VENALITY: A STRANGELY PRACTICAL HISTORY OF UNREMOVABLE OFFICES AND LIMITED EXECUTIVE POWER

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The Roberts Court has asserted that Article II's "executive power" implied an "indefeasible" or unconditional presidential removal power. In response to counterevidence from the Founding era, unitary executive theorists have claimed a "British Backdrop" of a general removal power under the English Crown and European "executive power." These assumptions are incorrect.

This Article shows that many powerful executive officers through the late eighteenth century, especially high English Treasury offices and even "department heads" in the cabinet, were unremovable. A long common law tradition protected many English offices as freehold property rights. Moreover, this Article explains why it was widely understood that monarchs lacked a general removal power and why so many public offices were treated as private property: a surprisingly functional "venality" system. Many powerful officeholders in European monarchies bought their offices, and in return for their investment, their office was protected as property—especially in England. European administration depended upon a flexible mix of removable patronage offices and unremovable offices for sale. Montesquieu rejected "displacement" at will (i.e., removal

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*at pleasure) as a tool of "despotic government," and he endorsed "*vénalité.*" He and many English legal writers defended such limits on removal as a practical system of family investment, incentives, checks, and balances. The sale of offices as property may seem strange and corrupt today, but it was a practical foundation for the nation-state, modern administration, and colonial expansion.*

This history shows how removal was neither necessary nor sufficient for law execution. It offers a consistent explanation for the text of Article II, the Federalist Papers*, and the First Congress's debates and statutes. Thus, unitary theorists have not met their evidentiary burden to support their historical claims about Article II implying removal as a matter of original public meaning.*

[I]n despotic governments . . . the subjects [in office] must be instantaneously placed or displaced by the prince.

—*Montesquieu,* The Spirit of Laws[1]

INTRODUCTION

Some assumptions about the past seem so obvious from our modern experience that Supreme Court Justices and legal scholars think they do not need footnotes and documentary support. One example from the unitary executive theory's series of assumptions is that European monarchs must have had broad removal powers over their officers, and thus "executive power" included a general removal power; ergo the Founders implicitly granted the President an unconditional (i.e., an "indefeasible") power to remove executive officers at will, without cause. In the 2024 presidential immunity decision in *Trump v. United States*, the Roberts Court went even further: the President's removal power and the related power to direct prosecutions, though unwritten, were so "core executive"[2] and so "conclusive and preclusive" that the President must be "absolutely immune" in the exercise of such powers.[3]

It turns out that all of these historical and originalist claims are wrong. European monarchs, and particularly the English Crown, lacked the power to remove many powerful administrative officers due to the now-forgotten conception of offices as protected private property.[4] "Executive power" did not imply a general removal power in England or during the Founding. In fact, some of the most powerful executive offices in England were unremovable, even deep into the eighteenth century.

The history of venality offers a coherent historical explanation for something that today seems implausible: European monarchs and the

1 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 100 (London, J. Nourse & P. Vaillant 1750) (1748) (defending "venality," the sale of office, and protections against removal in constitutional monarchies). See *infra* Part II for more context and analysis.

2 Trump v. United States, 144 S. Ct. 2312, 2352 (2024) (Barrett, J., concurring in part).

3 *Id.* at 2328 (majority opinion) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)).

4 A small number of legal scholars have discussed the sale of office in England, but not in relationship to presidential removal power. *See* James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125, 1144 (2013); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2148 (2019); Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 WM. & MARY L. REV. 1297, 1308–09, 1321 (2021); Douglas W. Allen, *Compatible Incentives and the Purchase of Military Commissions*, 27 J. LEGAL STUD. 45, 53 (1998) (law and economics study of incentives in the English military, not about administration).

English Crown lacked a removal power because they had engaged in long-term bargains with potential officeholders, offering property rights as part of the sale of office. This "venality" system is an overlooked and counterintuitive backstory of how Europeans transformed decentralized feudal societies into modern bureaucracies and global colonial empires. In England, many powerful offices were bought, sold, and strongly protected as "freehold property" similar to land, and this legal regime survived long into the nineteenth century.

This Article builds on recent historical research criticizing the unitary theory on removal.[5] Unitary theorists have responded—correctly—that we had not (yet) identified central English offices exercising significant executive power relevant to late eighteenth-century American Founders.[6] However, new evidence from old English

5 For a concise review of the recent literature on both sides (and a preview of this research), see Jed Handelsman Shugerman, *The Ebb, Flow, and Twilight of Presidential Removal*, ADMIN. & REGUL. L. NEWS, Spring 2024, at 6. *See generally* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. 229 (2023); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022) [hereinafter Chabot, *Interring*]; Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021); Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 J. CONST. L. 323 (2016). *See also* Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023) [hereinafter Shugerman, *Indecisions*]; Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022) [hereinafter Shugerman, *Vesting*]; Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM. L. REV 2085 (2021) [hereinafter Shugerman, *Presidential Removal*]; Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUMANS. 125 (2022) [hereinafter Shugerman, *Removal of Context*].

6 *See* Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 142 n.205 (2020). See Jed Handelsman Shugerman, Freehold Offices vs. 'Despotic Displacement': Why Article II "Executive Power" Did Not Include Removal 67–68 (Feb. 1, 2024) (unpublished manuscript), https://ssrn.com/abstract=4521119 [https://perma.cc/DT4S-WB7E], for more on Wurman's insightful and generally persuasive critique. I agree with Wurman's critique and add that many examples are too late and too remote. Shugerman, *Removal of Context*, *supra* note 5, at 160 n.165; *see also* Birk, *supra* note 5. Manners and Menand's *Three Permissions* was a breakthrough on the prevalence of freehold property in offices in the eighteenth century, but alas, it provided few examples of powerful executive offices and made some incorrect concessions about when this system faded. *See* Manners & Menand, *supra* note 5, at 20 ("In Revolutionary America, the idea of offices as property was roundly rejected."). It turns out that beyond the Revolution and the Founding, the concept of offices as property continued into the First Congress and early republican America, as Chief Justice Marshall's *Marbury* opinion indicates. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803).

histories shows that many high offices, and even "great offices," department heads, and cabinet-level offices were unremovable. By "unremovable," I mean the tenures of these offices included legal protections from being fired or displaced by an executive, including protections of "tenure during good behaviour" that we now associate with Article III judges. English law granted such legal protections to many powerful executive officials long before extending them to judges.

This backstory helps explain why the Constitution was silent on removal: not because "executive" removal was the assumed or implied default rule, but because unremovability was so pervasive, even at the highest reaches of government, and functional flexibility was the rule. Even after the American Revolution, some department heads, cabinet members, and significant offices running Treasury continued to hold their offices as freeholds for life.[7]

Buying and selling offices as property was controversial, but reformers proceeded only incrementally. The English did not prohibit the purchase, solicitation, or sale of office until the Act of 1809,[8] and even after that, strong freehold protection for many offices persisted.[9] In the eighteenth century, major British figures defended the sale of office as necessary and efficient, and they argued that its property system was a check against executive abuses.[10] Related concepts and phrases entered into the Constitution's text ("Office of Profit," three times)[11] and shaped Founding-era debates. Whether or not the Founders approved of or accepted this system, it was part of the Anglo-American legal background, along with the more familiar system of patronage appointments and removal at will. These two models coexisted flexibly in Anglo-America, so that there was no one general rule or default norm about a removal power. In fact, freehold property rights to offices were so prevalent that in some cases, the default rule was nonremovability.[12]

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7 *See infra* Parts III and IV. For the sudden adoption of judicial job security, see Act of Settlement 1701, 12 & 13 Will. 3 c. 2, § 3 (Eng.); 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 480–82, 498–516 (1938).

8 PHILIP HARLING, THE WANING OF 'OLD CORRUPTION': THE POLITICS OF ECONOMICAL REFORM IN BRITAIN, 1779–1846, at 119 (1996).

9 *See generally* DOUGLAS W. ALLEN, THE INSTITUTIONAL REVOLUTION (2012). *See also* Philip Harling, *Rethinking "Old Corruption,"* 147 PAST & PRESENT 127, 130 (1995) (placing the reform movement's more significant progress against the "Old Corruption" system only after 1815, especially in the 1830s–40s).

10 *See infra* Section IV.C.

11 U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 3, cl. 7 ("Office of honor, Trust or Profit"); *id.* art. II, § 1, cl. 2 ("Office of Trust or Profit").

12 *See* Manners & Menand, *supra* note 5, at 5.

Readers understandably might wonder why early modern European administrative history, the British Crown, and English property law would be relevant to interpreting Article II "executive power" in a republican America. First, the major removal precedents have relied on incorrect assumptions about English history. In the foundational unitary executive case, *Myers v. United States*, Chief Justice Taft wrote, "In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both."[13] In *Free Enterprise*, the first decision to revive and extend this theory for an indefeasible removal power, Chief Justice Roberts asserted that the power to oversee executive officers through removal was a "traditional" component of the executive power.[14] Neither *Free Enterprise Fund* nor *Seila Law* provided any historical sources for English removal as an "executive power," nor for their new indefeasibility rule.[15] Judges and prominent scholars, including Dean John Manning[16] and Akhil Amar,[17] recently made similar assumptions.[18] Even critics of the unitary theory sometimes have conceded this point.[19]

Second, as historians and legal scholars have critiqued or disproven unitary theorists' claims about the American Founding,[20] unitary theorists have shifted to "[t]he British Backdrop" of English

13 Myers v. United States, 272 U.S. 52, 118 (1926) (citing *Ex parte* Grossman, 267 U.S. 87, 110 (1925)).

14 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010). *See also* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2205 (2020) (citing *Free Enterprise Fund*, 561 U.S. at 483).

15 *Myers v. United States* discussed indefeasibility in dicta, but the statutory limit in question was a structural requirement for Senate consent to remove. *See Myers*, 272 U.S. at 171.

16 *See* John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 45 n.268 (2014) (noting that the Framers understood the Crown to have "limitless power to remove subordinates"); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2027 (2011) [hereinafter Manning, *Separation*] (referring to "the Crown's unfettered power to remove").

17 *See* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840, at 358 (2021); Shugerman, *Removal of Context*, *supra* note 5, at 126–32, 139–41.

18 *See* PHH Corp. v. CFPB, 881 F.3d 75, 141 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting).

19 *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 265–67 (2009).

20 See *infra* Section I.A for a summary of these critiques.

practices,[21] royal prerogatives,[22] and British colonial administration.[23] This retreat to Europe raises questions about originalist inconsistencies: for example, sometimes monarchy or British colonial practices were the *antimodel* (e.g., British abuses led to the Bill of Rights and limits on office-creation and appointment powers), but unitary theorists look to royalism as the model.

Third, this history of venality and this new evidence of the unremovability of many high English offices (even at the cabinet level) go beyond a counterargument against the unitary theory and fact-checking the Roberts Court. The pervasiveness and significance of venality and unremovable high offices also should change how we think about the development of administrative law. The conventional wisdom is that modern administration emerged as a more politically accountable alternative to the judiciary, but this assumption also turns out to be wrong. We have assumed that administrative law has a default rule of officer accountability, but the administrative state developed from a more complicated and necessary mix of removable patronage offices and of independent unremovable offices. A handful of cabinet-level officers and the privy council served at the pleasure of the king, but some cabinet-level offices were unremovable freeholds in the eighteenth century.[24] Many significant executive offices were patronage at pleasure, and many were bought and sold as unremovable freehold property. One commentator on this research has noted "its relevance to ongoing discussions of bureaucratic accountability."[25]

The unitary theory's reliance on English "executive power" also has a glaring problem, illuminated by new evidence from eighteenth-century law treatises and dictionaries: eighteenth-century English judges were still considered "executive" (for good reason), and thus

21 Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1790 (2023) (claiming that Article II "executive power" referred to "a cluster of powers" held by European executives, including "the common backdrop of at-pleasure removal," the British Crown's default power).

22 *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 340 (2020).

23 *See* Brief of Const. Originalists Edwin Meese III, Steven G. Calabresi, & Garry S. Lawson as *Amici Curiae* in Support of Respondents at 21–27, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22–859) [hereinafter Brief of Const. Originalists].

24 *See infra* Section III.A.

25 Jodi Short, *In Search of the Presidential Removal Power: What Venality (Offices as Property) Tells Us About the Constitutional Dogs That Did Not Bark and the Howling Hounds of Bureaucratic Accountability*, JOTWELL (July 26, 2023), https://adlaw.jotwell.com/in-search-of-the-presidential-removal-power-what-venality-offices-as-property-tells-us-about-the-constitutional-dogs-that-did-not-bark-and-the-howling-hounds-of-bureaucratic-accountability/ [https://perma.cc/T963-5HW9] (reviewing Shugerman, *supra* note 6).

they were major *unremovable* executive officers.[26] This more accurate "British Backdrop" is a problem for the unitary theory of removal.

This Article focuses more on the "British Backdrop" than on documenting how offices as property persisted into nineteenth-century America, but some of the examples are included here: the debates in the First Congress and references to the writ system;[27] Chief Justice Marshall's analysis of William Marbury's "vested" interest in his "irrevocable" nonremovable executive office of a non–Article III five-year term;[28] and the similarities in a surety system of bonds in office.[29]

It may be surprising that "tenure during pleasure" was not a default rule for kings and for offices in the eighteenth century. Freehold property rights to offices may seem aristocratic or even feudal, and we often associate "good cause" protections with modern independent agencies and union contracts. However, canonical sources rejected removal at pleasure as dangerous and defended tenure protections in surprisingly modern terms. In a critical passage overlooked by legal scholars, Montesquieu explained that removal at will was "despotic."[30] He then endorsed the "*vénalité*" of office, the sale of offices that were protected from removal as personal property, as a positive and practical feature of constitutional monarchies.[31] Montesquieu's *The Spirit of Laws* was one of the Founders' most influential sources, and Montesquieu is most associated with the formal separation of powers, the foundation of the unitary executive theory.[32] Yet even Montesquieu

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26 *See infra* Section I.B.

27 *See infra* Section VI.B.

28 *See infra* notes 452–56 and accompanying text.

29 *See infra* Section VI.B.

30 1 MONTESQUIEU, *supra* note 1, at 100. See *infra* Part II for more on Montesquieu.

31 *Compare id. with* 1 BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIX 112 (Geneva, Barillot, & Fils 1748).

32 *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 244–87 (1997); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 199–201 (1985); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 147–48 (2000) [hereinafter Rakove, *Second Amendment*] ("Montesquieu's theory of the separation of powers exerted enormous influence over American thinking, as evidenced by the formulaic restatement of the theory found in the early state constitutions and declarations of rights."); Jack N. Rakove, *James Madison's Political Thought: The Ideas of an Acting Politician*, *in* A COMPANION TO JAMES MADISON AND JAMES MONROE 5 (Stuart Leibiger ed., 2013) [hereinafter Rakove, *James Madison's Political Thought*]; Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 489–90 (1988) [Rakove, *The Madisonian Moment*]; Manning, *Separation*, *supra* note 16, at 1995 n.282 (citing GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 8 (1997)); William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32, 37 (1928) ("The writings of Montesquieu were accepted at Philadelphia as political gospel."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 488 (1989) ("[T]he idea of a government

rejected both the descriptive claim that "executive power" included removal and the normative claim that chief executives should be able to remove officers at will.[33] Blackstone's legal categories of offices reflect this flexible mix: three categories of protected offices (inheritable property, for life, for a term of years), and one of unprotected tenure ("during pleasure only").[34] Blackstone specified only a small number of offices with "during pleasure" tenure.[35]

Some skeptics of my arguments here initially objected that these institutions were too aristocratic, too antirepublican, and too antimodern to be relevant to the Founding. First, the primary question in this historical debate is whether the unitary theorists are even correct about "the British Backdrop" and what the Framers would have known about it.[36] If the unitary theorists are wrong about that historical question, then their "Backdrop" argument is yet another historical error. In fact, their objection would actually concede a core objection to the unitary scholars' reliance on the "British Backdrop": if unitary theorists reject this history of freehold offices because it is "unrepublican" and thus irrelevant, the unitary scholars' reliance on royal prerogatives and royal practice is again inconsistent.

Furthermore, venality's defenders offered remarkably modern functional efficiency arguments and even republican-style independence defenses. Blackstone, Burke, and Bentham also defended venality and tenure protections as a practical system protecting increasingly modern values of expertise, efficiency, and decisional independence—to allow officers to perform their tasks in the public interest, protected from local backlash, from special interests, from the centralized "court" party's corruption, and even from the Crown itself.[37] Venality was an early version of "Internal Separation of Powers."[38] Venality is a surprising story of the market-oriented origins of the modern administrative state.

The legal and administrative backstory of venality also explains the anti-unitary passages by Hamilton and Madison in *Federalist Nos.* 77

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structured by the separation of powers came to the Americans principally through the writings of Montesquieu.").

33 Legal scholarship has overlooked Montesquieu's rejection of "instant displacement" and his defense of unremovability, *cf.* 1 MONTESQUIEU, *supra* note 1, at 100, as well as similar explanations by other legal authorities with significant influence over the Founders. *See infra* Section VI.A (on Coke and Pufendorf).

34 2 WILLIAM BLACKSTONE, COMMENTARIES *20, *36–37.

35 *See* Shugerman, *Removal of Context*, *supra* note 5, at 128.

36 *See supra* text accompanying notes 20–23.

37 *See infra* Section IV.C (on Blackstone, Burke, and Bentham).

38 *Cf.* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (a modern approach to internal separation of powers).

and *39*.[39] It also helps explain the Opinions Clause's department heads and their implicit independence.[40] The First Congress not only rejected presidential removal,[41] but its debates also reflected background assumptions about offices as property,[42] and it passed a series of statutes that functioned similarly to buying offices: "sureties," as officers putting up bonds or financial commitments.[43] This Article builds on Nicholas Parrillo's *Against the Profit Motive*, which explains that English and American officers were often paid not by a regular salary, but by profits from fees and bounties.[44] This Article reveals a background bargain consistent with Parrillo's account: the literate and/or wealthy bought offices (and gave up other opportunities) to profit from the office's fees or bounties, and they required permanent job security in return for their investment of money and time. European historians have an emerging school of "corruption studies" which has focused on the venality of office in England and continental Europe,[45] and economic historians have explained the surprising efficiencies of this system (signals of skill and commitment, incentives to maximize the investment) to overcome the remoteness of early modern Europe.[46] Historians of Britain recognize the sale of offices as property was a foundation for the rise and dominance of the British global military-financial empire.[47] We imagine that past monarchs surely had an

39 THE FEDERALIST NO. 77 (Alexander Hamilton), NO. 39 (James Madison); *see also infra* Part II.

40 U.S. CONST. art. II, § 2, cl. 1; *see also infra* Section VI.A.

41 *See generally* Shugerman, *Indecisions*, *supra* note 5.

42 *See supra* text accompanying note 12; Shugerman, *Indecisions*, *supra* note 5, at 848–50.

43 *See infra* Section VI.B.

44 *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013).

45 *See, e.g.*, MARK KNIGHTS, TRUST AND DISTRUST: CORRUPTION IN OFFICE IN BRITAIN AND ITS EMPIRE, 1600–1850, at 345 (2021); HARLING, *supra* note 8; STEPHEN MILLER, FEUDALISM, VENALITY, AND REVOLUTION: PROVINCIAL ASSEMBLIES IN LATE–OLD REGIME FRANCE (2020); WILLIAM DOYLE, VENALITY: THE SALE OF OFFICES IN EIGHTEENTH-CENTURY FRANCE (1996); K.W. SWART, SALE OF OFFICES IN THE SEVENTEENTH CENTURY (1949); LINDA LEVY PECK, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND (1990); THE GOOD CAUSE: THEORETICAL PERSPECTIVES ON CORRUPTION (Gjalt de Graaf et al. eds., 2010); ANTHONY BRUCE, THE PURCHASE SYSTEM IN THE BRITISH ARMY, 1660–1871 (1980); R.O. Bucholz, *Venality at Court: Some Preliminary Thoughts on the Sale of Household Office, 1660–1800*, 91 HIST. RSCH. 61 (2018) (U.K.); Harling, *supra* note 9; J.H. Parry, *The Patent Offices in the British West Indies*, 69 ENG. HIST. REV. 200 (1954) (U.K.); Mark Knights, *Parliament, Print and Corruption in Later Stuart Britain*, 26 PARLIAMENTARY HIST. 49 (2007) (U.K.); William Doyle, *Changing Notions of Public Corruption, c. 1770–c. 1850*, *in* CORRUPT HISTORIES 83 (Emmanuel Kreike & William Chester Jordan eds., 2004).

46 *See* ALLEN, *supra* note 9, at 15–16; Gordon Tullock, *Corruption Theory and Practice*, CONTEMP. ECON. POL'Y, July 1996, at 6.

47 *See infra* Part III.

unconditional removal power, perhaps projecting back from today's "Imperial Presidency"[48] and from our assumptions about medieval kings, Machiavellian princes, and "absolute monarchs." However, European historians have demonstrated that building a modern nation-state was far more complicated. Kings and their central administrators had to bargain and compromise with feudal lords, local elites, and an emerging literate bourgeoisie. Venality was one such legal bargain. Unremovability persisted during the Founding—partly out of path dependency, practical necessity, and some surprising virtues that outweighed the obvious vices.

Some unitary scholars and judges argue that because the President has an Article II duty to "take Care that the Laws be faithfully executed" and to supervise execution, a removal power is necessary to fulfill such a duty.[49] Originalists might call this "pragmatic enrichment."[50] However, English historians have shown how removal was not necessary. When high executive officers were uncooperative and unremovable, the English Crown had other ways of executing its policy preferences: it geographically rotated officers, and if necessary, it created new offices and assigned the duties to other officers.[51]

This history does not lead down a slippery slope of allowing Congress to make the Defense Secretary or Treasury Secretary unremovable or an office for life. The point of this Article is about historical claims: to refute the unitary theory's historical assumptions. It is also about legal consequences from this history: the unitary originalists have not met their burdens to overturn longstanding precedents and statutes. The Court might leave the longstanding balance of *Myers* and modest limits on removal in *Humphrey's Executor*, *Wiener*, and *Perkins*.[52]

Part I offers some background observations about originalism and burdens of proof, and it then explains the separation-of-powers problem: "executive" and "judicial" powers had not been concretely distinguished, so that by the late eighteenth century, English judges were unremovable *executive* officers (a helpful starting point for understanding the flaws of the unitary theory's assumptions). Part II returns to Montesquieu's opposition to immediate removal ("despotic"

48 ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973)

49 U.S. CONST. art. II, § 3; *see, e.g.*, MCCONNELL, *supra* note 22. *But see* Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441 (2023); Jane Manners, *Beyond Removal*, 92 FORDHAM L. REV. 463 (2023).

50 *See, e.g.*, Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2011 (2021).

51 *See infra* Part IV.B (on the English Treasury).

52 Myers v. United States, 272 U.S. 52 (1926); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958); United States v. Perkins, 116 U.S. 483 (1886).

displacement) versus his acceptance of venality, and it then shows how the *Federalist Papers* are consistent with Montesquieu's views. Part III explains the European practice of venality and sale of office, a practical bargain of profits and unremovability between monarchs and educated elites. Part IV documents unremovable offices in the seventeenth and eighteenth centuries among members of the English cabinet, department heads, and high officers running Treasury, the driving force of its imperial expansion; it shows how major legal authorities defended the system as republican, modern, and efficient. Part V shows that unremovable powerful offices and the sale of office shaped the American colonial experience. Part VI observes that the Founding era continued aspects of the offices-as-property system. The Conclusion argues that the unitary theory's evidence is insufficient to overturn long-established precedents and longstanding statutes, and it suggests that this episode is another cautionary tale about the problems of originalism in practice.

I. BACKDROPS, BURDENS, AND THE EXECUTIVE/JUDICIAL PROBLEM

A. "Backdrop" Burdens and the "Heads-I-Win, Tails-You-Lose" Problem

Over the past decade, originalists have been developing some methodological guidelines, including a debate about burdens of proof: who bears the burden for which kinds of arguments.[53] This Article is not the place to focus on a thorough account of burdens of proof for originalist methods, but it is an opportunity to summarize and apply a basic approach.[54] Burdens of proof are a basic question in law, and usually, the question turns on which side is making an argument: the prosecutor or defendant, plaintiff or civil defendant. However, originalist arguments start as historical truth claims, and the one positing a truth claim bears the burden of proof. The Latin term is *onus probandi*, from the phrase "*onus probandi incumbit ei qui dicit, non*

53 *See, e.g.*, GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS (2017); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 806–07 (2022); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2363, 2382–83 (2015); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 417 (2013) (describing originalism as "searching for an empirical fact"); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875–77 (1992). For a discussion of burdens of proof, an empirical framework for analyzing historical originalist claims, and the unitary theorists, see Christine Kexel Chabot, Rejecting the Unitary Executive Theory 23–29 (Sept. 21, 2024) (unpublished manuscript), https://ssrn.com/abstract=4968775 [https://perma.cc/L5DS-YGN2].

54 For an initial sketch, see Shugerman, *Vesting*, *supra* note 5, at 1490–91, 1523; Shugerman, *Indecisions*, *supra* note 5, at 862.

ei qui negat,"[55] which translates as "the burden of proof is upon the one who speaks, not the one who denies."

The burden for an originalist has two steps: first, proving a historical claim about a fact (or understanding) about the relevant time period, and second, proving that the public (the ratifiers) during the relevant time period agreed about that fact (or understanding) as a matter of original public meaning. Most of today's originalists have wisely moved away from the myopic (and even reactionary) "original applications" or elite-centered "original understandings," and today they rightly emphasize the "original public meaning" of the ratifiers, "We the People," whose votes turned a proposed draft constitution or proposed amendments into law.[56] This burden is to prove *ordinary public* meaning[57] and *consensus*, appropriate for establishing constitutional meaning and the breadth and depth of supermajoritarian ratification. A few quotations from the Convention and the *Federalist Papers* are insufficient to establish what the ratifying public understood, nor are they sufficient to establish a broad consensus reflective of *constitutional* meaning of "We the People" circa 1787–88, 1866–68, etc. Unitary executive theorists acknowledge that ordinary public meaning is "the Default Rule."[58] An exception for more lawyerly/technical or detailed clauses is "original methods" originalism (e.g., legalistic phrases like habeas corpus, ex post facto, bills of attainder).[59]

Third, if an originalist argument is in conflict with past precedents, Supreme Court justices have recognized a higher burden to overcome the principle of stare decisis. Justice Alito recently wrote, "[S]omething more than 'ambiguous historical evidence' is required before we will 'flatly overrule a number of major decisions of [this]

55 *Cf.* UGO PAGALLO, THE LAWS OF ROBOTS: CRIMES, CONTRACTS, AND TORTS § 5.4, at 135 (2013); *see also generally* James B. Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45 (1890).

56 U.S. CONST. pmbl.; *see, e.g.*, Solum, *supra* note 50.

57 *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 275–76 (2017); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60 (1999); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 872–75 (2009).

58 Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541 (1998) (reviewing RAKOVE, *supra* note 32) ("The Constitution's very creation indicates that there was an implicit background rule of construction, the same rule that underlies all laws and almost all forms of communication: construe words using their ordinary, original meanings (the 'Default Rule').").

59 *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–53, 771–72, 784 n.116 (2009); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1325–26 (2018) (positing that constitutional interpretation should take a "language-of-the-law" approach rather than follow the ordinary language approach).

Court.'"[60] In concurrence, Justice Thomas indicated that a necessary condition for overturning a precedent is a showing that it was "demonstrably erroneous."[61]

Constitutional scholars have debated the appropriateness of other burdens, triggered by other substantive issues. Many have suggested a higher burden to overturn a statute, including Chief Justice John Marshall.[62] This burden is reflective of an original meaning of judicial power, that judicial review of statutes should be exercised only cautiously and only in clear cases (e.g., "repugnancy").[63] There is also a solid argument for a higher burden if adopting an originalist argument would unsettle longstanding legal institutions and public reliance, which is also consistent with the same history of judicial restraint. On the other side, originalists have also argued for burdens in favor of protecting liberty, federalism, and other substantive commitments.[64] Even if we set aside these considerations, the first three burdens are sufficiently problematic for the originalist "backdrop" arguments on "executive power" and removal.

It is important to understand how and why we have arrived at this "British Backdrop" debate: the evidence from the Constitution's text, the Constitutional Convention, the *Federalist Papers* (*No. 39* and *No. 77*), the Ratification debates, and the First Congress weighs against the unitary theory, and historians have been steadily disproving the contrary evidence offered by unitary theorists. Other scholars and I have already challenged the unitary arguments that Article II imports the "royal prerogative";[65] that Article II implies "indefeasible" or

60 Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) (second alteration in original) (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 (1987) (plurality opinion)); *see also* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1–2 (2001).

61 *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring).

62 *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827) (Marshall, C.J.) ("It has been truly said, that the presumption is in favour of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality.").

63 *See* Derek A. Webb, *The Lost History of Judicial Restraint*, 100 NOTRE DAME L. REV. 289, 307–13 (2024); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 424–25 (1996) (considering Thayerian burdens but also opposite burdens); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); *cf.* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("[A] law repugnant to the constitution is void . . . .").

64 *See* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1971–73 (2017) (burden begins with the claimant, but then shifts to the government).

65 *See* RAKOVE, *supra* note 32, at 244–87; Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 PRESIDENTIAL STUD. Q. 85, 95–98 (2007); Julian

unconditional executive powers;[66] that the Take Care (faithful execution) Clause implies an indefeasible removal power;[67] and that the First Congress's debates established a consensus that Article II implied presidential removal (the ostensible "Decision of 1789").[68]

In response in *The Executive Power of Removal* in the 2023 *Harvard Law Review*, Aditya Bamzai and Saikrishna Prakash asserted that Article II "executive power" referred to "a cluster of powers . . . *generally* through their association with the British Crown *and other executives*, both republican and monarchical," which included "the common backdrop of at-pleasure removal," the British Crown's default power.[69] Bamzai and Prakash could point to only one source for this claim of original public meaning,[70] and it was postratification: two sentences taken out of context from a newspaper account of a speech by James Jackson, an obscure Georgia congressman, during the congressional debate known as the "Decision of 1789."[71] They do not acknowledge that Jackson opposed their unitary theory that Article II implied a removal power, that he was referring to European monarchies in order to paint the pro-removal side as out-of-touch royalists, and that he had good reason to be inventing or exaggerating a historical claim about monarchic powers to serve this political agenda. Michael McConnell's thesis is that the royal prerogative explains Article II, and Steven Calabresi recently relied on English practice and colonial governors.[72]

The "British Backdrop" arguments present an especially complicated, multilayered originalist argument, and they bear multiple

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Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1220 n.188 (2019) [hereinafter Mortenson, *Article II*]; Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1345–65 (2020) [hereinafter Mortenson, *Executive Power*]; Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45, 48 (2014); Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 566 (2018); Shugerman, *Removal of Context*, *supra* note 5.

66 The assumption that "vesting" means legislatively unconditional is an ahistoric projection back from the Marshall Court's vested rights doctrine, without support in the eighteenth century. Shugerman, *Vesting*, *supra* note 5; Shugerman, *Removal of Context*, *supra* note 5, at 145–47.

67 U.S. Const. art. II, § 3; *see* Kent et al., *supra* note 4, at 2115–17, 2189–90.

68 *See* Shugerman, *Indecisions*, *supra* note 5, at 753.

69 Bamzai & Prakash, *supra* note 21, at 1790.

70 *Id.* at 1769 n.76, 1791 nn.249 & 252.

71 *Congressional Intelligence. Debate in the House of Representatives on Wednesday. (Continued.)*, DAILY ADVERTISER (N.Y.C.), June 20, 1789, at 2, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 889 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DHFFC] (reporting statements of Rep. Jackson).

72 *See* MCCONNELL, *supra* note 22, at 95–99; Brief of Const. Originalists, *supra* note 23, at 21–27.

burdens of proof. First, they posit a claim about English/British practice. Second, there is an explicit or implicit claim that American ratifiers circa 1787 knew of that practice (i.e., original public meaning, and usually "ordinary" meaning of the average knowledgeable voter/ratifier, rather than the author).[73] And third, there is an explicit or implicit claim that Americans endorsed that practice . . . or rejected it? Sometimes originalists claim continuity of the British practice (e.g., the unitary executive scholars treating royal powers as a model), but sometimes originalists claim discontinuity (e.g., rejecting parliamentary supremacy in favor of constitutional supremacy, the separation of powers,[74] and nondelegation;[75] British colonial abuses being rejected in favor of a Bill of Rights, like the Roberts Court's recent originalist arguments for expanding the Seventh Amendment right to a civil jury;[76] or the republican rejection of royalism[77]).

How do we know when the British practice was a model or an antimodel? This uncertainty leads to inconsistencies which can be called "heads-I-win, tails-you-lose originalism."[78] These "British Backdrop" arguments are an example of "heads I win, tails you lose." On the one hand, the unitary theorists point to an English practice as a model: the Crown removing officers as evidence of a default rule of "executive power." When critics offer counterevidence that Parliament often protected offices as a contrary default rule of legislative control, unitary theorists, on the other hand, dismiss those examples as mere

73 See *supra* notes 56–59 and accompanying text.

74 *See, e.g.*, United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741–42 (2023) (Thomas, J., dissenting) ("Finally, we should be especially careful not to overread the early history of federal *qui tam* statutes given that the Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited."); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 589 (2005) ("[W]e ought to be cautious about importing English constraints or exceptions to the executive power, when those limitations might be based on the principle of parliamentary supremacy.").

75 Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1527–32 (2021) (noting that the Founders rejected the British unwritten constitution in favor of a written constitution with Article I's limits on legislative power).

76 *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2128 (2024); *id.* at 2142–44, 2150 (Gorsuch, J., concurring).

77 MCCONNELL, *supra* note 22, at 11, 28–29, 96 (describing the president *who would not be king*, as the Americans rejected "unbounded" royal powers).

78 Jed Handelsman Shugerman, "Heads-I-Win, Tails-You-Lose" Originalism and "Vibe" Originalism (Nov. 10, 2023) (unpublished manuscript), https://ssrn.com/abstract=4629679 [https://perma.cc/A949-5NXM]; *see also* Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 141 (2006) (holding originalist argument to a burden of historical proof to show that "those who drafted and ratified the Constitution intended . . . to incorporate wholesale the preconstitutional historical practice").

exceptions that prove the rule: Parliament had to act in order to change the default rule, a royal "executive power" of removal, and the Americans rejected England's parliamentary supremacy. Why is the British executive the relevant default rule, and why is legislation the alien or rejected exception? Why don't these examples from Parliament count as evidence of a traditional "legislative power" to protect offices, which Article I vested in Congress?

Moreover, where is the evidence that Americans during the republican Founding would have respected such royal practices as a model for the presidency, rather than as an antimodel or as irrelevant? The new reliance on royalism has produced some internal contradictions among unitary theorists on the "rule of law" and the separation of powers.[79]

The bottom line is that these unitary arguments fail to meet the burdens of proof (1) for their claims about English history; (2) for their claim that Founding-era Americans understood or believed that history; (3) for their claim that, as original public meaning, Americans endorsed and adopted this understanding in Article II; and (4) for overcoming stare decisis to overturn precedents like *Humphrey's Executor*, *Wiener*, and *Morrison v. Olson*.[80]

This Article also goes further: it makes a positive claim that the venality of office and offices as unremovable property were pervasive in England, that this system shaped colonial America, and that Founding-era Americans understood that removal was no default rule and not implied by "executive power." This Article does *not* argue that most offices were unremovable. It argues that England and colonial America reflected a complicated mix of removable and unremovable offices, even at the highest levels of English administration and British imperial governance. This argument, even standing on its own, is a contribution to the history of administrative law and the history of European imperialism, separate from the originalist/unitary executive debate.

The unitary executive theorists' argument is ambitious and carries a heavy burden: proving a consensus about a general rule without exceptions. To overturn those precedents, they must show that Article II's "executive power" implied not only a presidential removal power, but an indefeasible and unconditional removal power over any office with significant executive authority.[81] They have the burden to show that all (or almost all) English offices with significant executive

79 *See* Shugerman, *Removal of Context*, *supra* note 5, at 167–69.

80 Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958); Morrison v. Olson, 487 U.S. 654 (1988).

81 *See* Bamzai & Prakash, *supra* note 21, at 1758–62.

power were held at pleasure, and that the American public understood this implied meaning and ratified it. It is insufficient to claim that most offices were held at pleasure, because "most" would not demonstrate that executive power implied removal. It is also insufficient to argue that all "great offices" were held "at pleasure," because the Constitution did not adopt the category "great offices." Instead, as explained below, the Framers appear to have created a new category, "the principal officer." As for Article II "department heads," this Article shows that some English department heads and cabinet members were also unremovable, even if most served at pleasure by the eighteenth century.[82]

This Article shows that Americans understood that English law treated offices as property with limits on removal, and it suggests that the Constitution's text, Ratification debates, and Founding-era law and interpretation reflected the continuity of that system. Reasonable people can disagree about whether this evidence shows a broad consensus during the Founding era that offices could be freehold property. But this Article is not arguing for overturning *Myers v. United States*,[83] nor for overturning any federal statute delegating removal power to the President, nor for overturning longstanding presidential powers.

B. The "Executive" Versus "Judicial" Novelty Problem: English Judges Were Unremovable Executive Officers

Before digging into the details of offices as unremovable freehold property, it is helpful to take a step back to the big picture about "executive power" and the separation of powers from a historical perspective. This Section asks the readers to take a step away from today's accepted orthodoxies and assumptions about the eighteenth century. It summarizes the historical evidence (to be developed in more detail in a forthcoming article) that the Founding era did not have an established or even a new coherent separation of "executive" and "judicial" power. In fact, as a matter of original public meaning, "executive power" included judges and judging.[84] The Framers were, more or

82 *See infra* Section IV.A (on the heads of household departments as members of the cabinet until 1782, after American independence).

83 Myers v. United States, 272 U.S. 52 (1926).

84 *See* Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 214–15 (1991) (citing M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 28, 37 (1967)); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1532 n.79 (1991) ("For the early separation-of-powers theorists, the power to judge was considered part of the executive power." (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 73 (J.W. Gough ed., Basil Blackwell 3d ed. 1976) (1690))); THOMAS PAINE, RIGHTS OF MAN 207–31 (Henry Collins ed., Penguin Books 1969) (1791); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 49

less, constructing a new distinction, without a background set of traditions, practices, or writings establishing what "executive power" implied—at least not with sufficient clarity about the role of judging, law interpretation, or removal. As we shall see, the consensus at the time of the Founding was that "executive power" included judges and judging.

I am not suggesting that the Founders invented the doctrine of separation of powers. The point is that the concept was relatively inchoate and had not been formalized or even formulated beyond separating legislative and executive power as a duality. The structure and text of Article I, Article II, and Article III did not signal a particular theory of formal separation of powers versus functional checks and balances, nor did it clarify a doctrine of "indefeasibility," whether executive power was so separated that it was beyond legislative conditions and judicial checks and balances.[85] Contrary to modern assumptions, the word "vested" did not connote formal separation, and the text of the Constitution explicitly mixed traditional powers while leaving out any separation-of-powers clause that had become common in earlier state constitutions.[86]

This Section summarizes the key points of some new evidence about the longstanding "executive power" versus "judicial power" problem. The Framers were among the innovators separating "judicial power" from "executive power." Because "executive power" included judges and judging in eighteenth-century England, the unitary theory has a serious historical problem with its "British Backdrop" assumption: judges were part of the "executive" power, and thus English judges were *unremovable executive* officers.

The English system was distinctly unseparated, and instead relied on "mixed government."[87] The English "mixed government" was a

(2001); VILE, *supra*, at 28 ("[T]he idea of a separate executive function is a relatively modern notion, not being fully developed until the end of the eighteenth century."); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 5 (1965) ("What we now call executive and judicial functions were known then usually as simply 'executive power.'"); Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 AM. J. LEGAL HIST. 117, 158–59 (1994).

85 *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 605–08 (1984); Farina, *supra* note 32, at 495–96; Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 108–09 (2022); Shugerman, *Vesting*, *supra* note 5; Shugerman, *Indecisions*, *supra* note 5, at 797–98; *cf.* Manning, *Separation*, *supra* note 16. The First Congress rejected a separation-of-powers clause when it proposed amendments to the Constitution in 1789, and the clearest explanation was that separationism was inconsistent with the Constitution's structure and many clauses that mixed powers.

86 *See* Shugerman, *Vesting*, *supra* note 5; Shane, *supra* note 5, at 334–44.

87 *See* Farina, *supra* note 32, at 490–92.

separation of *estates* (the Crown/monarchy, Lords/nobility, Commons/propertied commoners), not a separation of powers, and the different estates shared powers.[88] The king had a mix of legislative powers and executive powers, and the House of Lords also mixed roles. Hence, the English system is widely known as a "mixed constitution."

Over time, the English system focused on separating the legislative power from the executive power as a binary,[89] but executive power mixed together various functions, including adjudication and law interpretation. Historians have concluded that, until the late 1700s, "the judicial function was commonly described as an aspect of execution of the laws."[90] At a critical moment towards the end of the Constitutional Convention, Gouverneur Morris, one of the most significant designers of the singular presidency, observed that "the Judiciary . . . was part of the Executive."[91] The Ratification debates offered similar statements.[92]

It is fair to say that the Philadelphia Convention was the turning point in separating "judicial power" from "executive power." Even though a few English lawyers and treatise writers in the seventeenth century had referred to a distinct "judicial power," they seem to have been outliers whose notions never found general usage and faded

88 *See id.*; VILE, *supra* note 84, at 125–41.

89 Woolhandler, *supra* note 84, at 214–15 (citing VILE, *supra* note 84, at 28, 37); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 151–52 (1969); Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. Chi. L. Rev. 385, 387 (1935).

90 Jay, *supra* note 84, at 158; *see also* Manning, *supra* note 84, at 67 n.267 ("Since the concept of executive power had traditionally included judicial functions, many writings of this era use the term 'executor' to include judges." (citing GWYN, *supra* note 84, at 5)).

91 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299 (Max Farrand ed. 1911) [hereinafter RECORDS] ("Mr. Govr. Morris, suggested the expedient of an absolute negative in the Executive. He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law.").

92 *See* Mortenson, *Executive Power*, *supra* note 65, at 1313 n.219 ("The business of the judicial department is, properly speaking, judicial in part, in part executive, done by judges and juries, by certain recording and executive officers, as clerks, sheriffs, &c. they are all properly limbs, or parts, of the judicial courts, and have it in charge, faithfully to decide upon, and execute the laws, in judicial cases." (quoting Letter XV from Federal Farmer to the Republican (Jan. 18, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1043, 1043 (John P. Kaminski et al. eds., 2004))).

from memory.[93] Eighteenth-century English treatises and dictionaries almost never referred to "judicial power" as a category or even a term.[94]

Historians have demonstrated that many Framers intended the Constitution to continue a developing practice of judicial review, albeit in a more modest departmental sense.[95] Judicial review had emerged in the seventeenth century, but more consistent with judges functioning within an executive framework, and consistent with how "executive power" included legal interpretation and application. Max Radin described early English judicial review in departmental and executive terms: "'May the king's judges disregard a statute made by the king in his parliament?' or perhaps, 'May the king's judges distinguish between good statutes made by former kings in former parliaments and bad statutes, and reject the former?'"[96] In the 1640s, English lawyer Clement Walker articulated judicial review as a kind of delegated royal or executive review: "judicial review of statutes as a weapon in the hands of the king."[97] As those judges enjoyed tenure during good behavior, the king's executive power would not have been understood to include a power of removal over such "executive" officers, as these judges were considered.

Thus, the division between "executive" and "judicial" was essentially a novelty in the late eighteenth century, and the Founders had no "British Backdrop" of original public meaning—in theory or in

93 *See* Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PA. L. REV. 842, 856 (1938). In the 1640s, English lawyer Clement Walker identified a three-part separation of powers: (1) the Governing power, (2) the Legislative power, and (3) the Judicative power. CLEMENT WALKER, RELATIONS AND OBSERVATIONS, HISTORICAL AND POLITICK, UPON THE PARLIAMENT 150 (1648). Walker's term and ideas seem to have been lost after the seventeenth century, because he was unpopular with the Puritans and the Civil War's victors, and his ideas were not restored along with the Restoration. Sir Edward Coke used the term three times in *The Institutes of the Laws of England*, but not as a category parallel to legislative or executive. *See* 1 EDWARD COKE, INSTITUTES *74b. Matthew Bacon used the term as a category in *A New Abridgement of the Law* in 1736, but only once. *See* 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 554 (The Savoy, H. Lintot 1736). Tellingly, Jean-Louis de Lolme's *The Constitution of England* has few references to "judicial power," and then only as a "subordinate and dependant body" to the legislative power, not a remotely parallel or distinct power, and he then described it as an "evil, though a necessary one," among other cautionary warnings to limit judges' powers. J.L. DE LOLME, THE CONSTITUTION OF ENGLAND, OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 118, 124 (London, G. Kearsley & J. Ridley 1777).

94 *See* Shugerman, *supra* note 6.

95 *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 461 (2005); KRAMER, *supra* note 63, at 58–59; Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 121–32 (2004) (identifying support for judicial review 1787–89, but not judicial supremacy, and not investigating a conception of "judicial power" before 1787); Webb, *supra* note 63.

96 Radin, *supra* note 93, at 846.

97 *Id.* at 861.

practice—to draw lines between the two categories they had authored as Articles II and III. Judges ran criminal trials generally without lawyers on either side, so they often assisted private parties in the prosecution through the eighteenth century, sometimes serving more as prosecutor than judge.[98] Many officers, like the Justice of the Peace, exercised a mix of powers that we would describe today as a hybrid of policing, investigating, prosecuting, and judging.[99] These examples are a significant historical problem for Justice Scalia's assertion in *Morrison v. Olson*: "Governmental investigation and prosecution of crimes is a quintessentially executive function."[100] Little evidence from the eighteenth century supports this claim about the "quintessence" of executive function.

English legal thinkers included within the "executive power" the courts' jurisdiction and judgment, referred generally to judicial orders as "executions," and used the terms "executive" and "judicial" interchangeably.[101] English sources mixed judicial power with royal prerogatives, executive power, and law enforcement.[102]

Even the "separation" theorists, Locke, Montesquieu, and James Harrington, focused on executive and legislative functions.[103] Locke's "tripartite division of functions" did not include judicial, but instead "legislative, executive, and federative, the last being what we might today term the 'foreign affairs power,' and this he allocated to the executive branch."[104] Harrington's triad was "a Senate to propose laws, an Assembly to enact them, and an executive to enforce them," with enforcement including adjudication.[105]

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98 *See* Jay, *supra* note 84, at 158–59.

99 *See* SCOTT INGRAM, CONSTITUTIONAL INQUISITORS 23–26, 311 nn.29–31 (2023); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 39–41 (2003); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880, at 39–41 (1989); Mark Goldie, *The Unacknowledged Republic: Officeholding in Early Modern England*, *in* THE POLITICS OF THE EXCLUDED, C. 1500–1850, at 153, 159–60 (Tim Harris ed., 2001); Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720–1740*, 25 AM. J. LEGAL HIST. 141, 144–46 (1981).

100 Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

101 *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 28–30, 60–62 (Liberty Fund 2d ed. 1998) (1967); *cf.* SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 4 (1990).

102 See sources cited in Mortenson, *Article II*, *supra* note 65, at 1223 n.208, 1233 n.278, 1234 n.279.

103 *See* Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 595 (1986); Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1026–28 (1988).

104 Kurland, *supra* note 103, at 595 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382–84 (Peter Laslett ed., 2d ed. 1967)).

105 *Id.* (citing JAMES HARRINGTON, *The Commonwealth of Oceana*, *in* THE POLITICAL WORKS OF JAMES HARRINGTON 155, 172–87 (J.G.A. Pocock ed., 1977)).

In Article III of the U.S. Constitution, the Framers differentiated a "judicial power," but this category was such an innovation that there was no "British Backdrop" nor any preexisting consensus about the distinction between executive and judicial power. When the Framers drafted the Constitution, they clarified that Article III judges would serve during good behavior,[106] but they did not state any rules about the tenure of Article II officers. The silence is not because they understood a backdrop or default of tenure during pleasure for such officers. There was no default rule other than flexibility and a mix of tenure for such officers, and the Framers left the question open-ended; as a result, there was no constitutional rule for Article II officers' tenure.

The new evidence in this Article shows that, even after 1787, many English sources still did not identify a category of "judicial power." This silence and ambiguity led to many relevant questions about Article III judicial power and the administrative state today. But this fact also presents an overlooked problem for the unitary executive theory's reliance on the "British Backdrop": executive power could not have implied removal because (1) judges were generally understood to be part of the "executive" power and (2) judges were unremovable after 1701.

Judges were not a separate category, but were part of the patchwork mix of tenures throughout the administrative state. In fact, English historians have shown that in the early modern era, judges' tenures were even less protected than other executive officers'.[107] G.E. Aylmer, the leading historian of early modern English administration, observed, "It is difficult to generalize about security of tenure."[108] Aylmer wrote, "It is hard to see any rhyme or reason" in how offices were granted for life, for a term of years, "during good behaviour, or during pleasure."[109] However, he observed that offices were "often treated like pieces of private property," and he described a mix of tenures from the "middle rank" up to "major."[110] Most "middle rank" offices were held for life, but "a few" were held at pleasure.[111] Of the "great offices of state," "most" (but not all) were held at pleasure; some "great offices"[112] or "major offices"[113] were held for life. At the same time, the

106 U.S. CONST. art. III, § 1.

107 G.E. AYLMER, THE KING'S SERVANTS: THE CIVIL SERVICE OF CHARLES I, 1625–42, at 106, 109–113 (1961) [hereinafter AYLMER, THE KING'S SERVANTS]; *see also* G.E. AYLMER, THE STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC 1649–1660, at 82–95 (1973) [hereinafter AYLMER, THE STATE'S SERVANTS].

108 AYLMER, THE KING'S SERVANTS, *supra* note 107, at 110.

109 AYLMER, THE STATE'S SERVANTS, *supra* note 107, at 86, 82.

110 AYLMER, THE KING'S SERVANTS, *supra* note 107, at 106.

111 *Id.*

112 *Id.*

113 *Id.*

high judgeships on the King's Bench and Common Pleas were also held at pleasure, and not good behavior (until 1701).[114] He found no pattern or explanation for why some executive offices were protected and others were not, other than particular historical circumstances when an office had been created and then path dependency governed, with unpredictable shifts increasing or decreasing security of office.[115]

Aylmer offered a conclusion that would surprise today's readers: For centuries, early modern English law protected many executive offices, even some of the "great" executive offices, *more than it protected judges*—"the reverse of modern ideas."[116] Instead of our modern distinction between accountable executive officers and independent judicial officers, seventeenth-century English law held judges to be more "answerable in a special way for what they did and so . . . more easily removable" than "ministerial" officers.[117]

When Parliament gave judges tenure during good behavior in 1701, it was not creating a new branch or category of "judicial power";[118] it was moving judges along the spectrum of executive officials from the unprotected to the more protected. However, they still did not have tenure for life: when a king (or queen) died, they lost their right to their offices. They did not have their own life tenure, but instead served during good behavior during the monarch's life, because they were still executive extensions of the Crown. It was not until 1760 that Parliament granted judges good behavior during their lives, no longer just during the king's life.[119]

This Section did not focus on venality and the sale of office (although we will see below in Part III that the English judiciary was a major domain of buying and selling offices). The point here is to reorient a twenty-first century reader to some of the strange and unfamiliar structures and administrative arrangements of eighteenth-century England. The "British Backdrop" was not what the unitary theorists have assumed: it was less separation, more "mixed government"; not "branches" each reflecting "the people," but rather different estates represented by the Crown, lords, and commons, sharing overlapping powers; and a complicated, decentralized, diffuse administration with few general rules and little "administrative law." In that decentralized administration, judges were considered "executive officers," and through the eighteenth century, *English judges were unremovable*

114 *Id.*

115 *Id.* at 107.

116 *Id.* at 109.

117 *Id.* at 109.

118 *See* VILE, *supra* note 84, at 54.

119 *See* C.H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 224–26 (1913).

executive officers. In fact, judges were just one set among many categories of unremovable powerful executive officers (as we will see below in Parts IV and V).

II. "DESPOTIC DISPLACEMENT": MONTESQUIEU, HAMILTON, AND MADISON

In *Federalist No. 47*, Madison called Montesquieu "[t]he oracle who is always consulted and cited on this subject" of separation of powers.[120] Montesquieu's *The Spirit of Laws* was one of the most influential Enlightenment sources among the Founders,[121] if not the most influential.[122] Montesquieu remains the thinker most associated with the formal separation of legislative, executive, and judicial powers. And yet even Montesquieu, in a passage overlooked in modern legal debates, rejected the executive power of removal and strict separationism in the law of offices.[123]

It is rare to find much discussion of removal power on the Founders' bookshelf, but Montesquieu did discuss it—and rejected removal at will, while naming venality, endorsing its property rules of unremovability, and associating those rules with monarchy. He first described "instant" displacement (i.e., tenure during pleasure or at will) as a feature of "despotic states," and second gave a practical defense of offices as property in contrast to instant removal (i.e., a system of unremovable offices of profit). It turns out that both Hamilton and Madison are consistent with Montesquieu's approach. Hamilton shared his concerns about tenure during pleasure, and Madison endorsed a mixed approach based on legislative discretion and pragmatism.

Let's return to Montesquieu and read the full passage on "despotic" displacement, venality, and virtue:

> Fourth Question. When should public offices be venal [bought and sold as property]? They should not be sold in despotic states, where the prince must place or displace subjects in an instant.

120 THE FEDERALIST NO. 47, at 246 (James Madison) (Ian Shapiro ed., 2009).

121 *See* RAKOVE, *supra* note 32, at 248; *see* MCDONALD, *supra* note 32, at 199–201; Rakove, *Second Amendment*, *supra* note 32, at 147–48 ("Montesquieu's theory of the separation of powers exerted enormous influence over American thinking, as evidenced by the formulaic restatement of the theory found in the early state constitutions and declarations of rights."); Rakove, *James Madison's Political Thought*, *supra* note 32, at 5; Rakove, *The Madisonian Moment*, *supra* note 32, at 489–90.

122 *See* Manning, *Separation*, *supra* note 16, at 1995 n.282 (citing CASPER, *supra* note 32, at 8); Carpenter, *supra* note 32, at 37 ("The writings of Montesquieu were accepted at Philadelphia as political gospel."); Farina, *supra* note 32, at 488 ("[T]he idea of a government structured by the separation of powers came to the Americans principally through the writings of Montesquieu.").

123 *See supra* text accompanying notes 30–33.

> Venality is good in monarchical states, because it provides for (works as) performing as a family vocation/profession, what one would not want to undertake from a motive of virtue; and because it gives each one to his duty, and it renders the order of the state more permanent. Suidas very well observes that Anastasius had changed the empire into a kind of aristocracy, by selling all public employments.
>
> Plato cannot bear this venality: "This is (says he) as if a person were to be made a pilot or mariner of a ship for his money. Is it possible that this rule should be bad in every other employment of life and good only in the conduct of a republic?" But Plato speaks of a republic founded on virtue, and we of a monarchy. Now, in monarchies (where, even when offices are not sold by public regulation/regularity,[124] the indigence and avidity of the courtiers would be selling all the same), chance would produce better subjects than the choice of the prince. Finally, the manner of advancing through riches inspires and cherishes industry, a thing greatly needed in this kind of government."[125]

Montesquieu also added a footnote to put a finer point on it: "*Paresse de l'Espagne; on y donne tous les Emplois.*"[126] "Take note of the laziness of

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124 I.e., where the sale is in an unregulated free market.

125 This is my own translation from the original French, drawing from the standard Montesquieu translations by Thomas Nugent; David Wallace Carrithers; and Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone. *See* 1 MONTESQUIEU, *supra* note 1, at 100–01; MONTESQUIEU, THE SPIRIT OF LAWS 149–50 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748); MONTESQUIEU, THE SPIRIT OF THE LAWS 70–71 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) [hereinafter MONTESQUIEU (Cohler trans.)]. Original French:

> 4. QUEST. Convient il que les charges soient vénales? Elles ne doivent pas l'être dans les Etats Despotiques, où il faut que les Sujets soient placés ou déplacés dans un instant par le Prince.
>
> Cette vénalité est bonne dans les Etats Monarchiques, parce qu'elle fait faire comme un mêtier de famille ce qu'on ne voudroit pas entreprendre pour la Vertu; qu'elle destine chacun à son devoir, & rend les Ordres de l'Etat plus permanens. *Suidas* dit fort bien qu'Anastase avoit fait de l'Empire une espece d'Aristocratie, en vendant toutes les Magistratures.
>
> *Platon* ne peut souffrir cette vénalité. » C'est, *dit-il*, comme si dans un Navire on faisoit quelqu'un Pilote ou Matelot pour son argent, seroit-il possible que la regle fût mauvaise dans quelqu'autre Emploi que ce fut de la vie, & bonne seulement pour conduire une République » ? Mais Platon parle d'une République fondée sur la Vertu, & nous parlons d'une Monarchie. Or dans une Monarchie où quand les charges ne se vendroient pas par un réglement public, l'indigence & l'avidité des Courtisans les vendroient tout de même; le hazard donnera de meilleurs sujets que le choix du Prince. Enfin la maniere d'aller aux honneurs par les richesses inspire & entretient l'industrie; chose dont cet espece de Gouvernement a grand besoin.

1 MONTESQUIEU, *supra* note 31, at 111–12 (footnote omitted) (citations omitted).

126 1 MONTESQUIEU, *supra* note 31, at 112 n.*.

Spain, where one gives away all employment," instead of selling offices to the highest bidder.[127]

A few notes of explanation. Montesquieu is offering a free market defense of venality: the avid buyer is more likely to be a better officer than the prince's choice. Montesquieu justified "venality" as a practical necessity: "[T]he method of attaining to honors through riches, inspires and cherishes industry, a thing extremely wanting in this kind of government."[128]

Whereas instant "displacement" served the despot, "*vénalité*" and security of office produced stability and efficiency in a balanced, enlightened monarchy: an unregulated market of offices as protected property would yield better officers than "the prince's choice."[129] Other legal authorities and the Ratification debates also indicate an original public meaning circa 1787 that "executive power" did not include removal.[130] According to Montesquieu, the sale of offices offered relatively efficient administration, but only if such property was secure, and not if it could be "displace[d] . . . in an instant."[131]

The historical record of venality, of the buying and selling of offices, and of offices as property is even more robust as a matter of original public meaning. The Founding generation as colonists, as members of the British military, and as lawyers reading the books on their own shelves were well aware of this system. Pufendorf, another influential European legal treatise writer, offered similar conclusions about offices as property with legal limits on "sovereigns" removing officers, attributing these principles to Aristotle and Polybius.[132]

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127 My own translation. *Cf. id.*

128 1 MONTESQUIEU, *supra* note 1, at 100–01.

129 *Id.* at 100.

130 In *Against Political Theory in Constitutional Interpretation*, Christopher Havasy, Joshua Macey, and Brian Richardson caution against assuming that the political theory of Montesquieu and other European writers would explain the American Constitution, absent specific evidence of citation or reliance on such a passage. *See* Christopher S. Havasy, Joshua C. Macey & Brian Richardson, *Against Political Theory in Constitutional Interpretation*, 76 VAND. L. REV. 899 (2023). This Article mostly relies on Montesquieu as historical evidence of original public meaning—about the historical fact and widespread awareness of nonremovability as a feature of eighteenth-century European administration. This aspect of Montesquieu's political theory is the most general connection of removal and nonremoval to his well-known tripartite scheme of despotism, monarchy, and republic.

131 MONTESQUIEU (Cohler trans.), *supra* note 124, at 70.

132 BARON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 675 (London, A. & J. Churchil et al. 2d ed. 1710); *see* Appendix B: "The Founders' Bookshelf" on "Executive Power" and Removal, *in* Shugerman, *supra* note 6, at 76.

Hamilton's *Federalist No. 66* has been erroneously cited by unitary scholars,[133] but it is consistent with this European tradition of removable and unremovable offices:

> A third objection to the Senate as a court of impeachments, is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose official creation they had participated. The principle of this objection would condemn a practice, which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering those who hold offices during pleasure, dependent on the pleasure of those who appoint them.[134]

First, this passage does not indicate a general removal standard, but "during pleasure" is just one form among others. Again, it is widely understood that "during pleasure" coexisted with other more protected executive offices. Hamilton is simply noting that, among other kinds of officers, some hold offices during pleasure, and those who do are "dependent on the pleasure of those who appoint them." Second, it is worth noting that *Federalist No. 66* never specifies presidential removal. It identifies that officers serve at the pleasure of "those who appoint them." This logic was actually the Latin formula cited by those who argued for a Senate check on removals, because the President and Senate together appointed, and thus they both had to agree to remove. Indeed, Hamilton himself endorses this senatorial position in *Federalist No. 77*, as the removal would follow the appointment by the President and Senate together: "It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint."[135]

This parallelism was precisely the argument of the Senatorialists in 1789, as well as a senatorialist meaning that Hamilton himself confirmed, according to a letter in June 1789.[136] *Federalist No. 66* offers a

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133 *See* Bamzai & Prakash, *supra* note 21, at 1772. For additional critique, see generally Katz & Rosenblum, *supra* note 5.

134 THE FEDERALIST NO. 66, *supra* note 120, at 337 (Alexander Hamilton) (second emphasis added).

135 THE FEDERALIST NO. 77, *supra* note 120, at 386–87 (Alexander Hamilton).

136 Letter from William Smith to Edward Rutledge (June 21, 1789), *in* 16 DHFFC, *supra* note 71, at 832–33. Many scholars agree that Hamilton meant in *Federalist No. 77* that the Senate's consent was necessary for removals, according to a letter during the "Decision of 1789" debates. *See* GIENAPP, *supra* note 5, at 154–55; Gienapp, *supra* note 5, at 237; Jeremy D. Bailey, *The Traditional View of Hamilton's* Federalist *No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL'Y 169, 171 (2010). *But see* Seth Barrett Tillman, *The Puzzle of Hamilton's* Federalist *No. 77*, 33 HARV. J.L. & PUB. POL'Y 149,

simple English version of the Latin phrases cited repeatedly by the Senatorialists in the First Congress, as the most common legal authority and background rule: "*Unumquoque dissolvitur, eodem modo, quo ligatur,*"[137] and *"Cujus est instituere ejus abrogate* [sic]*,*"[138] meaning roughly "[e]very obligation is dissolved by the same method with which it is created,"[139] and "[w]hose right it is to institute, his right it is to abrogate," respectively.[140] It is not evidence of a unitary rule. And a Senate check on presidential removal could be a job security reflective of Montesquieu's account of balanced monarchies; it seems consistent with Montesquieu's third category of republican offices (albeit a vague category), certainly in distinct opposition to the despotic category of instant displacement.

If one were looking for uses of the phrase "during pleasure" as evidence of a background rule, it turns out that one of the only references to it in the *Federalist Papers* shows that (a) it was one kind of tenure among others, and (b) Hamilton disapproved of it or found it problematic.

Madison's *Federalist No. 39* is concise and to the point, consistent with Montesquieu's pragmatism: "The tenure of the ministerial offices generally, will be a subject of legal regulation . . . ."[141] He also listed three categories, the last two of which sharply limited removal: tenure during pleasure, tenure for a term of years, and tenure for life.[142] As my article *Indecisions of 1789* explains, Madison was more consistently a congressionalist, except for a more limited focus on department

149–54 (2010); FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 125–26, 130–31 (1982). If one doubts the reliability of this letter, then one has to doubt the unitary claim of the "Decision of 1789," which relies heavily on private letters to fill in gaps and address overwhelming math problems; and the rest of the First Congress, Convention, and Ratification debates should then also be taken with similar skepticism, because the recorders and journalists were summarizing and paraphrasing what they could hear—and historians show that it was often hard to hear. *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 166 (2010).

137 *See* Shugerman, *Indecisions*, *supra* note 5, at 820–21; The Notes of John Adams (July 16, 1789), *in* 9 DHFFC, *supra* note 71, at 447, 448 (quoting Senator Johnson); The Notes of William Samuel Johnson (July 14, 1789), *in* 9 DHFFC, *supra* note 71, at 465, 466.

138 *See* The Notes of John Adams (July 16, 1789), *in* 9 DHFFC, *supra* note 71, at 447, 449 (quoting Senator Izard); Shugerman, *Indecisions*, *supra* note 5, at 820–21.

139 The Notes of John Adams (July 16, 1789), *in* 9 DHFFC, *supra* note 71, at 447, 448 n.6; The Notes of William Samuel Johnson (July 14, 1789), *in* 9 DHFFC, *supra* note 71, at 465, 466 n.2; *see also* Debate in the House of Representatives, 18 June 1789, *in* 22 DHFFC, *supra* note 71, at 1681, 1681 (reporting Representative Sedgwick attributing to the other side the claim "[t]hat the power which gives, is the only power to take away").

140 *See* The Notes of John Adams (July 16, 1789), *in* 9 DHFFC, *supra* note 71, at 447, 449 n.7.

141 THE FEDERALIST NO. 39, *supra* note 120, at 194 (James Madison).

142 *Id.* at 193.

heads in the Foreign Affairs debate and after.[143] Madison rejected a "presidentialist" unitary interpretation in May 1789, again expressing that tenure conditions are at "the discretion of the legislature."[144] Madison also rejected presidentialism during the Treasury debate, proposing an independent comptroller.[145]

In fact, Montesquieu was in many ways a stricter theorist of separation than Madison and the Framers.[146] If Montesquieu-the-strict-separationist thought that removal was not an executive power, then Madison-the-mixer would be even less likely to assign this power to the executive; it turns out, Madison's *Federalist No. 39* explicitly discussed congressional regulation of the tenure of office, and despite the denials of the unitary theorists, he proposed congressional regulation (an independent comptroller) in the First Congress. Hamilton read the same authorities that the First Congress would later cite, in Latin, for this proposition that officers are removed in reverse of the way by which they received the office; and the tradition of venality and freehold offices explains why Hamilton and others did not assume each President started with a clean slate for each administration.

III. VENALITY AND OFFICES AS PROPERTY IN EUROPE AND ENGLAND

A. How Did Venality and Sale of Office Work?

The sale of office and the related unremovability of office were not merely episodic; they were systematic. They reached vertically from low offices to significant offices with a national (or central metropole) portfolio, and they reached out geographically to the American colonies as a tool of empire. European historians credit the tandem systems of venality and patronage for the rise of the nation-state and the administrative state before it became a modern bureaucracy.

European historians have an emerging school of "Corruption Studies" which has focused on the venality of office in England and continental Europe,[147] and economic historians have explained the surprising efficiencies of this system (signals of skill and commitment, incentives to maximize the investment) to overcome the remoteness of early modern Europe.[148]

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143 *See* Shugerman, *Indecisions*, *supra* note 5, at 773–74.

144 *See* The Congressional Register, 19 May 1789, *reprinted in* 10 DHFFC, *supra* note 71, at 722, 730.

145 *See* Shugerman, *Indecisions*, *supra* note 5, at 824–34.

146 *See generally* Rakove, *The Madisonian Moment*, *supra* note 32.

147 *See* sources cited *supra* note 45.

148 *See supra* note 46.

In order for a "venality market" to work—i.e., in order for literate members of the local elite to invest a significant amount of their wealth in offices as part of a growing centralized bureaucracy—investment in offices had to be protected legally. This bargain functioned as a coherent system of offices as legal property. The Anglo-American system relied less on the sale of offices and official privileges than the French, who took the system to an extreme, but part of the limit on English venality was that English law offered the strongest legal protections to officeholders: offices as freehold property.

This Article takes on this challenge to show more than examples of unremovable offices. Eighteenth-century English offices were a mix of offices held for life, protected offices held during good behavior, and unprotected offices held during the king's pleasure. Unremovable offices were not merely episodic, but systematic—not merely anecdotal and local, but central, if not modal. Historians have documented that many of these unremovable offices had significant power in the central English state, and they were not isolated to lesser local offices.[149] Not only does this evidence refute the core assumptions of the unitary theory, but it is sufficient to establish the opposite proposition: the Founding generation understood that the Crown did not have a general removal power and that the term "executive power" did not imply removal. To the extent that some unitary executive scholars ask for evidence of "national executive power,"[150] the English central Treasury had many unremovable offices with significant executive power.[151] Even though eighteenth-century parliamentary reforms reduced their number, Treasury continued to have unremovable offices into the eighteenth century. As discussed below, historians have concluded that the venality/sale-of-office system substantially limited the Crown's control over key military personnel, and proprietors had hereditary offices giving them vast unchecked executive powers over entire proprietary colonies—a formative colonial experience of protected offices.[152]

149 *See* J.C. Sainty, *The Tenure of Offices in the Exchequer*, 80 ENG. HIST. REV. 449, 464 (1965) (U.K.); NORMAN CHESTER, THE ENGLISH ADMINISTRATIVE SYSTEM 1780–1870, at 16–23 (1981); AYLMER, THE KING'S SERVANTS, *supra* note 107, at 117; AYLMER, THE STATE'S SERVANTS, *supra* note 107, at 82; G.E. AYLMER, THE CROWN'S SERVANTS: GOVERNMENT AND CIVIL SERVICE UNDER CHARLES II, 1660–1685, at 93 (2002) [hereinafter AYLMER, THE CROWN'S SERVANTS].

150 *See* Wurman, *supra* note 6, at 142 n.205.

151 *See* SIR MATTHEW HALE'S THE PREROGATIVES OF THE KING 111–12 (D.E.C. Yale ed., 1976) [hereinafter HALE'S PREROGATIVES]; Sainty, *supra* note 149, at 449 (on the important offices of chancellors and chamberlains); AYLMER, THE KING'S SERVANTS, *supra* note 107, at 8 (for other national executive offices).

152 *See infra* Section V.B (especially the example of Maryland and the hereditary Lords Baltimore).

It is true that the highest offices like the "great offices," privy council, and most of the cabinet served at pleasure, but some of the most powerful officers in England and even some members of the eighteenth-century cabinet were lifetime freeholds.[153]

The venality system was in gradual decline in the eighteenth century, relative to its fellow traditional system of (removable) patronage and a growing mixed system of meritocracy. By the eighteenth century, Blackstone, Burke, and others documented a reform effort in Parliament to curtail inheritable and life offices, especially in the military and treasury, but they also indicated that these changes were a departure from longstanding English tradition and that such reforms were limited.[154] The English did not prohibit the purchase, solicitation, or sale of office until the Act of 1809,[155] and even afterwards, the institution of freehold protection for offices persisted into the mid-nineteenth century.[156]

This system may seem archaic and corrupt. Even its supporters used the term "venality," conceding just as much while defending its necessity. Indeed, even after modern reformist sensibilities attacked the sale of office, venality had a premodern logic and efficiency that persisted long into the nineteenth century. At the end of the medieval period, the Crown had a household of offices in its court and capitol, but little administrative control in the "country," where feudal lords ruled. In order to build a centralized nation-state-size administration, the royal court and central administration needed to entice literate elites to leave their fiefdoms and become officers in the growing national capital or throughout the country.[157] Feudal aristocratic families had a mix of local power, literacy, skills, and wealth. To lure some from these landed gentry—likely the nonfirstborn sons of feudal elites—to give up their traditional local sources of power and wealth, the Crown had to offer job security: legally protected tenure. Legal academics

153 *See infra* Section IV.A (on the heads of household departments as members of the cabinet until 1782, after American independence); 10 HOLDSWORTH, *supra* note 7, at 499–501.

154 *See* 1 BLACKSTONE, *supra* note 34, at *327, *335–36 (chapter nine on subordinate magistrates); 3 THE WRITINGS AND SPEECHES OF EDMUND BURKE: PARTY, PARLIAMENT, AND THE AMERICAN WAR 1774–1780, at 485 (W.M. Elofson et al. eds., 1996) [hereinafter BURKE, WRITINGS]; 1 THE WORKS OF EDMUND BURKE, WITH A MEMOIR 296 (New York, Harper & Bros. 1847); Birk, *supra* note 5, at 206; Shugerman, *Removal of Context*, *supra* note 5, at 158–59.

155 HARLING, *supra* note 8, at 119.

156 *See* ALLEN, *supra* note 9, at 14; Harling, *supra* note 9, at 130 (placing the reform movement's more significant progress against the "Old Corruption" system only after 1815, especially in the 1830s–40s).

157 *Cf.* THOMAS ERTMAN, BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE 171–74 (1997).

and judges surely understand this bargain well: giving up a lucrative private practice in exchange for the security of tenure, among other benefits. (This may be its own legal fiction with respect to legal historians forgoing a lucrative market, but maybe less so with the Roberts Court's reliance on originalism.) Unlike professorships or modern judgeships, these offices came with a monopolistic system of fees, patronage, and the power to sell additional offices under them ("within their gift").[158] Thus, the Crown could charge for such lucrative powers—using the sale of office as a source of Crown revenue and as a proxy for skill, investment, and incentives to fulfill the office's duties.

For the buying and selling of offices to work as a market, and to reassure the buyers of a stable good, the office had to be protected legal property. Even though many reformers regarded the buying and selling of offices as inefficient and corrupting,[159] the system of "venality" survived as a necessary bargain, even a necessary evil, in order to build the modern state and modern empires. Though buying and selling offices offends our modern sensibilities, historians have identified how the venality system was relatively efficient, fair, and rational. After acknowledging how a system of patronage and venality sounds strange and corrupt to modern ears, Douglas Allen gave the clearest account of why these systems were necessary: centralized management, measurement, and merit systems were impractical from the medieval through the early modern period in an era of limited transportation and communication.[160] Early modern state formation depended on decentralized systems of local incentives, local supervision, and market proxies for skill and investment. The problem of a vast American republic was on the Framers' minds, as Madison's *Federalist No. 10* attests.[161] The practicality of decentralized administration over a sprawling frontier was highly salient and challenging. Only during and after other revolutions—a scientific revolution, an industrial revolution, a transportation and communications revolution—was an "institutional revolution" in centralized administration possible. As Douglas Allen summarized, "[B]etween roughly 1780 and 1850, the world experienced what can only be called an 'Institutional Revolution.' . . . I mean that there was a distinct change, especially in the sector of the economy we call the 'public service.'"[162] Incremental reform efforts had begun in fits and starts in the seventeenth and eighteenth centuries, but the

158 Pfander, *supra* note 4, at 1139, 1139–42.

159 *See* DOYLE, *supra* note 45, 249–59; HARLING, *supra* note 8, at 22–23, 119; *cf.* SWART, *supra* note 45, at 46–48.

160 ALLEN, *supra* note 9, at 12–16, 19, 22–24, 32–34, 148.

161 THE FEDERALIST NO. 10 (James Madison).

162 ALLEN, *supra* note 9, at xii.

more significant reforms were after 1806, too late to have coalesced as original public meaning in 1787.[163]

Historians have identified how the English Crown exercised control over executive administration even without full removal powers: the king still created new offices and delegated new powers to them,[164] especially in the domain of treasury and finance, while keeping the old officers in place in their sinecures.[165] This approach seems to have resulted from a mix of realpolitik and legal constraint. John Brewer told this story in his famous book *The Sinews of Power: War, Money and the English State, 1688–1783*, and other historians have given a similar account.[166]

This system of venality and the sale of office had six steps or components as a key to building (or indeed, buying) the modern state and modern European empires over wide geographic areas before the communication revolution:

1. The Crown (by royal prerogative) and Parliament had flexibility to create new offices.[167]
2. The Crown enjoyed flexibility in making royal appointments.[168]
3. Officials sold many offices, and many of those offices could be resold.[169]
4. In addition to buying offices, many officers had to put up significant assets or financial commitments as security (known as "sureties") for their faithful performance of those offices.[170]

163 *See* HARLING, *supra* note 8, at 88, 89–91, 118–19, 134–35; Harling, *supra* note 9, at 130.

164 Blackstone described the Crown as the "fountain . . . of office." 1 BLACKSTONE, *supra* note 34, at *261. On the royal power of office creation and appointment, see WOOD, *supra* note 89, at 143–48; EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 69–70 (4th rev. ed. 1957); E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 178–79 (2018). Birk makes the important point that this executive power was not exclusive; Parliament also had the power to create offices and set conditions or alternative modes of appointment. Birk, *supra* note 5, at 217–20.

165 *See* JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783, at 12–20, 59–71 (1989); *see also* JOSEPH R. STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE 100–06 (2005); ALLEN, *supra* note 9, at 14; ERTMAN, *supra* note 157, at 172.

166 BREWER, *supra* note 165; STRAYER, *supra* note 165, at 100–06; ERTMAN, *supra* note 157, at 172–74.

167 *See supra* note 164 (on both office creation and appointment).

168 *Id.*

169 *See infra* text accompanying notes 219–20.

170 *See infra* Section VI.B.

5. Many offices were based on a highly profitable system of fees and bounties, as a return on investment (whether the purchase or surety).[171]
6. As a "security" on the other side of the transaction, offices were protected legal property (freehold and heritable), designed to be unremovable except by impeachment, misbehavior, or other judicial due process.[172]

This last step was the most relevant to our present debates: *executive removal was not an assumed power, because it would have undermined the core system of exchange of offices as profitable property, of offices of investment, whether by sale or surety.*

This *vénalité* system, the selling of offices as property, was not merely an understanding in the old world of Europe or in the distant past. It was part of the American colonial system, documented in colonial records, sitting on the Framers' bookshelves, hinted in the Declaration of Independence,[173] and reflected even in the constitutional text itself.

The 1787 Framers changed two (and a half) of these six steps. First, they delegated office creation to Congress through the Necessary and Proper Clause.[174] Second, the Framers divided up and shared the appointment power between President and Senate. And the additional half step: principal and inferior officers could not resell or bequeath the offices, because that exchange would violate the Article II Appointments Clause (one needs to be appointed to the office, rather than to have bought it).[175]

However, they left others untouched and in place—even with several references to "offices of profit" as continuity of the offices-as-property tradition. Nothing in the Constitution's text ended the sale of office by the government as part of an appointment process if Congress wanted to allow such fees for higher officers. The early congresses did not create offices with a sale price on top of the appointment process, but they frequently required financial bonds called sureties.[176]

Judicial offices held during good behavior (for life) fit into the English system of offices as protected property, and nothing in the text

171 *See generally* PARRILLO, *supra* note 44.

172 *See infra* Section III.C.

173 THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."). *See also* Pfander, *supra* note 4, at 1144 n.102 (first citing WOOD, *supra* note 89, at 212; and then citing James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 9 (2008)).

174 U.S. CONST. art. I, § 8, cl. 18; *see also* West, *supra* note 164, at 177–83.

175 U.S. CONST. art. II, § 2, cl. 2.

176 *See infra* Section VI.B; Chabot, *Interring*, *supra* note 5, at 176–77, 179, 192, 201–02; Shugerman, *supra* note 6, at 57–59, 72–73.

precluded non–Article III offices from having similar legal property protections. In fact, in *Marbury v. Madison*, Chief Justice John Marshall described William Marbury's non–Article III office, held for only a five-year term, as "not removable" and "not revocable."[177] The phrase "office of profit or trust" or a similar formulation appears three times in the Constitution: Article I, Section 3, Clause 7, on impeachment from office; Article I, Section 9, Clause 8, the foreign emoluments clause; and Article II, Section 1, Clause 2, on who may not be a member of the Electoral College.[178] Meanwhile, neither "remove" nor its legal synonym "displace" appears among Article II's presidential powers. And this is for good reason, in light of this venality system of return on investment. As historians have explained, the "office of profit," the sale of office, and offices as property were not a coincidence of independent practices, but rather were an interconnected system of incentives, checks, and balances throughout early modern Europe.[179]

The Presidentialists in the First Congress claimed Article II had resolved this issue, but it turns out that they were only a minority, roughly thirty percent of the House.[180] The Congressionalists were actually closest to the trends in the eighteenth and nineteenth centuries in England and on the continent: legislative reformers granting executive removal as a policy choice.[181] The 1787 convention coincided with a few states starting reforms of the sale of office, but it would take several decades for public meaning to shift in the Anglo-American world from (some or many) offices as property to offices as removable

177 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167, 162 (1803); *see* Shugerman, *Presidential Removal*, *supra* note 5. Bamzai and Prakash counter that some argued that Marbury's Justice of the Peace office was an Article III judicial office. Bamzai & Prakash, *supra* note 21, at 1810–13. However, the small number of Federalists they cited had their own partisan or political reasons to argue for Federalist officers' job security; the Supreme Court did not adopt this explanation in *Marbury*; and there is no explanation for how Marbury's five-year term would have been consistent with the uncontested understanding that Article III's tenure during good behavior meant life tenure. Nor have Bamzai or Prakash followed the logic of this idiosyncratic argument to concede that Congress could impose short term limits on Article III judges, whether eighteen years or five years, as many critics of the Roberts Court have proposed. Bamzai and Prakash's alternative explanation, that Congress had more latitude over territorial offices, does not explain why the statutory text of a five-year term would imply unremovability. *Id.* at 1811–12. Meanwhile, Manners and Menand's historical explanation for offices with a limited term of years, consistent with offices as property, does explain this implicit default meaning of unremovability. *See* Manners & Menand, *supra* note 5, at 18–27.

178 U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 3, cl. 7; *id.* art. II, § 1, cl. 2.

179 *See* BREWER, *supra* note 165, at 89–92; HENRY ROSEVEARE, THE TREASURY: THE EVOLUTION OF A BRITISH INSTITUTION 124 (1969).

180 *See* Shugerman, *Indecisions*, *supra* note 5, at 753 (indicating that the Presidentialists numbered at most sixteen out of fifty-four members of the House).

181 *Cf.* HARLING, *supra* note 8, at 21–24.

public service. Even after Parliament began its reformist period in the 1780s, many offices retained their freehold status.[182] England's reforms of venality and the rise of modern bureaucracy—which Allen called "the institutional revolution"—was complete only by around 1850, long after the Founding.[183]

B. Vénalité *in France*

The English and European law of offices was a complicated mix of public and private, of buying and selling offices for prestige, power, profits, and taxation privileges (by the eighteenth century known as "the venality of office"). A general "removal" power would have undermined the investments and depreciated each office's value, potentially toppling the royal treasury's house of cards. England may have been the first in medieval Europe to develop a systematic sale of office ("brocage"),[184] but France took this system to spectacular imperial heights until it crashed in 1789. French success invited copying throughout continental Europe, until the French Revolution abolished the sale of office and began a gradual phasing out of venality throughout Europe.[185]

The term "venality" seems pejorative, but its defenders embraced the term, acknowledging the realpolitik of incentives. Montesquieu and later writers used it to describe a longstanding practice of buying and selling offices. Montesquieu did not use the term pejoratively, but writers closer to the French Revolution used the term to sharpen their critique of the *ancien régime*.[186]

"Venality of office" was one of the underappreciated background causes of the French Revolution. In his classic study *Venality: The Sale of Offices in Eighteenth-Century France*, William Doyle traces the rise and rise of the sale of office until its collapse on the eve of the French Revolution.[187] His core argument is about its persistence and practical importance, despite many critics who rightly saw its dangers in shortsightedly raising short-term revenue while reducing the tax base in the long term, as well as a French crisis of corruption.[188] In *ancien régime* France,

182 *See id.* at 22–24, 30, 119. *See generally* ALLEN, *supra* note 9. *See also* Harling, *supra* note 9, at 130 (placing the reform movement's more significant progress against the "Old Corruption" system only after 1815, especially in the 1830s–40s).

183 *See* ALLEN, *supra* note 9, at 5, 7, 13–21.

184 *See* SWART, *supra* note 45, at 46–48.

185 *See* MILLER, *supra* note 45, at 139.

186 *See* MILLER, *supra* note 45, at 21 (recognizing Le Trosne's 1779 work, *De l'administration provinciale et de la réforme de l'impôt*, as critiquing venality).

187 *See generally* DOYLE, *supra* note 45.

188 *See id.*

most public officers had bought or inherited their positions.[189] Over three centuries of financing imperial expansion, French kings sold offices as property, and for an additional fee, the officeholders could have the right to sell their offices or bequeath them.[190] According to Doyle, the number of royal offices in France from 1515 to 1600 tripled from roughly 4,000 or 5,000 to 15,000, and over the next 64 years (by 1664), tripled again to 45,780, just as France was emerging as an early centralized nation-state.[191] By the eighteenth century, the French monarchs had created 70,000 such offices, including most military officers, most treasury officers, and the entire judiciary.[192]

France's dramatic growth of offices for sale coincided with the centralized imperial administration in Paris over a vast French nation-state, the rise of the House of Bourbon as the European superpower, and the expansion of the "Sun King's" global empire, eclipsing the Spanish, Portuguese, and Dutch empires.[193] National financial administration was at the center of this seventeenth-century powerhouse, just as it would be in Britain as it surpassed France over the eighteenth century. Doyle explains, "Among the most reliable [sources of revenue] was the sale and manipulation of offices. Officeholders could be certain that if the war was prolonged the king would seek to extract money from them through a whole range of all-too-familiar expedients."[194] Buying an office was a way for a father to buy the prestige of nobility for himself, his family, and his descendants for an extra fee.[195] However, these offices also came with the costs of additional tax burdens. In the early seventeenth century, Louis XIV's regime came up with a new market of offices to raise revenue: sell "offices" that gave the holder no new powers, fees, or commissions, but that came with long-term inheritable immunity from taxes.[196] These "offices" were much like selling Treasury bonds for an immediate infusion of cash into the royal treasury in exchange for larger future payments to the buyer. As this was such an investment in property, "nobody imagined that those who had invested in offices could ever be bought out."[197]

189 *See id.* at 12; J.H.M. Salmon, *Venality of Office and Popular Sedition in Seventeenth-Century France: A Review of a Controversy*, PAST & PRESENT, July 1967, at 21, 22.

190 *See* DOYLE, *supra* note 45, at 3; *cf.* SWART, *supra* note 45, at 48–49.

191 *See* DOYLE, *supra* note 45, at 6, 10–11.

192 *Id.* at 60.

193 *See generally id.*

194 *Id.* at 27.

195 *See id.* at 200–01; Douglas W. Allen, *Purchase, Patronage, and Professions: Incentives and the Evolution of Public Office in Pre-Modern Britain*, 161 J. INSTITUTIONAL & THEORETICAL ECON. 57, 60–62 (2005).

196 *See* DOYLE, *supra* note 45, at 16–25.

197 *Id.* at dust jacket, front flap.

Louis XIV and XV used these revenue infusions like war bonds to finance the global wars and colonial expansion that catapulted France into the superpower of the eighteenth century, until the inevitable fiscal crisis.[198] By the mid-1780s, the French fiscal system of venality collapsed under its top-heavy weight.[199] Wealthy non-nobility families had bought so many "offices" as inheritable tax breaks that by the late eighteenth century, there were few wealthy or even upper middle class families left to tax. If you ever wondered in your high school or college classes, "Why did the French government foolishly put such a high tax burden on the poor?," the long-term effects of venality are a clear explanation. This fiscal crisis and the resulting French Revolution occurred largely after or remotely from the Constitutional Convention. In fact, the French assistance of the American Revolution drew on venal revenues and also contributed to France's fiscal overreach and collapse.

But before the 1780s, the French debated venality, and even its critics conceded its practical advantages. One of the most fascinating aspects of Doyle's study is how renowned French Enlightenment thinkers initially attacked venality of office, but over time, they grasped its pragmatic benefits and either softened their critique or reversed themselves. Voltaire famously criticized venality in his best-selling *Le siècle de Louis XIV* in 1751.[200] The famous school of French Physiocrats initially joined in the critique, but by the 1750s and 1760s, these more "economic" and practical thinkers adopted a more balanced view in favor of incremental reform, recognizing the practicality of the sale of office.[201] In his seminal *Encyclopédie* in the 1750s, Denis Diderot initially recorded Montesquieu's positive view of venality, quoting his *The Spirit of the Laws*.[202] In the 1760s editions, Diderot pivoted to a more critical stance.[203] The basic point is that even Enlightenment thinkers sympathetic to reform still saw the merits of the sale of office, along with its demerits.

The French Revolution was a turning point for venality. While many reforms during the French Revolution did not survive, the revolutionaries' abolition of venal office holding did hold on, and the reforms spread more slowly but more successfully than Napoleon's army.

198 *See generally id.*

199 *Id.* at 302–23.

200 *Id.* at 254 (discussing VOLTAIRE, LE SIÈCLE DE LOUIS XIV (Berlin, M. de Francheville 1751)).

201 *Id.* at 254–55.

202 *Id.* at 256 (citing *Charge*, 3 ENCYCLOPÉDIE 197 (Denis Diderot & Jean de Rond d'Alembert eds., Paris, Briasson et al. 1753)).

203 *Id.* at 256 (first citing *Office*, 11 ENCYLOPÉDIE, *supra* note 202, at 414; and then citing *Vénalité des charges*, 16 ENCYCLOPÉDIE, *supra* note 202, at 909).

European historians agree that the sale of public office remained robust in the eighteenth century, until it was phased out over the nineteenth century.[204]

One of the most significant studies of European "venality of office" is K.W. Swart's *Sale of Offices in the Seventeenth Century*.[205] Swart shows, first, that venality was so fundamental throughout Europe—and not just in the seventeenth century, but long before and long after—that it would be obvious to contemporary lawyers and even the general public that offices as property was a common practice—and a common-sense practice—throughout Europe and its colonies.[206] Second, Swart found that the English had started the practice of buying and selling of offices earlier than other continental powers, but over time, other European powers relied more heavily on venality to increase revenue, to build nation-states, and to expand an empire.[207] A major part of Swart's explanation for why England relied on the practice less than did those other powers is that the English gave the strongest legal protections to those bought-and-sold offices, including them in the category of "freehold"—and thus they were protected from removal.[208] Given those strong legal protections, these offices limited the Crown's administrative flexibility, so the English were more careful about creating freehold offices, compared to the French and other continental powers.[209] Even if the English relied on venality less than did other European powers, the bottom line is that the American Founders read and experienced more widely than just the English system; from Montesquieu to real-world experience, the colonists lived in a world of imperial powers, governed by a robust mix of removable and unremovable officers.

C. Sale of Office and Freehold Property in England

Historians and economists have worked backward from the infamous French disaster to understand the origins of venality and its institutional logic, tracing similar practices in the rest of Europe and especially in England. The English story is classic England: older, more stable and incremental, more economically rational, with more rule-of-law norms focused on private property, less revolutionary, and with generally positive fiscal consequences with innovative and precise bookkeeping. By the seventeenth century, English kings and queens

204 *See, e.g.*, *id.* at 323; *see also* Allen, *supra* note 195, at 62.
205 SWART, *supra* note 45.
206 *See generally id.*
207 *See id.* at 45.
208 *Id.* at 47.
209 *See id.* at 49.

did not sell the offices themselves, but their appointees did, and many of those offices were recognized as unremovable freehold property. By the eighteenth century, English reforms gradually shifted more executive power to removable offices, but unremovable officers continued to wield significant executive power, and English administration continued as a complicated mix of patronage and offices as property, with no general rule either way.

Aylmer, the leading historian of early modern English administration, summarized the seventeenth-century system with six characteristics, emphasizing property rights:

> (i) entry into office was by purchase or patronage; (ii) tenure was for life or during pleasure; (iii) office holders were considered to have normal property rights to the office; (iv) office holders could be absent and hire deputies to do the work; (v) remuneration was by fees, shares in revenues, gratuities and perquisites, rather than salaries; and (vi) an office was a private interest, not a public service.[210]

As economic historian Douglas Allen observed, "Until the 19th century, however, with one exception public offices were either sold outright or granted through acts of patronage. Most notable was that merit, at least in the way we currently think of it, was not a consideration in the appointment to public office."[211] The exception was the English tax farms,[212] the parallel to eighteenth-century France's venal offices as tax shelter. Unlike the French, the English had the good sense to phase out the venal purchase of these tax farms in the 1670s and '80s, during the Stuart Restoration and soon before their own Revolution (known as "Glorious" in part because it was so nonviolent relative to the English and French ones before and after).[213]

Even though the English Parliament had been reforming the law of offices by phasing out tax farms first, and then inheritable offices and life-tenure executive offices (in contrast to judges), property rights in offices remained robust throughout the eighteenth century. In fact, historians have observed that for much of early modern English history, many executive offices enjoyed more job security than judges did.[214]

The sale of office originated in the early Norman period as offices were recognized as a form of feudal property. The classic multivolume

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210 Allen, *supra* note 195, at 59 (citing G.E. Aylmer, *From Office-Holding to Civil Service: The Genesis of Modern Bureaucracy*, 30 TRANSACTIONS ROYAL HIST. SOC'Y 91, 92 (1980)).

211 *Id.* at 59.

212 *Id.* at 73.

213 *Id.* at 72.

214 *See* AYLMER, THE KING'S SERVANTS, *supra* note 107, at 106, 109.

study of English law by William Holdsworth traces this origin and its continuity through the modern period.[215]

In *Birth of the Leviathan*, Thomas Ertman's chapter "Bureaucratic Constitutionalism in Britain" traces the distinctly English legal move of converting offices to the protected status of freehold land—and inheritable—in the 1200s[216]:

> The real starting point for the English law of offices that was to hold sway for the next 500 years was a clause in the Second Statute of Westminster issued in 1285. . . . In the statute of 1285, this logic [of freehold property law from real estate] was then extended to certain kinds of offices, but with a distinctly English twist.[217]

Initially, these property rules applied only to inheritable offices, at a time when a higher percentage of offices were inheritable. As inheritable offices declined as a share of the English state, the property rules nevertheless extended to the rising forms of office, such as the many offices for life.[218]

Once an office was sold, it became a relatively flexible commodity with a fluid market. Allen summarized, "Generally speaking, once an office had been granted it could be mortgaged, sold privately or through public auction, and bequeathed to heirs upon death."[219] Swart similarly observed, "Offices could be disposed of as if they were cattle or real estate. They could be bought, inherited, and divided between different persons. The proprietary rights extended to the fees attached to the offices and not even the king could deprive the official of these benefits without proper indemnification."[220] It is striking to reread the Fifth Amendment and the Takings Clause in this context: offices were property that could be taken only with just compensation.[221]

For some offices, the holders could sell only with the approval of the king, but in practice, the king delegated approval to subordinates, and permission was given flexibly. Many of the "great offices" of the Crown included the rights to sell subordinate offices and collect those payments.[222] These offices were often inheritable,[223] and they often had significant executive powers.

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215 *See* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 246–51 (3d ed. 1922); 10 HOLDSWORTH, *supra* note 7, at 499–506, 509–10.

216 *See* ERTMAN, *supra* note 157, at 173.

217 *Id.* at 172–73 (footnotes omitted).

218 *Id.* at 174.

219 Allen, *supra* note 195, at 60.

220 SWART, *supra* note 45, at 47.

221 *See* U.S. CONST. amend. V.

222 Allen, *supra* note 195, at 60–61.

223 *Id.* at 61.

These rules of offices as freehold property were already clear enough, and then the 1693 decision *Harcourt v. Fox*, decided by the King's Bench, confirmed that offices could be protected the same as other kinds of legal property.[224] The court held that tenure during good behavior ("*quamdiu se bene gesserit*") was an estate for life, with the same legal status.[225] As Chief Justice Holt said, "[M]en should have places not to hold precariously or determinable upon will and pleasure, but have a certain durable estate, that they might act in them without fear of losing them."[226] Later, *Harcourt* would be widely cited in early American Founding-era debates and the early republic, especially in the fight between the Federalists and the Jeffersonians over the courts and other offices.[227]

In English law of the seventeenth and eighteenth centuries, good-behavior tenure was common.[228] In 1740, Matthew Bacon provided a list of office types, most of which were forms of protected property following the same categories of real property: "Offices, in respect to their Duration and Continuance, are distinguished in those which are of Inheritance, or in Fee, or Fee-tail, those of Freehold or for Life, those for Years or a limited Time, and those which are at Will only . . . ."[229] An office for a term of years "would descend to the officer's heirs should the officer die in the middle of their term."[230] Bacon also indicated that some offices for a term of years may have been completely unremovable, even after crimes.[231] A few years later, Blackstone would confirm Bacon's account: tenure for a "term of years" was freehold

224 Harcourt v. Fox (1693) 89 Eng. Rep. 720; 1 Show. K.B. 506.

225 *See id.* at 729; 1 Show. K.B. at 525.

226 *Id.* at 734; 1 Show. K.B. at 535; *see also* Manners & Menand, *supra* note 5, at 19; Jed Handelsman Shugerman, Marbury *and Judicial Deference: The Shadow of* Whittington v. Polk *and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 92 (2002).

227 *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 42 (2012).

228 *See* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 100 & n.114 (2006).

229 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 732 (The Savoy, Henry Lintot 1740); *see also* 1 HOLDSWORTH, *supra* note 215, at 247–50 (listing offices held "in fee, in tail or for life" as forms of traditional property which "came very naturally to the mediæval common law," *id.* at 249, 248); Manners & Menand, *supra* note 5, at 19–20.

230 Manners & Menand, *supra* note 5, at 19–20 ("[O]ffices 'of great Trust concerning the Administration of Justice' should not be granted for a term of years, because if the officeholder died before the expiration of the term, 'it would go to Executors or Administrators,' leaving the office 'in suspense' until the will was probated, thereby injuring 'the Publick.'" (quoting 3 BACON, *supra* note 229, at 734)).

231 *See id.* at 20 (citing security even in case of "Outlawry" (quoting 3 BACON, *supra* note 229, at 734)).

property similar to the many inheritable offices and life-tenure offices, and thus was not held at pleasure.[232]

Allen provides remarkable examples, such as this one from 1660: Samuel Pepys was a major executive and legislative officer, administrator of the English Royal Navy, and a member of Parliament famous for keeping a detailed diary during a tumultuous era (the Restoration, wars, the Great London Fire, the Great Plague of London, etc.).[233] He recorded a freewheeling market of bidding for offices in an entry from 1660.[234]

The Glorious Revolution offers an example of offices as property being difficult to remove. Ralph Montagu had bought the office of "master of the wardrobe," a significant "household" office, from his cousin, the Earl of Sandwich, for £14,000 (about £1.5 million today), with an income of £3,000 per year (about £350,000 today).[235] A few years later, Montagu revealed to Parliament Charles II's secret deals with Louis XIV of France.[236] In 1678, Charles II "attempted to strip Montagu of the position," but failed.[237] It appears James II tried again and gave his office to a Stuart favorite, Preston, "but both the circumstances and the legality of the maneuver are unclear."[238] In 1685, Lord Halifax revoked Montagu's "patent" by alleging "miscarriage" in the office and gave the office to Preston.[239] After the Revolution, King William restored Montagu and regarded Montagu as never having lost his office.[240] This dispute led to litigation and the necessity of showing that Preston had committed a "great misdemeanor" or misprision (i.e., "ersatz treason," a misuse of office, neglect of duty, or political misconduct).[241] Once the litigation over the office required an allegation of misconduct against Preston, the lawsuit escalated into a prosecution.[242] Preston begged for pardon and the prosecution was dropped, but the litigation over the office continued.[243] Montagu eventually won the

232 2 BLACKSTONE, *supra* note 34, at *36; Manners & Menand, *supra* note 5, at 5, 19–20.

233 1 THE DIARY OF SAMUEL PEPYS (Robert Latham & William Matthews eds., 1970).

234 *Id.* at 177–216.

235 RICHARD S. KAY, THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW 256 (2014).

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.* at 256–57; *see also* EDWARD CHARLES METZGER, RALPH, FIRST DUKE OF MONTAGU, 1638–1709, at 170 (1987).

240 KAY, *supra* note 235, at 257.

241 *Id.* at 260–61.

242 *Id.* at 262.

243 *Id.*

suit, and Preston attempted to flee to France.[244] The point of the story is how difficult and burdensome it was to remove a purchased office—even a household office when the holder had betrayed the king's trust and the king adamantly wanted to remove that officer. That is solid evidence that some purchased offices were not removable except by serious quasi-criminal allegations and extreme litigation burdens.

English reforms began in the seventeenth century, but they were reversed during Restoration in the 1660s.[245] Reform efforts against buying and selling offices failed in the early modern period, as numerous exceptions allowed plenty of loopholes to return to the venal status quo.[246] The English Civil War sparked a short-lived reform effort,[247] but the Stuart Restoration not only restored the monarchy, it also restored patronage and the sale of office.[248] Reformers tried and failed again after the Glorious Revolution of 1688–89.[249] Parliament discussed banning sales, but it backed away—likely for reasons of revenue and practicality.[250] Knights described a debate about the particular problems when "ministers and high officials" sold offices, and he pointed to high officers selling offices, like the governor of the East India Company, including offices in colonial America.[251]

Swart comments that these failures should be unsurprising: "The Revolution of 1688–89 had consolidated the position of that part of the nation which was primarily interested in the continuation of the sale of offices."[252] The Whig revolutionaries were, to oversimplify the class dynamics, "new money" who wanted the ability to buy into increasing status, power, and prestige, and to buy their way past the Tories and aristocracy.[253] They also were attracted to the profits from fees as a good financial investment, especially for life and family inheritance—government as an upwardly mobile family business.[254] In an era of political upheaval and jockeying for status, the investment in an office often required the protection of that property from removal at pleasure or at will. The sale price of the office would turn on whether it was protected as property, and the English regime had an interest in

244 *Id.*

245 *See* KNIGHTS, *supra* note 45, at 350.

246 *See* AYLMER, THE KING'S SERVANTS, *supra* note 107, at 228.

247 *Id.* at 225–30.

248 SWART, *supra* note 45, at 54–59; *see generally* Bucholz, *supra* note 45.

249 SWART, *supra* note 45, at 61; *see also* Bucholz, *supra* note 45, at 86–89.

250 *See* SWART, *supra* note 45, at 60–61.

251 KNIGHTS, *supra* note 45, at 351, 353–55.

252 SWART, *supra* note 45, at 61.

253 *See* SWART, *supra* note 45, at 60–61; Bucholz, *supra* note 45, at 80–81; *see also* PARRILLO, *supra* note 44, at 26.

254 PARRILLO, *supra* note 44, at 59.

making that property more valuable at the time of sale.[255] Swart's account is confirmed by more recent historical studies by Ertman, Hurstfield, Aylmer, Chester, and Grassby.[256]

Later, eighteenth-century English guides were published to publicize how much offices cost and how profitable they were.[257] Knights observed, "Sale of office was reasonably routine and attempts to proscribe it failed repeatedly. Offices were even advertised in eighteenth-century newspapers."[258] He cited advertisements that clarified that "money, not merit, was the key consideration."[259] Knights concluded that reforms or bans on the sale of office were limited in scope throughout this period, until an 1809 statute "curbed" most sales of administrative offices.[260] Anticorruption reforms had stalled until the political tides turned after 1815.[261]

Even after these reform efforts, historians have described the eighteenth-century administrative state as a complicated mixed regime of new bureaucracies built on old ones, with a complicated and even byzantine maze of property rules. Aylmer quipped, "in eighteenth-century administration anomaly was the norm," and went on to call eighteenth-century administration "an extraordinary patchwork."[262]

IV. UNREMOVABILITY AMONG THE CABINET, DEPARTMENT HEADS, TREASURY, AND MILITARY

A. Holdsworth on the Cabinet and Department Heads

I, along with other critics of the unitary executive theory, have already shown that many English offices were unremovable.[263] Unitary theorists have responded that these offices were too early, too low-level, too local (i.e., non–central executive), or too judicial to be evidence relevant to late eighteenth-century Americans of unremovable offices

255 *Cf.* SWART, *supra* note 45, at 63 ("[O]ne third of the proceeds from the sale of offices would be destined for the liquidation of [London's] debt.").

256 *See* ERTMAN, *supra* note 157, at 8; RICHARD GRASSBY, THE BUSINESS COMMUNITY OF SEVENTEENTH-CENTURY ENGLAND 229–33 (1995); JOEL HURSTFIELD, FREEDOM, CORRUPTION AND GOVERNMENT IN ELIZABETHAN ENGLAND 315–16 (1973); Aylmer, *supra* note 210, at 92; CHESTER, *supra* note 149, at 19.

257 *See* KNIGHTS, *supra* note 45, at 345 (citing RICHARD HAYES, AN ESTIMATE OF PLACES FOR LIFE: SHEWING HOW MANY YEARS PURCHASE A PLACE FOR LIFE IS WORTH (London, W. Meadows 1728)).

258 *Id.* at 346.

259 *Id.*

260 *Id.* at 343.

261 HARLING, *supra* note 8, at 137; Harling, *supra* note 9, at 131.

262 Aylmer, *supra* note 210, at 96, 106; *see also* BREWER, *supra* note 165, at 72.

263 *See* Birk, *supra* note 5, at 175; Manners & Menand, *supra* note 5, at 19; Shugerman, *Removal of Context*, *supra* note 5, at 158.

with significant executive power.[264] I would add that some of the critics' evidence was also too late (1780s England).[265]

It turns out that we all missed how English historians a century ago (especially William Holdsworth) already had documented how many high offices, and even "great offices," were unremovable. During the Restoration of the Stuart Monarchy after the English Civil War, Charles II relied on redistributing unremovable freehold offices to solidify his return to power.[266] Many of these offices were "department heads."[267] Instead of using removal to wipe the slate of office clean and installing his own favorites, Charles II bought back offices at a huge public expense in 1663.[268] Charles II made sure to clarify that in his Restoration, the newly purchased offices would remain freeholds and were not removable.[269] Some of these highest royal court offices that were bought and were unremovable were known as "department heads." The three main "departments" were the "chamber," headed by the Lord Chamberlain; the "household" headed by the Lord Steward and Board of Greencloth; and the "stables," headed by the Master of the Horse.[270] They may not seem analogous to the American Constitution's "department head," because they eventually had more of a ceremonial and functional support role around the king. However, they were part of the early *curia regis* (the royal council and king's court) with significant advisory, executive, and judicial power, especially the chamberlain.[271] In *The Prerogatives of the King*, Sir Matthew Hale, a leading seventeenth-century jurist, listed some of these household department heads (the Lord High Steward and the Lord High Chamberlain) alongside the "great officers of state" as the king's closest advisors.[272] One of the most influential historians of English law suggested they "formed the nucleus of the Exchequer and the Curia Regis" and served as the king's "permanent, continual or resident

264 *See, e.g.*, Wurman, *supra* note 6, at 142 n.205.

265 *See, e.g.*, Birk, *supra* note 5, at 183, 215 n.248, 219 n.274, 223 n.295, 227; *see* Shugerman, *Removal of Context*, *supra* note 5, at 160.

266 Bucholz, *supra* note 45, at 69.

267 *Id.*

268 *Id.*

269 *Id.* at 71–72.

270 *Id.* at 65.

271 *See* RONALD BUTT, A HISTORY OF PARLIAMENT: THE MIDDLE AGES at 90 (1989); 1 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 345 & n.1, 388 (Oxford, Clarendon Press 1874) (on the steward's and the chamberlain's judicial roles); *cf.* J.E.A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND: FROM THE ENGLISH SETTLEMENT TO 1485, at 290 (4th ed. 1961); ANN LYON, Constitutional History of the UK 66, 99, 168 (2nd ed. 2016); J.R. MADDICOTT, THE ORIGINS OF THE ENGLISH PARLIAMENT, 924–1327, at 189, 397 (2010).

272 HALE'S PREROGATIVES, *supra* note 151, at 111–16.

council."[273] Even after their legal and executive power diminished, they retained administrative power and high status in the royal court.[274] These department heads supervised roughly 800 to 1,400 employees, a significant number of the entire national administration, and a vital part of constructing a magisterial Crown to promote the nation-state of England.[275] These offices were high status, culturally and economically powerful, and they were directly involved in building and centralizing executive power.

Unitary theorists have objected that these household "department heads" were ceremonial and nothing like executive offices exercising executive power.[276] To the contrary, William Holdsworth's classic *A History of English Law* explained that these officers of the "household" were leading members of the king's councils, and the "inner ring" of the original royal "Council" became "the committee" and the initial royal "cabinet" that defined modern English government.[277] The emerging cabinet "always comprised some of the most important officials of the state, the church, and the royal household."[278] The lord chamberlain and the lord steward were core members of the "Cabinet Councell" or "cabinet Councill" from the late seventeenth into the eighteenth century.[279] As a more amorphous "Council" or "committee" developed into the smaller modern institutional "cabinet," it still included "the chief officials of the King's household" through the eighteenth century.[280] Holdsworth observes that only in 1782 was the "cabinet" restricted to heads of the "departments of state" (law, army, navy, revenue, home, and foreign affairs), excluding the household departments as it took the form that is more familiar to twentieth- and twenty-first-century readers.[281]

Holdsworth then provided a long description of how offices as freehold property were so persistent, even into the nineteenth

273 2 STUBBS, *supra* note 271, 255–56; *cf. id.* at 344–45.

274 *See* Bucholz, *supra* note 45, at 65–67, 69.

275 *Id.* at 65.

276 *See, e.g.*, Wurman, *supra* note 6, at 142 n.205.

277 10 HOLDSWORTH, *supra* note 7, at 456, 481.

278 10 HOLDSWORTH, *supra* note 7, at 481; *see also* 1 EDWARD RAYMOND TURNER, THE CABINET COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES, 1622–1784, at 16–17 (1930) [hereinafter TURNER, CABINET]; 2 EDWARD RAYMOND TURNER, THE PRIVY COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES, 1603–1784, at 220–27, 265–74 (1928) [hereinafter TURNER, PRIVY COUNCIL].

279 *See* 1 TURNER, CABINET, *supra* note 278, at 403, 402, 403–10; 2 *id.* at 1–13, 241, 339, 359; Edward Raymond Turner, *The Development of the Cabinet, 1688–1760, Part I*, 18 AM. HIST. REV. 751, 754, 761 (1913).

280 10 HOLDSWORTH, *supra* note 7, at 482.

281 *Id.*; *see also* 2 TURNER, PRIVY COUNCIL, *supra* note 278, at 227.

century.[282] He then documented the pervasiveness of such freehold offices and sinecures in the powerful offices in the centralized departments of Exchequer and Treasury, with references to "great officers" with significant powers.[283]

Of course, these "department heads" do not look like today's Secretary of State or Secretary of the Interior, but in the eighteenth-century world, they were significant "department heads" both in name and function. If one wants to see evidence of more recognizably national executive powers with unremovable officers, keep reading the next Part on the English Treasury and its long history of unremovable officers.[284]

B. Sinews of Power: Treasury's Significant Unremovable Offices

John Brewer's *The Sinews of Power: War, Money and the English State, 1688–1793* is a famous study of the transformation of the English Treasury and its role in effective tax collecting and in building a global military empire.[285] Brewer described its mixed system of patronage and venality as a "labyrinth" of "drones, parasites, sharks and harpies," and yet nevertheless, it persisted—and the English state was still "able to operate so effectively against its chief diplomatic and military rivals," becoming the global superpower in this period.[286] The numbers show the transformation: In the 1660s, England had a population of about 5.5 million people, and the Crown struggled to raise £2.5 million.[287] By 1763, and with a population of about 8 million people, the English government spent £20 million per year, and comfortably managed £130 million in debt.[288] English historians explain that this fiscal revolution "was an achievement which is not explicable purely in terms of

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282 *See* 10 HOLDSWORTH, *supra* note 7, at 499–506, 509–16. In an uncharacteristically candid passage with editorializing against venality, Holdsworth wrote,

> An office was granted to a person, as if it was a piece of property. . . . [I]t was impossible to get rid of them. Since the right to the office was in many cases a freehold, which gave the holder a vote for the election of members of Parliament, it could not be abolished . . . .
>
> In all parts of the machinery of central government we can see the results of these mediæval ideas. They are present not only in the older offices and departments of government, but also in some of the more recent; for these ideas were infectious. They infected all parts of the machinery of government . . . .

Id. at 499–500 (footnotes omitted).

283 *Id.* at 501–04.

284 *See infra* Section IV.B.

285 *See* BREWER, *supra* note 165.

286 *Id.* at 58, 60.

287 Allen, *supra* note 195, at 72 (citing P.G.M. DICKSON, THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688–1756 (1967)).

288 *Id.*

economic growth, for it has been convincingly argued that the resources of mid-eighteenth-century Britain had not grown in proportion to the demands being placed upon them."[289]

Douglas Allen's *The Institutional Revolution* helps explain why: It was a bureaucratic revolution, but without a modern bureaucracy; it was a mixed administration of patronage and venality.[290] A system of patronage and the sale of office enabled an efficient mix of incentives to overcome vast distances, reducing the need for communication and central control.[291] Allen argued that patronage plus venality of office "[m]aximiz[ed] the value of the kingdom."[292] "The outright sale of a civil office ha[d] very strong incentive effects" to take advantage of a major investment and work harder to do the job and collect fees.[293] If an individual could pull together enough cash to buy the office, this price was a proxy for sufficient education, skill, and effort to perform the office effectively, or to resell it to someone else who would.[294]

Matthew Hale, a major seventeenth-century legal authority on royal power, documented Treasury as a domain of many unremovable offices in the early modern period.[295] British historian J.C. Sainty's thorough study, *Office-Holders in Modern Britain: Treasury Officials 1660–1870*, documents how significant Treasury officers below the Secretary level had life tenure and were unremovable into the 1780s.[296] Following Sainty, the below list presents a simple hierarchical organization chart of Treasury's "basic structure" of its centralized leadership in London from at least the early eighteenth century until the reforms of 1782[297]:

- 1 Treasurer and 5 Commissioners of the Treasury;[298]
- 1 Chancellor of the Exchequer;[299]
- 2 Secretaries;[300]
- 4 Chief Clerks;[301]

289 HENRY ROSEVEARE, THE FINANCIAL REVOLUTION 1660–1760, at 2 (1991).
290 *See* ALLEN, *supra* note 9, at 15.
291 *See id.*
292 *Id.*
293 *Id.*
294 *Id.* at 15–16.
295 *See* HALE'S PREROGATIVES, *supra* note 151, at 111–12; Sainty, *supra* note 149, at 452.
296 1 OFFICE-HOLDERS IN MODERN BRITAIN: TREASURY OFFICIALS 1660–1870, at 12 (J.C. Sainty ed., 1972) [hereinafter SAINTY].
297 *Id.* at 5.
298 *Id.* at 16.
299 *Id.* at 16–17.
300 *Id.* at 4.
301 *Id.*

- 9 "Under Clerks" as of 1715, then 21 "Clerks" and "Under Clerks" as of 1776;[302] and
- 3 Under Clerks for keeping accounts.[303]

The Chief Clerks and Clerks (or Under Clerks) had "secure tenure," and Chief Clerks "generally remain[ed] in office until death or voluntary resignation."[304] The name "clerk" may be misleading to modern readers. Chief Clerks were authorized "to undertake any of the business of the office" when necessary, and they often did.[305] They were formally "the senior members of the permanent staff" under the Secretaries until 1805, when the office of Assistant Secretary was created.[306] When Treasury was reorganized into five or six divisions, each Chief Clerk ran a division.[307] The Chief Clerks seem roughly comparable to the modern U.S. Treasury's under secretaries or assistant secretaries, which require Senate confirmation.[308]

Even above the powerful level of the clerks, the heads of Treasury had a mix of permanent tenures for much of this era. The Treasurers and Commissioners of the Treasury held their offices at pleasure, but the first "secretaryship," who functioned as the head of Treasury, had "permanent" tenure as a matter of norms and practice, "unaffected by political changes,"[309] and this secretaryship took precedence over the second secretaryship until 1752.[310] The Chancellor of the Exchequer was a life-tenure office until 1676, then held during pleasure thereafter.[311] Nevertheless, support for secure tenure in Treasury remained robust through the end of the nineteenth century. In 1793, the Privy Council proposed that one of the Joint Secretaries should be placed on a permanent tenure.[312] Treasury rejected this proposal,[313] but the debate indicated that life tenure for such significant executive offices, arguably the equivalent of a secretary or modern department head, was still a robust norm and a viable proposal with widespread support at

302 *Id.* at 5, 36.

303 *Id.* at 5.

304 *Id.* at 6.

305 *Id.* at 34 n.2. "Until 1805 the Chief Clerks ranked after the Joint Secretaries and in addition to their own particular responsibilities acted in a general advisory capacity to the Board." *Id.* at 34.

306 *Id.* at 34.

307 *Id.*

308 See, for example, offices designated as "PAS" (Presidential Appointment with Senate Confirmation) in *United States Government Policy and Supporting Positions*, commonly known as the Plum Book. H. COMM. ON OVERSIGHT & REFORM, 116TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 122–25 (Comm. Print 2020).

309 1 SAINTY, *supra* note 296, at 29.

310 *Id.*

311 *Id.* at 26; *see also* Sainty, *supra* note 149, at 466.

312 *See* 1 SAINTY, *supra* note 296, at 11.

313 *Id.*

the king's cabinet (and Privy Council) level, even after the U.S. Constitution was ratified.

Holdsworth also characterized the powerful departments of Exchequer and Treasury as dominated by freehold unremovable offices throughout this era,[314] even into the nineteenth century.[315] He then provided a remarkable list of major offices in Treasury and other important offices that were unremovable sinecures, including the comptroller.[316] Hale also referred to "many great officers" in Exchequer with significant powers who were unremovable, and he complained that many of them passed on their duties to deputies.[317] A century later, Burke made a similar observation about the important patent offices in the Exchequer department.[318]

To overcome the problem of incompetent or corrupt officers who could not be removed, the British Treasury relied on a practice known as "removes," but a completely different kind of removal from displacement or firing.[319] These "removes" were geographic rotation, more moving than removing, as Treasury officers regularly switched location.[320] It was more like jurisdictional removal, or like removing a jury trial to a different forum. This "removes" rotation was a check against officers getting too comfortable, entwined with local interests, and colluding with merchants.[321] A smaller percentage of "removes" served as punishment.[322] Brewer finds that about 41% of officers were "removed" (rotated) in any given year in the early eighteenth century, with an additional 13% moved as punishment; these rates declined to about 15% in a regular rotation, and about 3% moved as punishment by the 1780s.[323]

It seems rotation may have served a purpose like removal without removing the officer: the Crown could move officials around to get the wrong mix of officers out to the margins and to open up space for the right mix of officers in the right places. This era from the Restoration through the Glorious Revolution and into the eighteenth century was

314 *See* 10 HOLDSWORTH, *supra* note 7, at 501–04.

315 *Id.*

316 *Id.* at 502–03.

317 *Id.* at 501 (quoting Hale, *Considerations Touching the Amendment or Alteration of Lawes*, *in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, FROM MANUSCRIPTS 253, 279 (Francis Hargrave ed., Dublin, E. Lynch et al. 1787)).

318 *Id.* (quoting 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 100 (London, Henry G. Bohn 1855) [hereinafter BURKE, WORKS]).

319 *See* BREWER, *supra* note 165, at 89.

320 *Id.* at 82–83, 89–91.

321 *Id.* at 89.

322 *Id.* at 89–91.

323 *Id.* at 90.

a revolution in public finance and revenue.[324] "What changed that allowed this financial revolution to happen? It is tempting to view the Glorious Revolution as the watershed moment," Allen observes.[325] But instead, Allen concludes that the finance revolution was a long-term secular trend, regardless of who held the Crown: "[I]t is best seen as part of a continuous transfer of power from the Restoration onwards from crown to Parliament."[326]

C. The Republican Virtues of Venality: Blackstone, Burke, Bentham

As I presented this new evidence in earlier drafts, some unitary theorists who initially criticized my arguments about "venality" objected that these institutions were too aristocratic, too antirepublican, and too impractical to be relevant to the Founding. First, as I noted above, this objection misses the parameters of this historical debate: it is the unitary side that increasingly relies on a "British Backdrop" of royal powers,[327] and it is sufficient to show that they are wrong about English history and what the Founding generation perceived about English practices, whether or not Americans approved. Second, this objection backfires: if my evidence of freehold offices is too "aristocratic" and "unrepublican" to be relevant, then their reliance on "British Backdrop" royalism, the royal prerogative, and British colonial practices is clearly even more problematic. (Their objection to counterevidence from English law and practice would be an example of "heads-I-win, tails-you-lose originalism."[328]) Third, if they believe that the Framers would have rejected these institutions as aristocratic or obsolete, they are welcome to look for such evidence. In the meantime, Parts V and VI show evidence of American continuities, and a separate article shows that efforts to revive their theory have offered little evidence about a general rule of "tenure during pleasure" or of "indefeasibility."[329]

Furthermore, venality's defenders offered remarkably modern functional efficiency arguments and even republican-style independence defenses. Blackstone and Burke also defended tenure protections (as did famous utilitarian Jeremy Bentham in the nineteenth century) as a practical system protecting increasingly modern values of expertise, efficiency, and decisional independence. As we saw above in Part III, French enlightenment thinkers beyond Montesquieu

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324 *See, e.g.*, Allen, *supra* note 195, at 73.
325 *Id.* at 75.
326 *Id.*
327 *See supra* Section I.A.
328 *See supra* Section I.A.
329 Shugerman, *supra* note 6, at 5, 6. *See generally id.*

defended venality in modern functional and pragmatic terms.[330] These authorities, as well as Coke, Pufendorf, Blackstone, Burke, and (later) Bentham provided a mix of practical arguments. Offices as property incentivized and protected more expertise in offices, even intergenerational family expertise; decentralized and delegated powers to local elites with local control/local knowledge, but with secure independence from local backlash; and enabled checks and balances against royal court politics and, within the bureaucracy, a proto–*Internal Separation of Powers*.[331] The British Treasury is a primary example.

On the one hand, Montesquieu's *The Spirit of Laws* attributed venality and sale of office to constitutional monarchy or aristocracy, and cited Plato's rejection of venality in a "republic founded on virtue."[332] At the same time, Montesquieu was describing the European backdrop of executive power, and he linked tenure-at-pleasure/removal-at-will to "despotism." Regardless of where venality fits, Montesquieu reflects a rejection of an indefeasible removal power for either republics or mixed regimes.

In addition to Brewer, other modern scholars have described Treasury as a special domain of many unremovable offices in the early modern period, even if the trend was moving towards more at-pleasure tenure,[333] and according to Brewer and other historians, these bureaucratic structures played a role in strengthening British financial and imperial power.[334] This is not just historians' hindsight. As I have shown earlier, Blackstone and Burke commented on the persistence of offices as property, especially in Treasury, and on how reform efforts were only gradual.[335] Blackstone's chapter on Treasury and the military reflected his approval of a tradition that high officers had job security against removal. He was sharply skeptical of the reform efforts towards more removal power, demonstrating the reformers' "unaccountable want of foresight."[336] He protested that too much power "in the hands of the crown, ha[s] given rise to such a multitude of new officers, created by and removeable at the royal pleasure, that they have extended the influence of government to every corner of the nation."[337] Blackstone blamed these reforms for turning Treasury into a

330 *See supra* Section III.B; *see, e.g.*, DOYLE, *supra* note 45, at 254–56.

331 *See generally* Katyal, *supra* note 38 (on a modern approach to internal separation of powers).

332 1 MONTESQUIEU, *supra* note 1, at 100.

333 *See* Sainty, *supra* note 149, at 466; AYLMER, THE KING'S SERVANTS, *supra* note 107, at 106.

334 *See* BREWER, *supra* note 165, at 93.

335 See the discussion of Blackstone and Burke in Shugerman, *Removal of Context*, *supra* note 5, at 159.

336 1 BLACKSTONE, *supra* note 34, at *324.

337 *Id.*

nepotistic bastion for the Crown's cronies and undermining the independence so important for the Treasury.[338]

Edmund Burke similarly responded to the reform movement by defending property in offices. Burke recognized flaws in the freehold office system, but he also identified its advantages and its efficiencies. In 1780, his famous "Economical Reform" speech focused on the biggest problem: offices as inheritable property.[339] However, he warned that property rights in offices protected the rule of law. The removal power would lead to abuses of "the discretion of power," and "we can be at no loss to determine whose power, and what discretion it is that will prevail at last."[340] He was not merely showing early signs of Burkean incrementalism. In the 1770s, Burke was supportive of the American cause and sympathized with democratic reform.[341] Implicitly, he was defending the system of offices as unremovable property as protecting administrative expertise against royal or political abuses. Prominent scholars of the English administrative state have echoed Blackstone and Burke.[342]

Nineteenth-century reformer Jeremy Bentham is also part of this story because the sale of office so widely persisted into the nineteenth century. In the eighteenth century, judges added to their compensation by fees and salaries by selling offices within their gift, which was "regarded as a species of property attached to the judicial office itself."[343] As judges sold offices, they would "bargain[] with the purchaser in the expectation that the appointment to a sinecure would provide an annuity for the life of the individual installed."[344] In 1790, the Lord Chancellor, the Master of the Rolls, the Chief Justice of King's Bench, and the Chief Justice of Common Pleas made over half of their income from patronage and the sale of office.[345] In 1818, royal commissions were appointed to study the sale of office in the judiciary, and then reforms were only incremental over the next few decades, deep into the nineteenth century.[346]

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338 *Id.*

339 *See* 3 BURKE, WRITINGS, *supra* note 154, at 484–85.

340 *Id.* at 526; *accord* 2 BURKE, WORKS, *supra* note 318, at 329.

341 *See* Jeff Spinner, *Constructing Communities: Edmund Burke on Revolution*, 23 POLITY 395, 403 (1991).

342 *See* 10 HOLDSWORTH, *supra* note 7, at 499–520; CHESTER, *supra* note 149, at 16–23; AYLMER, THE KING'S SERVANTS, *supra* note 107, at 106; AYLMER, THE STATE'S SERVANTS, *supra* note 107, at 82; AYLMER, THE CROWN'S SERVANTS, *supra* note 149, at 93.

343 Pfander, *supra* note 4, at 1138–40 (citing DANIEL DUMAN, THE JUDICIAL BENCH IN ENGLAND 1727–1875: THE RESHAPING OF A PROFESSIONAL ELITE 111 (1982)).

344 *Id.* at 1140 (citing DUMAN, *supra* note 343, at 116).

345 *See* DUMAN, *supra* note 343, at 106 tbl.8, 112–13 tbl.9.

346 1 HOLDSWORTH, *supra* note 215, at 248, 262–64; 10 HOLDSWORTH, *supra* note 7, at 500–16; Allen, *supra* note 195, at 60.

However, Bentham had long defended the sale of office. In his book *The Rationale of Reward*—published in 1825, but authored in the 1780s or 1790s—he gave voice to the explanations that historians later inferred: "When a man purchases an office, it may be fairly presumed that he possesses appropriate aptitude for the discharge of its duties."[347] Bentham wrote that there were no clear rules about when the sale of office was more or less appropriate: "[T]his question can only be determined by an accurate account, exhibiting the balance of the sums paid and received," case by case.[348] He even suggested that offices based on honor and not profit "would be to convert a tax upon honour,"[349] and described the movement against the sale of office as "prejudice."[350] He ultimately embraced Montesquieu's reasoning:

> The circumstance which ought to recommend the system of venalty [sic] to suspicious politicians is, that it diminishes the influence of the crown. The whole circle over which it extends is so much reclaimed from the influence of the crown. It may be called a corruption, but it serves as an antidote to a corruption more to be dreaded.[351]

Much like the French Enlightenment thinkers of the eighteenth century who started criticizing *vénalité* and then saw its advantages, so too did Bentham show the enduring pragmatism of a mixed system of incentives in the sale of office deep into the nineteenth century. Americans experienced the system's mix of virtue and vices, and as Parts V and VI will show, the Founding era reflected a mix of changes with the continuities of property in office.

V. VENALITY AND UNREMOVABILITY IN COLONIAL AMERICA

A. The British Military and American Experience

The story of the American revolution is a reminder of how the British military was built on the sale of office. The main reason George Washington could not move up in the British military in the 1750s was bias against the colonists and the privileges of the British, and he was also frustrated by a system of patronage and seniority.[352] The mix of a

347 JEREMY BENTHAM, THE RATIONALE OF REWARD 182 (London, John & H.L. Hunt 1825).

348 *Id.*

349 *Id.*

350 *Id.* at 184.

351 *Id.* at 186.

352 *See* RON CHERNOW, WASHINGTON: A LIFE 68 (2010); JOHN R. ALDEN, GEORGE WASHINGTON: A BIOGRAPHY 50 (1984); JAMES THOMAS FLEXNER, GEORGE WASHINGTON: THE FORGE OF EXPERIENCE (1732–1775), at 221 (1965).

patronage system and the seniority-sale system limited Washington's access to promotions. If he had been promoted in the late 1750s, who knows how the American Revolution would have fared? And one reason some historians suggest the Americans defeated the British was that the British system of buying and selling and inheriting military commissions produced a more mediocre set of mid-level officers.[353] One historian, in a book titled *The Men Who Lost America*, on the failures of the British military leadership during the Revolution, observed, "The [British] army abounded with officers in their teens," and it seems from his account and the accounts of others that these inexperienced, unreliable officers gained their place through a mix of class and family patronage.[354]

Purchasing officer commissions was the standard practice among cavalry and infantry officers in the British army from the seventeenth century until the practice's abolition in 1871, after a series of more scandalous military failures.[355] Historians estimate that about two-thirds of British army commissions were held by purchase.[356] Consistent with the law of other offices, military commissions were also protected by legal property rights, and even when the system was abolished in 1871, Parliament paid compensation in recognition of the taking of those property rights.[357] Around 1787, however, the sale of military officer commissions and their property status were still entrenched legal practices.

Economic historian Douglas Allen observes, "The modern commercial connotation of the word 'company,' in part, reflects the commercial nature of these armies."[358] The "company" shared the "profits" of plunder and spoils of war.[359] Military commissions came with significant financial benefits: the largest share of plunder and, at the end of a career, the sale of the commission to the next officer, a sizable pension.[360] They also carried large financial costs: a duty to provide "company" expenses for uniforms, wages, equipment, and death benefits to widows.[361] Purchasing a commission was the dominant way to

353 *See* CHERNOW, *supra* note 352, at 68; ANDREW JACKSON O'SHAUGHNESSY, THE MEN WHO LOST AMERICA: BRITISH LEADERSHIP, THE AMERICAN REVOLUTION, AND THE FATE OF THE EMPIRE 155–56 (2013).

354 O'SHAUGHNESSY, *supra* note 353, at 155–56.

355 *See* BRUCE, *supra* note 45, at 4, 6, 13–16.

356 *See* J.A. HOULDING, FIT FOR SERVICE: THE TRAINING OF THE BRITISH ARMY, 1715–1795, at 100 (1981).

357 *See* BRUCE, *supra* note 45, at 144.

358 Allen, *supra* note 4, at 48.

359 *Id.* at 48–49.

360 *See* ALLEN, *supra* note 9, at 7; Allen, *supra* note 4, at 49.

361 Allen, *supra* note 4, at 46–47.

enter the officer corps.[362] Then promotion turned on a mix of purchase, seniority, and patronage. Purchases formally required the Crown's approval,[363] but because the officers had control over the market, this system sharply limited the control of the Crown and Parliament over army staffing.

B. Colonial America: Unremovable Proprietary Rule and Sale of Office

As James Pfander has pointed out, the Declaration of Independence listed among its many protestations and causes a denunciation of the king's patronage: "He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."[364] Pfander, in his study of judges selling offices, cites other scholars who conclude that the Declaration was protesting the Crown's "tendency to use offices as sinecures for the benefit of 'placemen.'"[365]

The American colonists had many experiences with the British sale of office and unremovable offices. The most important point is that the American colonists had frequent and longstanding experience with the Crown's lack of a removal power over those who wielded executive power and administered the colonies. Most of the colonies started as "proprietary" colonies or corporate colonies. Proprietary colonies did not have the same structure as corporate colonies, but they had similar charters and legal protections against removal.[366] A proprietary colony was led by a single proprietor or a small number of proprietors, like landowner landlords with executive power.[367] As Blackstone explained, "Proprietary governments [were] granted out by the crown to individuals, in the nature of feudatory principalities . . . ." [368]

Corporate colonies also had similarities with private law: they had a corporate charter from the king. In the same passage, Blackstone continued on to describe "[c]harter governments, in the nature of civil corporations, with the power of making by-laws for their own interior regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation."[369] Though the king named a governor and could remove that governor, the king could not cancel the charter and had

362 *See* ALLEN, *supra* note 9, at 146, 152.

363 *Id.* at 153.

364 THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

365 Pfander, *supra* note 4, at 1144; *see* sources cited *supra* note 154.

366 *Cf.* Herbert L. Osgood, *The Proprietary Province as a Form of Colonial Government, II*, 3 AM. HIST. REV. 31, 32 (1897).

367 *See id.*

368 1 BLACKSTONE, *supra* note 34, supp. at iii.

369 *Id.*

limited control over the rest of the charter government. The king had the power to "erect[] corporations" but did not have the power under English law to dissolve corporations; the only ways to dissolve a corporation were by an act of Parliament, surrender, forfeiture, or death.[370] Corporate rights were similar to property rights. Accordingly, much of the leadership of a corporate colony was not removable by the king.[371]

Seventeenth-century colonies were most often proprietary: Maryland, Pennsylvania, East and West Jersey, New York, Delaware, the Carolinas, Nova Scotia, and initially New Hampshire (as of 1629).[372] Georgia was a proprietary colony from its establishment in 1732 until 1752.[373] Most proprietary colonies were converted to royal colonies, but Pennsylvania, Maryland, and Delaware reverted back to or remained proprietorships into the eighteenth century.[374] The king granted a single proprietor an "estate of land" in the colony, a strong property legal protection, and it functioned like a fiefdom.[375] The proprietor governed and owned the colony alone, and it passed along like property to "his heirs and assigns," "an heritable fief," through primogeniture to the proprietor's eldest son.[376] For example, Maryland was governed by five generations of "Lord Baltimore," the hereditary proprietors who controlled the colony by inheritance through most of the eighteenth century.[377]

The proprietor was not removable. The king had to use a different legal tool of suspension of the proprietorship, at which point the regime became a royal colony, not a removed and vacant office for a new proprietor.[378] When the Crown suspended a proprietorship, the

370 1 BLACKSTONE, *supra* note 34, at *462, *473.

371 *See* Herbert L. Osgood, *The Corporation as a Form of Colonial Government, I*, 11 POL. SCI. Q. 259, 273 (1896).

372 *See generally* 1 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY (1904); 2 OSGOOD, *supra*; David Dewar, *The Mason Patents: Conflict, Controversy, and the Quest for Authority in Colonial New Hampshire*, *in* CONSTRUCTING EARLY MODERN EMPIRES: PROPRIETARY VENTURES IN THE ATLANTIC WORLD, 1500–1750, at 269 (L.H. Roper & B. Van Ruymbeke 2007).

373 *See* JAMES ROSS MCCAIN, GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST 24, 110, 134–35 (1917).

374 *See generally* 3 OSGOOD, *supra* note 372; *see also id.* at 481; Osgood, *supra* note 366, at 31 n.1; VICKI HSUEH, HYBRID CONSTITUTIONS: CHALLENGING LEGACIES OF LAW, PRIVILEGE, AND CULTURE IN COLONIAL AMERICA 54 (2010); JOHN A. MUNROE, COLONIAL DELAWARE: A HISTORY 233 (2003).

375 Herbert L. Osgood, *The Proprietary Province as a Form of Colonial Government, I*, 2 AM. HIST. REV. 644, 656, 655–56 (1897).

376 *Id.* at 649.

377 *See* CHARLES ALBRO BARKER, THE BACKGROUND OF THE REVOLUTION IN MARYLAND 119, 133, 142–44, 226–30, 238–39 (1940).

378 *See* Osgood, *supra* note 366, at 31.

proprietor reverted to a landlord with vast property but no political power.[379] The only other way to vacate the office was for the proprietor to resign.[380] The proprietary model of the individually controlled fiefdom can be contrasted with the charter or corporate model of distributed powers to the legislative assembly and general court, like a corporate board.[381]

In a classic study of corporate and proprietary colonies, H.L. Osgood explained that the Crown's process to check a proprietor was "suspen[sion]," and not removal.[382] Thereafter, a proprietor might choose to resign, surrender, or sell their property rights back to the Crown rather than continue in the legal limbo of suspension, but they were not considered "removed."[383] As Nikolas Bowie has documented from the colonial history of Massachusetts, the king could not simply change proprietary colonial administration at his will or pleasure, but instead he needed a judicial process of writs like scire facias and quo warranto to show good cause to overturn such property rights and offices.[384]

William Penn experienced suspension of the proprietorship in 1692,[385] but he did not resign. The king restored it to him in 1694.[386] Penn also established administrative offices to serve during "good behavior," so Pennsylvanians experienced multiple layers of unremovable executive offices (because Penn as governor was proprietary, and his officers enjoyed "good behavior" protection).[387] The Lord Baltimore of 1690 was suspended from his proprietorship, and it was restored in 1715.[388] New Jersey proprietors' claims to proprietary rights were contested by the Crown. Instead of the Crown declaring power by fiat or removing the New Jerseyans, the Crown prevailed only after the New Jerseyans surrendered their rights formally in 1702 and became private landlords in a royal colony.[389] The unified proprietary

379 *See id.*

380 *See id.*

381 *See id.*

382 *See id.*

383 *See id.*; Herbert L. Osgood, *The Proprietary Province as a Form of Colonial Government, III*, 3 AM. HIST. REV. 244, 265 (1898).

384 *See* Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1455 (2019).

385 *See* Osgood, *supra* note 383, at 261.

386 *See id.* at 262.

387 Osgood, *supra* note 366, at 41.

388 *See id.* at 31 n.1.

389 *See* JOHN E. POMFRET, THE PROVINCE OF EAST NEW JERSEY, 1609–1702: THE REBELLIOUS PROPRIETARY 336–64 (1962); Surrender from the Proprietors of East and West New Jersey, of Their Pretended Right of Government to Her Majesty (Apr. 15, 1702), *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF

colony of Carolina became North and South Carolina as royal colonies in 1729, but only after seven of the Carolinas' Lord Proprietors sold their interests to the Crown, not by the king's direct power.[390] And even then, the new royal colonial arrangement required an act of Parliament.[391]

Beyond these fights showing the unremovability of the highest levels of colonial administration, "good behaviour" tenure was extended beyond judges to other officials in colonial Massachusetts.[392] Swart documented a series of colonial complaints in Maryland, Virginia, North Carolina, and South Carolina about the sale of office as part of British colonial governance.[393] An 1895 piece titled *Causes of Discontent in Virginia, 1676* identified the British selling and buying of colonial offices and then the abuse of those offices and their fees as a background condition building up to Bacon's Rebellion.[394] The piece reproduces a local list of grievances protesting the sale and resale of administrative offices.[395]

One of the consistent complaints was about British colonial officers buying their offices and using the offices to exploit fees and commissions from the colonists.[396] Though they often complained, offices as property was part of their legal architecture. In 1759, pro–judicial independence colonists in the New Jersey Assembly battled the Crown over a "good behavior" judicial commission for Robert Hunter Morris.[397] A judge ruled that the commission was valid, and moreover, it was a freehold property—the critical distinction for the writ of assize of novel disseisin.[398]

THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2585 (Francis Newton Thorpe ed., 1909).

390 *See* ROBERT M. WEIR, COLONIAL SOUTH CAROLINA: A HISTORY 111 (1997); L.H. Roper & Bertrand Van Ruymbeke, *Introduction* to CONSTRUCTING EARLY MODERN EMPIRES, *supra* note 372, at 1, 15.

391 *See* Osgood, *supra* note 375, at 658.

392 *See* Prakash & Smith, *supra* note 226, at 105.

393 *See* SWART, *supra* note 45, at 65 n.99 (citing BARKER, *supra* note 377, at 144, 226, 230; 1 THE OFFICIAL LETTERS OF ALEXANDER SPOTSWOOD, LIEUTENANT-GOVERNOR OF THE COLONY OF VIRGINIA, 1710–1722 (R.A. Brock ed., Richmond, Va. Hist. Soc'y 1882); 10 THE COLONIAL RECORDS OF NORTH CAROLINA 332–33 (William L. Saunders ed., Raleigh,1890); 3 THE STATUTES AT LARGE OF SOUTH CAROLINA, at iii, 468–69, 471 (Thomas Cooper ed., Columbia, 1838)).

394 *See Causes of Discontent in Virginia, 1676*, 2 VA. MAG. HIST. & BIOGRAPHY 166, 166 (1895); *Causes of Discontent in Virginia, 1676 (Continued.)*, 2 VA. MAG. HIST. & BIOGRAPHY 380, 387–88 (1895) [hereinafter *Causes (Continued.)*.

395 *See Causes (Continued.)*, *supra* note 394, at 387–88.

396 *See* BARKER, *supra* note 377, at 133, 142, 226, 229–30.

397 *See* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1125, 1125–30 (1976).

398 *Id.* at 1128.

Many governors sold offices in their gift,[399] and some even stayed in England because they sold the office to a deputy and kept some of the salary. Many customs officials also never moved to the colonies, selling their offices instead.[400] The lower house of the Maryland Assembly sharply criticized the governor for the sale of office.[401] Colonists in North Carolina also protested these practices as corrupt.[402] Pfander observed that "[r]eform-minded Americans beat their English cousins to the punch; many of the post-revolutionary state constitutions had already attempted to regulate the collection of official fees and perquisites of office."[403] Yet there is no record of abolishing the sale of office or ending the office-as-property legal regime.

Swart offers examples from North Carolina and South Carolina of the colonists chafing under this system of venality, buying offices, and office of profit.[404] This provides more context for the authors of the Declaration of Independence listing the excessive creation of offices among their complaints, reflecting the pervasiveness of the sale of colonial offices.[405]

VI. FROM FREEHOLDS TO FUNCTIONALISM: "OFFICES OF PROFIT" AND SURETIES

A. Removal's Silence but Constitutional Continuities of Independence: "Offices of Profit," the Opinions Clause, the First Congress, and Marbury

The Constitution has no "separation of powers" clause and no "removal" clause. If the unitary theorists were right about the "British Backdrop," then perhaps removal was so widely assumed that the Framers could let it go unstated in Article II. But the unitary theorists are wrong about English practice and the royal prerogative, so the silence cuts the opposite direction.

It turns out that the Constitution's silence about an "executive power" of removal was part of a broader silence on the Founders' bookshelf and in leading English authorities indicating that "executive power" did not include removal. This evidence is detailed in a separate

399 *See* Pfander, *supra* note 4, at 1142 (citing 2 COLONIAL RECORDS OF NORTH CAROLINA 158–59 (William L. Saunders ed., Raleigh, 1886)).

400 *Id.* at 1143.

401 *See* 40 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, 1737–1740, at 392–93 (Bernard Christian Steiner ed., 1921).

402 2 COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 399, at 158–59.

403 Pfander, *supra* note 4, at 1142.

404 SWART, *supra* note 45, at 65 nn.97 & 99.

405 THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."); *see* Pfander, *supra* note 4, at 1144.

article critiquing the unitary theorists' evidence.[406] Before summarizing this problem, this Section notes that the text of the Constitution contains hints and silences that lead to opposite implications: that the Framers set some limits on appointments to offices and their profits but left many other aspects of offices as property unaddressed. They were certainly aware of these British traditions. The Framers may have had qualms, but they tolerated those practices, lacked the urgency or consensus to spell out specific rules, and/or accepted the necessity of such flexibility.

The Opinions Clause[407] remains a clear textual signal of independence: if presidents otherwise had a power to remove, why would a clause be needed for such a lesser power, to allow a president to ask department heads for opinions?[408] Legal scholars have also missed the significance of the Constitution's references to "offices of profit" three times—a phrase which reflects the continuity of English markets in offices.[409] The Founding generation's references to the writs (mandamus and scire facias) as necessary for removal are all continuations of the English system in the American republic.[410] The First Congress not only rejected presidential removal,[411] but it also passed a series of statutes that continued similar protections, judicial process, and a more functional financial approach to securing offices: "sureties," like putting up bonds.[412]

Here is a summary of the silence about removal during Ratification, on the Founders' bookshelf, and in dictionaries, detailed further in a separate article.[413] Historians have studied which tracts the Framers had on their shelves—what we might call the "Founders' bookshelf."[414] This Article presents research after canvassing these legal and political sources, showing that none of them listed removal as a general

406 *See* Shugerman, *supra* note 6.

407 U.S. CONST. art. II, § 2, cl. 1.

408 *See* Shugerman, *supra* note 6, at 14.

409 U.S. CONST. art. I, § 3, cl. 7 ("Office of honor, Trust or Profit"); *id.* art. I, § 9, cl. 8 ("Office of Profit or Trust"); *id.* art. II, § 1, cl. 2 ("Office of Trust or Profit").

410 Shugerman, *Indecisions*, *supra* note 5, at 848–49.

411 *Id.* at 758.

412 *See infra* Section VI.B.

413 *See* Shugerman, *supra* note 6, at 41.

414 For the Founders' bookshelf, see David Lundberg & Henry F. May, *The Enlightened Reader in America*, 28 AM. Q. 262 (1976); HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700–1799, at ix–xiv (1978); TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 12–24 (Liberty Fund 1998) (1965) (surveying library catalogs during the eighteenth century). See also my article on Blackstone and other treatises on removal, Shugerman, *Removal of Context*, *supra* note 5, at 151–72; Julian Davis Mortenson's series on executive power, Mortenson, *Article II*, *supra* note 65, at 1188–89; Mortenson, *Executive Power*, *supra* note 65, at 1315–16; and Shugerman, *Vesting*, *supra* note 5.

royal "prerogative" power. As a matter of general practice (as opposed to a named prerogative power), some referred to a royal removal power over the cabinet level and the "great officers" and "Ministers of State,"[415] but none of these sources suggest that the Crown had a general prerogative or practice of removal over executive officials below the cabinet level (i.e., beyond the dozen highest officers). To the contrary, these sources are more consistent with the prevalence of the sale of office, also known as "brokage" or "brocage,"[416] even if it was also controversial.

Here is a list of the books identified on the "Founders' Bookshelf" that are digitally searchable:

- Hugo Grotius, *Of the Rights of War and Peace* (1625);[417]
- Sir Edward Coke, *The Institutes of the Laws of England* (1628–44);[418]
- Baron von Pufendorf, *The Law of Nature and Nations* (1672);[419]
- Sir Matthew Hale, *Analysis of the Law* (1713);[420]
- William Bohun, *Institutio Legalis* (1732);[421]
- Sir Francis Bacon, *Law Tracts* (1st ed. 1737; 2nd ed. 1741);[422]
- Matthew Bacon, *A New Abridgement of the Law* (1736–66);[423]
- Lord Kames (Henry Home), *Essays upon Several Subjects Concerning British Antiquities* (1747);[424]
- Montesquieu, *The Spirit of Laws* (1748);[425]
- Emmerich de Vattel, *The Law of Nations* (1758);[426]

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415 DE LOLME, *supra* note 93, at 15, 237.

416 *See supra* note 184 and accompanying text.

417 1–3 H. GROTIUS, OF THE RIGHTS OF WAR AND PEACE (London, D. Brown et al. 1715) (1625).

418 1–4 COKE, *supra* note 93.

419 PUFENDORF, *supra* note 132.

420 THE ANALYSIS OF THE LAW: BEING A SCHEME, OR ABSTRACT, OF THE SEVERAL TITLES AND PARTITIONS OF THE LAW OF ENGLAND (The Savoy, John Walthoe 1713). Hale's *Analysis of the Law* includes an extensive discussion of the king's powers and prerogatives. *Id.* at 6–27.

421 WILLIAM BOHUN, INSTITUTIO LEGALIS: OR, AN INTRODUCTION TO THE STUDY AND PRACTICE OF THE LAWS OF ENGLAND (The Savoy, J. Walthoe et al., 4th ed. 1732).

422 FRANCIS BACON, LAW TRACTS (The Savoy, R. Gosling 1737); FRANCIS BACON, LAW TRACTS (The Savoy, Dan. Browne 2d ed. 1741).

423 1–5 BACON, *supra* note 93 (1736–66).

424 ESSAYS UPON SEVERAL SUBJECTS CONCERNING BRITISH ANTIQUITIES (Edinburgh, A. Kincaid 1747).

425 For various editions, see *supra* note 125.

426 1–2 DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE (London, J. Newbery et al. 1759–60).

- Sir John Comyns, *A Digest of the Laws of England* (1st ed. 1762–67);[427]
- Sir William Blackstone, *Commentaries on the Laws of England* (1765–69);[428]
- Jean-Louis de Lolme, *The Constitution of England* (1771);[429]
- Richard Starke, *The Office and Authority of a Justice of Peace* (1774);[430]
- Sir John Mitford, Baron Redesdale, *Treatise on the Pleadings in Suits in the Court of Chancery* (1780);[431]
- John Adams, *A Defence of the Constitutions of Government of the United States of America* (1787).[432]

The study also included over thirty English dictionaries, including the ones identified as the most influential, between 1701 and 1806 (which also provided the new evidence in Part I on the lack of clarity about a "judicial power" separate from "executive power"[433]). This survey shows that English authorities almost never listed removal among "executive powers," rarely described removal at all, but sometimes explicitly defended freehold offices and their unremovability.

Sir Edward Coke's *Institutes* has a section, "An Exposition upon the Statute of . . . Offices," on offices as property, and while the specific rules are relatively inscrutable, it identifies categories of offices that were protected as property (with a catalogue of remedies and restitutions) and categories of other offices that were not protected.[434] Pufendorf also described offices as property with legal limits on "sovereigns" removing officers, relying on Aristotle and Polybius.[435] Coke's endorsement of nonremovability is especially relevant to a unitary executive theorist's mistaken reliance on another source (in addition to taking this source out of context).[436]

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427 1–5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND (London, John Knapton et al. 1762–67).

428 1–4 BLACKSTONE, *supra* note 34.

429 DE LOLME, *supra* note 93.

430 RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE EXPLAINED AND DIGESTED, UNDER PROPER TITLES (Williamsburg, 1774).

431 A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY (London, W. Owen 1780).

432 1–2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (London, C. Dilly 1787).

433 *See supra* Section I.B.

434 2 COKE, *supra* note 93, at *688–96.

435 *See supra* note 130.

436 Beyond this list of "Founders' bookshelf" books, I also looked into over thirty English and American law dictionaries and law reference books of the era, from 1701 through Webster's 1806 dictionary. Most have little detail on the royal prerogative. Of the few that do, I found only one recognition of a royal power of removal: in Giles Jacob's *Every Man His Own Lawyer*, published in 1768, which was also on many American bookshelves. EVERY

To summarize the Ratification's silence, the starting point is both Madison and Hamilton rejecting presidential removal in the *Federalist Papers*. Gienapp also observed that during ratification and the First Congress, no one claimed that the convention delegates had considered the removal question and agreed that Article II implied presidential removal.[437] It is perhaps even more remarkable that there is no record of the Antifederalists raising a concern about presidential removal—though they raised other concerns about Article II and presidential power. They had the strongest incentive to warn about, and even exaggerate, the potential implications of "executive power."[438] One Antifederalist, Luther Martin, referred to the Commander-in-Chief Clause[439] ("the President is appointed commander in chief of the army and navy of the United States, and of the militia of the several States" [440]), and then, in the next passage, he worried that the

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MAN HIS OWN LAWYER: OR, A SUMMARY OF THE LAWS OF ENGLAND, IN A NEW AND INSTRUCTIVE METHOD (New York, 1768) [hereinafter JACOB]. As Jacob had written in this book and his earlier dictionaries, "The king is the fountain of honour, and has the sole power of confer[r]ing dignities and honourable titles; as to make dukes, earls, barons, knights of the garter, &c. And he names, creates, makes and removes the great officers of the government . . . ." *Id.* at 239. Most importantly, Jacob was essentially *the only source out of the thirty dictionaries in this study to suggest a royal removal power, even to this narrow extent for "great officers."* The only book on the "Founders' bookshelf" to suggest a royal removal power (De Lolme) was even narrower in its description, not listing it among the royal prerogatives, but listing it as an even narrower power over "Generals, the Ministers of State," even more limited than Jacob's reference to "great officers." DE LOLME, *supra* note 93, at 237. It would be a mistake to take Giles Jacob the Outlier out of context. *See* Ilan Wurman, *The Opinions Clause and Presidential Power*, 16 J. LEGAL ANALYSIS (forthcoming 2024).

Recall that the term "great officers" was formally limited to a small number of traditional officers, some of whom had more of a judicial or ceremonial role than an executive role. *See supra* Section IV.A. For this reason, and because he was the only one of thirty or so dictionaries to suggest any removal power, we might call him "Jacob the Outlier." Moreover, among the many citations Jacob offered to statutes and treatises to support his summary statements and definitions in *Every Man His Own Lawyer* and in his *New-Law Dictionary* editions, conspicuously, Jacob's single citation for this sentence in his various editions is to Coke. *See, e.g.*, JACOB, *supra*, at 239 (citing 1 COKE, *supra* note 93, at *165). This page and entire section did not support the removal claim or mention removal at all, and thus, when evaluating Jacob's reliability, it is notable that Coke elsewhere endorses offices as property. *See supra* note 434 and accompanying text. Jacob appears to offer no other support for his removal claim.

437 Gienapp, *supra* note 5, at 233–35.

438 *See* Brief of *Amicus Curiae* Professor Jed H. Shugerman in Support of Petitioner at 9, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859); Shugerman, *supra* note 6, at 40–41; Gienapp, *supra* note 5, at 249.

439 U.S. CONST. art. II, § 2, cl. 1.

440 *See* Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 19, para. 2.4.85, at 67 (Herbert J. Storing ed., 1981).

president would have a power to remove military officers.[441] Martin specified the president's control over "army and navy" and "militia" as "dependant on his will and pleasure." Martin did not mention any civil officers, and he did not mention "executive power." As an Antifederalist, Martin had every motive to cite other dangers from Article II, and yet he did not suggest that Article II's vesting of "executive power" implied a broader removal power beyond the Commander-in-Chief Clause.[442] Nor is there any other record in the many volumes of the antifederalist speeches and writings of anyone suggesting that "executive power" implied removal that bears up to scrutiny.[443]

If Luther Martin is the unitary theorists' best example of anyone during the ratification debates interpreting Article II to imply removal, it proves the opposite: Antifederalists were not worried about a general presidential removal power, but if they were, they did not think about Article II's "executive power."

The Constitution's text may not address removal, but it does mention "heads of departments" in the Opinions Clause of Article II, Section 2: the President "may require the Opinion, in writing, of the

441 *Id.* para. 2.4.86, at 67–68.

442 Bamzai and Prakash have defended their reliance on this passage by suggesting that Luther Martin was relying on the Executive Vesting Clause, U.S. CONST. art. II, § 1, cl. 1, not the Commander-in-Chief Clause, U.S. CONST. art. II, § 2, cl. 1, even though Martin had cited the Commander-in-Chief Clause in the same passage, and not the Executive Vesting Clause. Aditya Bamzai & Saikrishna Bangalore Prakash, *How to Think About the Removal Power*, 110 VA. L REV. ONLINE 159, 172 n.54 (2024). They assert that Martin "elsewhere spoke of a power to remove that was not limited to military officers." *Id.* (citing Luther Martin, Letter to the Citizens of Maryland (Mar. 25, 1788), *reprinted in* 3 RECORDS, *supra* note 91, at 295, 296). Unfortunately, Martin was not referring to a general executive power to remove, but merely the existence of some offices with tenure at the pleasure of the president, which obviously could exist by congressional statute: Martin complained that "the judges [could be] capable of holding other offices at the will and pleasure of the government." Martin, *supra*, at 296. Obviously, Congress could create such offices. The existence of offices held at pleasure does not exclude the possibility that Congress could create other forms of tenure. Martin does not suggest that *all* executive offices had to be tenure at will or pleasure, nor did he cite the Executive Vesting Clause or any other Article II source for a removal power. For documentation of similar uses of historical sources in search of a presidential removal power, see generally Shugerman, *Indecisions*, *supra* note 5, and Jed Handelsman Shugerman, *"Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity" Appendix II* (Feb. 28, 2023) (unpublished manuscript), https://ssrn.com/abstract=4359596 [https://perma.cc/D54V-D3KE].

443 Bamzai and Prakash briefly cited a few other examples from the Ratification debates, *see* Bamzai & Prakash, *supra* note 21, at 1772–73, but they also do not hold up to scrutiny. They misinterpret a statement by a Philadelphian "American Citizen" and the context of remarks by Richard Henry Lee, among other sources. *See* Jed Handelsman Shugerman, Sounds of Silence? The Misuse of Ratification-Era Documents by Unitary Executive Theorists 15 (Nov. 17, 2024) (unpublished manuscript) (on file with author) (discussing in more detail their misinterpretations of Hamilton's *Federalist No. 66*, Luther Martin's arguments, and these other sources).

principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[444]

The Opinions Clause signals a decisionally independent administration, with some department heads (or principal officers) with protections from removal. The Opinions Clause has always been a problem for those who claim an indefeasible removal power. As a matter of text, an explicitly enumerated power to ask for opinions would imply that the Constitution did not grant the President a greater power over department heads, indicating that department heads could have interpretive and decisional independence, depending on Congress's choices. If Article II already gave the President an absolute removal power, why would it need to specify a lesser power merely to ask for opinions? Refusal to give an opinion surely would be sufficient cause for removal.

Legal scholars have already shown that the texts of early state constitutions did not reflect an expansive meaning of "executive power" to control state administration.[445] In a separate article, I address the Opinions Clause: how state constitutions and early debates during Ratification and the First Congress confirmed its meaning of independence.[446] Opinions clauses appeared in state constitutions alongside clauses establishing offices independent of governors' control or other independent interbranch relationships, as discussed below.[447]

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444 U.S. CONST. art. II, § 2, cl. 1.

445 Shane, *supra* note 5, at 334–44.

446 *See* Shugerman, *supra* note 6, at 14.

447 Wurman's interpretation of the Opinions Clause has a few problems, including his use of my research about the Founders' Bookshelf and Giles Jacob, *see supra* note 436, and his interpretation of my research on the First Congress's debates relying on the Latin maxim that removal follows appointment. Ilan Wurman, *The Original Presidency: A Conception of Administrative Control*, 16 J. LEGAL ANALYSIS 26, 35–36 (2024). Wurman suggests that this maxim would lead to presidential removal. *Id.* at 36. First, this interpretation has an obvious textual problem: The Appointments Clause states the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art II, § 2, cl. 2. Article II clearly distinguishes between unilateral presidential "nominat[ion]" and a shared "appoint[ment]" power between President and Senate. *Id.* That textual problem is confirmed by a contextual problem: the senatorial bloc frequently offered the maxim, but it was exceedingly rare for presidentialists to rely on it—presumably because they read the Appointments Clause and believed that removal followed appointment, not mere nomination. It is an odd originalist argument if almost no one during the Founding or in the First Congress interpreted the maxim or the Appointments Clause the

In another paper,[448] I offer new research on state constitutions, making two observations. First, it is notable that the First Congress struggled for months over constitutional ambiguity about removal. If the First Congress had focused on the gap in Article II's text and then decided in favor of an executive power of removal, one might have expected the next state constitutions to reflect this decision and specify removal, to avoid any further confusion. And yet they did not. The Founding generation did not clarify a relationship between executive power and "removal" after the ostensible "Decision of 1789," which further illustrates that there was no decision that executive power implied removal.

The second observation is that before and after 1787, there was a correlation between constitutions that had opinions clauses (or parallel "information" clauses) and structures of decisional independence. Each "opinion clause" in a state constitution appeared only in the context of structural separation: an officer or a council needed a specified power to ask other officers for opinions or information because they did not otherwise control those officers.[449] Some members of the ratifying conventions and the First Congress interpreted the Opinions Clause to mean that department heads were constitutionally separate offices with decisional independence from the President.[450] During the First Congress, opponents of presidential removal made this observation themselves: the "less[er]" power to merely ask for opinions suggested the lack of any "greater" power to remove.[451]

The relevant point here is that these commentators read the Opinions Clause to mean that "department heads" were independent from presidential control, and with respect to the term "department

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way Wurman reads it. *See* Wurman, *supra*, at 35–38. A forthcoming article will detail further problems with these interpretations. *See* Shugerman, *supra* note 6.

448 *See* Shugerman, *Indecisions*, *supra* note 5.

449 Shugerman, *supra* note 6.

450 *See id.* at 49–50 (first quoting DAILY ADVERTISER (N.Y.C.), June 23, 1789, *reprinted in* 11 DHFFC, *supra* note 71, at 945, 948 (reporting statements of Rep. Jackson); then quoting 1 ANNALS OF CONG. 551 (1789) (Joseph Gales ed., 1834) (statement of Rep. Jackson, June 18, 1789); and then quoting *id.* at 557 (statement of Rep. Gerry, June 18, 1789). (There are two printings of the first two volumes of the *Annals of Congress* with different running heads and pagination. Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 520 n.2 (1961). Citations in this Article refer to the first printing (running head: "Gales & Seaton's History of Debates in Congress").)

451 *See* Letter from Richard Henry Lee to Samuel Adams (Aug. 15, 1789), *in* 16 DHFFC, *supra* note 71, at 1320, 1320–21 (noting that the Opinions Clause implies that Article II has no removal power, because if there were a removal power, the "greater" removal power would have included the "less[er]" power to ask for opinions, rendering the Opinions Clause an "absurdity"); Bamzai & Prakash, *supra* note 21, at 1800 & n.310; Ilan Wurman (@ilan_wurman), X (July 17, 2023, 5:10 PM), https://x.com/ilan_wurman/status/1681048657737691136 [https://perma.cc/B6HU-6GH6].

heads," it was not strange for any of them to imagine that department heads might be independent from a chief executive—perhaps a reflection of original understandings that executive design had a spectrum of control and removability, and that there was no general implied rule that department heads were controllable and removable in the English tradition.

One more key piece of evidence is hiding in plain sight in one of the most canonical cases in American history: *Marbury v. Madison*.[452] As explained elsewhere in detail, Chief Justice Marshall's repeated references to Marbury's vested interest in the office and to the office not being "revocable" or "removable" are further indications that offices as property continued.[453] Moreover, Marbury and the Justices of the Peace were not Article III judges: their terms of office were only five years, not life during good behavior as Article III was widely interpreted;[454] and justices of the peace were traditionally officers with mixed powers,[455] best understood in this context as executive officers, not Article III judges. And nevertheless, Marshall concluded that Marbury had a property interest in his office and was unremovable.[456]

B. From Sale to Sureties

The First Congress had a lengthy and vigorous debate about Article II. The First Congress's removal debates referred to property in office, its relation to the purchase of office, and the writ system as protection of that property. Its statutes reflected the law of freehold property and converted the purchase system into a more republican system: officers had to provide financial "sureties" as bonds of faithful execution.

During the "Decision of 1789" debate, arguments against presidential removal included references to property in offices protected from removal,[457] to the English writ system (mandamus and scire facias) as legal processes for officeholders as plaintiffs to defend their property,[458] and as a due process requirement in order for superiors to

452 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

453 *Id.* at 162, 167; *see* Manners & Menand, *supra* note 5, at 25; Shugerman, *Presidential Removal*, *supra* note 5, at 2088–89.

454 *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton).

455 *See supra* note 99 and accompanying text.

456 *Marbury*, 5 U.S. (1 Cranch) at 167.

457 *See* The Congressional Register, 17 June 1789, *reprinted in* 11 DHFFC, *supra* note 71, at 904, 936 ("property in his office"); The Congressional Register, 16 June 1789, *reprinted in* 11 DHFFC, *supra* note 71, at 860, 881–82 (Ames acknowledging Smith's property argument).

458 *See* Shugerman, *Indecisions*, *supra* note 5, at 822–24, 847–49; The Congressional Register, 16 June 1789, *reprinted in* 11 DHFFC, *supra* note 71, at 860, 864, 866.

go to court to remove protected officers.[459] The First Congress continued these writs in the All Writs Act, as part of the Judiciary Act of 1789.[460]

The question was contested, as the debates record that a defender of presidential removal associated the doctrine of unremovability with "purchase[]" of office and the English Crown, rejecting them as unrepublican.[461] However, the debate overall reflected that the office-as-property system continued to have supporters, and there is evidence that the treatment of offices as property continued. For example, the case *Harcourt v. Fox* was cited by Founding-era Americans as precedent for a law of offices—and it treated offices as a property interest.[462] As noted above, Chief Justice Marshall referred to Marbury's irrevocable and vested rights to his office[463] even though Marbury had a five-year term and was not an Article III judge.[464]

The First Congress did not revive sale of office, but it frequently required "sureties," an updated version of financial investments in office. Sureties of office as financial commitments on faithful performance date back to England in the seventeenth century;[465] they were part of American colonial administration,[466] and they continue today in many states.

Sureties probably did not function as cash deposits. When eighteenth-century statutes required an officer (or a shipowner, etc.) to "give bond, with . . . sureties," it most likely required the individual to write a promise to pay or execute a bond, and a wealthy friend or associate would cosign the bond and take on liability for faithful performance.[467]

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459 *See* Shugerman, *Indecisions*, *supra* note 5, at 848.

460 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

461 1 ANNALS OF CONG., *supra* note 450, at 499 (recording Hartley attributing the doctrine to English practice and opposing it in a republic).

462 *See supra* text accompanying notes 224–27 (on *Harcourt*); Shugerman, *supra* note 228, at 94–96 (American reliance on *Harcourt*).

463 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803); *see also* Shugerman, *supra* note 226, at 94; *cf.* SHUGERMAN, *supra* note 227, at 30–45.

464 *See* Manners & Menand, *supra* note 5, at 25.

465 *See* P.M. Dwyer, Annotation, *Liability of Sureties on Bond of Public Officer for Acts or Defaults Occurring After Termination of Office or Principal's Incumbency*, 81 A.L.R. 10 (1932); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 342–43 (1992); Arlington v. Merricke (1672) 85 Eng. Rep. 1215, 1220; 2 Wms. Saund. 403, 411.

466 *See* Letter from Wilson Forster (Aug. 7, 1783) (on file with author); Letter from Nathaniel Newnham, Esquire, Lord Mayor and Alderman of the City of London (Aug. 7, 1783) (on file with author); Letter from Henry Stevens & Geo. Gostling (July 31, 1776) (on file with author); Kent et al., *supra* note 4, at 2171.

467 ROBERT MAYO, A SYNOPSIS OF THE COMMERCIAL AND REVENUE SYSTEM OF THE UNITED STATES 318 (Washington, 1847). Thanks to Nicholas Parrillo for this clarification

The long-term shift from sale of office to sureties could be cited as an example of preservation through transformation in legal history.[468] Sureties were similar in function to venality, but without freehold property rights. The wealth requirement for the bond was a mixed sorting mechanism for officers from wealthy backgrounds or with the relevant skills which they applied to earn enough for the bond, and with the commitment to hold office for a longer term. The surety functioned as a system of disincentives like the purchase of an office as property: in venality, an incompetent or corrupt officer risked losing the property; in Founding-era America, an incompetent or corrupt officer risked losing their surety bond.[469] In both the venality system and the surety system, the officeholder had legal rights to contest those losses, a judicial check against removals without cause.

The First Congress required sureties for many offices: many Treasury offices, many offices created by the Judiciary Act, for custom collectors, naval officers, surveyors, and debt commissioners.[470] In its first session, the First Congress enacted six statutory clauses for sureties of offices, mostly in Treasury, the Judiciary Act, and for customs.[471] The First Congress included sureties for the Treasurer in the Treasury Act, one of the three department bills of the ostensible "Decision of 1789":

> [The Treasurer shall] give bond, with sufficient sureties . . . in the sum of one hundred and fifty thousand dollars, payable to the United States, with condition for the faithful performance of the duties of his office, and for the fidelity of the persons to be by him employed, which bond shall be lodged in the office of the Comptroller of the Treasury of the United States.[472]

In the Judiciary Act of 1789, Congress required clerks to "give bond, with sufficient sureties . . . in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."[473] The same statute required sureties for marshals, but they

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and for references to the Treasury Comptroller's 1793 circular and Robert Mayo's *A Synopsis of the Commercial and Revenue System of the United States*.

468 *See generally* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

469 *See* Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816, 1846–48 (2024). *See generally* Erik Mathisen, *"Know All Men by These Presents": Bonds, Localism, and Politics in Early Republican Mississippi*, 33 J. EARLY REPUBLIC 727 (2013).

470 Act of Sept. 2, 1789, ch. 12, § 4, 1 Stat. 65, 66; Judiciary Act of 1789, ch. 20, §§ 7, 27, 1 Stat. 73, 76, 87; Act of Aug. 4, 1790, ch. 34, § 12, 1 Stat. 138, 142; Act of Aug. 4, 1790, ch. 35, § 25, 1 Stat. 145, 162.

471 *See* Shugerman, *supra* note 6, at 73 & n.464; Chabot, *Interring*, supra note 5, at 176–79.

472 § 4, 1 Stat. at 66.

473 § 7, 1 Stat. at 76.

were removable at pleasure.[474] The Tonnage Act of 1790 also mandated sureties for many officers who held offices of profit:

> That every collector, naval officer and surveyor shall . . . give bond with one or more sufficient sureties, to be approved of by the comptroller of the treasury of the United States, and payable to the said United States, with condition for the true and faithful discharge of the duties of his office according to law . . . .[475]

The First Congress required commissioners under the Public Debt Act of 1790 to provide sureties and "faithful execution of their trust," and created large financial penalties for failing to maintain "their good behaviour."[476] The second and third sessions enacted several more clauses for duty collectors, customs, officers engaged in trade with Native American tribes, and again in Treasury. Through the 1790s, Congress passed almost fifty more clauses establishing surety requirements.[477] The practice indicates that sureties would be lost in cases of unfaithful performance, i.e., only for cause.[478] This practice was a more functional and practical updating of the use of financial investments in office. It was not formally the purchase of an office, but it functioned similarly to the venality system as a rough sorting mechanism, an incentive to perform in the office (or else lose the surety), but also as an implicit legal protection, because the officeholder was entitled to judicial process before losing the office and the surety investment.

A separate forthcoming article explains how the First Congress and early Congresses enacted other functional removal provisions by judges for corruption or "high misdemeanors," continuing to reflect the officeholders' property interests in their offices and their sureties or financial bonds—a clarified practical process for removal that was a pragmatic compromise between freehold property rights and presidential removal at pleasure.[479]

CONCLUSION

In his classic book *The Imperial Presidency*, in the late stages of Vietnam but before the 1972 DNC break-in had become full-blown "Watergate," Arthur Schlesinger raised concerns about how the modern

474 *Id.* § 27, 1 Stat. at 87.

475 Act of Aug. 4, 1790 § 52, 1 Stat. at 171.

476 § 12, 1 Stat. at 142.

477 *Cf.* Shugerman, *supra* note 6, at 59, 73–74; Brief of *Amicus Curiae* Jed H. Shugerman in Support of the Court-Appointed *Amicus Curiae* at 21–24, Collins v. Yellen, 141 S. Ct. 1761 (2021) (Nos. 19-422, 19-563) [hereinafter Shugerman Brief].

478 *See* Shugerman Brief, *supra* note 477, at 21–24.

479 *See* Shugerman, *supra* note 6, at 72–75; Shugerman Brief, *supra* note 477, at 21–24.

presidency had become so much more powerful than the Framers could have imagined or intended.[480] He led with an introductory paragraph of Chapter 1, "What the Founding Fathers Intended," on some of the dangers of relying too much on original intent, reading too much into history, and reading too much formalism into the Constitution.[481] Then he quoted a historian of English kings and parliaments: "'No single fault has been the source of so much bad history,' C.H. McIlwain reminds us, 'as the reading back of later and sharper distinctions into earlier periods where they have no place.'"[482]

The American presidency was Schlesinger's example then, and it is again today. We have read back into Article II our later and sharper distinction of modern presidential control, which was made possible by revolutions in politics, communication, transportation, information, and bureaucracy.

We imagine kings and queens ruled "absolutely" and must have removed executive officers at will. It turns out that history is far more complicated. "Absolute monarchy" never gained a foothold in England. In continental Europe, it was only a relatively brief phase, and even then, it was more theory than practice. Mixed government and decentralized administration were practical necessities. Without modern technology, centralized executive power in the early modern world could not build a modern state or monitor officers, so it had to find other models of decentralized incentives: one was patronage and removable offices; the other was venality—offices for profit, offices for sale, offices as unremovable property. The institution of venality and unremovable offices made so much sense to this era that Montesquieu described executive removal at will as a feature of *despotism*.

The English Crown could "execute" law and policy without a general removal power, because the king had such broad office-creation and appointment powers to supersede unremovable and uncooperative officers.[483] The Framers deliberately reduced the presidency's front-end powers in the construction of an administration, relative to the English king. Did they not think through the back-end implications on the president's power to "execute" if they did not specify a presidential removal power? Maybe the Framers intended more congressional control over removal. That seems to be the best reading of the Opinions Clause, Madison and Hamilton's *Federalist Nos. 39* and

480 *See generally* SCHLESINGER, *supra* note 48.

481 *See id.* at 1.

482 *Id.* (quoting CHARLES HOWARD MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 64 (1958)).

483 There is a separate debate about whether Article II implies powers to supersede, nullify, command, or control. *See, e.g.,* Lawson, *supra* note 49.

77, and the silence of the Antifederalists.[484] Or perhaps they had not thought through the implications and the tensions between Article I and Article II over administration. Intended or not, these consequences and ambiguities were left to future generations to address. In the First Congress and the early republic, early generations gradually delegated some removal power to the President, but they also limited the removal power in many contexts.[485] These debates over the past two centuries have produced a modern functional settlement, mostly in favor of presidential control: *Myers*'s general rule of removability for executive officers with exceptions for independent regulatory commissions under *Humphrey's Executor* and special counsel under *Morrison*. This incremental, functional growth of presidential removal power was some mix of congressional policy choice, construction, common law constitutionalism, and living constitutionalism, but crucially, not original public meaning circa 1787–88.

This history counsels, first and foremost, for judicial restraint, to leave longstanding precedents like *Humphrey's Executor* in place and to interpret *Myers* narrowly. Reasonable people can come to different conclusions about whether the duty to "take care" leads to a presidential removal power as a matter of pragmatic enrichment, but such an interpretation is not supported by eighteenth-century sources and practices, which show that removal was not necessary for execution.[486]

Second, this history weighs in favor of an alternative functional approach to the separation of powers. Formalism may seem clear and simple as bright-line rules, but then those bright lines become overly broad strokes, creating a mess of the law and a mess of the history. This case study of the flexible and functional law of offices suggests that the "separation of functions" framework and the "checks and balances" framework, as Peter Strauss articulated almost four decades ago,[487] are more historically grounded and prudent approaches. What if Congress repealed these delegations and limited presidential removal of traditional executive offices like the Secretary of State or Secretary of Defense? Could Congress create Treasury offices held "during good behaviour"? Even though "executive power" did not imply a removal power, the courts could invoke originalist arguments against such congressional overreach, including a more originalist doctrine of functional separation of powers and checks and balances, as well as other constitutional arguments about precedent and practice. Chief Justice

484 *See supra* Section VI.A.

485 *See* J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, THE CONTESTED REMOVAL POWER, 1789–2010, at 16–72 (2013); Shugerman, *Indecisions*, *supra* note 5; Chabot, *Interring*, *supra* note 5.

486 *See supra* Section IV.A.

487 Strauss, *supra* note 85, at 578.

Rehnquist's functionalist approach to "good cause" protections for independent counsel in his 7–1 majority in *Morrison v. Olson* is a good model.[488]

Third, this case study of removal is a warning about originalism in practice. Other legal scholars across the political spectrum have already observed that the Roberts Court decisions are political theory, not originalism. This Article has shown that even when the Roberts Court is attempting originalist history, its history is simply wrong. The mix of unsupported assumptions and historical errors shows that originalism in practice is just as vulnerable to confirmation bias, motivated reasoning, ideological preferences, and cultural assumptions as the methods that originalists reject. The case of "the executive power of removal" suggests that originalism is no more objective or reliable than those other methods.

488 Morrison v. Olson, 487 U.S. 654, 692–93 (1988).