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# RELEARNING FOUNDING LESSONS: THE REMOVAL POWER AND JOINT ACCOUNTABILITY

*Martin S. Flaherty*<sup>†</sup>

## INTRODUCTION

Recent history has not been kind to those who have championed the President's exclusive power to remove government officials who implement the law. In 1936, Solicitor General Stanley Reed confidently argued that President Roosevelt could properly fire Federal Trade Commission member William E. Humphrey for reasons other than "inefficiency, neglect of duty, or malfeasance in office,"<sup>1</sup> the grounds to which Congress had limited the President's removal authority.<sup>2</sup> Reed lost.<sup>3</sup> Fifty years later, Solicitor General Charles Fried (perhaps less confidently) argued that President Reagan could fire Independent Counsel Alexia Morrison for reasons other than "good cause, physical disability [and] mental incapacity,"<sup>4</sup> the grounds to which Congress had restricted the President's removal authority in that instance.<sup>5</sup> Fried also lost.<sup>6</sup> Combined,

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1. 15 U.S.C. § 41 (1995).

2. See *Humphrey's Executor v. United States*, 295 U.S. 602, 612-17 (1935) (argument of Solicitor General Reed). So confident was Reed that the case could not be lost that, following tradition, he chose it as the first case he would argue in his new post. For a lively account, see WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 52-81 (1995).

3. See 295 U.S. at 602.

4. 28 U.S.C. §§ 49, 591 et seq. (1982).

5. For an account discussing the White House's constitutional position and strategy,

these and other defeats<sup>7</sup> stand for the proposition that certain congressional limitations on Executive removal authority do not necessarily "impede the President's ability to perform his constitutional duty"<sup>8</sup>—at least for now.

Today's champions of presidential removal authority may be down, but they are far from out. Justice Scalia, of course, has carved out a central place as the judiciary's most prolific and passionate opponent of congressional meddling in the President's powers in general, and the ability to discharge subordinates in particular.<sup>9</sup> If there is any one scholar who can lay claim to being the Justice's academic counterpart, it is Professor Steven Calabresi.<sup>10</sup>

Professor Calabresi makes a strong, unified case for a "strong and unitary Executive." "[T]he United States Constitution," the argument goes, "allocates the power of law execution and administration to the President alone."<sup>11</sup> It follows that this allocation of executive power entails the exclusive authority "to remove inferior executive officers, either by firing them altogether, or by removing permanently their ability to exercise implicitly delegated executive power."<sup>12</sup> These Constitutional commands, in turn, display great normative wisdom in a number of ways. Here Calabresi follows other "unitarian" champions in citing popular accountability as a "key consideration."<sup>13</sup> On this view, a unitary executive that controls removal authority promotes such accountability by making it easier for the people "to detect policy errors and to punish those who are responsible for them."<sup>14</sup>

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see CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST-HAND ACCOUNT* 133-41 (1991).

6. See *Morrison v. Olson*, 487 U.S. 654 (1988).

7. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding good-cause removal limitation).

8. *Morrison*, 487 U.S. at 691.

9. See *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting); *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

10. See Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1994); Steven G. Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

11. Calabresi & Prakash, *supra* note 10, at 549.

12. *Id.* at 596.

13. Calabresi, *supra* note 10, at 42.

14. *Id.* at 42.

Like Justice Scalia, Calabresi has tried to show that time really should be on the side of the unitarians. Previously he and Saikrishna Prakash sought to demonstrate that the original understanding of the Constitution contemplated exclusive presidential removal authority. If so, most originalist theories of interpretation would mandate the same result today. As he and Christopher Yoo graciously acknowledge,<sup>15</sup> I recently suggested that the original understanding was not so.<sup>16</sup>

Undaunted, Calabresi and Yoo now bring the historical account forward beyond the Founding, asserting that the post-ratification history indicates “no systematic, unbroken, long-standing practice . . . of presidential acquiescence to congressionally-imposed limitations on the President’s sole power to execute the laws and remove subordinate officials.”<sup>17</sup> “On the contrary,” they continue, “the historical record shows that Presidents almost always object or fight when [at least from their point of view] Congress trespasses on their constitutional power to execute the laws free from legislative control.”<sup>18</sup> This part of the record in the first instance matters less for originalist purposes than as a discrete source of constitutional understanding. Drawing upon Justice Frankfurter, Calabresi and Yoo contend that consistent post-ratification practice provides a “gloss on [constitutional] text” that may illustrate how various branches view the scope of their own power and which may resolve separation of powers questions more generally.<sup>19</sup> Having articulated this “Burkean” theory of constitutional meaning, the authors conclude that the post-ratification history that they commence in these pages demonstrates that no reasonable “common law constitutionalist could conclude that history and practice resolves the unitary executive debate in Congress’s favor.”<sup>20</sup> Taken together, the originalist and Burkean points of view come down to a simple and powerful proposition: “They the Presidents” have done nothing to cede the authority to remove executive officers originally granted by “We the People.”

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15. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1454-55 (1997).

16. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

17. Calabresi & Yoo, *supra* note 15, at 1472.

18. *Id.*

19. *Id.* at 1470. Cf. *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case) 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

20. Calabresi & Yoo, *supra* note 15, at 1472.

Arguments based upon history, however, are—or should be—only as convincing as the history they employ. Here that history appears nothing if not rigorous and intuitive. That said, no account this sweeping and ambitious can count as conclusive without more work, especially by scholars with the time and expertise to subject the authors' various claims to adequate historical scrutiny. Yet even if the current account is taken as dispositive, the historical case settles constitutional matters only so far, a point Calabresi and Yoo concede. For starters, consistent presidential claims of exclusive removal authority by themselves say nothing about whether Congress or the courts acquiesced to these claims. As Calabresi and Yoo rightly point out, “[W]e do not deem it necessary for our purposes to prove that there is a 208-year-old three-branch consensus about these matters.”<sup>21</sup> More importantly, history since the Founding cannot resolve the issue if the history of the Founding indicates that there was no exclusive executive removal power for presidents to cede in the first place.

This essay argues that there was not. A thorough review of the original understanding indicates no reason to expect consensus on the matter. Rather, where widespread commitments do emerge, they tend to cut the other way. This is particularly—and perhaps counterintuitively—true with regard to accountability, traditionally a unitarian strong suit. Part I attempts to clear up certain misunderstandings at the outset to show precisely where my disagreements with Professor Calabresi do and do not lie. The underbrush cleared, Part II lays the groundwork for my own position by suggesting what should count as “good history” in the first place. Mindful of the resulting standards, Part III critiques Calabresi and Yoo’s historical assertions, then considers their theoretical commitments to make clear how important the Founding remains for their current arguments about presidential non-acquiescence. Part IV therefore turns to the Founding. It first argues that, however much the Founders discussed accountability in modern unitarian terms, they developed and displayed a more fundamental commitment to a theory of “joint accountability,” which treated the popular claims of any single government department as suspect and multiple popular sources of government oversight as preferred. This Part also applies this concept through a model of translation to the Supreme Court’s removal jurisprudence to suggest that Reed and Fried rightly lost.

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21. *Id.* at 1457.

This essay concludes that at-will executive removal may or may not be a timely innovation, but that a review of times past indicates that its implementation as a settled constitutional doctrine would be an innovation nonetheless.

### I. UNTANGLING A PRELIMINARY KNOT

As Calabresi and Yoo rightly indicate, I have argued that 200 years of constitutional practice since the Founding undermine the unitarian claim that the President alone can properly exercise executive removal authority.<sup>22</sup> This argument was just that—a contention about modern constitutional doctrine, though one that drew upon various historical understandings to get there. My principal claim went, and goes, something like this: first, that the Founding generation believed that separation of powers stood for certain broad, functional goals, such as balance among the branches; second, that 200 years of practice has resulted in great institutional change, such as a significant shift in power away from Congress and to the President; and thus, third, that judicial intervention to safeguard presidential power undercuts such Founding commitments as balance in light of changed circumstances.<sup>23</sup> Calabresi and Yoo, however, for some reason confuse this argument, which relies on post-Founding history, with my historical account of that history.

Their article does this in a number of ways. It expressly chides me for my “misassessment of the unitary executive’s history.”<sup>24</sup> It castigates me for failing to live up to my own professed standards of historical scholarship.<sup>25</sup> It also appears to assume that the history it offers directly challenges my own historical account of the 200 years in question.<sup>26</sup> All of this curiously proceeds without any mention of my specific historical assertions about the two centuries in question other than, it seems, an attribution to me of other scholars’ positions that the executive branch never consistent-

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22. *See id.* at 1456.

23. *See Flaherty, supra* note 16, at 1810-36.

24. Calabresi & Yoo, *supra* note 15, at 1460 n.25.

25. *See id.* at 1460. On this point Calabresi and Yoo fairly note that many of my criticisms of Calabresi and Prakash’s historical method were indeed and perhaps unfortunately sharp. What they do not do is what my own article did in making those criticisms: attempt to carefully lay out the historical assertions and supporting material to be critiqued, then seek to demonstrate how those specific propositions rested on insufficient command of the relevant historical scholarship and of primary sources.

26. *See id.*

ly opposed independent agencies<sup>27</sup>—an assertion that appears nowhere in my work directly or indirectly.

While I am as keen as the next fellow to reap extra citations as a straw person,<sup>28</sup> the truth is that Calabresi, Yoo, and I do not necessarily disagree on the executive's post-ratification history. Given what my own assertions actually were, there may even be a basis for eventual accord. My principal—and only extended—assertion about constitutional development since the Founding was straightforward, noncontroversial, and almost trivially evident. For various reasons, I argued, the presidency has evolved into a far more formidable institution than it was envisioned to be at the Founding.<sup>29</sup> Presidents, as noted, have successfully garnered increased power both in absolute terms and with respect to Congress.<sup>30</sup> They have also facilitated their growth in power with greater claims to a popular democratic base.<sup>31</sup> Before making this point, my article quotes the eminent historian Forrest McDonald for the proposition that 200 years of disagreement between Presidents and Congresses suggests a lack of consensus on the unitarian vision of the executive.<sup>32</sup> It is not clear that Calabresi and Yoo would dispute these points. To the contrary, their narrative of vigorous Chief Magistrates sits comfortably with the notion that the presidency has increased its authority over time. The same narrative likewise comports with the thesis of consistent interbranch conflict by demonstrating how one of the political branches has consistently tussled with the other over such matters as removal.

Where we do disagree is on the *constitutional* conclusions that the post-Founding *historical* practice suggests. Here the principal

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27. See *id.* at 1456 & n.20.

28. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990) (arguing that legal reputation correlates with frequent citation by others of one's work).

29. See generally, Flaherty, *supra* note 16, at 1816-26.

30. See *id.* at 1816-21, 1821-24; see also *supra* text accompanying note 23.

31. See Flaherty, *supra* note 16, at 1821-24.

32. See *id.* at 1816 (quoting FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 180 n. 35 (1994)). Two things are problematic about Calabresi and Yoo's characterization of this argument. First, and without really making clear what it contended, their focus on this point, while ignoring my main assertions, implies that it was a more important component of my article than it actually was. Second, they bolster this impression by making unclear to what extent the exact articulation about 200 years of interbranch conflict came from me or Forrest McDonald. See Calabresi & Yoo, *supra* note 15, at 1456 & n.20. In truth, the entire quotation comes from McDonald precisely because I did not desire to toss around too many bold statements about the topic on my own. That said, I have seen nothing to contradict McDonald's thesis. To the contrary, Calabresi and Yoo's present effort is entirely consistent with it.

conclusion that Calabresi and Yoo draws holds that “the historical practice over the last 208 years tends to *confirm* rather than disprove the textual, structural, originalist, and normative arguments in favor of a presidential power to control execution of laws.”<sup>33</sup> More specifically, they contend that since successive Presidents have defended sole executive authority to execute the laws in historical terms, Presidents have not ceded the power otherwise legitimately claimed for constitutional purposes. Just what the presidency thereby retains therefore depends on the predicate assumptions concerning legitimate executive authority. As Calabresi and Yoo note, those assumptions could follow the lead of Burke and Frankfurter and emphasize constitutional practice as it has actually evolved. On this view, presidential resistance at the very least robs those who oppose the unitary executive of the argument that the President has acquiesced to a congressional power grab.<sup>34</sup> Interestingly, Calabresi and Yoo do not themselves embrace this approach.<sup>35</sup> Rather, their assumptions about the baseline of presidential power rest on ostensibly stronger sources, including original understanding. On this view, when individual Presidents defend their power to execute the law, they are really defending the original allocation of power set forth when the Constitution was framed and ratified.

I start with a radically different predicate, and thus draw upon practice since the Founding to draw radically different conclusions. Broadly speaking, the principal approach in my work concentrates on fidelity to original understanding through translation and synthesis. Under this theory, Calabresi and Yoo’s post-Founding account would confirm the original understanding on the assumption that this understanding commanded a unitary executive. Assuming, however, that the Founding understandings do not support a unitary executive, Calabresi and Yoo’s description of practice would at best be irrelevant, demonstrating merely that Presidents fought for authority never exclusively granted to them in the first place. Worse, the Founding may even stand for certain predicate rules under which presidential assertions of exclusive authority are best viewed with suspicion. Should, as previously suggested, the Founding mandate balance among the three branches, a post-Founding

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33. Calabresi & Yoo, *supra* note 15, at 1460.

34. *See id.* at 1457.

35. *See id.*



shift in power to the President would logically weigh against the Supreme Court stepping in on behalf of the increasingly powerful Chief Executive.

Where Calabresi contends that the Founding is best understood as supporting a formalist, unitary executive,<sup>36</sup> I have argued that this position simply has no basis in even the most minimally adequate historical account.<sup>37</sup> Worse still, I have further sought to demonstrate that where the Founding does yield something like widespread agreement, the constitutional values that result suggest that there is even less reason to support a unitary executive in 1997 than in 1787 when those values are translated into the changed circumstances that 200 years of practice have wrought.<sup>38</sup> It is on this originalist predicate—not the 208 years of practice—where Calabresi and Yoo on one hand, and I on the other, part company. In short, the constitutional relevance of Calabresi and Yoo's current project to a significant extent turns on first adhering to original understanding, an approach that Calabresi has elsewhere extolled and does not here reject.

But what of Burkean custom? That is, what of two centuries of practice not as changed circumstances to apply Founding values, but as a discrete source of constitutional authority in its own right? Recall that Calabresi and Yoo seek to refute my position on just this ground, claiming that I argue 200 years of constitutional custom undermines the unitary executive directly. Yet in truth, I have almost nothing to say about practice in terms either Burkean or Frankfurterian.<sup>39</sup> Following Forrest McDonald, I have nonetheless suggested in passing that 200 years of inconclusive turf battles between the President and Congress do not appear to furnish a promising source of binding rules to resolve matters, such as removal, over which battles still rage.

Moreover, my historical assertion about 200 years of inter-branch infighting fits comfortably with an account that portrays Presidents as consistently guarding their authority if only because consistent presidential defense almost necessarily suggests consistent

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36. Calabresi and Prakash argued this point at length. See Calabresi & Prakash, *supra* note 10. Calabresi and Yoo now take this position as a given. See Calabresi & Yoo, *supra* note 15, at 1455-57, 1472, 1475.

37. See Flaherty, *supra* note 16, at 155-1810.

38. See *id.* at 1810-36.

39. Contrary to the impression conveyed by Calabresi and Yoo, see Calabresi & Yoo, *supra* note 15, at 1460 & n.25, my reliance on this interpretive approach commanded two sentences in a 112-page article. See Flaherty, *supra* note 16, at 1816.

congressional opposition. Such consistent defense, if demonstrated, would indeed show that Presidents have not acquiesced to congressional assertions of power and thus not count against the unitary executive. How much it would settle beyond that is another matter. Calabresi and Yoo nowhere claim that it would. To the contrary, they deem it important to assert that presidential action does not merely furnish Burkean custom, but that this custom confirms the original grant of power to the President at the Founding. For all of us, in short, the 208 years of custom—on which we largely agree—is significant, but the Founding—about which we almost completely differ—remains the key.

## II. THE ILLUSION OF MASTERY

As should be clear, both originalist and Burkean approaches share a heavy reliance on the past as a source of constitutional meaning. This common reliance in turn stems from a common theoretical desire to augment normative legal arguments with a source of authority external to the law. To this extent, it follows that this mutual reliance on the past subjects both approaches not just to the standards of law, but to history as well.

Originalism classically focuses on the “legislative history” leading up to the enactment of a given constitutional text or doctrine—here, separation of powers.<sup>40</sup> This evidence matters for a range of reasons. Most strongly, it all but dictates a result on the democratic positivist ground that Constitutional rules owe their authority to the considered choice of the American people acting in their sovereign capacity through the ratification process.<sup>41</sup> Less forcefully, the understanding of the Founders in particular yields the persuasive authority of an exceptionally talented group of men with practical experience that remains unmatched.<sup>42</sup> A surprising array of modern constitutional thinkers accept some form of originalism, including several who blanch at the term.<sup>43</sup> For the

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40. Originalist analysis does at times go beyond the Founding to look at early practice, decisions of the First Congress in particular. Here the idea is that original understanding prior to ratification can be inferred from the early implementation of provisions when there is little reason to believe that the slightly later understandings evident diverge in any significant way from the original one.

41. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-04 (1819).

42. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 856-59 (1995).

43. See, e.g., Bruce Ackerman, *A Generation of Betrayal*, 65 FORDHAM L. REV. 1519

removal debate as for other areas of constitutional law, this originalist turn makes the historical stakes ever higher. Earlier this century Chief Justice Taft invoked originalist history to claim the Founding for the unitarian view.<sup>44</sup> Today his heirs continue seeking to entrench that title.

Another historical tack—especially prominent in separation of powers analysis—is custom, practice, tradition. Here the premium is on evolving practice *after* ratification of a given rule. Here, too, the past matters on a number of counts. Some constitutional authorities, such as Justices Frankfurter and Jackson, argue that custom matters as a gloss on Constitutional text.<sup>45</sup> Others, like Chief Justice Rehnquist, view it as a direct source of constitutional law in its own right.<sup>46</sup> Still others, most provocatively Professor Larry Kramer, view bodies developing tradition as paramount even to other sources, arguing that well-settled practices should trump even the original understanding and text themselves.<sup>47</sup>

However different, each of these justifications for relying on history share a critical element. Common to them all is some notion that history theoretically provides an external constraint on constitutional discourse, furnishing a source of authority or guidance outside technical canons of construction or “naked” individual preference. In this regard, Laura Kalman rightly observes that originalism retains its appeal thanks in large part to its promise of constraining constitutional choice.<sup>48</sup> The same can be said of constitutional custom as well.

Reliance on an external body of knowledge means, or should mean, reliance on the conventions that define that body of knowledge. Sociological arguments seem more credible when they follow the canons developed by sociologists; economic points, when they pass muster among economists; and historical assertions when they

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(1997); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365 (1997).

44. See *Myers v. United States*, 272 U.S. 52, 94 (1926).

45. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring); *id.* at 634 (Jackson, J., concurring).

46. See *Dame & Moore v. Regan*, 453 U.S. 649 (1982).

47. Compare ROBERT H. BORK, *THE TEMPTING OF AMERICA* 157 (1990) (suggesting that respect for precedent was inherent in the original understanding of federal “judicial power”) with Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485 (1994) (emphasizing the importance of constitutional practice).

48. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 132-39, 236 (1996).

comport with standards recognized by historians. At least for history, these corollaries follow for reasons that are at once old-fashioned and post-modern. Those traditionalists seeking to enhance their legal points with an appeal to what "actually happened" must abide by the standards historians have developed since those precepts define what is credible. More avant-garde thinkers, who deny an objective reality and merely desire to enhance their arguments with insights from other disciplines, must likewise recognize historians' standards because those standards determine what counts as an insight from that discipline.<sup>49</sup> Exhorting lawyers to follow historians' standards when making historical points has proven surprisingly controversial, though—it should be pointed out—controversial only among lawyers.<sup>50</sup> To their credit, however, neither Calabresi nor Yoo appear to be among the interdisciplinary nihilists.

That said, few legal academics—and probably no lawyer or judge—ordinarily enjoy the time, training, or resources to come close to making the historical grade. Then again, fewer still probably see the problem. As Professor John Hart Ely noted, "Now I know we lawyers are a cocky lot: the fact that our profession brings us into contact with many disciplines often generates the delusion that we have mastered them all."<sup>51</sup> Consider, then, the following anomaly. Typically, a graduate student of history will spend years taking courses to acquire both research skills and a general background, mastering the secondary literature in a chosen specialty, and then pouring over archival and other primary source materials—all for a topic that can be as narrow as a single specific event. By contrast, a lawyer, judge, even a law professor will, at most, commonly spend a few weeks constructing a historical account, and then usually proceed directly to certain readily available sources (or their indices) with little or no effort to set the evidence in any context. One usually writes for an audience of three or four within an academic department. The other, if lucky, may find his or her assertions used to shape the supreme law of the land.

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49. I respond to some of these critiques at greater length in Martin S. Flaherty, *The Practice of Faith*, 65 *FORDHAM L. REV.* (forthcoming 1997).

50. See Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 *CHI.-KENT L. REV.* 909 (1996); Cass R. Sunstein, *The Idea of a Useable Past*, 95 *COLUM. L. REV.* 302 (1995).

51. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 56 (1980).

Fortunately, the legal community need not be condemned to relying on accounts that might embarrass undergraduates. Lawyers may not be able either to acquire an adequate general background nor pour over hundreds of pamphlets, letters, cases, and papers.<sup>52</sup> But historians, who do all this and more, in effect can do so on their behalf. Elsewhere I have termed—and repeatedly extolled—greater reliance on historians as “pragmatic fidelity” to the past.<sup>53</sup> Where an objectively verifiable account is the aim, historians commonly do far more work at verification. Where the views of an outside discipline is the goal, historians by definition provide the narratives, interpretations, or questions that are sought. Accordingly, perhaps the worst thing law scholars can do is plunge directly into primary sources with no idea of the relevant historiographical accounts or frameworks. This is not to say that professional historians should enjoy immunity from lawyerly questioning. It is to say that invoking reliance on their work in the first instance offers a feasible, and, frankly, a not very demanding, way of providing far more credible accounts than the legal community usually produces today.

With other unitarians, Calabresi and Yoo open the historical door wide and thus invite historical critique. Through his earlier scholarship, Calabresi defends the originalist tradition forged by Chief Justice Taft<sup>54</sup> and Justice Scalia,<sup>55</sup> against such recent historicist challenges set forth by Professors Abner Greene,<sup>56</sup> Lawrence Lessig and Cass Sunstein.<sup>57</sup> With their present study, Calabresi and Yoo also invoke custom for historical support in the manner of Frankfurter in particular.<sup>58</sup> Substantively, these approaches combine to present a historical fall from grace that is downright Borkian: the Founders originally granted the President exclusive removal authority; Presidents have customarily defended

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52. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at vii-viii (1969); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 67 n.25 (1985).

53. See, e.g. Martin S. Flaherty, *History “Lite,” in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523, 549-556 (1995).

54. See *Myers v. United States*, 272 U.S. 52, 94 (1926).

55. See *Mistretta v. United States*, 488 U.S. 361, 361 (1989).

56. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Law-making*, 61 *U. CHI. L. REV.* 123 (1994).

57. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994).

58. See *supra* text accompanying notes 33-34.

this prerogative; Congress and the Courts, however, have joined forces to usurp the original understanding and executive tradition.<sup>59</sup> In each regard, historical standards rightly come into play.

### III. CONSTITUTIONAL CUSTOM

#### A. *Rendering Unto Clio*

To take the project in reverse order, these standards suggest that Calabresi and Yoo have produced an account of constitutional custom that is plausible—indeed highly probable—but as yet unproven. As Professor Theodore Lowi observed, their project reads like one of the most thoroughly researched briefs that anyone interested in this or any other topic could possibly desire.<sup>60</sup> Like a brief, however, the account also raises certain concerns about how open it is to possible points on the other side. Nonetheless, any historical assessment, good or bad, must be provisional in light of the same historical precepts that would form the basis of that assessment. No adequate critique can be offered that does not itself rest upon the degree of basic rigor that the initial account should ideally reflect to begin with.<sup>61</sup> Any critique, in other words, must practice the standards that it preaches, and that would require more time, space, and expertise than an immediate response of this sort allows.

Nonetheless, some points seem clear. Without doubt, *The Unitary Executive During the First Half-Century* makes an important contribution to our understanding of how “things have worked out.” This contribution rests most squarely on the extensive primary research that Professor Lowi wrongly dismisses as “overkill.”<sup>62</sup> Demonstrating extended and consistent presidential defense of perceived executive authority requires extended and consistent reliance on actions that Presidents actually took and statements that they actually uttered. Calabresi and Yoo deliver these goods throughout their paper. Especially rich in this regard is the authors’ treatment of Andrew Jackson, the President who fought for executive authori-

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59. Cf. BORK, *supra* note 47, at 19-99.

60. See Remarks of Theodore J. Lowi, Symposium on Presidential Power in the Twenty-First Century, Case Western Reserve University Law School (April 8, 1997).

61. For a critique that attempts to live up to standards it professes, see Flaherty, *supra* note 16, at 1756-1810.

62. Remarks of Theodore J. Lowi, Symposium on Presidential Power in the Twenty-First Century, Case Western Reserve Law School (April 8, 1997).

ty more vigorously and eloquently than any other in the Republic's first half-century.<sup>63</sup> The historical case that results is accordingly convincing.

Calabresi and Yoo are convincing not just because of how they present their case, but also because of what their case holds.<sup>64</sup> That is, the account of presidential vigilance that they present is—to put it mildly—intuitive in light of certain background propositions about human nature and the growth of presidential power. As Madison famously observed, “[T]hose who administer each department” will not infrequently act out of ambition and self-interest.<sup>65</sup> This is not to say that history does not often belie what appear to be common sense truths. Historians revel in confirming counterintuitive stories when preliminary evidence suggests something unusual took place.<sup>66</sup> Presidential vigilance, however, does not appear to be one of these. More importantly, the account comports with standard historical accounts. In particular, historians from Ralph Ketcham<sup>67</sup> to Forrest McDonald<sup>68</sup> have all sounded the common theme of the growth of presidential power. Set in an evolving tradition of executive aggrandizement, Presidential defense of removal authority would appear to follow.

An important contribution, however, should not be confused with a dispositive one. And here the project's brief-like single-mindedness gives one pause. This quality would be acceptable, perhaps mandatory, were the authors in the Office of Legal Counsel actually writing a brief. But here they are scholars engaged in a good faith effort to examine whether or not a form of external authority—here constitutional custom—bolsters a position that they have otherwise adopted for textual and normative reasons. Nor would it suffice to say that the historical account need only be

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63. See Calabresi & Yoo, *supra* note 15, at 1458-59, 1526-59.

64. Elsewhere I distinguished “procedural” historical standards, which refers to method, and “substantive” standards, which refer to how well a proffered account comports with an established historiographical narrative or framework, if either is available. See Flaherty, *supra* note 53, at 549-56.

65. THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter, ed. 1962).

66. Edmund Morgan, for example, wrote a celebrated account seeking to explain why the early settlers of Jamestown starved rather than raise crops, hunt, or otherwise provide for themselves in a land of evident plenty. See EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 73-91 (1975).

67. See RALPH KETCHAM, PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829 (1984).

68. See FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY (1994).

good enough to be convincing to a legal audience. As noted, appeals to history convince such an audience because the appeal is to a source of authority outside of the law.<sup>69</sup>

One set of concerns about the project's zeal sounds in method. It has, for example, proceeded with considerable swiftness given its heroic scope of no less than thirty-two presidencies. This may seem an odd criticism considering that the overall undertaking has already taken over three years and runs beyond 300 pages. Historical studies, however, typically take as long or longer for considerably narrower topics. Given its breadth, moreover, even just the present portion of the undertaking often seems too certain, simple, and unqualified.

The Washington administration provides a case in point. While they refer to Washington's role in putting down the Whiskey Rebellion, for example, Calabresi and Yoo fail to report that the President did not federalize the Pennsylvania militia until he first received a determination from Associate Justice James Wilson that civil authority in the state had broken down, a requirement set forth in the Militia Act of 1792.<sup>70</sup> Rather than mention this dramatic, and apparently unresisted, encroachment on presidential authority, Calabresi and Yoo instead devote an extended treatment to the well known defense of executive authority penned by Secretary of the Treasury Hamilton, among his generation's most extreme advocates on the point.

Another set of caveats goes to substance in the sense of considering whether the authors' views broadly comport with interpretations, narratives, and frameworks established by historians who have often spent lifetimes studying the presidency or given Presidents. Of concern in this regard is the authors' idiosyncratic reliance on historians. Some of the most eminent historians of the early national period are simply absent or barely mentioned, even when they have produced studies that are directly on point. This roster includes such well-known scholars as McDonald, Ketcham, Stanley Elkins, David McKittrick, Dumas Malone, and Irving Brant. By contrast, the present portion of the study displays a comparatively greater willingness to rely on works that are comparatively dated, that appeared in law reviews, or that were written by

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69. See *supra* text accompanying notes 48-50.

70. See STANLEY ELKINS & DAVID MCKITTRICK, *THE AGE OF FEDERALISM* 478 (1993).



jurists or politicians who are known more as advocates of presidential power than as dispassionate scholars. Use of the secondary literature may seem superfluous when, as here, use of the primary sources is so extensive. Nearly the opposite is true. Without a basic grounding in the relevant historiography, placing particular executive pronouncements in context becomes difficult and often impossible. And without sufficient context, interpretations of what people said long ago can often miss what they meant at the time, however obvious their meanings may seem to us today.

All told, these and other possible cautionary notes are likely to prove to be little more than quibbles. At this stage, however, sufficient methodological concerns about the initial account make at least one point clear. More work, and much more scholarly assessment of that work, will have to be done before the current, bold version of Calabresi and Yoo's thesis can pass historical muster as the final word on the topic. It is, however, an extremely persuasive first word.

### *B. Rendering Unto Cæsar*

What questions *The Unitary Executive* does raise have less to do with history than with law. Many if not most lawyerly appeals to the past make grand normative claims based upon a minimum of historical homework. Calabresi and Yoo invert this standard picture. They laudably do a good deal of research. The constitutional payoff, however, appears minimal. In fairness, Calabresi and Yoo do not pretend to develop a full-blown theory about the legal significance of presidential custom. Still less is a response such as this the place for an extended theoretical critique. A few observations seem appropriate nonetheless.

For starters, the authors seem bent on refuting an erroneous school of thought without first having established that it exists. The central aim of not just this article, but the three to follow, is to "examine the claim . . . that the custom, tradition, and practice of the last 208 years amounts to a *presidential* acquiescence in the existence of congressional power to (at times) limit the President's removal power and curtail his other constitutionally granted mechanisms of control over law execution."<sup>71</sup> This is a useful undertaking, but it is unclear that anyone has argued for such a tradition. Given Madisonian intuitions about ambition, it is even less clear

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71. Calabresi & Yoo, *supra* note 15, at 1457.

why anyone would. Calabresi and Yoo do offer four scholars as “jumping to the conclusion” that such a tradition of acquiescence has occurred. On closer examination, three of these examples turn out to be passing references to presidential ambivalence about modern independent agencies.<sup>72</sup> The other conclusory leap is in reality the authors’ misreading of my own position.<sup>73</sup>

More importantly, Calabresi and Yoo’s research supports a claim that, for now, is almost entirely defensive. To their credit, the authors are careful to point out that their recovery of presidential custom establishes only that Congress has failed to adversely possess authority ostensibly vested in the President, rather than the other way around. They are also careful to point out that if the other branches should ever bow to presidential custom—itsself a bolder claim—the most compelling case is itself defensive. Drawing upon ideas of departmental or coordinate review, they tentatively argue that “it would seem that deference to the President’s consistent and vigorous interpretation of the scope of the removal power is appropriate.”<sup>74</sup>

Nonetheless, just because claims are defensive does not mean they do not run into problems. Calabresi and Yoo, first of all, need to work out a more complete theory of acquiescence. Why, for example, should a President’s failure to oppose an unfriendly bill count as acquiescence—failures that Calabresi and Yoo demonstrate are rare—but not a failure to challenge the same measure, once enacted, before the judiciary—failures which appear to have occurred almost all the time? The authors also need to defend more thoroughly their conception of defensive resistance. From the White House, asserting control over removal authority may look like protecting executive prerogative. From Capitol Hill it may look far more like employing legislative authority to structure offices, at least when all that Congress asserts is the power to impose “for cause” limits on removal power that the President otherwise retains.

But even when fully worked out, defensive claims do not settle much. Grant for the moment that Presidents have done nothing to give away certain disputed powers to Congress. If, however, Congress itself has consistently fought for the same powers, it too has failed to cede anything. In this type of situation, constitutional

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72. *See id.* at 1456 n.20.

73. *See supra* text accompanying notes 23-32.

74. Calabresi & Yoo, *supra* note 15, at 1469.

custom may well show that the branches have been jealous of their perceived powers much as Madison expected, but it does not determine which branch's claim is valid. As Justice Frankfurter himself suggested, it is only when both the President and Congress acquiesce on the allocation of a particular power that the matter can be regarded as presumptively settled.<sup>75</sup> Yet the historical account that Calabresi and Yoo put forward necessarily suggests consistent congressional opposition, if only because without it, consistent presidential "defense" would be unnecessary.<sup>76</sup> Further, this same account tends to expose additional problems with bolder potential assertions of coordinate review. When both the President and Congress claim the same authority, uncompromising rejection of the other's position on constitutional grounds seems more a recipe for chaos than working government. Perhaps for this reason, Calabresi and Yoo prudently stop short of asserting outright that merely because Presidents have exercised certain powers they have rightly exercised them.

#### IV. BACK TO THE FOUNDING

##### *A. Framing Joint Accountability*

In contrast to their work on constitutional custom, Calabresi and Yoo's assumptions about original intent reflect grand constitutional claims based upon historical evidence that is more wishful thinking than fact. As noted, this originalist element is the more important part of Professor Calabresi's overall case because it serves as the theoretical predicate for the custom argument.<sup>77</sup> To argue that the Presidents have not given away a power assumes that they rightfully wielded this power in the first place. Should history belie that the Founders' understood the Executive to enjoy sole, at-will removal authority, then Presidential defense of the power starts to look less like high-minded preservation. Here some preliminary work has been done.<sup>78</sup> Unfortunately for the unitarian

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75. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

76. Exactly this story of ongoing interbranch conflict supports my prior conclusion, however much it was made in passing, that 200 years of constitutional practice does not settle matters in favor of the unitary executive. See Flaherty, *supra* note 16, at 1816.

77. See *supra* text accompanying notes 10-16, 24-27, 33-36.

78. See, e.g., Flaherty, *supra* note 16; Greene, *supra* note 56.

position, it indicates that the originalist predicate is based more on wishful thinking than credible history.

Pragmatic fidelity to the Founding first requires a look at the substantial, and in many ways unprecedented, body of ideological, legal, and constitutional history produced in the last generation. The scholarly roster includes, among others, Bernard Bailyn, Barbara Black, Forrest McDonald, Edmund Morgan, J.G.A. Pocock, John Phillip Reid, and Gordon Wood. Despite important differences, the work of these scholars taken together enables a coherent reconstruction of constitutional development in the late eighteenth century.<sup>79</sup> Only with the general context that results from this reconstruction can more specific primary sources be marshalled for more particular questions. Even then, an adequate account would have a far greater reach both in terms of scope and length.<sup>80</sup> For present purposes—here a focus on accountability and removal authority—the following outline must suffice. That outline begins with independence.

Independence ushered in a set of often radically republican state constitutions, which in turn meant a commitment to a straightforward conception of governmental accountability. All this was truly revolutionary, not least because it reflected a rejection of English “mixed” government to which Americans had previously hailed. Under the theory of mixed government, the English Constitution provided for three institutions (King, Lords, and Commons) that embody three types of government (monarchy, aristocracy, democracy) that in turn track three orders (monarch, nobility, commoners) evident in any society. Replicating the English Constitution in a newly independent United States proved to be a non-starter in part because no monarch or nobility in the European sense existed on American soil. It was a non-starter as well since by 1776 Americans identified Parliament’s unrepresentativeness with attacks on rights. In this light, the main option for American constitutionalists became a republican model in which self-government and actual representation became as thoroughgoing as anything the world had seen.

The early state constitutions implemented these ideas by creating powerful legislatures that were designed to represent the people as closely as possible. In what Professor Wood calls “a revolution-

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79. See generally, Flaherty, *supra* note 53, at 536-49.

80. For an attempt at such an account, see Flaherty, *supra* note 16.

ary transformation of political authority," these first-generation frameworks concentrated nearly all significant power in the assembly, the lower house in particular.<sup>81</sup> Most early state legislatures could, for example, not only pass laws, but could in many cases appoint judges and governors, proceed without threat of executive veto or adjournment, alter judicial and magisterial salaries, and effectively amend their constitutions by statute.<sup>82</sup> Pennsylvania's Constitution of 1776, the most radical of the early experiments, concentrated legislative power still further by abolishing the upper house of the legislature and effectively doing the same with the governor.<sup>83</sup> Moreover, notes Morgan, where "the colonists had been contending that a representative ought to think, feel, and act like his constituents . . . [n]ow they began to practice what they preached."<sup>84</sup> Annual elections, terms limits, a right of localities to "instruct" their representatives, and an extensive franchise for its day all quickly became common features throughout the several states.<sup>85</sup> In typical fashion, Pennsylvania further provided that the doors of the assembly remain open and that all bills be printed for public consideration.<sup>86</sup> In many regards, never before and never again would American government be more straightforwardly accountable.

By contrast, the Constitution of the United States reflected what Wood terms a new "Federalist science of politics," a science that entailed a far more diffident stance toward accountability. As before, this response resulted largely from "the lessons of experience,"<sup>87</sup> in this instance the perceived failures of the republican state constitutions. Foremost among these was the discovery of "democratic despotism,"<sup>88</sup> the realization that the people could

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81. See GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 163 (1969).

82. See, e.g., DEL. CONST. of 1776, arts. 7, 10; PA. CONST. of 1776, § 20; VA. CONST. of 1776, paras. 8-10; see also WOOD, *supra* note 81, at 141.

83. See PA. CONST. of 1776, §§ 2.

84. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 247-48 (1988).

85. See, e.g., DEL. CONST. of 1776, art. 3, 15; GA. CONST. of 1777, arts. II, III, XXIII, XVI, XXIII, LIII; MD. CONST. of 1776, arts. XXV, XXVI, XXVII; N.C. CONST. of 1776, Declaration of Rights, art. 18; PA. CONST. of 1776, §§ 8, 9, 11, 31; VT. CONST. of 1777, ch. II, §§ VIII, X; VA. CONST. of 1776, paras. 4, 5, 6.

86. See PA. CONST. of 1776, §§ 13 & 15.

87. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 143-83 (1985).

88. WOOD, *supra* note 81, at 404.

tyrannize themselves.<sup>89</sup> On this view, selfish factions and demagogic leaders had seized too many state legislatures, and these in turn had enacted ill-advised laws infringing rights of contract, property, and trial by jury.

A principal solution to democratic despotism came in the form of what had been to that point largely a secondary doctrine most commonly associated with Montesquieu known as separation of powers. Where mixed government linked governmental institutions with different social classes, the newly fashionable theory connected them to different government powers. In now familiar fashion, the strategy solved the problem of concentrated authority by allocating legislative power (defined roughly as the promulgation of general norms) to the assemblies; executive power (viewed generally as implementing those norms) to a magistrate; and adjudicative power (seen basically as the resolution of legal disputes) to judges. Yet the newfound distrust of unitary popular mandates led to the corollary that each branch of government should have some direct or indirect democratic basis.

The Federal Constitution, following several "second-generation" state frameworks, put these principles into effect with a general blueprint that was clearly filled in only at the top. The document greatly enhanced the power of a distinct executive and judiciary. Among other things, it created a unitary *presidency* (as opposed to executive branch), granted the President a qualified veto, salary protection, protection from removal except by impeachment and set out what was then a unique set of express powers. Likewise, the judiciary benefitted from life tenure, its own salary protection, and newly established and widely contemplated power of judicial review.

The Constitution, however, did more than simply shift authority from the legislature. It also made each branch accountable to the people while at the same time denying to any branch the dangerous claim of speaking for the people exclusively. Most obviously, the Federal Chief Magistrate would not be a mere appointee of the legislature, as were many of his state counterparts, but would be indirectly elected by the people. Congress, of course, would remain democratically accountable as well. In contrast to the Pennsylvania assembly, however, the national legislature would also be bicameral with the directly elected House and the then-indirectly elected

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89. *Id.* at 403-13; McDONALD, *supra* note 87, at 143-83.

Senate, thus multiplying the democratic bases still further. Even the unelected judiciary furthered the strategy. While state practice mainly left judicial selection to the legislature, the Constitution accorded it to both the President and Senate, thus making the least dangerous branch ultimately answerable to two electorates rather than one.

Conspicuous by its absence in these developments is evidence of any widespread agreement on removal power. One telling example highlighted by Justice Scalia must suffice (even though it deals with the related topic of appointment authority). As the Justice noted, the Massachusetts Constitution of 1780 illustrates contemporary ideas about government with an express and seemingly absolute separation of powers clause.<sup>90</sup> The Justice might also have noted that the Massachusetts framework is doubly probative since it was precisely the type of "second generation" state constitution that anticipated the Federal Constitution.<sup>91</sup> A glance at the rest of the Massachusetts document, however, reveals that many of the most important executive posts—including the state secretary, treasurer, and militia officers—not only could but had to be appointed by the Assembly.<sup>92</sup> It may be of course, that these assignments were merely exceptions to an established background understanding of formal separation. The problem with that theory is that all sorts of exceptions, variations, and experiments characterized not only contemporary state frameworks, but the Federal plan as well.<sup>93</sup> Perhaps more important, both the pace of constitutional development during this era,<sup>94</sup> combined with the relatively novel appearance of Montesquieu as applied rather than theoretical doctrine,<sup>95</sup> makes the notion untenable.

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90. *Morrison v. Olson*, 487 U.S. 654, 697-98 (1989) (Scalia, J., dissenting). The clause reads:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

MASS. CONST. of 1780, pt. I, art. XXX.

91. See WOOD, *supra* note 81, at 451-53; CHARLES C. THACH, *THE CREATION OF THE PRESIDENCY 1775-1789: A STUDY IN CONSTITUTIONAL THEORY* 51-52 (1969).

92. See MASS. CONST. of 1780, pt. II, ch. II, § 4, art. I; see also N.H. CONST. of 1784, pt. I, art. XXXVII & pt. II.

93. See Flaherty, *supra* note 16, at 1768-71, 1776, 1778-87.

94. *Id.* at 1774-75.

95. See WOOD, *supra* note 81, at 153-54.

What the Founding generation generally agreed upon were the more general underlying functions that separation of powers ideally furthered. The clearest theme involved balance among the three principal branches of government. Reformers, Federalists, and Antifederalists alike championed separation of powers as a means to prevent the tyrannical accretion of power in any one part of government, however much they disagreed on the doctrine's specifics. To a lesser extent, the Founders also advocated separation of powers in the name of greater governmental energy. More interesting, and counterintuitive, are Founding attitudes about the doctrine's relationship to governmental accountability. In contrast to modern unitarian views, the Founding generation did not exclusively, or even primarily, view separation of powers as means to making those who implement the law exclusively accountable to a Chief Magistrate, who was in turn accountable to the people. Rather, their own experience of government led the Founders to reconceptualize earlier notions about accountability to make the concept less dangerous and more representative of a deliberative electorate as a whole.

The reconceptualization grew out of a zeal for accountability that soon evolved into caution. Initially American constitutionalists viewed governmental responsiveness as an undivided good. Early state constitutions therefore concentrated power in the legislature as the most representative branch in part to make the line of governmental responsibility transparent. These initial charters further employed such devices as annual elections and rotation in office to ensure representatives were more responsive. The discovery of "democratic despotism," however, led many to rethink matters. The actual experience under the early frameworks suggested that the simple view of accountability led to governments that were not really accountable at all, but which instead fell prey to factions, demagogues and localism. Separation of powers helped deal with this problem by recasting accountability in ways that made it less dangerous and more deliberative.

This newer conception of "joint accountability," to give it a modern name, viewed precipitous governmental action in the name of popular mandates with suspicion, and so sought to ensure that each significant segment of government could plausibly claim some popular basis in its own right. In this way, no single branch of government could wield power in the name of the people without some agreement from other branches armed with similar claims.



Later constitutions implemented this idea of joint accountability mainly by taking selection of the governor out of the hands of the legislature and placing it into the hands of the electorate, while at the same time involving both the assembly and chief magistrate in the appointment of the judiciary.

The Federal Constitution sounded a variation on this theme through indirect popular election of the president and presidential selection of federal judges with the advice and consent of the (then also indirectly elected) Senate. Defending this scheme, James Wilson observed that "[t]he executive and judicial are now drawn from the same source . . . with the legislative authority: they who execute, and they who administer the laws, are so much the servants, and therefore as much friends of the people, as those who make them."<sup>96</sup> Professor Wood sums up the significance of such claims in terms of accountability, noting: "Because the Federalists regarded the people as 'the only legitimate fountain of power,' no department was theoretically more popular and hence more authoritative than any other."<sup>97</sup> No one department, in other words, would again be able to claim an exclusive popular mandate to undertake oppressive measures, as state assemblies had done before.

This is not to say that modern unitarians can take no solace from the Founding. The older concept of accountability, for example, did not vanish. Hamilton, perhaps his generation's foremost champion of a strong executive, famously linked the older view to presidential power in defending the Convention's choice to create a responsive, unitary president as opposed to the type of executive committee that some states had previously attempted (yet also as opposed to a unitary executive branch, as modern unitarians often misconstrue the point).<sup>98</sup> As Professor Lowi observes, it is all but axiomatic that a complex governmental framework such as the Constitution would reflect several different notions of accountability at once.<sup>99</sup> But it should also be clear that a concept's failure to disappear does not mean it continued to dominate. To the contrary, the development of constitutional thought during the Founding period demonstrates that simpler notions of accountability survived

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96. *Id.* at 598 (quoting James Wilson).

97. *Id.* at 550 (citation omitted).

98. See THE FEDERALIST No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter, ed. 1961).

99. Remarks of Theodore J. Lowi, Symposium on Presidential Power in the Twenty-First Century, Case Western Reserve Law School (April 4-5, 1997).

despite the emergence of separation of powers rather than because of it.

Likewise, to note that the Founding reveals no consensus about exclusive presidential removal authority is not to insist that the Founders believed that the President need not be involved in removal at all, at least as an initial matter. As the foregoing account sought to make clear, certain functional values underlying separation of powers—such as joint accountability—commanded the most evident and widespread assent at the time. Yet also prompting general agreement was at least the core formalist notion that the legislature should enact binding norms, the executive should implement them, and the judiciary should resolve disputes that arise under them. Wilson reflected this fundamental notion in speaking of departments that “make,” “execute,” and “administer” (by which he meant adjudicate) the law.<sup>100</sup> This basic division at least suggests an expectation that the head of the executive department would normally play a role in removal of underlings who help see to it that the laws are executed. Hamilton assumed as much in his oft-noted argument that Senate approval would be necessary both for certain appointments and dismissals because what that body would affirm in the first place would be prior presidential actions.<sup>101</sup> On this view the Supreme Court’s holding in *Bowsher v. Synar*<sup>102</sup> gains additional plausibility since Congress in that case had denied the President any role in removing the Comptroller General when that official was arguably executing the laws.

Even here, however, a thorough account of the period counsels prudence. Though the Founding generation commonly employed the terms “legislate,” “execute,” and “adjudicate,” they rarely paused to define even the central meaning of these ideas with precision. Still less did the Founders clearly address, much less resolve, such ancillary mechanisms as removal, issues that have been the fodder of interbranch battles from then until now. The general goals of the doctrine are clear and with effort can be reconstructed. More detailed assumptions, especially when unsupported by similarly detailed constitutional text, cannot.

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100. See *supra* text accompanying note 98.

101. THE FEDERALIST No. 77, at 459 (Alexander Hamilton) (Clinton Rossiter, ed. 1962).

102. 478 U.S. 714 (1986).

### B. Executing Joint Accountability

As a source of constitutional norms, the Founding thus takes away but also gives in return. Properly reconstructed, the Founders' ideas about separation of powers deprive unitarians of their originalist predicate and with it precise baseline assumptions about such contested subjects as removal. Founding ideas nonetheless do furnish clear yet more abstract commitments. These general precepts, however, subvert the unitarian position in light of changed circumstances and subsequent constitutional developments. In this different light, constitutional custom does not confirm an original unitary understanding that in fact never existed. Instead, subsequent practice undermines the unitarian position once more general Founding values are applied to modern government.

Seeking fidelity to the Founders' more general concepts fully comports with what self-proclaimed originalists preach, though not always with what they practice. Justice Scalia, for example, almost always finds original commands in precise understandings or contemporaneous applications. This tendency is especially egregious in the Justice's separation of powers pronouncements, where he fails even to acknowledge the considerable historical evidence that renders his formalist position problematic at best.<sup>103</sup> These results have led some commentators to label such uniform applications as "narrow" or "hard" originalism.<sup>104</sup> History's notorious messiness, however, suggests that precision will often be a mirage.<sup>105</sup> That, at any rate, is clearly the case with separation of powers. An originalist's only alternative, therefore, is to become more "broad" and attempt to maintain faithfulness to the more abstract norms that may emerge. No less a figure than Judge Bork concurs, observing: "[A] judge should state a principle at the level of generality that text and historical evidence warrant."<sup>106</sup>

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103. *Printz v. United States*, 1997 U.S. LEXIS 4044, \*42 (opinion of Scalia, J.). By contrast, Justice Scalia has been somewhat more candid about conceding historical evidence that conflicts with his doctrinal judgments in other areas. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29, 34-35 (1989) (Scalia, J., concurring in part and dissenting in part).

104. James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 50 & n. 291 (1995).

105. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 857 (1995).

106. BORK, *supra* note 47, at 144.

Identifying the initial norms, however, is only the first step. Where an original meaning is sufficiently general to survive outside its immediate context, the critical next step entails holding that meaning constant in light of subsequent developments. Doing so can proceed in at least two ways. One, articulated by Professor Lessig, conceives the task as "translation." On this view specific applications of a general principle may have to change in response to changed context.<sup>107</sup> Another, developed by Professor Bruce Ackerman, emphasizes "synthesis." This method posits the introduction of later constitutional norms that do not fully repeal, but instead must be reconciled with, older norms.<sup>108</sup> Despite these differences, it does not especially matter which of these models are followed in maintaining fidelity to Founding separation of powers values. In applying a concept such as joint accountability, what matters is the world that 200 years has created rather than whether that world results from incremental change, as Lessig emphasizes, or dramatic transformations, as Ackerman posits.

The changed circumstance most relevant to a principal of joint accountability is obvious, sweeping, and entirely consistent with the idea that presidents have spent the last two centuries in vigorous pursuit of power. Where, during the Founding, most observers viewed the legislature as the branch most likely to abuse popular mandates, today that threat most clearly issues from the executive thanks to what Professor Lowi has termed the rise of the "plebiscitary presidency."<sup>109</sup> Recounting this phenomenon would be more tedious than contentious. Historians generally agree that the Founders expected the presidency to be mostly a nonpolitical recognition for seniority and previous service to the nation.<sup>110</sup> This conception broke down almost immediately, starting with Jefferson's innovative efforts at partisan, issue-oriented, egalitarian presidential leadership.<sup>111</sup> Andrew Jackson, and his brilliant theorist, Martin Van Buren, greatly extended Jefferson's achievements,

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107. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

108. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 90-108 (1991).

109. THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED; PROMISE UNFULFILLED* 7-21, 97-133 (1985).

110. See, e.g., RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829*, at 3 (1984).

111. See Ralph P. Formisano, *Deferential Participant Politics: The Early Republic's Political Culture, 1789-1840*, 68 AM. POL. SCI. REV. 473 (1974).

and left behind them a full-blown model of the President as party leader, proponent of the Federal agenda, and national personality.

Though this model did not always dominate in the 1800s,<sup>112</sup> such factors as the growth of the national government, foreign policy commitments, and the rise of the media have made it the norm for this century. Perhaps no President more fully exploited its potential than Franklin Roosevelt. Indeed it was precisely because F.D.R. viewed himself as "the chosen leader of the American people" that he took the decision in *Humphrey's Executor* as almost a personal affront and may well have prompted his direct assault on separation of powers through the court-packing plan.<sup>113</sup> While the populist presidency may have receded from these heights, it has hardly disappeared. It is in fact just these current aspects of the presidency that modern unitarians applaud.<sup>114</sup>

At this point the path to a genuine constitutional fidelity becomes clear. For better or worse, the Founding does not yield a specific understanding about removal power. It does, however, display a more general commitment to, among other ideas, a notion of joint accountability that aimed to prevent any one part of government from taking ill-considered or oppressive measures in the name of last year's election results. Since then, the rise of the populist presidency has meant that the most likely source for the abuse of electoral mandates comes from the executive rather than the legislature. It follows that congressional involvement in the removal of officials who implement laws does not frustrate a key Founding value, but furthers it.<sup>115</sup>

To see the argument at work, revisit the case that angered F.D.R. *Humphrey's Executor* arose out of the President's desire to "restaff and reinvigorate"<sup>116</sup> the Federal Trade Commission ("FTC") along New Deal lines, a doubly important task since the FTC had recently been given key roles in administering both the National Industrial Recovery Act and the Securities Act of 1933.

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112. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885).

113. REXFORD G. TUGWELL, THE DEMOCRATIC ROOSEVELT 392 (1957).

114. See, e.g., Calabresi & Rhodes, *supra* note 10, at 1175-85; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52-58.

115. In this way the argument from fidelity parallels the analysis, based on non-historicist grounds, developed by Dean Peter Shane. See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995).

116. John M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 28, 34 (1959).

Standing in F.D.R.'s way was then still very much alive Humphrey, a Coolidge appointee whom Senator George Norris once described as "the greatest reactionary of the country."<sup>117</sup> To the President, who came up with the idea,<sup>118</sup> firing Humphrey could not have been a more straightforward case of government responsiveness to popular will. While F.D.R. may have had "a vivid sense of presidential prerogatives,"<sup>119</sup> he had after all been swept into office by one of the greatest electoral landslides in history.

From a joint accountability standpoint, however, Roosevelt was only partly right. The House, the Senate, and in indirect ways, even the Supreme Court, also had claims to popular mandates. These bodies therefore had corresponding claims upon the FTC's New Deal role, at least on a theory that government should not act without thoroughly and deliberately reflecting the will of the electorate as a whole. Of course it happened that the House and Senate agreed with what emerged as F.D.R.'s New Deal vision, themselves the result of electoral landslides repudiating the G.O.P. policies that Humphrey personified. The mere likelihood of congressional approval, however, does not mean that the President may unilaterally transform a key agency by removing a holdover member for political reasons, especially when an earlier Congress had sought to prevent just such an action. Instead, a theory of joint accountability would dictate that the President seek actual congressional approval, either through the repeal of removal limits as they applied to holdovers or more generally. This approval could almost certainly have been gained precisely because the nation in 1933 had come close to speaking with one voice not just through the presidential election, but through dozens of congressional elections as well.

The point emerges more clearly when run through a slightly different set of facts. Suppose, as happened, that F.D.R. had come to office on the strength of a landslide. But further suppose, as did not occur, that the Hoover Republicans retained both the House and Senate. Taken in isolation the presidential returns would indeed have signalled that the American people were committed to a New

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117. Claudius O. Johnson, *George William Norris* in *THE AMERICAN POLITICIAN* (J.T. Salter, ed. 1938) (quoting Senator George Norris).

118. LEUCHTENBURG, *supra* note 2, at 56.

119. TUGWELL, *supra* note 113, at 392.

Deal, and with it a potential assault on current property and contract rights through powerful unelected agencies. The congressional returns, however, would indicate nothing of the sort. The Republic's clear message, in short, would be no clear message. On these facts, presidential transformation of the FTC would appear especially anomalous. Five New Dealers on the board might reflect the agenda of the majority that voted for the President. A mixed board, however, would have been more genuinely accountable to the electorate as a whole.

A similar analysis holds for cases like *Morrison*. Recall that the case specifically dealt with President Reagan's attempt to discharge a competent Independent Counsel who had undertaken an investigation into the withholding of documents related to the enforcement of the "Superfund Law."<sup>120</sup> Viewed more broadly, however, the controversy implicated questions of accountability no less than *Humphrey's Executor*.

On one side of the issue, President Reagan had won his own landslides based in no small part on a "get government off our back" pledge to substantial deregulation. Consistent with this goal was adopting a less aggressive stance toward ferreting out wrongdoing that may have resulted from too cozy a relationship between government (de)regulators and business. Assuming the President's mandate reflected a clear choice for the deregulatory approach, getting rid of a watchdog like *Morrison* would also have been consistent with—and a demonstrated accountability to—a shift in the national mood.<sup>121</sup>

But such an assumption would have been incorrect. On the other side of the question, the ever regulatory Democrats had retained the House even in their electoral debacle of 1980, and won back the Senate two years later. Taking all of these Federal elections into account, the nation had in reality sent a mixed message on deregulation and much else. In this more complete light, bold experiments in slashing red tape were appropriate insofar as they did track a significant shift in the national mood. Yet likewise appropriate was insuring that a qualified prosecutor could police those experiments lest they wind up cutting certain legal corners along with red tape. From the perspective of joint accountability, a

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120. *Morrison v. Olson*, 487 U.S. 654, 665-68 (1988).

121. See CHARLES FRIED, *ORDER & LAW, ARGUING THE REAGAN REVOLUTION* 135-36 (1991).

greater, more sustained mandate would not only have enabled, but justified President Reagan in putting the brakes on investigators not as committed to deregulation as he by modifying the Ethics in Government Act through a compliant Congress. Such a thoroughgoing mandate, however, did not occur.

#### CONCLUSION: PLUS ÇA CHANGE

One irony in all of this is that much of the foregoing debate may well be beside the point. As Professor Jonathan Entin points out, Congress and the President have relied far more heavily on devices other than removal in their perennial conflict over how to influence the thousands of people who actually implement law and policy.<sup>122</sup> This is not to say, nor does Professor Entin, that the removal power is unimportant. Even so, the parallel academic battle over the issue, which the present exchange extends, may have less to do with actual power and more to do with constitutional symbolism than either side would care to acknowledge.

If so, the current scholarly dispute still matters profoundly on another plane. Lately the legal community has turned to history to affect law, but this process necessarily impacts our understanding of history. Professor Christopher Eisgruber rightly observes that the Supreme Court is effectively a national educative institution that has an impact apart from the controversies it resolves or the doctrine it settles.<sup>123</sup> While Professor Eisgruber had lessons about justice in mind, in case after case the Court also proffers lessons about our past. In its way, the legal academy performs much the same role. The accounts of the past that result form an important part of what Professor Frank Michelman describes as an intergenerational dialogue that constitutes us not merely as a legal order, but as a people.<sup>124</sup> These are high stakes. Basing this dialogue on wishful doctrinal thinking rather than credible historical evidence has effects that range well beyond law reviews or U.S. Reports.

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122. Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595 (1997); Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L. REV. 699, 777-82 (1986).

123. Christopher Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992).

124. Frank Michelman, *Law's Republic*, 97 YALE L. J. 1493 (1988).



Credible historical evidence almost certainly demonstrates that for 208 years Presidents have jealously guarded what they have seen as their constitutional prerogatives. Calabresi and Yoo are to be congratulated for undertaking the massive job of bringing this evidence to light. Nonetheless, their narrative does not so much confirm an original constitutional grant as it does demonstrate that Presidents have acted out of institutional self-interest much as the Founders expected. If the contribution that these two scholars make confirms anything, it is that two centuries of practice under the Constitution has not resolved the removal question with any more finality than did the Founding generation. What history shows, as it often does, is that the more things have changed, the more they have stayed the same. Therefore, it follows that placing the removal question outside the reach of the political branches would be more innovation than preservation. Such innovation may or may not be a good idea on normative grounds. But as an innovation, it looks to history at its own risk.