 1924 ed. at 66.
403 WOODROW WILSON, CONSTITUTIONAL GOVERNMENT, supra n. XX, at 70.
Myers contributes to scholarly debates about law and the presidency. To understand the law of the executive, we show, scholars must attend to institutional transformations and not merely changes in formal legal doctrine.

A. The House That Taft Built

The received wisdom on William Howard Taft has emphasized the cramped legalism of his thinking that produced a cramped, legalistic presidency. Some of this is the result of contrast: Teddy’s Roosevelt’s outsized personality overshadowed Taft’s reticence and moderately conservative politics, while the astonishing productivity of the Wilson administration made Taft’s output look small and inconsequential.  

Roosevelt also helped, rather cruelly, to popularize this view. While on the 1912 campaign trail, the Progressive Party candidate called his old friend a reactionary “fathead” who was “useless to the people.” In 1913, fresh off defeat, Roosevelt published a bestselling autobiography which skewered Taft’s leadership in scarcely veiled terms. Presidential greatness, wrote Roosevelt, was hardly compatible with “the negative merit of keeping [one’s] talents undamaged in a napkin.” Taft, who had taken a post as Kent Professor of Law and Legal History at Yale Law School, countered with his 1916 monograph The President and his Powers, whose single most famous idea is its rejection of “an undefined residuum of power [the President] can exercise because it seems to him to be in the public interest.”

After the rancor of the campaign, the two men would not reconcile until just before Roosevelt’s sudden death in 1919.

Grievous as it was for the two men, the Taft-Roosevelt schism has been a disaster for presidential theory, a red herring that obscures the many ways in which the two men’s views were quite similar. Taft, the story goes, insisted that the President had no power except what the Constitution specifically granted him. Roosevelt, by contrast, defended the opposite view: the President’s powers were only limited by “specific restrictions and prohibitions appearing in the Constitution” or imposed by Congress under its constitutional powers.

404 Gould, supra n. XX at xi.
406 Theodore Roosevelt, supra n. 279 at 211.
408 Anderson, supra n. XX at 289, 291 (arguing that, because the two men were reacting to each other, the alleged differences between the theories “should be read skeptically,” and that “the similarities between the two conceptions are actually greater than the apparent differences”).
409 C.f. Taft, supra n. 353 at 104 (“The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.”) with Roosevelt, supra n. 279 at 211.
When we consider what Taft believed the Constitution empowered the president to do, we see that his “legalistic” presidency was gargantuan, indeed even Rooseveltian. As the political scientist Stephen Skowronek put it, Taft’s presidency may have “trimm[ed] the abrasive edges off the stewardship theory, but it did not imply a return to the governmental order of the late nineteenth century.” 410 Taft insisted that the prerogatives of Congress, judiciary, and presidency had to be respected, protected, and promoted within their proper sphere. But he never rejected executive prerogative or believed that the President should refrain from using administration to carry out the tasks the public expected of him. 411

Ironically, one of the drivers of Taft’s expansive idea of the presidency was an obsession with the survival and independence of the judiciary. The macroeconomic changes wrought by industrialization in the nineteenth century had manifested as new political demands—first among credit-strapped farmers, then disgruntled laborers, then well-heeled city residents—for government intervention into the economy. But time and again, turn-of-the-century courts, clinging to natural law ideas about the inalienability of property, struck down progressive legislation. 412 By the time the Supreme Court handed down its notorious Lochner opinion in 1905 striking down a New York labor law, anti-judiciary sentiment had reached a fever pitch. Alarmed, Taft would spend years trying to defend the courts from these charges. 413 As president, he once did so by vetoing populist Arizona’s 1913 draft constitution, which he deemed “destructive of the independence of judges.” 414 Once he left office, Taft turned to the lecture circuit to set the record straight against progressive insurgents and defend a judiciary bound by law.

The argumentative strategy Taft developed in these lectures and writings underscored his commitment to the Progressive presidency. Taft argued that, under a proper understanding of the U.S. constitution, the President must be responsive to the electorate in order that the judiciary should be freed to take countermajoritarian positions required of it by law. During one March 1912 speech before the Ohio Bar Association, Taft admitted that, regrettably, courts had on occasion invalidated “useful

410 SKOWRONEK, BUILDING, supra n. XX, at 173-74.
411 Id. at 173. Skowronek characterizes Roosevelt as a “Hamiltonian”; Taft as a “neo-Madisonian.”
413 See, e.g., William Howard Taft, Recent Criticism of the Judiciary (Address delivered before the American Bar Association Meeting, Detroit, Michigan, August 28, 1895); ———, “The Judiciary and Progress,” (Address delivered on March 8, 1912, Toledo, Ohio), ———, POPULAR GOVERNMENT (1913), ———, LIBERTY UNDER LAW (1922).
But it was a “complete misunderstanding of our form of government” to think that judges were bound to follow the will of the majority in deciding legal questions. The judge’s task was to protect rights (including, importantly, property rights), not to follow public opinion. If the public wanted accountability, they should look elsewhere. Where, exactly? Taft’s answer was clear: not Congress, but the Presidency, who was “elected by his constituents” to carry out “discretionary policy”: “In that sense he represents the majority of the electorate.”

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

 Needless to say, Taft stood at a great remove from this view of the Constitution. Taft consistently described the President as a leader stamped with a mandate to act, independently of Congress, by his supporters. The President’s authority to take discretionary action derived from his status as a leader of public opinion—and not even the opinion of Americans at large, according to his Ohio speech, but those of “his constituents,” the followers of his political party.

416 Id. at 5.
417 Id. at 4.
418 The President and His Powers, at 104-105 (describing his accord with strict constructions of the president’s implied powers).
419 BAILEY, supra n. XX at 9-10; c.f. Skowronek supra n. XX at 2077.
420 William Henry Harrison, Inaugural Address, March 4, 1841. Another famous episode in the development of Whig theory is Senator Henry Clay’s message to the Senate following Andrew Jackson’s infamous Bank Veto. Clay argued that the veto was a tool for filtering out unconstitutional legislation merely; for a president to use it on partisan grounds of policy disagreement was “totally irreconcilable” with the genius of republican government. 8 Cong. Deb. 1255 (1832).
421 Several political scientists have established that modern-day presidents act in “particularistic” ways, targeting co-partisans, not the whole nation. B. DAN WOOD, THE MYTH OF PRESIDENTIAL REPRESENTATION (2009), DOUGLAS L. KIRNER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY (2015).
This claim to leadership dovetailed with Taft’s commitment to presidential administration. Like the conservative presidential administrations of the 1920s, Taft mistrusted majorities clamoring for wealth redistribution, but was a staunch believer in the power of government to render the American economy rational and manageable, and in the President’s power to help achieve the goals of “economy and efficiency” by streamlining the federal administrative state.422

The same views also animated Taft’s long-standing conviction that the Constitution should be amended to give the President the power to prepare a budget.423 Taft’s interest in the budget reflected more than a concern with housekeeping. He grasped how, with such a power, the president could dictate the policy agenda. During one discussion of British parliamentarism and the American separation of powers, Taft admitted that it would have been “better” had the Framers thought to “bring the Executive a little closer in touch with Congress” in budgetary matters and drafting and debating legislation generally.424 However, argued Taft in a Wilsonian vein, once party ideology unified the political branches in a common enterprise American government had nothing to envy the British.425 After all, the President’s powers were “not rigidly limited” by the Constitution, but ebbed and flowed according to practice and construction.426

Out of office Taft became only more committed to presidential leadership, particularly as he reflected on the motives of legislators. As president, he had suffered frequent indignities at the hands of his Republican Congress. In 1908, he broke from party orthodoxy to advocate for a graduated federal income tax because the Republicans’ pending tariff bill threatened to leave irresponsibly large budget deficits. The political wounds Taft suffered from taking this stand help make sense of his self-serving observation in The President and his Powers that only the President possessed the perspective to save the nation from a Congress “unlimited in its extravagance, due to the selfishness of the different congressional constituencies.” Taft would devote several pages of the book to recounting Congressional bad behavior.427

422 On the “managerial” impulse in the 1920s, see Leuchtenburg, supra n. XX. This was not only the formal title of the committee Taft convened in 1910 to reform administration of the government, but also the name of his final address to Congress in April 1912 calling for granting the President enhanced power to recommend a federal budget. Taft, “Message of the President of the United States on economy and efficiency in the government service” (Address to Joint Session of Congress, April 4, 1912).

423 On this proposal, Congress could accept the proposed budget or revise it downwards, but not increase it! See id. at 16.

424 Id. at 4-5.

425 Id. at 8, 11-12, 31-32.

426 Taft, Our President and His Powers, supra n. XX, at 4.

427 Taft, The President and His Powers, supra n. XX, at 16, 22, 26-27.
B. *Myers* as the Statement of Taft’s Progressive Presidentialism

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

To begin: in reconstructing the arguments of the First Congress in favor of presidential removal, Taft rendered them as sustained by a core commitment to the idea of presidential responsibility. The Constitution’s division of the government into three branches with separate powers was important because it gave the president alone the duty to “take care that the laws be faithfully executed.”\(^{428}\) This in turn implied a removal power, since otherwise the president would be forced to rely on “those for whom he can not continue to be responsible.”\(^{429}\) Besides, Taft reasoned, if Congress had the power to condition presidential removal, then it could interfere in “the operation of the great independent executive branch of government.”\(^{430}\) Congress would be able to “fasten[] upon [the president] . . . men who by their inefficient service under him, by their lack of loyalty to the service or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible.”\(^{431}\) Skeptics might argue that the Senate already had the power to control the approval of some executive officers and so control the president’s staff.\(^{432}\) But there was a difference between picking officers ex-ante and retaining them ex-post.\(^{433}\) The president, Taft wrote (echoing the bureaucratic managerialism of his age), would be so much better informed than the Senate about the actual performance of an officer and his ability to do his job.\(^{434}\) Presidential removal was a simple functional necessity for him to fulfill his responsibilities.\(^{435}\)

There was something a little monarchic about all this, as Taft recognized. “In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers.”\(^{436}\) Taft believed that the framers of the Constitution included such removal power in their conception of executive power too.\(^{437}\) But this did not make the

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\(^{428}\) *Myers*, 272 U.S. at 117, quoting Art. II.

\(^{429}\) Id. at 117.

\(^{430}\) Id. at 127.

\(^{431}\) Id. at 131.

\(^{432}\) See id. at 121.

\(^{433}\) See id.

\(^{434}\) See id. at 122.

\(^{435}\) See id. at 132 (“Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal.”)

\(^{436}\) Id. at 118.

\(^{437}\) See id.
Framers, Taft, or the Court into monarchists. The crucial difference was the President’s representativeness. “In the discussions had before this Court,” Taft explained, there was a “fundamental misconception,” that the House and Senate were the people’s “only defender in Government” and that the president was somehow their enemy, a would-be tyrant waiting to abuse his powers. This was wrong. The President’s attitude towards the people was no different from the Congress’s, since “[t]he President is a representative of the people just as the members of the Senate and House are.” In fact, “at some times, on some subjects” the President was “rather more representative” of the people than the Congress, because “the President [was] elected by all the people” while “the Legislature[’s] constituencies are local and not countrywide.”

As the national representative, the president was in charge of national issues. “The extent of the political responsibility thrust upon the president” was vast. His concerns ranged from dealing with foreign government to overseeing the mails to protecting the public. Sometimes he was in charge of running the government wholesale, particularly in the age of American racial empire, as Taft knew from experience. “The possible extent of the field of the President’s political executive power may be judged by the fact that quasi-civil governments of Cuba, Porto Rico and the Philippines, in the silence of Congress, had to be carried on for several years solely under his direction as commander in chief.” “In all such cases,” Taft went on, “the discretion to be exercised is that of the President in determining the national public interest.” He was uniquely in charge of realizing the nation’s policy.

To do that, he needed control over other government actors. Critics might object that the government’s staffers were “bound by the statutory law and are not [the President’s] servants to do his will.” But to Taft they missed the point. Government servants engaged in all manner of actions. And sometimes, particularly when engaged in some of their “highest and most important duties”—what the Court had in the past called “political” duties—they were simply acting as stand-ins for the president. In those cases, the government’s staffers were “exercising not their own [discretion] but [the president’s],” they were simply “act[ing] for him.” It was the President who was the representative of the people and had a

438 Id.
439 Id. at 123.
440 Id.
441 Id.
442 Id. at 133.
443 See id. at 133-34.
444 Id. at 134.
445 Id.
446 Id. at 132.
447 Id.
unique charge in national affairs. It was the President who had the duty to take care that the laws be faithfully executed and held the executive power. The other actors in the executive branch were ultimately his assistants and subordinates, there to help him realize his duty and exercise his power. 448 “Each head of a department is and must be the President’s alter ego” on the most important matters of law and policy. 449 They were an extension of the president himself; the president needed to be able to remove them when he no longer believed they represented him accurately.

To these arguments from presidential representation and executive policy-making, Taft added a functional corollary. It was not enough for the president to have power in the abstract. He needed to be able to use it. Without a removal power over his officers, the Congress could impede “that unity and co-ordination in executive administration” which was “essential to effective action.” 450 It was simply not possible to distinguish between those moments when executive branch actors were exercising the president’s discretion, wherein they should be absolutely accountable to him, and those when they were discharging their ordinary duties. 451 For pragmatic reasons alone, then, the president should have removal power over all executive officers all the time.

This, Taft believed, was in keeping with the president’s responsibility for running an efficient government. He asserted that the president enjoyed “general administrative control” by virtue of the vesting of executive power in himself alone. 452 Pursuant to that administrative authority, the president could and should invigilate the federal government’s staff, to ensure that they did not act negligently or inefficiently. 453 He could also “supervise and guide their construction of the statutes under which they act” in the interest of ensuring the “unitary and uniform execution of the laws.” 454 The president should judge his subordinates’ judgment, evaluate their ability, take account of their “energy” and capacity for motivating their workforce. 455 To Taft’s eyes, the president was already the general manager of the federal government. To give him removal authority over executive actors was a natural extension of the powers and responsibilities resting on him anyway.

These, then, were the “merits” grounds of the Myers decision. 456 The President enjoyed “general administrative control of those executing the laws,” which included the power of removal, pursuant to the vesting

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448 See id. at 117.
449 Id. at 133.
450 Id. at 134.
451 See id.
452 Id. at 135.
453 See id.
454 Id.
455 Id.
456 Id. at 163.
clause of Article II.\textsuperscript{457} That power enabled him to realize “his obligation to take care that the laws be faithfully executed.”\textsuperscript{458} To that end, Congress needed to be kept away from removal, since otherwise it might interfere with the President’s ability to fulfill his responsibilities and undermine the Constitution’s scheme.\textsuperscript{459} According to that vision, the president was the great national spokesman, uniquely charged with realizing the national interest. He was the people’s representative, the state’s chief policy-maker, and the government’s administrator, all rolled into one.

We see the full reach of the Progressive nature of this vision in the limits and carve-outs that Taft built into it. Detractors of presidential removal worried that a constitutional right to executive removal would “open the door to a reintroduction of the spoils system.”\textsuperscript{460} Taft recognized that the defeat of the spoils system and creation of the civil service were some of the great accomplishments of modern government.\textsuperscript{461} He had no desire to reverse them (or be associated in any way with their recent reintroduction at Wilson’s hands). He thus explained that, as long as the civil service remained confined to inferior officers, “[t]he independent power of removal by the President alone . . . works no practical interference.”\textsuperscript{462} In fact, the merit system could even be extended.\textsuperscript{463} As long as Congress vested the appointment of inferior officers in the heads of departments, rather than the president, it could control the conditions of their appointment and removal, under Perkins.\textsuperscript{464}

In the same spirit, a presidential removal power did not, for Taft, endanger adjudicative independence within administrative agencies. (Note, here, Taft’s twinned interest in presidential representation and judicial insulation.) Taft stated baldly that whether administrative judges or members of executive tribunals could be removed by the President alone “present[s] considerations different from those which apply in the removal of executive officers”; he declined to address the question at all.\textsuperscript{465} He did suggest, though, that such officers could enjoy greater protection without raising constitutional problems.\textsuperscript{466} In these cases, Taft thought the

\begin{footnotesize}
\begin{enumerate}
\item[457] Id. at 164.
\item[458] Id.
\item[459] See id.
\item[460] Id. at 173.
\item[461] See id.
\item[462] Id.
\item[463] See id.
\item[464] See id. at 162.
\item[465] Id. at 158.
\item[466] Officers who might enjoy properly enjoy protection included those who exercised “duties of a quasi-judicial character,” members of “executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control,” or those with duties “so peculiarly and specifically committed to the discretion . . . as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance.” Id. at 135.
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President might be able to remove them after the fact, if he thought they had not been “intelligent[]} or wise[[]” in the exercise of their discretion.\textsuperscript{467} But they would be free to act in the moment pursuant to law, free from executive interference.

Taft’s vision of the executive was thus limited in its way. His conception of executive power did not make the president into a king, although he acknowledged some parallels. But in the end his was a democratic executive. As the representative of the people, he would act to realize the nation’s interests, as he had already done in particular in U.S. imperial policy. And as the leader of the people’s government, he would run it efficiently and efficaciously. The removal power would be a tool for him to perform this presidential role. In Taft’s hands, it would not threaten the great accomplishment of Progressive state building. Presidential removal would not upend the civil service nor undermine Article I judges.

More generally, Taft saw presidential removal as compatible with the emerging administrative state. Both served the same purpose: efficient and effective presidential government. Removal was a tool of administration, which would help the president do his job under the Constitution. Whether this was the First Congress’s vision as Taft claimed is unclear. It was certainly not the vision embodied in the removal jurisprudence from the years before Myers. It did, however, belong to Taft—and, with him, to the new Progressive conception of the office of the President, which he had helped create.

C. Assessing the Contemporary Court’s use of Myers

This is not how the current Supreme Court has read Myers, however. In a series of influential opinions constructing the unitary executive, today’s Court has cited it for the following case-defining propositions\textsuperscript{468}:

1. The President’s Article II mandate to “faithfully execut[e]” the law includes a removal power that is indefeasible, save in certain narrow circumstances.\textsuperscript{469}

\textsuperscript{467} Id.

\textsuperscript{468} See, citing Myers, Free Enterprise Fund, supra n. 3 at 1, 11, 28, Seila Law, supra n. 1 at 2, 12, 19, 26, Collins v. Yellen, supra n. 3, at 27.

\textsuperscript{469} Free Enterprise Fund, 561 U.S. at 1 (“Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary.”) The opinion also cited Myers for the proposition that the Constitution confers upon the president “the general administrative control of those executing the laws” (11); and that the “general default rule” is that removal is incident to the power of appointment (28).
2. Congress oversteps its constitutional powers insofar as it tries to insulate executive officers from presidential control by law, save under narrow circumstances.\footnote{Collins v. Yellen, 594 U.S. at 31 ("[A]s we explained last Term, the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer" (citing Seila Law, 591 U.S., at 26)).}

3. Dividing the executive power up among officers who are not politically accountable threatens the President’s ability to carry out his duties.\footnote{Seila Law, 591 U.S. at 23 (the Founders counterbalanced unitary executive power by making the President “the most democratic and politically accountable official in Government”).}

4. The President has a unique “national” vantage point that justifies the removal power and which makes him in some way “more representative” of the People than Congress.\footnote{Collins v. Yellen, 594 U.S. at 27 (the removal power helps to ensure that executive branch subordinates “serve the people effectively and in accordance with the policies that the people presumably elected the President to promote”).}

5. The President is elected by the people to get things done, that is, to achieve a certain set of policies.\footnote{Seila Law, 591 U.S. at 2, 12 ("The President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision Myers" and describing Taft’s Myers opinion as an authoritative treatment of “the First Congress’s determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point.”)}

6. The foregoing conclusions are a necessary inference from the Constitution, the Framers’ writings, the Decision of the First Congress of 1789, and the landmark opinion Marbury v. Madison.\footnote{Strauss, supra n. XX at 490.}

Our recovery of Myers, reading the case in its proper context, casts these propositions “into constitutional shadow."\footnote{See Chabot, supra n. 57 and 58, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 34-35, 81-82 (2012).} Myers does not establish all six. And insofar as it stands for any of them, it does so as a judicial construction by a Supreme Court under the sway of a pro-presidentialist political philosophy rather than a logical inference from text and history.

To begin with, however colorable as an interpretation of Article II, Claims 1-3 are quite weak empirically. As a veritable pile of scholarship has established, American government has never been without government actors insulated from direct presidential control; indeed, the earliest American governments featured a plethora of them.\footnote{Strauss, supra n. XX at 490.} And, as Part III reviewed, the Supreme Court tolerated countless such arrangements, even where these encoded explicit removal limits in statute.\footnote{See Part II, supra.}

Just as important, Myers offers no support for Claims 1-3 either. Taft recognized that Congress could insulate government actors from...
presidential removal, particularly in the civil service. And he took it as obvious that Congress could prescribe the duties of executive branch officers in such a way as to deprive the President of meaningful control. Taft believed that the President could fire a subordinate whose judgment he no longer trusted. Still, even then, the President could not properly control that subordinate if the statute vested discretion in him, rather than in the President.

This was not because *Myers* subscribed to the Congress-first vision of governance dominant in the nineteenth century. As we saw, Taft and the Progressive Presidents rejected the spoilsman’s state and believed firmly in the notion of the president’s superior representation and leadership (claims 4 and 5), respectively. But precisely for this reason, progressive presidentialists, like Taft himself, were committed to administrative independence (contrary to claim 2). If the president was to get the work of the people done (claim 5), he would need a professional civil service, immune from the dangers of political interference.

The Court’s reliance on *Myers* for Claim 6—the originalist unitary president—is perhaps the crowning irony in a story so full of them already. As strong as the progressives’ president was, he fell well short of the unitary executive, with its audacious sweep and supposed textual bearings. We have already spotted the discrepancies: Taft’s canny (if questionable) use of early republic sources did not make *Myers* an originalist opinion; at most Taft used them to make a point about constitutional acquiescence by the political branches.477

Perhaps more problematically for originalism unitarism, *Myers* relied on bad history. Most contemporary scholars agree that Taft’s account of the Decision of 1789 is tendentious and historically inaccurate, glossing over irreducible ambiguities.478 But even from the moment Taft’s opinion appeared, scholars and jurists attacked its historical arguments.479

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477 Id. at 136. And see explaining this sort of precedential mode of interpretative authority, id. at 170-71 (“In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend ... also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded”). In other words, political practice—not just original meaning—was a source of authority on constitutional interpretation.


constitutioonal scholar Edward Corwin was particularly savage: “[W]hat a judge cannot prove he can still decide. Viewed purely as history, the chief justice’s interpretation of the decision of 1789 is without validity.”

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

The dissenters expressed the same skepticism for Taft’s free-wheeling construction of the bare language of Article II. Brandeis declared, “[A]n uncontrollable power of removal in the Chief Executive is not a doctrine to be learned in American governments.” McReynolds concluded: “I think the supposed necessity and theory of government are only vapors.” Justice Holmes referred to the same readings of the text as “spider’s webs inadequate to control the dominant facts.” The American Law Review pointed out, “[I]mplications are quite commonly intellectual devices for making plugs fit holes.” This was quite similar to Chief Justice Rehnquist’s observation, in Morrison v. Olson, that to smuggle an indefeasible removal power into the bare clauses of Article II or the silences of the Philadelphia Convention was “more than the text would bear.”

The point is this: not even in its own time did others believe that Taft’s view of the presidency could be sustained purely as a creation of

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480 Corwin also questioned Taft’s treatment of past jurisprudence: “[T]he chief justice’s opinion in the case at bar finds surprisingly little support in anything that the court itself has previously said with regard to the power of removal.” See supra n. 39 at 23, 38. He further deemed Myers’ reliance on Chief Justice John Marshall’s Life of Washington to overturn Marbury only the oddest of Taft’s many strange moves. See Corwin, supra n. XX at 372-374.

481 Louis Brandeis, in dissent, marshaled dozens of pages of statutes and judgments upholding removal restrictions in defiance of Taft’s “settled and well-understood construction.” Brandeis also demonstrated that removal restrictions preceded Reconstruction by 30 years, despite Taft’s assertion that such restrictions stemmed from the clashes between President Johnson and his Congress and represented a constitutional anomaly. Id. at 240-294.

482 Id. at 122.
483 Id. at 192.
484 Id. at 292 (citation omitted).
485 272 U.S. at 192.
486 272 U.S., at 177 (HOLMES, J., dissenting).
488 487 U.S. at 690, n. 21.
1789. And there is evidence that Taft himself perhaps knew that. While still in the throes of crafting *Myers*, he wrote in a letter to a friend:

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

The contemporaneity of *Myers* appears right on its surface, when you know what to look for. Taft’s retelling of Reconstruction history fairly seethes over with late nineteenth-century contempt for Congress. Siding with Andrew Johnson against the Radical Republicans, Taft accused the legislative bloc of seeking to paralyze “the executive arm and destroy the principle of executive responsibility and separation of the powers, sought for by the framers of our Government.” This was not good history. But it was a fairly accurate paraphrase of the then-dominant Dunning School of historiography, as Niko Bowie and Daphna Renan have powerfully shown. For the Dunning school, Reconstruction was not a moment of redemption for a slaveholding America, but a cautionary tale in which a fanatical Congress “unconstitutionally paralyzed the President in pursuit of an unwise and unjust policy of racial equality.” On this view, Taft’s invocation of an “original” constitutional model of three separated branches forbidden from intermingling is a smokescreen designed to

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489 Taft to Thomas W. Shelton, quoted in Post, 186-87. *And see Myers*, 272 U.S., at 65 (citing President Taft’s message of June 27, 1912, transmitting the recommendations of the Commission of Economy and Efficiency, that checks be imposed on the “usurpation of power by the executive departments”).

490 272 U.S., at 167. Meanwhile, Taft’s own Solicitor General, James M. Beck, described Congress’s efforts to stop Andrew Johnson from dismantling Reconstruction as “one of the most discreditable chapters” in American history, Argument of James M. Beck in *Myers*, at 95.

491 Renan & Bowie, supra n. XX at 2049.

492 Id. at 2020.
prevent a repeat of the Johnson affair. His judicialization of a longstanding political question reflected, not just naked judicial activism, but also his political conservatism. Congress might act rashly and unwisely in support of extreme policy aims, but the President would be more circumspect.

To advance his project, Taft appealed to history. This, of course, is exactly what today’s Supreme Court does. 

Myers thus stands a successful example of how to smuggle a contemporary conservative legal project into the language of historical analysis. But it is not, actually, a historical authority at all.

D. The Law of the President in Historical Time

So what? Despite formal doctrine that claims to rely ever more on history, the current court has shown a remarkable disregard for historical accuracy (or even factual accuracy). Someday, perhaps, judges will be interested in what Myers really said. When that day comes, our Article will have implications for doctrine.

Until then, this Article’s main contributions are scholarly. Getting the history right matters most for our understanding of the executive. This in turn shapes how we think about the law of the presidency and so how we might want to think about reforming it.

Studies of constitutional law in general, and the law of the executive in particular, have often remarked on the strange flip-flopping in the law between formalist and functionalist approaches. We agree with Bowie and Renan that Myers is alive today as the main case-law authority for a separation-of-powers formalism quick to strike down legislation for violating implied legal limits on Congress’s power to structure the executive branch. Such formalism tends to surface on the Supreme Court in cyclical fashion through the decades, coinciding with certain very clear ideological postulates.

Explaining the rise of formalism on purely internal, doctrinal terms has never succeeded, though. Our account offers another

497 Today’s Court adopts Taft’s version of the history of the removal power almost in toto, including Taft’s treatment of the Reconstruction Republican Congress as an overzealous and meddlesome body in adopting a removal statute “without discussion” during the heat of the Civil War.” See Seila Law, 591 U.S., at 19f.
498 See Chemerinsky, supra n. 505 at 1111, and Strauss, supra n. 505 at 526.
explanatory variable to the story of formalism ascendant: the evolution of the office of the presidency itself.

This attention to institutional development makes the unitary executive a constitutional paradox. Today, most unitarians are committed originalists. But far from endorsing presidential leadership, the Framers feared what we might call “issue arousal” today, and they separated executive and legislative power in hopes that the president would provide a “counterweight to impulsive majorities” likely to channel their energies through Congress, the most popular branch.499

Taft agreed with Hamilton that the executive could be a conservative counterweight to rash, ill-conceived policy, by supplying government with stability, unity, and competence. Taft believed, for instance, that the president should have been given a six- or seven-year term with no reelection so he could discharge his duties with “greater courage and independence” and maintain “the efficiency of administration” free from the distracting effects of campaigning.500 Taft’s long-standing support for the President being authorized to draft the federal budget was also on the grounds that his national “method of election and range of duties” gave him the vision and independence to resist the pull of irresponsible spending, unlike short-sighted legislators pillaging the federal treasury for pork to benefit their local constituencies.501

But Taft was a modern, living with a modern office, in contrast to Hamilton. The Hamiltonian executive may have been unitary, but it was only an executive, not a lawmaker by virtue of some claim to superior representativity.502 As we saw, Myers saw the President as the leader of the nation, elected to carry out a national policy agenda. In postulating that faithful execution of the law entitles the President to “determin[e] the national public interest” and direct his subordinates to carry it out, Myers cloaked the constitutional presidency with a will of its own, fatefully transforming a duty imposed by the text into a power vested by virtue of representing popular opinion—a fact that dissenters, then and today, have not missed.503

This transformation, as we saw, happened in practice before it happened in law. The law did not evolve according to its own logic. Rather, it was self-consciously pushed in order to accommodate and further intellectual and political developments in the office of the presidency. The law and the office were never fully independent, but they changed according to different imperatives and on different timelines. Little surprise, then,

500 TAFT, THE PRESIDENT, supra, n. XX, at 4.
501 Id. at 5. And see generally Dearborn, supra n. 346.
502 See supra, Part 1B, esp. n. 82-84.
503 Myers, 272 U.S., at 52, 177, 184, 292, and Seila Law, 591 U.S., at 8 (KAGAN, J., dissenting) (noting that the Take Care clause “speaks of duty, not power”).
that the modern presidency combines democratic legitimacy and textual authority in an often unwieldy admixture.\textsuperscript{504}

\textit{Myers} was not simply reactive. It was also productive. The law of the executive affects the continuing development of the office of the president. It makes some things easier and forecloses others.\textsuperscript{505} \textit{Myers} is no different. And the developments it set in motion remain ongoing.

Consider, in closing, its discussion of the civil service. As we have already explained, Taft saw the civil service as an essential component of the modern state, a potential ally to the Progressive Presidency, and in any case not threatened by his opinion in \textit{Myers}. But judicial opinions have a power beyond their author’s ability to control. If “effective enforcement of the law” is a value worthy of constitutional protection, and if effectiveness means “under the control of a single individual,” then why tolerate a civil service (or Article I judges, or any independent officers at all)?\textsuperscript{506}

In an internal memorandum to Taft during the drafting process, a young Harlan Stone had insisted that the functional argument be taken to its logical conclusion and the president accorded unrestricted removal power of all executive subordinates, irrespective of their function or who had appointed them.\textsuperscript{507} Taft pragmatically refused to “intimate that the Civil Service was constitutionally infirm” in any way, and he became angry at his dissenting colleague, McReynolds, for suggesting that the opinion contained any suggestion to the contrary.\textsuperscript{508}

But considering how strongly McReynolds pressed Taft on this point, \textit{Myers}’ failure to specify the conditions under which Congress could lawfully trench upon the President’s removal authority left the decisional rationale “curiously suspended and unsatisfying.”\textsuperscript{509} A few months after the decision came down, \textit{The Nation} commented that it would make it “impossible for Congress” to give any fixed tenure to “quasi-judicial offices,” and that “the fear of removal will henceforth operate to bow hitherto independent officials to the will of the President or of his party speaking through him.”\textsuperscript{510}

Nearly 100 years later, the constitutional rule adumbrated in \textit{Myers} has taken on a life of its own. It has swallowed up Chief Justice Taft’s carefully traced-out exceptions, as Justice Stone (approvingly) and \textit{The Nation} (critically) correctly deduced it would. Writing in 2021 to dismantle tenure protections for the head of a regulatory agency, the Court

\textsuperscript{504} See B\textsc{a}iley, supra n. XX at 3.
\textsuperscript{505} On law’s contributions to path dependence, see XX.
\textsuperscript{506} 272 U.S., at 132.
\textsuperscript{507} Post, supra n. XX at 176, 178.
\textsuperscript{508} Id. at 183.
\textsuperscript{509} Id.
\textsuperscript{510} Quoted in id. at 186.
concluded that the Constitution “prohibits even ‘modest restrictions’ on the President’s power to remove the head of an agency with a single top officer,” regardless of their function or the manner of their appointment. This sweeping conclusion reached back, for support, to its own holding a year prior, in Seila Law, and, of course, farther back, to Myers itself.\(^5\)

It is not, we have argued, a correct reading of Myers. But Myers left itself open to this interpretation. More: it constitutionalized a strong president, that would, predictably, continue to develop in strength. The law of the president set in motion institutional developments, which have now come back to transform the law. Taft would have been scandalized at what the Court has done with his opinion. But modern unitarism has real roots in the Progressive presidency nonetheless.

CONCLUSION

The theory of the unitary executive is the dominant one guiding the separation-of-powers jurisprudence of the Roberts Court. This theory holds that a faithful reading of Article II of the U.S. Constitution requires an executive branch insulated from most forms of congressional oversight and interference.\(^6\) The theory has been put into practice in a series of recent cases invalidating statutes attempting to define administrative arrangements; insulate civil servants and technocratic expertise from presidential control; and, indeed, check the President himself.

These recent cases have displayed an overwhelming reliance on a single case for their originalist theory of the presidency: Myers v. U.S., a 1926 opinion written by William Howard Taft, not coincidentally the only chief justice of the Supreme Court ever to have been president himself. Myers appears to contain the main ingredients of unitarism today: a formalist reading of Article II; abstract derived principles of constitutional “structure” elevated over statutes; and the invalidation of a congressional enactment mandating bureaucratic independence. Most useful for the Court, Myers seems to root its presidentialism in the Founding, making an originalist case for the modern unitary theory.

Yet this reading is mistaken. Myers is not originalist. It does not explicate a long extant tradition of presidential administrative supremacy. In fact, just the opposite: it broke with decades of Supreme Court precedent that had firmly established the primacy of Congress’s statutes in setting the bounds of presidential control of the administrative state. Nor did the Myers opinion rely on originalist methodology. It defended its theory of the executive on functional grounds and dubious arguments from acquiescence.

\(^6\) See supra n. 8.
At the heart of *Myers* was a theory of presidentialism rejected at the Founding and unknown in nineteenth-century case law: the theory of presidential representation. The theory had various roots in American history, but reached its flowering in the Progressive Era. Early in the twentieth century, the Progressive Presidents gave the theory expression as Theodore Roosevelt, William Howard Taft, and Woodrow Wilson explored what the presidency could be. By the time they were done, the president was looked to as the people’s lead policymaker, head government administrator, and privileged champion. The change was durable enough that it survived into the 1920s, reflected in the conservative administrations of the period, as well as Taft’s own post-presidential writings.

With *Myers*, Taft wrote this new theory into law. On its own terms, it imagined a strong executive with far-reaching powers that would have upset the Founders. But even Taft’s executive fell far short of the unitarian fantasy. *Myers* recognized the necessity of the civil service, the propriety of insulating executive branch officials from presidential control, and ultimately Congress’s power to structure the government.

Recovering this more contextually adequate reading of *Myers* has important consequences for doctrine and scholarship today. Doctrinally, it leads us to reject the Supreme Court’s current reliance on *Myers*. The case cannot be made to stand for the Founders’ view of the presidency. Nor does it support presidential control over all executive branch officials. Nor does it aggressively cabin Congressional creativity in the design of the executive branch.

At the level of scholarship, this new reading of *Myers* highlights the necessary imbrication of law and institutional development, especially when it comes to the study of the presidency. *Myers* did not embody the unitary executive. But, by writing the strong Progressive Presidency into law, it helped legitimate the development of stronger executives down the line. Law reflects institutional realities, as Taft did when he wrote *Myers*. And law helps create new institutional relationships, as modern unitarists illustrate when they rely on *Myers* to champion their own, new, presidentialist projects.

Unitarians may think they are simply restoring the Constitution to its original state. But, as our return to the case has showed, *Myers* was practically the opposite of the text-based, pre-political, ahistorical totem that the Roberts Court now venerates. It was a period-specific manifestation of early twentieth-century political thought. In this way, the current conservative Supreme Court is doing just what *Myers* did: writing a new theory of the office of the president into law by reaching back to the Founding to construct a new continuity.

*Myers* is thus the right progenitor for the Court’s unitary project, but not for the reason it thinks. The real story of how the president became
the administrator-in-chief is one of institutional innovation and judge-led legal development. Today, with its unitary revolution, what the Court once made one way, it is trying to make anew. That is the kind of judicial revolution *Myers* itself engaged in. Taft would reject the presidency they are creating. But the judicial project of the Roberts Court? That, he would understand. It was what he himself had done.