LEGAL PRAGMATISM AND PRESIDENTIAL POWER: A CASE STUDY

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ABSTRACT

This Article explores the differences between legal pragmatism and formalism as working forms of legal thought. After a short overview of pragmatist philosophy and a description of Justice Louis Brandeis as an exemplar of legal pragmatism, this Article turns to the evolving case law regarding presidential removal. This issue has led to notable face-offs between formalists and pragmatists, from William Howard Taft versus Justices Oliver Wendell Holmes and Brandeis, to Justice Clarence Thomas versus Justice Elena Kagan and Chief Justice John Roberts. Because of their preference for bright-line rules, formalists have tended to oversimplify Founding-era history and post-Founding practice. Pragmatists have provided more nuanced historical accounts and have tried to come to grips with the trade-offs involved in issues of institutional design. The choice between these styles of thought is not inherently tied to differences in ideology or substantive constitutional views. Legal pragmatism has the potential, however, to connect judicial decisions to issues that are meaningful to the public, to provide more transparency into the reasons that motivate decisions, and to promote better dialogue among judges.

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* Sho Sato Professor of Law, University of California, Berkeley. This Article is part of the 2021 Drake Constitutional Law Symposium on Legal Pragmatism. I have drawn on my earlier writings on the subject, Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163 (1995); Daniel Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988). Much has happened in the meantime, however, in the realms of constitutional law, legal scholarship, and my own thinking. Thus, my approach in this Article necessarily differs from my earlier work.

I. INTRODUCTION

Presidential power has been a flashpoint of political and legal debate under every recent President. Judicial decisions on the subject differ greatly not only in their conclusions but in how they approach the subject. Formalist judges focus heavily, sometimes exclusively, on the historical record, which they often find to be clear and unambiguous.[1] Other judges find more ambiguity in history and focus more on how institutions operate in practice.[2] These opinions also differ in the metaphors they use to describe the constitutional structure. Consistent with their penchant for bright lines, the metaphor pervading formalist opinions is one of separation between branches of government.[3] More pragmatic judges are more prone to speak of checks and balances than separation.

In this Article, my focus will be less on the substance of those disputes than on how judges approach them. Consistent with the theme of the 2021 Constitutional Law Symposium, this Article will examine how legal pragmatism has figured in the debate, often in distinction from formalist methodologies used by other judges. Although this Article's focus is on recent opinions, the same contrast between different judicial methodologies stretches back a century to the Chief Justice William Taft Court.[4] By investigating judicial approaches in a subset of presidential power cases, I hope to illuminate how the distinction between formalism and pragmatism matters in the work of courts and in law more generally.

The Article's emphasis will be on pragmatism as a form of "working legal thought" rather than as a school of academic philosophy.[5] Thomas Grey has helpfully defined this term as "the cluster of attitudes and approaches to law that lawyers take on during their apprenticeships, and

1. *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 478 (2003) [hereinafter *Judicial Review and Legal Pragmatism*].

2. *See id.* at 478–79.

3. *See* discussion *infra* Part III.

4. *See id.*

5. I have adopted the phrase "working legal thought" from Thomas Grey. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 478. An alternative formulation might be phrased in terms of "the process of practical reasoning with and within law"—or in other words, "how do, and should, judges practically reason with and about legal materials?" Charles L. Barzun, *Three Forms of Legal Pragmatism*, 95 WASH. U. L. REV. 1003, 1004–05 (2018).

then actually manifest in their work as practitioners, judges, teachers, and doctrinal commentators."[6] Grey contrasts working legal thought with "the kind of jurisprudential high theory whose influence reaches only to those who take a specialized academic interest in jurisprudence or legal philosophy."[7] Nevertheless, this Article will also touch on pragmatism as a form of philosophical inquiry.[8] Doing so can help clarify the forms of thought that can be considered "pragmatic," and it is also true to the historical connection between legal and philosophical pragmatism.

This Article will also follow Grey in describing U.S. formalism as a type of working legal thought.[9] As Grey articulates the distinction, U.S. formalists stress "the specifically legal virtues of the clarity, determinacy, and coherence of law, and try to sharpen the distinction between legislation and adjudication."[10] The type of formalism now prevalent in the United States emphasizes the importance of clear rules and of approaches to interpretation such as textualism and originalism.[11] Notably, those methodologies sharply restrict a court's ability to consider contemporary history or social needs.[12] Unlike theorists, however, working judges and lawyers rarely adopt one style

6. *Judicial Review and Legal Pragmatism*, *supra* note 1, at 478.

7. *Id.* I would not exclude the possibility that, in the long run, such forms of legal theory may percolate via law schools into the thinking of lawyers and judges. While the direct influence of legal theorists may be limited to the academy, their indirect intellectual influence may be broader, at least in some cases.

8. *See* discussion *infra* Part II.

9. *Judicial Review and Legal Pragmatism*, *supra* note 1, at 478.

10. *Id.* Another strand of formalism, which emphasis deduction of legal rules from abstract concepts, figures less in U.S. formalism.

11. *See id.* at 470. The formalist/pragmatist discussion is clearer conceptually than in practice. For instance, speaking of textualism as a formalist methodology, Samuel Issacharoff and Trevor Morrison observe that:

> The lexical primacy of the text leaves open much of the lived experience under a constitution, a problem not just for constitutions but for any controlling instrument, even an ordinary commercial contract. Contract law itself combines the centrality of the instrument with interpretive tools drawn from custom and the ways in which the parties have organized their behavior based on the presumed advantage of negotiated exchange. In the domain of public law, even the most expansive view of textualism recognizes contemporary practice as a tool of interpretation, one that directs and constrains courts in their task of giving meaning to imprecise legislative and constitutional commands.

Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1914 (2020).

12. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 479.

of thought exclusively. Thus, as practiced, formalism and pragmatism do not make up a sharply defined dichotomy but rather represent a spectrum.[13] While some lawyers and judges may be much more prone to one approach rather than the other, other judges may take different approaches in different cases.[14]

This Article will use a recurrent and hotly debated issue of constitutional law as a concrete example of the contrast between formalism and pragmatism in judicial practice. The issue, which has been litigated for over a century, is the President's power to remove officials without cause.[15] This issue received unusually great attention during the Richard Nixon and Donald Trump presidencies, especially in connection with independent prosecutors who were investigating members of those administrations.[16] It has also been a point of controversy since the early 1900s in the context of independent agencies—regulatory agencies like the Federal Trade Commission (FTC) whose members can only be removed for cause.[17] I focus on the removal power because differences between styles of legal thought are particularly clear in judicial opinions on the removal power.[18] In addition, it is easier to focus on differences in judicial philosophy in dealing with a structural issue, where emotions do not run as high as they do with hot button issues like abortion or the death penalty.

A recent clash between Chief Justice John Roberts and Justice Elena Kagan on this issue is especially revealing.[19] The arguments in favor of unlimited presidential removal power are formalist in two fundamental ways—they rely heavily on originalism rather than analysis of the actual operation of the administrative state, and they seek the clarity of bright-line rules. As we will see, Justice Clarence Thomas embraces the purest form of this approach, while Chief Justice Roberts adopts much but not all of it. This formalist bent of the doctrine provides a setting in which contrasts with pragmatism can be seen most clearly.

13. *See id.* at 478–79.

14. *See generally* Barzun, *supra* note 5, at 1004–05.

15. *See* discussion *infra* Part III.A.

16. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5–6 (1994).

17. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

18. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

19. *See id.* at 2201–07; *id.* at 2224–38 (Kagan, J., dissenting).

In considering the differences between these methodologies, one important dimension relates to the potential for constructive dialogue. Originalists can disagree about the results in particular cases, which can lead to debate over fine points of originalist methodology or over the implications of particular historical evidence.[20] Those disagreements are likely to shed little light on the reasons why a ruling in one direction or another matters.[21] In fact, readers may be puzzled by why judges should disagree so strongly about how to interpret the vote on a particular bill two centuries ago. Such a discussion is likely to be completely opaque to the public at large. In contrast, a pragmatic perspective would allow judges on both sides to focus on the issues that really divide them.[22]

For instance, a more pragmatic perspective would have advocates of presidential removal power engage more directly with the real issues of governance at stake in the case, even if the case came out the same way.[23] They might then more directly engage concerns about the potential for presidential removal to politicize decisions that should be made more objectively because of their technical nature or because of fairness to the parties. A formalist approach forecloses any meaningful dialogue about reasons for insulating officers from presidential control and the reasons for limiting that insulation. Perhaps removal power advocates could have said more about the role of informal restraints on presidential removal. In turn, those who support limits on the removal power would have been forced to address some issues in deeper depth, including reasons why norms or other safeguards might not be enough to safeguard the integrity of the decision-making process.[24]

In today's highly polarized society, we should be looking for ways to further dialogue between opposing positions. Formalism, in contrast, is designed to foreclose discussion of the issues that really concern people with conversation stoppers, such as "The Framers decided this" or "That's not

20. *See generally* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

21. *See id.* at 233–34.

22. Barzun, *supra* note 5, at 1031.

23. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 478–79.

24. To be fair, Chief Justice Roberts may not have been wholly responsible for the formalism of the *Selia Law* opinion, given that he had to hold the votes of Justices who more strongly embrace formalism and who might well have preferred a more sweeping result.

what we did in the past."[25] By ruling out the possibility of presidential abuse of power as a concern, formalist advocates of unlimited removal power in effect delegitimize discussion of the real issue, which is whether at some point the disadvantages of presidential control outweigh the advantages.[26] Formalism relegates judges to debating obscure points of early U.S. history rather than the issues facing U.S. society today.[27]

This Article will proceed as follows. Part II provides some background on legal pragmatism as a philosophical and a legal mode of thought.[28] Both as a philosophy and as judicial practice, pragmatism has multiple strands. The working pragmatism that most interests me was exemplified early on by Justice Louis Brandeis, whose approach is echoed in some ways by more recent Justices, including Justice Kagan and Justice Stephen Breyer.[29]

Moving to the case study of presidential removal power, Part III traces the evolution of case law from the early twentieth century to the recent clash between Chief Justice Roberts and Justice Kagan.[30] Almost from the beginning, debates on this issue have been marked by a division between more formalist and more pragmatic judges. This division lies close to the surface in the conflicting perspectives of Chief Justice Roberts and Justice Kagan on presidential power.[31]

Part IV then takes a closer look at the different approaches of Chief Justice Roberts and Justice Kagan, particularly their different views of how to take into account the practices of other branches of government.[32] Part IV also considers an important recent argument that stringent adherence to originalism is better suited to preventing presidential overreach than more evolutionary approaches to constitutional interpretation.[33]

25. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 510.

26. *See id.*

27. *See id.*

28. *See* discussion *infra* Part II.

29. *See* Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163 (1995) [hereinafter *Reinventing Brandeis*]; Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

30. *See* discussion *infra* Part III.

31. *See generally Seila Law LLC*, 140 S. Ct. at 2183.

32. *See* discussion *infra* Part IV.

33. *See id.*

Part V offers a summary and a few closing thoughts.[34] In recent history, there is a clear alignment between ideological divides between Justices, the formalist/pragmatist divide, and views of the removal power. This Article argues that this alignment is historically contingent. There are conservative arguments for limiting presidential removal, and pragmatist arguments for expanding it. Part V also elaborates the arguments why a more pragmatic orientation would lead to healthier dialogue between opposing viewpoints.[35]

II. LEGAL PRAGMATISM AS THEORY AND PRACTICE

There are important affinities between pragmatist philosophy, especially in its classic phase in the early twentieth century, and the work of judicial pragmatists. While it is not the central focus of this Article, a brief description of pragmatist philosophy provides helpful background. Philosophers are often concerned with issues that do not connect directly with legal practice, such as how words relate to the world we perceive, what it means to say that a statement is true, or whether entities such as electrons are real.[36] Even in addressing these conceptual issues, however, pragmatist philosophers have emphasized the need to connect our ideas with the real problems that we confront as human beings, rather than analyzing them entirely in terms of abstractions.[37]

The heart of pragmatist thought is the view that the ultimate test of our ideas is always experience.[38] The truth of propositions is to be tested by their cash value, according to William James, that is, by the differences they can make to how we experience and act in the world.[39] Similarly, according to John Dewey, the value of art rests in its ability to enrich the human experience.[40] Different pragmatic thinkers have provided varying analyses of this connection between experience, actions, and belief.[41] Pragmatism has

34. *See* discussion *infra* Part V.

35. *See id.*

36. *See, e.g.*, JOHN DEWEY, ART AS EXPERIENCE (Minton, Balch & Co. 1934) [hereinafter ART AS EXPERIENCE] (analyzing the intersection of art, daily life, and emotion in creating aesthetic experience).

37. *See, e.g.*, CHARLES S. PEIRCE, PHILOSOPHICAL WRITINGS OF PEIRCE 5 (Justus Buchler ed., Dover Publ'ns, Inc. 1955).

38. *See, e.g.*, *id.* ("[E]xperience alone teaches anything."). For further discussion, *see* ALBERT R. SPENCER, AMERICAN PRAGMATISM: AN INTRODUCTION 29 (Polity 2020).

39. *See* WILLIAM JAMES, PRAGMATISM 95–113 (Harvard Unvi. Press 1975).

40. ART AS EXPERIENCE, *supra* note 36, at 344–46.

41. *See* Barzun, *supra* note 5, at 1004. As early exemplars of these different

also often stressed that knowledge is a community activity that must be built on open-mindedness and dialogue.[42] As such, the search for knowledge has inherent affinities with a concept of democracy based on dialogue and deliberation.[43] There are evident affinities between these views and the ways in which the scientific community seeks to refine theories in the light of observation and experimentation.

Pragmatism seems especially congenial to the legal mind. Like the pragmatist philosophers,[44] U.S. lawyers are trained to be suspicious of glittering generalities and abstract theories. Justice Oliver Wendell Holmes's adage that the life of the law is experience rather than logic summarizes much of the lawyer's creed.[45] The case method used in law schools leads students to contextualize legal analysis rather than thinking only in terms of general rules or abstractions[46]—thinking things rather than words, to paraphrase another Holmesianism.[47]

approaches, Charles Barzun refers to Justice Benjamin Cardozo, Roscoe Pound, Walter Cook, and Jerome Frank. In particular, he says:

> One can see, then, that Cook and Frank interpret the pragmatist test for judges differently and that they do so in ways that map onto the ambiguity identified in Cardozo's lectures. Cook interprets it as requiring judges to test the value of legal doctrines by reference to the observable social and economic consequences they produce. Therefore, the key is for judges to be clear in their thinking about goals and rigorous in trying to predict the consequences of their decisions. Frank, meanwhile, has a more expansive understanding of the kind of "experience" that validates a decision. It includes the judge's own emotional reactions and felt experience. So the goal is to cultivate judicial sensibilities in such a way as to produce the right sort of reactions to the particular facts in a case—reactions that would produce legal certainty in a "deeper sense."

Id. at 1015. Among more recent legal thinkers, Barzun distinguishes between "instrumentalists" such as Richard Posner, "quietists" such as Ronald Dworkin, and "holists" such as David Souter, with the three categories seemingly differing in their stance on what forms of experience they view as relevant to judging. *See id.* at 1020–31. Despite this, Barzun's distinctions seem easier to understand in terms of how these differences map onto the work of legal theorists than to differences between judicial styles of thought.

42. *See* MICHAEL BACON, PRAGMATISM: AN INTRODUCTION 55, 120 (Polity 2012).

43. *Id.* at 58–62.

44. JAMES, *supra* note 39, at 31.

45. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 312 (Little, Brown, & Co. 1st ed. 1881).

46. John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 873–75 (1975).

47. OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 238 (Harcourt,

Although pragmatism is not solely concerned with the utilitarian consequences of judicial decisions, it does prompt a healthy concern about the societal impact of law.[48] Too often, formalist judges seem unconcerned about the societal effects of constitutional rules, washing their hands of all responsibility for the impact of their own decisions. The Court could profitably give more thought to whether its decisions further societal goals such as freedom, equality, and democracy. All too often, when it purports to do so, it relies on snippets of language from the Framers rather than actual evidence to posit these connections.[49] For instance, as we will see, Chief Justice Roberts attempts to connect his approach to presidential removal to democratic norms, but he does so only through cherry-picking statements from eighteenth century figures.[50] Because he relies on the authority of past figures to validate his views, he avoids confronting legitimate questions about whether those views are completely true to the present day realities of U.S. government.[51]

Pragmatists reject appeal to authority as a test of truth, but this is not to say that the tradition and the wisdom of the past carry no weight with pragmatists.[52] The pragmatist philosophers understood the importance of tradition, not just as an instrumental value, but as a necessary ingredient in all human reasoning.[53] According to pragmatists, the mind is never a blank sheet; it is always structured by experience and culture.[54] Consistency with the past is, as Justice Holmes said, as much a necessity as a virtue, for "the past gives us our vocabulary and fixes the limits of our imagination."[55] Moreover, to the extent that ideas are a product of community, the community in question is itself a product of a shared history. Judges are drawn from a legal community that shares certain ways of thought and from a political culture with deep roots in U.S. history.[56] Whether they are formalists or pragmatists, they cannot help but think as U.S. judges rather than religious seers or professional philosophers.

Brace & Howe 1920) [hereinafter COLLECTED LEGAL PAPERS].

48. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 479.

49. *See, e,g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020).

50. *See id.*

51. *See id.*

52. *See*, *e.g.*, JAMES, *supra* note 39, at 79–80.

53. *See id.*

54. *Id.* at 35, 83, 104, 119.

55. COLLECTED LEGAL PAPERS, *supra* note 47, at 139.

56. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 491–507.

Immersion in a tradition does not mean being hidebound or renouncing change. According to Dewey, creativity and innovation do not arise from a rejection of tradition but rather from a full embrace of it.[57] Dewey viewed innovative scientists, philosophers, and engineers as deriving their original ideas from culture and tradition, which he viewed as "an essential factor in original vision and creative expression."[58] This is somewhat akin to the saying that genius steals while talent borrows, meaning that truly creative individuals deeply process and make existing ideas and styles their own rather than mimicking them.[59] In contrast, the convention-bound thinker or practitioner has adopted "only a superficial version of tradition," leaving tradition to "remain upon the surface as tricks of technique or as extraneous suggestions and conventions as to the proper thing to do."[60] Similarly, pragmatist judges would not simply view existing law as a constraint or as a factor in a utilitarian analysis. Instead, they would have already internalized it as part of their own way of thinking.

One final question is whether pragmatism leads to ad hoc decisions, lacking any coherence or attachment to principle. Dewey certainly thought not. Indeed, he stressed the importance of system in law, so as to make law as coherent and predictable as possible.[61] The pragmatist would like as much system as possible but is agnostic about how much this will really turn out to be. Compare Albert Einstein's comment that "Everything should be made as simple as possible, but no simpler"—in other words, fitting the complexities of the real world rather than ignoring them.[62] Moreover, it is a mistake to think that formalist methods will necessarily result in coherence. Textualism will lead to coherence only to the extent that text itself is coherent, and it is equally true that originalism will lead to coherence only

57. ART AS EXPERIENCE, *supra* note 36, at 265.

58. *Id.*

59. Perhaps consistently with the spirit of this saying, a look at the internet shows that it has been attributed in various forms to everyone from Oscar Wilde to Pablo Picasso and T.S. Elliott. Thomas Cornwall, *Talent Borrows, Genius Steals*, MEDIUM (Nov. 24, 2015), https://medium.com/corkscrew-thinking/talent-borrows-genius-steals-4a226bd6a375.

60. ART AS EXPERIENCE, *supra* note 36, at 265.

61. John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17, 19, 24–25 (1924).

62. This saying may have been apocryphal, or at least a more pungent restatement of Einstein's actual words. *See* Andrew Robinson*, Einstein Said That—Didn't He?*, NATURE, May 2018, at 30.

to the extent that the Framers themselves had a coherent viewpoint of constitutional issues.[63]

Rather than discuss legal pragmatism as an abstraction, it seems more true to the spirit of pragmatic thought to consider how the pragmatic approach functions in the work of judges. Justice Brandeis remains an epitome of pragmatism considered as a form of legal practice rather than theory.[64] Among modern pragmatist writers, Justice Holmes is popular as an example of pragmatist jurisprudence.[65] Justice Holmes's jurisprudential views were akin to pragmatic philosophers; indeed, he was personally familiar with James and his work.[66] He stated those views with exceptional elegance and wit, but Justice Holmes's pragmatism was often more theoretical than practical. As he was wont to say, he detested facts and admired grand generalities—a turn of mind reflected by his refusal even to read the newspaper.[67] In one notable case, he flatly ignored the realities of southern race relations in arguing that a law criminalizing breach of labor contracts as applied to Black workers was not a form of involuntary servitude.[68] It seems strange that someone who was repeatedly wounded as a Union soldier should seem so clueless about the grim legacy of slavery in

63. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 478.

64. *See Reinventing Brandeis*, *supra* note 29.

65. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989) [*hereinafter Holmes and Legal Pragmatism*]; Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. UNIV. L. REV. 541, 543 (1988).

66. *Holmes and Legal Pragmatism*, *supra* note 65, at 788, 865–66.

67. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 310 (Harvard Univ. Press 1984) [*hereinafter* JUSTICE FOR THE PEOPLE]; PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 69 (Univ. Press of Kan. 1993) [*hereinafter* BEYOND PROGRESSIVISM].

68. Vicki Jackson explains:

> This lack of knowledge or interest [in facts] is palpable in his dissent in *Bailey v. Alabama*, where the Court invalidated Alabama's criminal breach of contract statute, which was being used to perpetuate a system of involuntary servitude for African American laborers in violation of the Thirteenth Amendment. Holmes began his dissent with the assertion "that this case is to be considered and decided in the same way as if it arose in Idaho or New York." . . . The "life of the law," then, did not include black laborers' "experience" in the South.

Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2353–54 (2017).

the south.[69] The jewel-like clarity of his judicial opinions is gained at the expense of close attention to the record or prior law; sweeping generalities were more feasible for a judge who liked to circulate his opinions almost immediately after they were assigned.[70]

In contrast to Justice Holmes, Justice Brandeis was an "idealistic pragmatist,"[71] who loved facts and distrusted philosophy, which he viewed as an escape from the real intellectual battles of life.[72] He feared that the legal system was too often caught in the ideas of the past, deaf to the political, social, and economic changes that were sweeping society.[73] For Justice Brandeis, knowledge and understanding had to precede judging.[74]As a practicing lawyer, he is most famous for authoring the "Brandeis brief" in *Muller v. Oregon*.[75] *Muller* was a *Lochner*-like challenge to an Oregon statute limiting the working hours of women.[76] After only a few pages of citation to precedent, the brief proceeds with many pages of detailed factual information about maximum hour laws for women. He succeeded in persuading a regulation-skeptical Supreme Court that this particular form of regulation was reasonable enough to pass constitutional muster.[77]

The *Muller* brief was not an aberration for Justice Brandeis. He had an exceptional interest in facts.[78] He once remarked "that a lawyer who has not studied economics and sociology is very apt to become a public enemy."[79] His opinions are packed with footnotes detailing factual and historical background.[80]

69. *See* Hantzis, *supra* note 65, at 548.

70. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 296 (Norton 2d ed. 1990).

71. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE xiii (Knopf Doubleday Publ'g Grp. 2009).

72. JUSTICE FOR THE PEOPLE, *supra* note 67, at 310. Justice Brandeis called philosophy "the cyclone cellar for finer souls." *Id.*

73. UROFSKY, *supra* note 71, at 432.

74. *Id.* at 557.

75. 208 U.S. 412 (1908); David P. Bryden, *Brandeis's Facts*, 1 CONST. COMMENT. 281, 282 (1984).

76. *Muller*, 208 U.S. at 416–17.

77. *See id.* at 422–23.

78. JUSTICE FOR THE PEOPLE, *supra* note 67, at 50.

79. STEPHEN W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS 229 (1994).

80. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 65 (1932) (Brandeis, J., dissenting); Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J.,

> Brandeis's signal contributions were an openness to the significance of changing economic facts; a view that legislatures have a "comparative advantage" over courts in determining facts about economic conditions; and commitment to the idea that the Constitution reflects a "democratic preference for solutions legislated by those whom the people elect."[81]

Justice Brandeis's dissent in *New State Ice Co. v. Liebmann* illustrates his pragmatism.[82] *New State Ice* involved an Oklahoma law that imposed public utility-like regulations on the ice industry (a major business in the days before refrigeration).[83] The Court held the statute a violation of due process because selling ice was not, in the majority's view, a business affected with a sufficient public interest to justify regulation.[84] Note that this was in a time when purchasing ice was the only available form of refrigeration for consumers or businesses, unlike today when it is primarily used by consumers to cool drinks.[85] In an era when footnotes were rare in judicial opinions, Justice Brandeis's dissent contained 57 footnotes and cited a mix of sources that would still be unusual today: the tenth edition of the *Ice and Refrigeration Blue Book,* a journal called *Refrigerating World,* law review articles (rarely cited in judicial opinions of the day and disliked by some Justices even today), statutes from other states, testimony before Congress of the Director of Research and Statistics of the Federal Reserve Board, and U.S. Census monographs.[86] Though this portion of his opinion hardly consists of scintillating prose, it does make a strong case for the reasonableness of the regulation in question. This elaborately detailed demonstration is all the more impressive because Justice Brandeis almost certainly disapproved of the regulation as anticompetitive.[87] But being pragmatic does not mean being results oriented in deciding cases based solely on one's preferred policy outcome.

Justice Brandeis viewed even initiatives of which he disapproved as valuable experiments and thought judges should be open to innovations they

dissenting); United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting).

81. Jackson, *supra* note 68, at 2356.

82. *See* 285 U.S. 262, 280–311 (1932) (Brandeis, J., dissenting).

83. *Id.* at 271 (majority opinion).

84. *Id.* at 277–80.

85. *See generally id.*

86. *See id.* at 283 n.3, 287 nn.8–9, 299 n.40, 307 n.49 (Brandeis, J., dissenting).

87. *See* BEYOND PROGRESSIVISM, *supra* note 67, at 65.

considered dubious.[88] He held grave doubts about the general approach to regulation exemplified by the Oklahoma statute, an approach that gave less scope to competitive markets than Justice Brandeis preferred.[89] Still, he added, advances in science and technology "remind us that the seemingly impossible sometimes happens."[90] Just as trial and error has been a major source of advance in science and technology, so too "[t]here must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."[91] It is little wonder that Justice Brandeis was embraced by Dewey as the very model of judicial pragmatism.[92]

88. The dissent in *New State Ice* is well known today, but not for its footnotes or its erudition regarding the ice manufacturing industry. Rather, it is famous for its closing paragraph:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co., 285 U.S. at 311.

89. *Id.* at 306–11.

90. *Id.* at 310.

91. *Id.* at 311. As Jackson points out, *New State Ice* was echoed by other Justice Brandeis opinions:

> Brandeis's commitment to state experimentalism in economic matters was evident in a range of other cases. In *Pacific States Box & Basket Co. v. White*, Brandeis, writing for the Court, rejected a challenge by an out-of-state box manufacturer to Oregon requirements that raspberries and strawberries be offered for retail sale in boxes of specified dimensions. Describing the facts in detail, he offered several rational reasons for the regulatory body to have specified the dimensions that it did (for example, the fruit might survive better in the more shallow boxes, or consumers, being used to shallow boxes, might be confused about quantities being offered if differently shaped boxes were used). In another more closely divided case, Brandeis wrote for the majority in rejecting challenges to a state law limiting the rates charged for fire insurance.

Jackson, *supra* note 68, at 2356–57.

92. BEYOND PROGRESSIVISM, *supra* note 67, at 6.

Justice Brandeis's belief in the need to learn from experience and attend to a changing society also left him skeptical of theories that tried to fix the meaning of the Constitution for all time. He considered the Constitution to be a living organism, not a straitjacket—capable of expansion and adaptation to new times.[93] For that reason, he dissented when a majority of the Court held that wiretapping was exempt from the Fourth Amendment because it did not involve a trespass onto private property.[94] He considered wiretapping a threat to the values embedded in the Fourth Amendment and therefore unconstitutional, without worrying about the largely indeterminate question whether an eighteenth-century definition of a "search" would include a technology beyond the Framers' imagination.[95]

Formalism has become an increasingly dominant mode of thought, particularly among conservative jurists and scholars.[96] It is not difficult to imagine today's Supreme Court, if it faced the issue for the first time, deciding like its predecessor a century ago that wiretapping is not technically a Fourth Amendment search. The question of presidential removal power has been debated even longer, with a similar division between pragmatists and formalists.[97] My purpose in this Article is to explore how both modes of thought have operated in one hotly disputed area of constitutional law: The President's power to fire other Executive officials. This Article will argue that pragmatism comes off well in the comparison.

III. CASE STUDY: THE PRESIDENTIAL REMOVAL POWER

Presidential power remains a subject of great public and scholarly controversy. Within the legal academy, a particularly controversial issue has been whether Congress can place any limits on the President's power to remove other officials.[98] The Supreme Court has shown increasing sympathy to the idea of the unitary Executive, under which the President's power of

93. *Id.*

94. *Id.* at 630–31.

95. *Id.* at 629–30.

96. For a discussion relating to formalism and its operation in practice, see Daniel A. Farber, *Legal Formalism*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 740, 740 (James D. Wright ed., Elsevier Ltd. 2d ed. 2015).

97. *See* David A. Strauss, *Non-Judicial Precedent and the Removal Power*, 2020 U. CHI. L. REV. ONLINE 45, 49 (2020).

98. *See, e.g.*, Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021).

removal is constitutionally unlimited.[99] The centerpiece of this Part will be a recent Supreme Court decision that makes a stunning change to established doctrine in the direction of the unitary Executive.[100] First, however, some background is needed on the prior development of the case law. It is striking how often pragmatics and formalists have clashed in those judicial opinions over the course of the past century.

A. *The Developing Law of Presidential Removal Power*

Myers v. United States is the foundational case on the presidential removal power.[101] *Myers* involved the removal of a local postmaster by the Postmaster General, despite a statute requiring the advice and consent of the Senate for removals.[102] This 1926 opinion of the Court was written by Chief Justice (and former President) Taft.[103] Notably, although the opinion is formalist, it was motivated by Chief Justice Taft's experience as President,[104] an example of how formalism can obscure the underlying motivation for opinions. Chief Justice Taft's opinion for the Court held that this limitation on presidential removal was unconstitutional, upholding broad presidential power to fire Executive Branch officials.[105] The Court reasoned that such power was necessary to preserve the unity and

99. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

100. Lisa Schultz Bressman, *What* Seila Law *Says About Chief Justice Roberts' View of the Administrative State*, 2020 U. CHI. L. REV. ONLINE 37, 40 (2020).

101. *See* 272 U.S. 52 (1926). For background on *Myers* and a staunch defense of its holding, see Saikrishna Prakash, *The Story of* Myers *and its Wayward Successors: Going Postal on the Removal Power*, *in* PRESIDENTIAL POWER STORIES 165 (Christopher H. Schroeder & Curtis A. Bradley eds., Found. Press 2009).

102. *Myers*, 272 U.S. at 106.

103. *Id.*

104. The unusual drafting history of Chief Justice Taft's opinion is recounted in Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of* Myers v. United States, 45 J. S. CT. HIST. 167 (2020). Intriguingly, at one point Chief Justice Taft wrote another Justice that:

> I agree that in the beginning it might have been decided either way, but it was decided in favor of the view that the Constitution vested the executive power of removal in the President, with only the exceptions that appear in the instrument itself. My experience in the executive office satisfies me that it would be a great mistake to change that view and give to the Senate any greater power of hampering the President and tying him down than they have under the view we voted to recognize as the proper one.

Id. at 173.

105. *Myers*, 272 U.S. at 176.

coordination of the Executive Branch and because in matters subject to presidential discretion, Executive Branch officials must operate as the President's loyal servants.[106]

Chief Justice Taft relied heavily on what he called the Decision of 1789 for historical support.[107] It does provide some support for his position, but less than he seems to have believed. This historical episode began when Representative James Madison filed a motion in the House to establish the first cabinet department, making its secretary removable by the President.[108] Representative Madison successfully fought off an effort to make removal conditional on Senate approval.[109] One House member argued that Congress needed to provide for removal one way or another.[110] He thought it made good sense to give this power to the President.[111] Another representative thought that it was unnecessary for Congress to say anything about removal because removal was an executive power that the President would have anyway.[112] The House then passed a motion to declare the power of removal to be in the President.[113] The motion did not clarify whether this was a constitutional requirement, or a policy decision made by the House.[114] When the matter returned to the House from the Senate for a vote on the legislation, the debate continued regarding whether removal was inherently within the Executive power.[115] To resolve the dispute, the bill was amended to drop any direct reference to authority for removal.[116] Instead, the amendment stated that the duties of the office would go to the department's chief clerk whenever the secretary was removed by the President.[117] The amendment implied that the President could remove the secretary, but it did

106. *Id.* at 134.
107. *See id.* at 142–77.
108. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, (1789–1801) 36 (Univ. of Chi. Press 1997).
109. *Id.* at 36–40.
110. *Id.* at 37.
111. *Id.*
112. *Id.* at 40.
113. *Id.* at 40–41.
114. *Id.*
115. *Id.* at 41.
116. *Id.*
117. *Id.*

so without stating the source of that power.[118] This amendment passed the House.[119]

What should we make of this train of events? There was considerable House support for the idea of an inherent presidential removal power. That was consistent with Chief Justice Taft's later interpretation of the episode. But the meaning of the final House vote is unclear, because the amendment was supported by two groups with opposing views on the constitutional issue: those who believed the President had inherent power and those who thought he had to get that power from Congress. The Senate was evenly divided, leaving the Vice President to break the tie in favor of the "whenever" formulation.[120] Congress then used the same "whenever" language in the statutes setting up the other two departments, Treasury and War.[121]

The episode seems more ambiguous than Chief Justice Taft or later Chief Justice Roberts was willing to admit. On the one hand, many members of Congress did believe the Constitution gave the President the removal power.[122] On the other hand, if the Constitution was a clear grant of this power, many members of Congress seemed quite oblivious to this supposedly clear meaning—and some denied its existence.[123] The one thing that does seem clear is that most House members thought the President should be able to remove cabinet officers, whether for constitutional or policy reasons.[124] It also seems clear that Congress, or at least the House, rejected the view that Senate consent was required for removal of Executive officers. On the other hand, it is worth noting, when the same House of Representatives created the Treasury Department, it deleted reference to the Treasury as an "executive" department and gave the Secretary of Treasury duties running directly to Congress as well as executive duties.[125]

Myers used sweeping language about the President's plenary control of the Executive Branch, but the holding may not be quite as sweeping as it

118. *Id.*
119. *Id.*
120. *Id.* at 41 n.243.
121. *Id.* at 41.
122. *Id.* at 39.
123. *Id.*
124. *Id.* at 44. The meaning of the House's actions are even harder to unpack because different coalitions voted for eliminating direct reference to the President's power to appoint and for indirectly referring to presidential appointment in another clause.
125. *Id.* at 41–42.

seems.[126] First, *Myers* left intact a previous decision allowing Congress "to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them."[127] Second, the Court did not entirely preclude the possibility of limitations on the President's power to supervise the Executive Branch.[128] The Court noted that "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."[129] The Court also noted that "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control."[130] Even in these instances, however, the Court thought the President should be able to remove an officer based on a judgment that the "discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[131] That meant that, at the very least, requiring Senate concurrence with a presidential removal decision was unconstitutional.[132] It is not clear, however, that Chief Justice Taft was entirely ruling out the possibility of for-cause removal requirements—for example, cases in which the President was motivated by purely partisan considerations or an effort to coerce a specific decision by the underling rather than general dissatisfaction with the underling's performance.

All that was really needed to decide *Myers* was that the Senate had no constitutional role in the removal of Executive officers. Nothing beyond that was raised by the facts, so the bulk of Chief Justice Taft's opinion was dictum. It was not dictum that received general approval at the time.[133] Notably, Chief Justice Taft's opinion seemed to have gotten a critical reception from both conservatives and liberals, with one outspoken Senator remarking that it could only be an appealing ruling to those who longed for

126. *See generally* Myers v. United States, 272 U.S. 52 (1926).

127. *Id.* at 127. The previous decision in question was United States v. Perkins, 116 U.S. 483, 485 (1886).

128. *See generally Myers*, 272 U.S. 52.

129. *Id.* at 135.

130. *Id.*

131. *Id.*

132. *See id.*

133. *See* UROFSKY, *supra* note 71, at 590.

an American Mussolini.[134] So mired was Chief Justice Taft's opinion in earlier history that it seems somewhat jarring to realize that it was written after World War I, at a time when authoritarianism was rearing its head in Europe. Perhaps the inability to tell whether an opinion was written today or in 1800 should be accounted a triumph of originalism.

The members of the Court with the closest affinities to pragmatism dissented.[135] Justice Brandeis stressed that Congress had often legislated regarding removals, sometimes to limit them and sometimes to mandate them.[136] He thought that the Court had ignored history that bore strongly on the original understanding.[137] Justice Brandeis quoted a House member as saying in 1789 that an unlimited removal power "is a doctrine not to be learned in American governments"; moreover, "[s]uch power had been denied in colonial charters, and even under proprietary grants and royal commissions" as well as "in the thirteen states before the framing of the federal Constitution."[138] Thus, there was no precedent at the time for an unlimited Executive removal power in a democracy. Finally, by stressing the need for efficient government over all else, the Court had misunderstood the purpose of the separation of powers.[139] Separation of powers was adopted "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[140] Indeed, the potential for unrestrained

134. *Id.*

135. *See Myers*, 272 U.S. at 240 (Brandeis, J., dissenting).

136. Justice Brandeis pointed out a long string of then-recent examples:

> The practice of Congress to control the exercise of the executive power of removal from inferior offices is evidenced by many statutes which restrict it in many ways besides the removal clause here in question. Each of these restrictive statutes became law with the approval of the President. Every President who has held office since 1861, except President Garfield, approved one or more of such statutes. Some of these statutes, prescribing a fixed term, provide that removal shall be made only for one of several specified causes. Some provide a fixed term, subject generally to removal for cause. Some provide for removal only after hearing. Some provide a fixed term, subject to removal for reasons to be communicated by the President to the Senate. Some impose the restriction in still other ways.

Id. at 262–63.

137. *See id.* at 292–93.

138. *Id.* at 292–93 nn.83–85.

139. *See id.* at 290–93.

140. *Id.* at 293.

presidential power to threaten liberty is simply ignored in all of the Court's opinions striking down restrictions on presidential removal.

Justice Holmes's dissent also strikes a pragmatist note. Justice Holmes considered Chief Justice Taft's

> arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spiders' webs inadequate to control the dominant facts.[141]

That fact was that Congress had complete control over the creation and continued existence of the office held by Myers.[142] In terms of the relevance of the "take care" clause, according to Justice Holmes, "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."[143]

In its next encounter with the removal power, the Court gave further attention to the "quasi-judicial" category of officials mentioned by Chief Justice Taft.[144] *Humphrey's Executor v. United States* involved President Franklin Delano Roosevelt's removal of a member of the FTC.[145] The FTC was established by Congress as an independent agency whose members are appointed by the President with the advice and consent of the Senate.[146] The statute provided that the President can remove these officials only for "inefficiency, neglect of duty, or malfeasance in office."[147]

Justice George Sutherland, the intellectual leader of the conservative wing of the Court, wrote the opinion for a unanimous Court upholding the statute.[148] Justice Sutherland's opinion limited *Myers* to purely Executive officers, who do not exercise quasi-legislative or quasi-judicial powers.[149] Notably, the majority included Justice Sutherland and other conservative

141. *Id.* at 295 (Holmes, J., dissenting).
142. *See generally id.*
143. *Id.* at 295 (Holmes, J., dissenting).
144. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
145. *Id.* at 612.
146. *See generally id.*
147. *Id.* at 620.
148. *See id.* at 612.
149. *Id.* at 627–28.

members of the Court who had joined *Myers*, suggesting they had never accepted Chief Justice Taft's argument fully despite joining his opinion.[150] The unanimity of the Court in restricting presidential power over independent commissions is also an indication that there is no inherent link between political ideology and positions on the removal power.

According to Justice Sutherland, members of the FTC were not purely executive in that they were charged with interpreting the broad language of the statute prohibiting unfair trade practices and they decided cases dealing with the conduct of individual companies.[151] Justice Sutherland observed that, in passing the law, Congress had believed that long experience by commissioners was needed to gain expertise and that partisan pressures posed a threat to their independence of judgment.[152] Justice Sutherland considered an agency such as the FTC quite different from executive officers such as postmasters, whose function was essentially managerial.[153] He declined to extend the *Myers* holding to this new class of officers.[154] "The narrow point actually decided," Justice Sutherland observed, "was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress."[155] Indeed, "[i]n the course of the opinion of the court, expressions occur which tend to sustain the government's contention [of unlimited removal power], but these are beyond the point involved and, therefore, do not come within the rule of stare decisis."[156] Disavowing that dictum, Justice Sutherland said, "[i]n so far as they are out of harmony with the views here set forth, these expressions are disapproved."[157]

The next major case on removal was *Morrison v. Olson*.[158] A statute passed after Watergate established the position of independent counsel to

150. Urofsky suggests this possibility, although he does not present any direct evidence. UROFSKY, *supra* note 71, at 704.

151. *Id.* at 628.

152. *See id.* at 624–25.

153. *Id.* at 627.

154. *Id.* at 626.

155. *Id.*

156. *Id.*

157. *Id.*

158. 487 U.S. 654 (1988). Background on the case can be found in Kevin M. Stack, *The Story of* Morrison v. Olson: *The Independent Counsel and Independent Agencies in Watergate's Wake*, *in* PRESIDENTIAL POWER STORIES 401, 401–46 (Christopher H. Schroeder & Curtis A. Bradley eds., Found. Press 2009).

pursue allegations of misconduct by high government officials, including the President.[159] Congress was at great pains to eliminate political influence over the independent counsel. Apart from impeachment or the termination of the special prosecutor's work, the special prosecutor could be removed "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[160]

Chief Justice William Rehnquist's opinion for the Court abandoned the distinction between purely executive and quasi-legislative or judicial officials.[161] Given that Congress had not retained any control of removal of the officer in question, he considered *Myers* irrelevant and instead considered *Humphrey's Executor* the relevant precedent.[162] He called, however, for a revised reading of that opinion. Although "[w]e undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial,'" he wrote, "our present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"[163] Rather, Chief Justice Rehnquist said,

> [t]he analysis contained in the court's removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.[164] Moreover, Chief Justice Rehnquist pointed out, the Court had so recharacterized Humphrey's Executor in an opinion 30 years prior to Morrison.[165]

159. Stack, *supra* note 158, at 402–03.
160. *Morrison*, 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1)).
161. *See id.* at 689.
162. *See id.* at 685–87.
163. *Id.*
164. *Id.* at 658.
165. Chief Justice Rehnquist wrote:

> The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of

Chief Justice Rehnquist pointed out that "the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."[166] Chief Justice Rehnquist conceded that "the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act," but "we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[167] Nor did the Court think that the for-cause removal provision "impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act," since "the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."[168]

Chief Justice Rehnquist also rejected a more general separation of powers challenge to the independent counsel statute as a whole, including both the appointment and removal provisions.[169] The Court concluded that the statute did not involve the Judicial Branch in performing non-judicial functions in appointing the special counsel or determining the scope of the inquiry.[170] Nor did it aggrandize congressional power at the expense of the

> the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure.
>
> At the other end of the spectrum from *Myers,* the characterization of the agencies in *Humphrey's Executor* and *Wiener* as "quasi-legislative" or "quasi-judicial" in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

Id. at 690–91 (quoting Wiener v. United States, 357 U.S. 349, 352 (1958)).

166. *Id.* at 691.
167. *Id.* at 691–92.
168. *Id.* at 692.
169. *See id.* at 694–95.
170. *Id.* at 695.

President, since Congress had no control over the appointment, removal of the counsel or the counsel's investigation.[171]

Justice Antonin Scalia alone dissented, sharply attacking the opinion by Chief Justice Rehnquist, his fellow conservative.[172] Justice Scalia emphasized the general principle of separation of powers, saying that "[i]f to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning."[173] After quoting the clause vesting the executive power in the President, he laid out what has come to be known as the theory of the unitary executive.[174] The clause "does not mean *some of* the executive power, but *all of* the executive power."[175] Consequently, he wrote, the statute must be struck "if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?"[176] To ask these questions may indeed be to answer them, given Justice Scalia's assumption that prosecution is a core executive function, since the whole purpose of the statue was to limit presidential control over investigations of high officials.[177] Of course, the majority did not agree that these were the right questions to ask.[178]

Justice Scalia lambasted the majority for failing to establish a bright line limiting congressional interference with removals, saying that "[a]s far as I can discern from the Court's opinion, it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover."[179] He continued: "The Court essentially says to the President: 'Trust us. We will

171. *Id.* at 694.

172. *See id.* at 697–734 (Scalia, J., dissenting).

173. *Id.* at 703.

174. *See id.* at 705.

175. *Id.*

176. *Id.* It is actually less clear than Justice Scalia thought that prosecution is an inherently executive function. Peter Shane argues that it was common at the time of the framing to view prosecution as a judicial function, rather than purely executive. Notably, the Sixth Amendment requires cases to be brought by an indictment from a grand jury, not at the discretion of the prosecutor. *See* Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 257 (2019).

177. *See Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

178. *See generally id.* (majority opinion).

179. *Id.* at 726–27 (Scalia, J., dissenting).

make sure that you are able to accomplish your constitutional role.' I think the Constitution gives the President—and the people—more protection than that."[180] The possibility that the removal power could be used to protect criminal activity by the President or close associates, including conduct aimed at disabling political opponents, seems to have been beyond Justice Scalia's reckoning.[181]

Morrison remains controversial to this day and is obviously unacceptable to adherents of the unitary Executive theory.[182] Arguably, the Court underestimated the extent to which the now-expired independent counsel law undermined the functioning of the presidency. In Justice Scalia's view, however, that question is irrelevant, since he insisted that any interference whatsoever with presidential control of the Executive Branch, however slight, would invalidate the statute.[183] Supporters of *Morrison* emphasize its vital importance in safeguarding congressional power to prevent the President from further entrenching himself in power by hobbling or terminating federal criminal investigations of the President or his campaign, aides, or associates.[184] Yet, Justice Scalia's worldview seems entirely lacking in the possibility that limits on the removal power might be needed to protect the integrity of government.[185]

The Court returned to the presidential removal power in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[186] This case involved a board setting accounting standards for corporate auditors that was appointed by the Securities and Exchange Commission (SEC).[187] The members were removable by the SEC only for good cause, and the SEC commissioners themselves were removable by the President only for

180. *Id.* at 727.

181. *See id.* at 726–27.

182. *See* Shane, *supra* note 176, at 242–43.

183. *Morrison*, 487 U.S. at 708.

184. *See id.* at 683–84 (majority opinion).

185. *See id.* at 708 (Scalia, J., dissenting).

186. 561 U.S. 477 (2010). *PCAOB* is pronounced "peek-a-boo." Note that the President had not attempted to remove any member of the Board. *See generally id.* Nor was there any evidence even hinting that the Board would have altered its views in any way relevant to the plaintiff if the members had been removable by the President. *See generally id.* The Court extended standing despite the lack of any evidence of injury to the plaintiff, on the formalistic theory that any constitutional flaw in the design of the office rendered all of its decisions invalid. *See id.* at 500. Doing so converted the "injury in fact" prong of standing into an "injury in theory" requirement. *See id.*

187. *Id.* at 485.

cause.[188] The Court distinguished this situation from that of independent agencies like the SEC itself, whose members the President can directly remove for good cause.[189] The double-layer of protection for the accounting board went too far in protecting it from presidential oversight.[190] The Court portrayed the need for presidential control as basic to democracy.[191] In Chief Justice Roberts's view, "The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."[192] In this telling, the President is the embodiment of the public will, a populist vision that seems to leave little basis for restricting Executive authority.

188. *See id.* at 486–87.

189. *Id.* at 495. As Chief Justice Roberts said,

> [W]e have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard.

Id.

190. According to Chief Justice Roberts,

> A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute "inefficiency, neglect of duty, or malfeasance in office."

Id. at 496 (internal quotation marks omitted) (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)).

191. *Id.*

192. *Id.*

Chief Justice Roberts notably ignored the argument that the vast power of the Executive Branch provides reasons why it might be wise to provide some limits on political control of the government.[193] If we take seriously the idea that greater presidential involvement always increases accountability, and that public accountability is a sufficient check on the President, the consequences would seem to be far-reaching. From that perspective, perhaps it may seem regrettable that the President does not personally select which prosecutions to bring, which taxpayers to audit, which licenses and permits should be issued, and what language goes into scientific reports on controversial subjects, so as to ensure that all those decisions reflect presidential preferences and thereby the "will of the people." Others might think that the power of the federal government is precisely why not every decision should be subject to the direct control of the President and White House political staff. At least, one might think that this risk of presidentialism might deserve a mention, if only to explain why it should not be a serious concern.

In dissent, Justice Breyer took a more pragmatic approach, much like Justice Brandeis had decades earlier.[194] Justice Breyer emphasized the need to "look[] to function and content, and not to bright-line rules."[195] That approach, he said, could be traced back to Chief Justice Thurgood Marshall's view that "our Constitution is fashioned so as to allow the three coordinate branches, including this Court, to exercise practical judgment in response to changing conditions and 'exigencies,' which at the time of the founding could be seen only 'dimly,' and perhaps not at all."[196] Thus, "[A] functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances."[197] Indeed, presidents might well favor restrictions on the removal power in certain circumstances in order to further their ability to achieve goals like fair adjudication and appropriate use of expertise.[198]

193. *See id.* at 477–514.

194. *Compare id.* at 519–20 (Breyer, J., dissenting), *with* Myers v. United States, 272 U.S. 52, 266 (1926) (Brandeis, J., dissenting).

195. *Free Enter. Fund*, 561 U.S. at 519–20.

196. *Id.* at 520.

197. *Id.*

198. *See id.*

> If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can

Justice Breyer criticized the Court for overemphasizing the removal power as a form of Presidential supervision.[199] In reality, Justice Breyer said,

> a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress's ability to assert influence) are more likely to affect the President's power to get something done.[200]

Moreover, Justice Breyer pointed to a series of statutory provisions that make "the Commission's control over the Board's investigatory and legal functions is virtually absolute."[201] Stressing that the structure of the accounting board was supported both by Congress and the President, Justice Breyer concluded that "Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal."[202]

This case set the stage for the Court's most recent ruling on the removal power. As we will see in the next Part, the Court used that ruling to recast the past doctrinal framework, sharply limiting prior holdings that upheld limitations on the removal power.

B. *The* Seila Law *Case*

The Supreme Court's latest ruling on the removal power, *Seila Law LLC v. Consumer Financial Protection Bureau*,[203] marks a further step toward adoption of the unitary executive theory. In the aftermath of the 2008 financial crisis, Congress established the Consumer Financial Protection

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> similarly help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

Id. at 522.

199. *See id.* at 515.

200. *Id.* at 524.

201. *Id.* at 529.

202. *Id.* at 532.

203. 140 S. Ct. 2183 (2020).

Bureau (CFPB) to protect consumers against abusive or fraudulent financial practices.[204] Rather than a multimember commission, the CFPB's chief decisionmaker is its director, who is appointed by the President for a five-year term.[205] Congress took special care to insulate the director from the enormous political influence of the finance industry.[206] The director may be fired only for "inefficiency, neglect of duty, or malfeasance in office."[207] The same language the Supreme Court had previously approved for independent commissions.[208] But this time the result was different.

Chief Justice Roberts again wrote for the five-Justice majority,[209] holding that the head of the CFPB is removable by the President. He found the case distinguishable from precedents involving independent commissions because the CFPB's director was even more insulated from presidential control than the heads of other independent agencies.[210] Unlike the typical commission, there was only one member, so there was no

204. *Id.* at 2192–93.

205. *Id.* at 2193.

206. *See id.*

207. 12 U.S.C. § 5491(c)(1); *id.* § 5491(c)(3).

208. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 619 (1935).

209. *See Selia Law LLC*, 140 S. Ct. at 2191. Justice Thomas, joined by Justice Neil Gorsuch, joined this portion of the Chief Justice Roberts opinion, although they called for going further to eliminate independent agencies:

> Unfortunately, this Court "ha[s] not always been vigilant about protecting the structure of our Constitution," at times endorsing a "more pragmatic, flexible approach" to our Government's design. Our tolerance of independent agencies in *Humphrey's Executor* is an unfortunate example of the Court's failure to apply the Constitution as written. That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design.

Id. at 2212 (Thomas, J., concurring in part and dissenting in part) (citation omitted). Of course, the Constitution *as written* does not explicitly say that the President can remove other officials. *See* U.S. CONST. art. I. It does explicitly say that Congress can pass laws necessary and proper to carrying out its own responsibilities and those of the other branches, which might seem to include power to set terms for removal of individuals who hold the offices Congress has created. *See id.* art. I, § 8, cl. 18. This is not to say that one side or the other is right, but it is hard to see how one of them can claim to be identical to the Constitution as written. *See generally* U.S. CONST.; *see also Seila Law LLC*, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part). Justice Thomas and Justice Gorsuch also criticized the majority for holding the provision limiting presidential removal to be severable from the statute. *See id.* at 2211.

210. *Id.* at 2192 (majority opinion).

guarantee that an appointment would come up during any given President's term.[211] Unlike multimember commissions, the President lacked the power to determine which member would serve as chair.[212] Moreover, Chief Justice Roberts found, the greatest indication of unconstitutionality was that Congress had dared to experiment by crafting a novel arrangement.[213] As he said, "'[p]erhaps the most telling indication of [a] severe constitutional problem' with an Executive entity 'is [a] lack of historical precedent' to support it an agency with a structure like that of the CFPB is almost wholly unprecedented."[214] For those reasons, Chief Justice Roberts found prior cases distinguishable.[215] And because of the CFPB's unusual financing arrangement, the President could not even hope to use budgetary influence on the agency.[216] The majority believed that the need for removal power was especially important because of these other features of the CFPB structure.[217]

The unique features of the CFBP perhaps make it distinguishable from other independent agencies. What augurs poorly for those other agencies, however, was Chief Justice Roberts's general language about the removal power.[218] Based on selective quotations from the framing era, primarily featuring Representative Madison, the Roberts Court found an unmistakable conscious decision by the Framers to give the President full control of all executive functions.[219] He also relied on the "contemporaneous and weighty evidence" of the Decision of 1789.[220] In Chief Justice Roberts's view, the Framer's "constitutional strategy" was clear: "Divide power everywhere except for the Presidency and render the President directly accountable to the people through regular elections."[221] The Framers viewed

211. *Id.* at 2193. The CFPB is funded by the Federal Reserve Bank, which has its own financing independent of Congress. *Id.* at 2194.

212. *Id.* at 2193.

213. *Id.* at 2201.

214. *Id.*

215. *See id.* at 2203–04.

216. *Id.* at 2203.

217. *See id.* at 2193.

218. *See id.* at 2193–94.

219. *See id.* at 2197–98.

220. *Id.* at 2197 (citing Bowsher v. Synar, 478 U.S. 714, 723 (1986)).

221. *Id.* at 2187. As Chief Justice Roberts said,

> The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws,"

the legislature as the greatest threat to liberty, Chief Justice Roberts said, while they wanted energy and decisiveness from the Executive Branch.[222] But to continue Chief Justice Roberts's analysis, he maintained that the Framers settled on a simple arrangement.[223] "In that scheme," he said, "individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President."[224] The result, according to Chief Justice Roberts, is to uphold the electorate's control of the administration of the laws, via the President.[225] "Through the President's oversight, 'the chain of dependence [is] preserved,' so that 'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the President on the community.'"[226]

Curiously, while he refers to the division of Congress into two branches, Chief Justice Roberts does not mention the organization of the Judicial Branch. Like the Executive Branch, the Judicial Branch is a hierarchy with a single head—there is a "Supreme Court" and "inferior

> "the protection of property," and "the security of liberty." Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man."
>
> To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." The President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

Id. at 2203 (first quoting THE FEDERALIST NO. 70 (Alexander Hamilton); then quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010)). It is not clear that the President is constitutionally the most democratic or politically accountable official. *See id.* Members of the House must be elected by popular vote; something the Constitution does not specify regarding the President. Moreover, House members are elected every two years, making them more quickly accountable to the public.

222. *Id.*

223. *See id.*

224. *Id.*

225. *Id.*

226. *Id.* (quoting 1 ANNALS OF CONG. 499 (1789)).

courts." It does have the power to overturn lower court decisions and even to issue directives to lower courts. Those powers are limited by statute, however. The Supreme Court does not have the power to remove federal judges in lower courts to ensure obedience to its precedents. Yet, no one doubts that the Supreme Court actually is the supreme head of the federal Judicial Branch. Apparently, the Framers thought there was more than one way to provide unity to a branch of government. Of course, the Judiciary and the Executive differ in many ways, including the precise language used in their vesting clauses. It seems odd, however, that Chief Justice Roberts referred to the division of power everywhere else while only describing one of the other two branches.

It is striking how little Chief Justice Roberts's rhetoric aligned with the actual circumstances at the time he wrote. He portrayed a chief Executive at the mercy of the fearsome legislative power.[227] That hardly seems an apt description of the then-sitting President Trump, or for that matter, his immediate predecessor President Barack Obama. In an era when Congress seems paralyzed to act on its own while Presidents are hyperactive, this focus on the dangers of legislative power, to the extent the Framers embraced it, seems an antique relic of a bygone past. His insistence on the President's accountability to the people ignored the fact that at the time he wrote, two of the past four Presidents (President Bill Clinton and President George W. Bush) had been initially elected with only a minority of the popular vote. Both of those Presidents also served second terms during which they were no longer accountable to the public since they could not stand for reelection.

Justice Kagan argued for the four dissenters that the majority had overlooked considerable contrary evidence about the original understanding, the actual functioning of the Executive Branch, and the justifications for those unique features of the CFPB.[228] She said the majority "recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB," agencies with "similar powers," "agencies charged with similar missions, agencies created for similar reasons."[229] Although the majority had proclaimed a general rule of presidential power with two exceptions for multi-member commissions and for inferior officers, Justice Kagan complained that "[t]he majority's general rule does not exist," and the "exceptions likewise, are made up for the

227. *See id*.

228. *Id.* at 2224–25 (Kagan, J., concurring in part and dissenting in part).

229. *Id.* at 2225.

occasion—gerrymandered so the CFPB falls outside them."[230] The upshot was that the majority opinion "commits the Nation to a static version of governance, incapable of responding to new conditions and challenges."[231]

In terms of Chief Justice Roberts's reliance on the original understanding, Justice Kagan pointed to important contrary evidence. As she explained, in the Founding era, "Parliament often restricted the King's power to remove royal officers—and the President, needless to say, wasn't supposed to be a king."[232] Moreover, "many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses."[233] Finally, Justice Kagan said Chief Justice Taft had badly misread the Decision of 1789.[234] Justice Kagan also pointed to important historical exceptions to the majority's supposed historical rule of unlimited presidential removal power.[235]

230. *Id.*
231. *Id.* at 2226.
232. *Id.* at 2228.
233. *Id.*
234. Justice Kagan explained:

> The best view is that the First Congress was "deeply divided" on the President's removal power, and "never squarely addressed" the central issue here. The congressional debates revealed three main positions. Some shared Hamilton's Federalist No. 77 view: The Constitution required Senate consent for removal. At the opposite extreme, others claimed that the Constitution gave absolute removal power to the President. And a third faction maintained that the Constitution placed Congress in the driver's seat: The legislature could regulate, if it so chose, the President's authority to remove. In the end, Congress passed a bill saying nothing about removal, leaving the President free to fire the Secretary of Foreign Affairs at will. But the only one of the three views definitively rejected was Hamilton's theory of necessary Senate consent. As even strong proponents of executive power have shown, Congress never "endorse[d] the view that [it] lacked authority to modify" the President's removal authority when it wished to.

Id. at 2230 (citation omitted).

235. Particularly cogently, Justice Kagan pointed to an example only twenty years after the drafting of the Constitution. This was "Congress's decision in 1816 to create the Second Bank of the United States—'the first truly independent agency in the republic's history.'" *Id.* at 2231 (citing Lessig & Sunstein, *supra* note 16, at 30). The President could appoint and remove only five of the Bank's twenty-five directors who led the Bank, the President could appoint and remove only five. *Id.* Yet, Justice Kagan observed, "the Bank had a greater impact on the Nation than any but a few institutions, regulating the Nation's money supply in ways anticipating what the Federal Reserve does today." *Id.*

Chief Justice Roberts's version of history might be called mythic originalism.[236] As we will see below, while there is some evidence to support Chief Justice Roberts's view of the original understanding regarding the presidential removal power, attributing a unified vision to the Framers as a whole is dubious. For one thing, Alexander Hamilton was apparently quite unaware of this "simple arrangement" when he wrote about the issue in the *hou* and thought Senate approval was required to remove cabinet officers.[237] Apparently, he did not discern the clear link between his robust vision of Executive power and presidential removal power that the majority of the Court now finds so obvious.[238] And the Framers definitely did not consider the President's dependence on the community as a sufficient protection against abuses of power. If they had, they could have dispensed with checks and balances entirely. The clarity that Chief Justice Roberts purports to see in history is the clarity of his own conception of Executive power, not the clarity of the historical record.[239]

Justice Kagan made another argument against the Chief Justice Roberts view, based on a comparison of the institutional capacities of the relevant institutions.[240] In her view, the Court was clearly much less capable of making decisions about agency design than Congress and the President.[241] "Judicial intrusion into this field," she said, "usually reveals only how little

236. Chief Justice Roberts relied mostly on prior authority for this view, rather than actually inspecting the historical record:

> [Presidential removal] "was discussed extensively in Congress when the first executive departments were created" in 1789. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." The First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," and has long been the "settled and well understood construction of the Constitution."

Id. at 2197 (majority opinion) (citations omitted). It is hard to see how the dictum in *Myers* can be considered the settled, consensus view of the Constitution when it was rejected only a few years later in *Humphrey's Executor* and again in *Morrison*. *See id.* It is probably true that historical practice embodied a presumption in favor of presidential removability, but adherence to that presumption has never been fully consistent.

237. *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

238. *See id.*

239. *See Seila Law LLC*, 140 S. Ct. at 2203.

240. *Id.* at 2237 (Kagan, J., concurring in part and dissenting in part).

241. *Id.*

courts know about governance."[242] In reality, she said, an agency's independence is highly context dependent, depending on "appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships."[243] Because of this context-dependence, it was "hard to pinpoint how those factors work individually, much less in concert, to influence the distance between an agency and a President."[244]

In short, Justice Kagan said, the Constitution "authorizes Congress to meet new exigencies with new devices."[245] Article II of the Constitution does not bar Congress from creating independent agencies, "[n]or do any supposed structural principles" or "any odors wafting from the document."[246] In Justice Kagan's view, "Save for when those agencies impede the President's performance of his own constitutional duties, the matter is left up to Congress."[247] But Justice Kagan, of course, was writing in dissent.

If Justice Kagan's opinion has a weakness, it is her seeming inability to identify a reason for Congress's departure from the general practice of making independent agencies multi-member commissions. She does not reference any explanation from Congress itself, and she does not suggest any. Perhaps the reason was a desire for more decisive, expeditious action.[248] Repeated Republican efforts to convert the CFPB to a multi-member commission seem to have been motivated based on the premise that doing

242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 2245.
246. *Id.*
247. *Id.*
248. One advocate of converting the CFPB to a multi-member commission observes that even in later years,

> many CFPB supporters continue to believe that a single director is far better than a commission. They argue that a commission-led agency inevitably leads to delays, and that such agencies are inherently slow and unresponsive. Most often, the SEC is cited as an example of why multi-member, bipartisan commissions fail.

Jolina C. Cuaresma, *Commissioning the Consumer Financial Protection Bureau*, 31 LOY. CONSUMER L. REV. 426, 481 (2019). The White House, Senate, and House legislative proposals took different positions about use of a multi-member commission. *Id.* at 444–45.

so would make it less aggressive in enforcing the law by increasing Congress's influence (and hence that of the industry) over the agency.[249] Thus, it is not implausible that the reason for a single director was conversely to allow energetic administration of the law. If so, that seems quite consistent with the faithful execution that Article II calls for.

The effect of *Seila Law* is to severely limit Congress's ability to restrict presidential removal power.[250] *Morrison* now applies (at most) only to inferior officers executing the law but lacking policy authority and to multimember commissions subject to other forms of presidential control.[251] In the short run at least, the future of presidential removal power depends on whether Chief Justice Roberts and at least one other conservative member of the Court are prepared to maintain those narrow exceptions from the otherwise unlimited power of the President to fire subordinates.

IV. HISTORY, INNOVATION, AND PRAGMATISM

Opponents of the unitary Executive such as Justice Kagan can point to the laws establishing the Treasury Department and the Comptroller General to show that government officers were not simply presidential appendages. In both cases, Congress took pains to establish the duties of offices independent of the President, and Congress clearly viewed these offices as enjoying a special relationship with its own activities.[252] Thus, Congress seemingly did not view these officers as merely the President's alter egos.[253]

249. According to a leading corporate law scholar,

> The Republican Party's opposition is, no doubt, informed by the agency's regulatory mission, which could financially burden important constituents in their political coalition, and the theoretical and statistical analysis suggests that Republican efforts to restructure the agency along conventional independent commission lines would have real bite. Not surprisingly, the bulk of the Republican bills would have transformed the CFPB into a multimember, bipartisan-balanced commission subject to the appropriations process. Such a reorganization would have the effect of rendering the CFPB more attentive to congressional preferences, which would include, of course, Republican preferences.

Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 YALE J. ON REGUL. 273, 316 (2019).

250. *See Seila Law LLC*, 140 S. Ct. at 2211 (majority opinion).

251. *See id.* at 2199.

252. *See* Lessig & Sunstein, *supra* note 16, at 96.

253. *See id.*

As the first Secretary of the Treasury, Hamilton was tasked by Congress with reporting to it on the economy and recommending legislation, a task that he zestfully undertook.[254] Even Representative Madison seemed to think that officers performing more judicial functions should be shielded from removal.[255] Although the statute establishing the Post Office originally provided that it would operate under the direction of the President, this language was removed almost immediately when the law was amended.[256]

Recent scholarship has strongly supported Justice Kagan's view. Plainly, use of the term "executive power" would not have connoted to a reasonable, well-informed reader of the time that the President had unlimited removal power.[257] Daniel Birk, the scholar whom Justice Kagan herself referenced, has established that the executive officers most familiar to such a reader—the King of England and U.S. governors—had no such power.[258] Birk's review of the historical record established that the King's power over other officials was more limited than one might have imagined.[259] The King "could not directly instruct most law enforcement and regulatory officials," and "[m]any officers were appointed and removable only by other officers or local magnates."[260] Furthermore,

> [a] large number of royal officers, from local law enforcement to exalted officials in the royal government, held their offices pursuant to life or hereditary tenure, and there were even pockets of administration completely outside the King's control. And Parliament created many offices by statute, particularly regulatory and administrative offices, and when it did so it often specified the mode of appointment, the mode of removal, and the tenure of the office.[261]

Moreover, according to Birk, Parliament abstained from dictating removal rules only for narrow classes of officials, basically those particularly close to the King or the exercise of the King's prerogative powers.[262] If the Framers understood Article II to give the President dictatorial powers over

254. *See generally id.*
255. *See id.* at 17–18.
256. *See id.* at 29–30.
257. Birk, *supra* note 98, at 182.
258. *Id.*
259. *See id.*
260. *Id.*
261. *Id.*
262. *Id.* at 183.

the entire Executive Branch, that was an innovation without precedent, whether in monarchy whose powers they had rebelled against, in colonial governments, or in any of the state governments.[263] One might have expected such a major change in practice to be more clearly signaled by the constitutional text.

There are also aspects of the Framing period that tend to undermine the claim that dismissal is an inherent part of the executive power. First, one of the plans before the Constitutional Convention explicitly gave the President the power to suspend officials, but this language was never discussed and did not make its way into the final draft.[264] Second, when the issue first arose in Congress, the issue was not regarded as obvious, and some important figures changed their minds, which was hardly likely if there was a clear understanding that the removal power was vested in the President as an inherent part of the Executive power.[265] Indeed, a careful recent reappraisal of the historical evidence raises serious doubts about whether the Decision of 1789 really did indicate broad support for an inherent presidential removal power rather than confusion or perhaps even broad rejection of that view.[266]

It is notable that the 1789 debate involved the Secretary of State, an official whose primary duties related to foreign affairs. Given that foreign affairs is an area in which the President has broad constitutional powers independent of Congress, the argument for presidential control of

263. *See id.*

264. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 162–63 (Princeton Univ. Press 2020).

265. *Id.* at 163.

266. *See* Jed Handelsman Shugerman, *The First Congress Rejected Unitary Presidentialism: The Indecisions of 1789, Strategic Ambiguity, and Removal by Judiciary* (Fordham L. Legal Stud., Working Paper No. 3596566, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566. Based on a careful inspection of the evidence, Shugerman concluded:

> Madison won the vote, but his constitutional theory did not win the debate that day. In the end, only 16 of the 53 representatives who voted on these questions can be categorized as presidentialist. The debates and votes indicate that a House majority opposed presidentialist interpretation of the Constitution. This Article also shows that the Senate debate reflected no clarity, either about constitutional theory or even about the statute's meaning.

Id. at 5. Legislative history seems in this instance at least an opaque lens for discerning the intent of Congress.

subordinates seems at its strongest for the Secretary of State.[267] Yet Congress found the issue difficult and divisive.[268] This difficulty is hardly what we would expect so soon after the Constitution was adopted if the meaning of the document was clear.

Although Chief Justice Roberts claimed the support of later practice, his vision of presidential hegemony over the Executive Branch does not describe reality. Modern practice includes not only a variety of independent federal agencies (for example, the Federal Elections Committee (FEC), the FTC, and the SEC, all mentioned above), but also civil service protections, inspectors general, and a variety of for-cause removal restrictions in federal laws and ethics laws. It is not clear how to reconcile such practice with the claim that the President must retain untrammeled control over the exercise of federal Executive power. Rather than leaving it to the President to decide whether agencies are faithfully executing the law, the Administrative Procedure Act (APA) charges the courts with deciding whether agency actions violated the law or applied the law in an arbitrary and capricious way.[269] Finally, the vision of some Framers of electoral accountability as a check on the President became only a half-truth with the passage of the Twenty-second Amendment, which means that second-term presidents lack any further accountability to the electorate.[270] The vision that Chief Justice Roberts attributes to the Framers is quite imperfectly reflected in the modern world.

Nor is the idea of presidential executive hegemony an obvious protection for liberty. Arguably, the contrary is true. Presidents can and have

267. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future* (Harv. Pub. L., Working Paper No. 20-32, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666130 at 9–10.

268. S*ee id.* at 9.

269. 5 U.S.C § 706. Under the APA, a reviewing court may "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion." *Id.* Judicial review on these bases would seem questionable if we truly believed that the President's control of the Executive Branch and accountability to the public is a sufficient safeguard against abuse of power by the Executive Branch.

270. *See* U.S. CONST. amend. XXII. The key language of the Amendment is that "[n]o person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once." *Id.* After reelection, then, the President has no personal incentive to respond to the electorate's wishes. *See id.*

abused their influence over the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Internal Revenue Service (IRS), the Central Intelligence Agency (CIA), and the National Security Agency (NSA), among other federal departments and agencies. No one at the time of the Founding or early eighteenth century imagined such a potent President, and it raises concerns about concentrating so much Executive power in the hands of a single individual. Nor did the Framers imagine such a polarized and dysfunctional Congress as exists today. Presidents rather than Congress generally seem to dominate the government, belying Chief Justice Roberts's vision of a weak presidency requiring protection from an overweening Congress.[271] To the extent the Framers thought it would be Congress rather than the President who would be in a position to threaten liberty, they seem to have gotten their forecasting wrong.

By relying on the Framers for his policy analysis, Chief Justice Roberts was able to avoid coming to grips with the realities of the modern world.[272] In his world, presidential power is all about assuring energy, efficiency, and decisiveness in government.[273] Under the eagle eye of the electorate. Presidents never abuse their powers to placate powerful special interests or harm their political enemies. Presidential interference never risks introducing bias into the decisions about federal license issuance or removal, criminal investigation, tax audits, wiretaps, or any of the other powers wielded by the federal government. Thus, Chief Justice Roberts sees no reason to balance the potential for abuse against the need for energetic government.[274] He is apparently at a loss to see why Congress would want to do so in designing administrative agencies.[275] One can certainly make a pragmatic argument that the design of the CFPB went too far in insulating the CFPB from presidential control, and for a pragmatic use of the multimember model as a dividing line, but Chief Justice Roberts did not make such an argument central to his decision.[276]

Chief Justice Roberts also relied on members of the Framing generation for the view that presidential control equates with the removal power.[277] There is a certain rough common sense behind this view, but

271. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020).
272. *See id.*
273. *See id.*
274. *See id.*
275. *See id.*
276. *See id.* at 2191–2211.
277. *See id.* at 2203.

Justice Kagan refers to substantial empirical evidence that it is not, after all, the most important factor.[278] If she is right, a more holistic test such as *Morrison* may be better for determining whether the president is able as a practical matter to ensure that officers are faithfully executing the law.[279]

Although I have been critical of Chief Justice Roberts for the formalist emphasis of his *Seila Law* opinion, his strategy in the case may embody a different kind of pragmatism. As shown by the Justice Gorsuch and Justice Thomas dissents, there is sentiment on the Court for declaring all independent agencies unconstitutional.[280] There also seems broad support for a general presidential removal power.[281] Chief Justice Roberts's opinions can be seen as efforts to save the independent agencies from fallout from cases like *Seila Law*, which involve attacks on removal limitations that a majority may see as more egregious.[282] By forestalling the threat that the exception might expand to include other institutional innovations, this strategy would allow multi-member commissions to remain intact as a

278. Because of its formalism, the *Seila* opinion could in the end diminish effective presidential power rather than expanding it. As Richard Revesz explains:

> The post-*Seila Law* equilibrium may have little effect on—and may even *reduce*—the president's executive power. Various political science studies illustrate that there is little systematic difference in the responsiveness of agencies to the president's preferences depending on whether their heads are removable at will. Empirically, the removal power does not appear to be particularly useful to the president at getting his way, at least compared with other forms of control. Furthermore, now that *Seila Law* forbids one kind of limitation on the removal power, Congress will likely substitute alternate methods of influencing agencies, either in amending the CFPB's structure or when designing future single-headed agencies. If these alternative forms are more effective at aggrandizing congressional power than limits on the removal power, the president's power is likely to decrease.

Timothy G. Duncheon & Richard L. Revesz, Seila Law *as an Ex Post, Static Conception of Separation of Powers*, 2020 U. CHI. L. REV. ONLINE 97, 103 (2020).

279. Michael McConnell seems to view the removal power as more properly an offshoot of the Take Care clause than the Vesting Clause but seems to think it is obviously essential to the president's power to supervise the Executive Branch. Whether that is true or not is an empirical question, and seems at least to be a contestable one. MCCONNELL, *supra* note 264, at 166–67. McConnell also seems to assume that someone who is subject to removable for cause is "answerable to no one at all." *Id.* at 168.

280. *Seila Law LLC*, 140 S. Ct. at 2211–24 (Thomas, J., concurring in part and dissenting in part).

281. *See id.*

282. *See* Bressman, *supra* note 100, at 40–41.

perhaps illogical but entrenched exception to the general rule of removability.[283]

Perhaps Chief Justice Roberts also prefers multi-member commissions, not simply because they increase presidential control, but because they also create internal safeguards against the abuse of power.[284] That is not a bad pragmatic argument, though Chief Justice Roberts carefully refrained from articulating it if it actually was part of his thinking. It is not a virtue of formalist opinions that they may encourage judges to conceal their actual reasons for decisions.

Justice Kagan and Chief Justice Roberts can also be seen as differing the ways in which they take into account established governance practices and their reasons for doing so.[285] Justifications for giving legal status to governmental practices can include "institutional reliance, deference to the constitutional judgments of the primary institutional actors, deference to the practical judgments of those same actors, and a tradition-privileging preference for the status quo that we might associate with thinkers like Edmund Burke."[286] Justice Kagan stresses the second of these factors, "deference to the constitutional judgments of the primary institutional actors," because she believes that judges are poorly placed to understand the deeply contextual issues of agency design.[287] Chief Justice Roberts gives no apparent weight to that factor.[288] He does not speak explicitly about institutional reliance, though that actually may carry weight with him.[289] In preserving the example of multi-member commissions, he may be operating within the Burkean tradition, viewing multi-member commissions as worth preserving because they now constitute an entrenched tradition in U.S.

283. McConnell presents a more explicit argument to this effect, saying that *Humphrey's Estate* is "wrong, illogical, and undemocratic—but it is firmly established by precedent and practice." MCCONNELL, *supra* note 264, at 169.

284. *See* Bressman, *supra* note 100, at 40–41.

285. *Compare Seila Law LLC*, 140 S. Ct. 2183, 2201–02, *with id.* at 2225–45 (Kagan, J., concurring in part and dissenting in part).

286. Issacharoff & Morrison, *supra* note 11, at 1917. In these authors' view, "more often than not, the driving force is some kind of basic concern for practical workability and functionality, paired with an understanding that the courts are often not in a position to view or evaluate all the elements of the accommodations that other branches have worked out over time." *Id.*

287. *Seila Law LLC*, 140 S. Ct. at 2225–26 (Kagan, J., concurring in part and dissenting in part).

288. *See id.*

289. *See id.*

government.[290] That reading seems consist with his insistence on maintaining traditional forms of agency independence while rejecting any extension of that governance structure.[291]

Chief Justice Roberts's resistance to innovations in governance finds support in formalist approaches to constitutional interpretation. In a recent book, Saikrishna Prakash argues that deviations from originalism are responsible for the dramatic expansion of presidential power in the past century, a development he deplores.[292] He mourns these deviations from what he sees as the wiser scheme of the Framers.[293] Today, he says, "most of us can sense that our presidency is a distortion of the original McCoy," a "funhouse-mirror version of the Founders' presidency."[294] He considers this "a creeping constitutional coup."[295] Prakash sees a choice between a living constitution and "faithful original[ism], favoring the Founders' Constitution and condemning not only executive pick pockets, but also congressional thieves and judicial shoplifters."[296]

290. The Burkean argument goes something like this:

> The point is not that there is no right answer in principle to the question of how the CFPB should be constituted. . . . But the answer is mired in normative and empirical uncertainty, and it cannot be found by invoking Madisonian abstractions about the nature of power.
>
> Once you accept that, it is natural to change the question. Instead of asking which structure better preserves liberty or avoids tyranny, we can ask which arrangement is consistent with how we usually do things. That will avoid any upheavals; it will keep things settled, . . . And how bad can an arrangement be if it conforms to the way we have done things all along, given that when we are dealing with the separation of powers . . . we do not have a good sense of what makes things better or worse?

Strauss, *supra* note 97, at 49.

291. To borrow language from Issacharoff and Morrison, Chief Justice Roberts's opinions on the removal power give "a privileged constitutional position for practices that have achieved the level of institutional settlement, with multiple actors acquiescing over extended periods of time, *and* a more exacting level of scrutiny for actions that are neither well-grounded in text nor demonstrated to have withstood the test of time." Issacharoff & Morrison, *supra* note 11, at 1931.

292. *See* SAIKRISHNA PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (Harvard Univ. Press 2020) [hereinafter THE LIVING PRESIDENCY].

293. *See id.* at 1.

294. *Id.*

295. *Id.* at 3.

296. *Id.* at 22.

Prakash sees in living constitutionalism a "slow road to a banana republic," a path that can only be halted if we "recommit to the quaint notion that the meaning of a law is fixed until its text is changed."[297] He argues that if constitutional rules can be modified by practice, the President will always have the advantage.[298] The reason is that a single individual can more easily take the initiatives than a fragmented Congress, and can move more quickly than the courts, which can only react.[299] These presidential advantages are quite real, but there is another side of the story.

Although Prakash is right about the advantages of the presidency in initiating institutional change, he overlooks some of the advantages of the other branches.[300] Unlike any single presidential action, which cannot by itself permanently change accepted practice, Congress can in a single legislative act change the rules governing institutions on a long-term basis. Similarly, a single judicial precedent, such as *Humphrey's Executor,* can govern institutional practice for decades.[301] In other words, the President can act more quickly, but Congress and the courts can act more permanently in setting the rules of the game.[302]

Moreover, there are checks on the ability of Presidents to expand their power that operate below the level of legislation or constitutional rulings. Congress has informal ways of pressuring the President, particularly through its oversight and budgetary powers. We should not underestimate the courts as checks on Executive power through enforcement of statutory restrictions and procedural requirements under statutes like the APA.[303] In the end, the question is whether we need the revolution in constitutional interpretation favored by Prakash to prevent Presidents from abusing their powers, or whether more targeted interventions from the other branches of government would suffice.

The debate over presidential removal illustrates some of the limitations on Prakash's argument. Congress has repeatedly passed limitations on the removal power over the past century.[304] This effort to restrict presidential

297. *Id.* at 279.
298. *Id.*
299. *See id.* at 2.
300. *See id.*
301. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).
302. *See* THE LIVING PRESIDENCY, *supra* note 292, at 2.
303. *See, e.g.*, 5 U.S.C. § 706.
304. *See, e.g.*, Myers v. United States, 272 U.S. 52, 167–68 (discussing the Tenure of

hegemony[305] has undoubtedly hampered the ability of Presidents to behave as the heads of banana republics.[306] Here, it is constitutional formalists, including Prakash, who have sided with presidential power, while pragmatists like Justice Kagan have taken the opposing view.[307] Prakash, himself, notes that "presidents have at their disposal a phalanx of executive personnel predisposed to advance the executive's policy agenda, and in the process, expand executive authority."[308] Decisions like *Seila Law*, however, only serve to increase the ability of the presidency to deploy the federal bureaucracy at will.

Prakash says that "We the People" clearly "never chose to transform our presidency."[309] The practical problem with Prakash's desire for a return to the eighteenth-century presidency is that the modern presidency has, by and large, had the support of the public.[310] That makes a fundamental transformation in the constitutional framework for the presidency unlikely. In the end, Prakash seems to recognize that we are stuck with a living constitution.[311] He seems resigned to the unlikelihood of returning to the original understanding, as he conceives it.[312] Though he still longs for a judicial embrace of unqualified originalism,[313] his recommendations place more emphasis on a series of actions that Congress could take—including, ironically, the creation of additional independent commissions.[314]

Office Act's requirement that the President's appointments obtain Senate approval).

305. *See, e.g.*, *Humphrey's Ex'r*, 295 U.S. at 629.

306. *See* THE LIVING PRESIDENCY, *supra* note 292, at 279.

307. *Compare id.* at 17, *with* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2224–25 (2020) (Kagan J., concurring in part and dissenting in part).

308. *See* THE LIVING PRESIDENCY, *supra* note 292, at 17.

309. *Id.* at 1.

310. Prakash argues that a unitary Executive Branch makes the Executive Branch more accountable than the other branches. *Id.* at 247–48. If so, the public seems not have been interested for the past century in holding presidents to account for acting beyond the parameters of the eighteenth-century presidency. *See generally id.*

311. *See id.* at 247.

312. *See id.*

313. *Id.* at 274.

314. *Id.* at 269–72. "Ironically" because Prakash has emphatically rejected the constitutionality of such commissions. *See* SAIKRISHNA PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 184–97 (Yale Univ. Press 2015) (arguing that all administrative officers are subordinates of the President and act as the President's direction).

Chief Justice Roberts is not wrong to think that we need a powerful presidency at the apex of the Executive Branch to provide policy coherence, direction, and electoral accountability.[315] Where he goes wrong, however, is to ignore the risks created by such a concentration of power and the concomitant need to provide safeguards against abuse. Reasonable people can certainly differ about how the balance should be struck. But to ignore the need to strike a balance can only increase the threat to liberty from the powers of modern government, a risk that Chief Justice Roberts himself is concerned about.[316] It is a conceit to think that the only problem stems from unelected bureaucrats.

V. CONCLUSION

In recent disputes over presidential power, the more pragmatic Justices such as Justice Kagan have favored restrictions on presidential removal power while more formalist Justices such as Chief Justice Roberts have voted the other way.[317] It is no secret that this division has also corresponded to the ideological split on the Court. It seems natural to ask whether these alignments between substantive constitutional positions, jurisprudential approaches, and ideology are coincidental.

Any connection between conservative thought and presidential removal seems quite complex. Admittedly, to the extent that populist presidentialism is now a form of conservativism, the populist would probably favor an absolute removal power and seek to extend it to the civil service and ideally even to the judiciary. There are other types of conservatism, however. Looking over the sweep of U.S. history, a Burkean conservative would recognize the predominance of presidential removal for higher level officials but also give weight to the stream of exceptions across much of our history.[318] Perhaps it is that kind of respect for entrenched practices that motivates Chief Justice Roberts in his effort to preserve but confine existing exceptions to presidential removal. A libertarian may or may not favor independent agencies, depending on whether liberty and property seemed safer or more insecure under such a regime than under direct political control of agencies. It is notable that opinions limiting presidential removal power were written by leading conservative Justices of their day, Justice Sutherland and Chief Justice Rehnquist.

315. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020).
316. Bressman, *supra* note 100, at 44.
317. *See* discussion *supra* Part III.B.
318. *See* Strauss, *supra* note 97, at 49.

It is also notable that conservative ire today often seems to focus on agencies like the Environmental Protection Agency (EPA), which is under direct presidential control, as much as on the independent agencies. To the extent that conservatives do tend to oppose independent regulatory agencies, perhaps their real objection may be to the second adjective, not the first one—perhaps the true objection is not to the fact that the agencies are independent but the fact that they are regulatory.

What of the connection between legal philosophy and constitutional views? Is there something inherent about formalism that aligns with an unlimited presidential removal power? If we hold ideology constant and vary judicial philosophy, it is unclear whether there is a strong link between judicial philosophy and views of the presidency. The originalist case for an unlimited presidential removal power is less than overwhelming, and an originalist could plausibly come out the other way. On the other side, a conservative pragmatist might make a case for presidential hegemony over the Executive Branch. Chief Justice Roberts and Justice Thomas give hints about what such a pragmatist argument might look like, by referring to the possible advantages in terms of energetic government, coherent policy across multiple agencies, and democratic accountability. Certainly, opponents of independent agencies express no regrets about their conclusion that independent agencies are unconstitutional. They seem unwilling to say that agency independence would be a really good idea if only it were constitutional. That suggests that their real objections may be pragmatic even if their legal arguments are formalist.

Unlike Chief Justice Roberts and Justice Thomas, however, a pragmatic presidentialist would feel some obligation to present evidence in support of those views, rather than merely relying on a few historical quotations. Moreover, the pragmatic defense of the removal power would also have to confront the values served by insulating administrators from arbitrary removal and providing them some degree of independence. Criticisms of agencies for politicization or for improperly combining rulemaking, enforcement, and adjudication would seem to apply even more forcefully to agencies in which all these functions are under the tight control of a single political actor. Pragmatic presidentialism would also have to provide some explanation about why the President and Congress acting together in the legislative process cannot be trusted to identify the right degree of presidential control. Thus, pragmatism to some extent would necessarily complicate the argument for abolishing agency independence.

Thus, legal formalism might be considered more favorable toward an absolute rule of presidential removability, given formalism's preference for

bright-line rules.[319] The preference for bright-line rules may also have a tendency toward simplistic readings of the historical record, given that deeper immersion in the record might suggest a more ambiguous or nuanced original understanding. Even so, one could also imagine a formalist embracing the opposite view, of complete congressional control over the tenure of officials, on the simple ground that the constitutional text fails to give the President any removal power.[320] It is Congress, rather than the President or the Supreme Court that is vested with the power to make necessary and proper rules about government.[321] Such a formalist could reasonably embrace a view of the separation of powers that leaves many structural questions to Congress.

Thus, if there is an argument for legal pragmatism, it should be distinct from ideological views or view on a specific substantive issue such as presidential power. This Article has argued that pragmatism allows judges to decide cases in terms that are understandable to the public, to speak more directly to the factors that actually motivate their decisions, and to have more constructive dialogues with each other. In considering a structural issue like the presidential removal power, pragmatism also makes judges active participants in the project begun by the Framers of combining effective government, democracy, and the rule of law. Judges necessarily operate at the microlevel in that endeavor, within the macrolevel framework created by the Founding Fathers. That seems to be a task more suitable for judges than acting as amateur historians or pretending our relatively brief Constitution, when properly deciphered, has rules for all occasions.

Nearly every judge is a formalist in the sense of seeing advantages to bright-line rules and believing some issues can largely be decided on the basis of the text and its original meaning. Nearly every judge is a pragmatist in thinking that bright-line rules are not always appropriate and that textualism and original meaning are not always decisive. Classifying judges as legal formalist or legal pragmatists says more about their presumptions and starting points than about their decisions in individual cases. As the cases on presidential removal illustrate, however, those starting points can really matter to how judges approach hard cases. To the extent that formalism seeks to make judicial decision an exercise in archival research or solving logic puzzles, rather than wrestling with conflicting values and evidence, my own view is that pragmatism has the better side of the

319. *See Judicial Review and Legal Pragmatism*, *supra* note 1, at 478.

320. *See* CURRIE, *supra* note 108, at 39.

321. U.S. CONST. art. 1, § 8.

argument. Given a choice between Chief Justice Taft and Justice Brandeis, I vote for Justice Brandeis.