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NIKOLAS BOWIE & DAPHNA RENAN

## The Separation-Of-Powers Counterrevolution

**ABSTRACT.** Most jurists and scholars today take for granted that the U.S. Constitution imposes unwritten but judicially enforceable limits on how Congress and the President may construct their interrelationships by statute. This “juristocratic” understanding of the separation of powers is often regarded as a given or inherent feature of American constitutionalism. But it is not. Instead, it emerged from a revanchist reaction to Reconstruction. As an ascendent white South violently returned to power in Washington, its intellectual supporters depicted a tragic era in which an unprincipled Congress unconstitutionally paralyzed the President in pursuit of an unwise and unjust policy of racial equality. Determined to prevent Reconstruction from reoccurring, historians, political scientists, and a future Supreme Court Justice by the name of William Howard Taft demanded judicial intervention to prevent Congress from ever again weaving obstructions around the President. This Lost Cause dogma became Supreme Court doctrine in *Myers v. United States*. Authored by Chief Justice Taft, the opinion was the first to condemn legislation for violating an implied legal limit on Congress’s power to structure the executive branch. It is today at the heart of an ongoing separation-of-powers counterrevolution.

That counterrevolution has obscured, and eclipsed, a more normatively compelling conception of the separation of powers – one that locates in representative institutions the authority to constitute the separation of powers by statute. This “republican” conception accepts as authoritative the decision of the political branches as to whether a bill validly exercises the Necessary and Proper Clause to carry into execution the powers and interrelationships of Congress, the President, and the executive branch. Where the juristocratic separation of powers undermines both the legal legitimacy of the Court and the democratic legitimacy of the political branches, the republican separation of powers sustains an inherently provisional constitutional order – one grounded in deliberation, political compromise, and statecraft.



**AUTHORS.** Nikolas Bowie is Assistant Professor of Law, Harvard Law School. Daphna Renan is Peter B. Munroe and Mary J. Munroe Professor of Law, Harvard Law School. For generous engagement with this project at various stages, the authors are grateful to Jack Balkin, Andrew Crespo, John Dearborn, Chris Desan, Ryan Doerfler, Ben Eidelson, Blake Emerson, Dick Fallon, Jonathan Gienapp, Annette Gordon-Reed, Mark Graber, Jamal Greene, Steve Griffin, Rick Hills, Vicki Jackson, Alan Jenkins, Mike Klarman, Genevieve Lakier, Daryl Levinson, Sanford Levinson, John Manning, Gillian Metzger, Frank Michelman, Martha Minow, Sam Moyn, David Pozen, Noah Rosenblum, Larry Schwartzol, Ganesh Sitaraman, Stephen Skowronek, Matthew Steilen, Matthew Stephenson, Cass Sunstein, Laura Weinrib, and participants of the Harvard Law School Public Law Workshop. For superb research and editorial assistance, the authors thank Katie Cion, Daniel Ergas, Molly Gupta, Emily Hatch, Ben Miller-Gootnick, Matt Morris, Krupa Patel, Julia Solomon-Strauss, and the editors of the *Yale Law Journal*.



## ARTICLE CONTENTS

INTRODUCTION	2024
<b>I. THE REPUBLICAN SEPARATION OF POWERS</b>	2032
A. The Theory of the Separation of Powers in England	2034
1. Nondomination	2034
2. Rule of Law	2037
3. Political Equality	2039
B. The Separation of Powers in Early American Practice	2041
<b>II. THE JURISTOCRATIC TURN</b>	2047
A. The Separation of Powers During Reconstruction	2049
B. Dunning and the Idea of Separation-of-Powers Juristocracy	2056
C. Taft and the Making of Separation-of-Powers Juristocracy	2072
D. The Juristocratic Separation of Powers after <i>Myers</i>	2077
<b>III. DECONSTRUCTING THE JURISTOCRATIC SEPARATION OF POWERS</b>	2082
A. Nondomination	2085
1. Arbitrary Entitlements	2086
2. An Impoverished Constitutional Imagination	2093
B. Rule of Law	2096
1. Historical Practice and the Rule of Law	2097
2. Dispensation and the Rule of Law	2100
C. Political Equality	2102
<b>IV. RECONSTRUCTING THE REPUBLICAN SEPARATION OF POWERS</b>	2107
A. Who Decides?	2108
B. Building on Existing Theories of Judicial Deference	2110
1. The Political Character of the Separation-of-Powers Decision	2110
2. Reinterpreting Thayer	2111
C. A <i>Garcia</i> for the Separation of Powers	2113
D. Case Studies	2117



1. The Legislative Veto	2117
2. Regulating the Pardon Power	2119
3. Presidential Removal and the Problem of Legislative Bad Faith	2122
<b>CONCLUSION</b>	<b>2125</b>

## INTRODUCTION

Modern separation-of-powers law is premised on a misunderstanding of what the separation of powers is. Today, judges and lawyers from across the political spectrum take for granted that the U.S. Constitution imposes unwritten but judicially enforceable limits on the power of one branch of government to interfere with the others. Even when the legislative and executive branches agree on what the separation of powers should look like—as when Congress and the President enact a statute that regulates how the executive branch should operate—members of the judicial branch have assumed the responsibility to invalidate such agreements if they conflict with a court’s interpretation of each branch’s implied constitutional prerogatives. Debates over the separation of powers have become debates over which lawyerly method courts should use to establish the Constitution’s true limits.<sup>1</sup> Although participants disagree on whether these limits should be defined formally or functionally,<sup>2</sup> or with reference to original public meaning,<sup>3</sup> liquidation,<sup>4</sup> or the gloss of historical practice,<sup>5</sup> they agree that it is

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1. See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–71 (2011) (discussing methodological debates about how courts should decide separation-of-powers questions); see also JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 326 (2018) (arguing that the idea of the Constitution “as a written, discrete, inert, historically conceived object . . . enforced by judges”—though invented and historically contingent—has become “a shared conception of the Constitution’s constitution”); cf. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 10 (1986) (“[T]he structuring of all possible human relations into the form of claims and counterclaims under established rules, and the belief that the rules are ‘there’—these combine to make up legalism as a social outlook.”).
  2. Compare, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984) (advancing a functional analysis of the separation of powers), with Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–61 (1990) (explicating the formalist approach). See also Manning, *supra* note 1, at 2005–39 (eschewing the formalist-versus-functionalist dichotomy in favor of an approach that infers legal principles from the Constitution’s more specific structural clauses).
  3. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 551–56 (1994).
  4. See, e.g., William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 49 (2019); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 549–53 (2003).
  5. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 17–31 (2020); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–30 (2012); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 946 (2008) (analyzing the limits of the President’s war-making authority in contravention of Congress through reference to historical practice).

the Supreme Court—using the instruments of legalism—that should decide them.<sup>6</sup>

This *juristocratic* separation of powers is often taken as a natural or inherent feature of American constitutionalism. But it took control of the American imagination only in 1926, after centuries in which a profoundly different understanding of the separation of powers was dominant. When John Locke, the Baron de Montesquieu, and other European intellectuals first popularized the separation of the legislative, executive, and judicial powers, they described a system in which each institution of government enforced its own prerogatives through political negotiation and statecraft.<sup>7</sup> When American revolutionaries incorporated these insights into their first written constitutions, they drafted the blueprints for a *republican* separation of powers, anticipating that representative institutions would distill constitutional meaning and enforce constitutional limits as part of the deliberation and compromise necessary to pass legislation.<sup>8</sup>

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6. The principal rebuttal, to date, has come from JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980). See *infra* note 31 for further discussion of Professor Choper’s approach.
  7. See M. DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* 215-16 (Thomas Nugent trans., London, J. Nourse & P. Vaillant 1750) (1748); see also Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 *COLUM. L. REV.* 1169, 1226 n.230 (2019) (discussing seventeenth-century conflicts between the Crown and Parliament); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 76-79 (2d ed. 1998) (describing similar conflicts in the eighteenth century).
  8. See, e.g., *THE FEDERALIST NO. 51*, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”). Like Madison, we use the term “republican” to emphasize the representative institutions that were once primarily responsible for defining the separation of powers. Cf. *THE FEDERALIST NO. 10*, at 80-81 (James Madison) (Clinton Rossiter ed., 1961) (defining a “republic” as a “government in which the scheme of representation takes place,” and the “republican principle” as that “which enables the majority to defeat [a minority faction’s] sinister views by regular vote”); STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* 32-33 (2021) (describing the public interest as “something distilled, not unilaterally declared” in a republic whose “division of responsibilities looks like a prod to cooperation”).

We recognize, of course, that the term has been used to describe a variety of conflicting perspectives in the history of political thought. Among American constitutional theorists, the term emerged in the 1980s and 1990s as part of a broader normative debate over whether the ideal relationship between the state and individuals was best characterized by a classical conception of civic virtue or by a liberal conception of personal autonomy. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*

While these republican thinkers never settled on a single version of the separation of powers, they viewed separating governmental responsibilities among different institutions as a strategy for developing a rule of law that, consistent with political equality, could prevent domination by any individual or group—be it a monarch or a tribunal.<sup>9</sup>

“Public opinion sets bounds to every government, and is the real sovereign in every free one,” James Madison wrote during the Constitution’s opening decade, as he and other politicians determined for themselves whether new institutions of government were necessary and proper to carry into execution the brief document’s indeterminate guidelines.<sup>10</sup> Even after *Marbury v. Madison*,<sup>11</sup> when the Supreme Court emphatically declared that it would decline to enforce statutes that conflicted with its interpretation of the Constitution, the Court spent the next century deferring to Congress and the President’s judgment about what the relationship between the Executive and Congress should legally entail.<sup>12</sup>

This republican understanding of the separation of powers was so pervasive that Congress eventually rejected the idea that the constitutionality of an enacted statute could be challenged for violating the separation of powers. After the Civil War, as supermajorities in Congress attempted to reconstruct the South into a racially egalitarian democracy, they also enacted statutes to prevent a hostile President from interfering with their policies. When President Andrew Johnson violated one of these statutes for the asserted purpose of bringing an alleged breach of the separation of powers to the Supreme Court’s attention, Congress impeached and nearly convicted him of violating his constitutional duty to take care that the laws be faithfully executed.<sup>13</sup> Observers who opposed the impeach-

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(1991); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). The term also has been used by proponents of a normative political theory premised on eliminating public and private forms of arbitrary domination. See, e.g., PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012); Frank Lovett, *Domination and Distributive Justice*, 71 J. POL. 817 (2009); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, in REPUBLICANISM AND POLITICAL THEORY 83 (Cécile Laborde & John Maynor eds., 2008); see also RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007). It is this latter tradition of nondomination that we build upon.

9. See *infra* Section I.A.

10. James Madison, *For the National Gazette* (Dec. 19, 1791), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-14-02-0145> [https://perma.cc/69FP-7WVZ]; see GIENAPP, *supra* note 1, at 114-16, 164-201.

11. 5 U.S. (1 Cranch) 137 (1803).

12. See *infra* Section I.B.

13. See *infra* Section II.A.

ment on partisan grounds nevertheless also rejected Johnson's claim that a President could decline to "execute the laws passed over his veto upon matters which in his opinion touch his executive prerogatives."<sup>14</sup> His argument struck many Americans as resonant of a power to dispense with statutes once claimed by the English Crown – a power that had long been repudiated as tyrannical.<sup>15</sup>

But Reconstruction gave way to a "counter-revolution": one that overturned not only Congress's civil-rights legislation but also its decades-long claim of interpretative supremacy.<sup>16</sup> In the 1870s, an ascendent white South violently returned to power in Washington, determined to end Reconstruction and prevent it from reoccurring. Where members of earlier Congresses had argued that federalism and the separation of powers were both indeterminate ideas subject to statutory amendment, this new generation of politicians, historians, political scientists, and judges argued that the antebellum constitutional order had been permanently settled by the Constitution's text and early precedent. From this new generation's perspective, it was appropriate for President Madison's First Congress to determine which institutional arrangements were necessary and proper to run the American government, but it was blasphemous for the Reconstruction Congress to reconceive those arrangements. Even worse, the Reconstruction Congress's tyrannical goal of establishing "congressional supremacy in the conquered South" was only narrowly avoided.<sup>17</sup> President Johnson was soon remembered as a tragic hero who would have prevented Congress's unconstitutional conduct if not for "the meshes which Congress was so mercilessly weaving about him."<sup>18</sup>

The lesson one law professor drew from this revisionist history was that the Constitution's abstract words revealed an objective and precise separation of

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14. JOHN WILLIAM BURGESS, *RECONSTRUCTION AND THE CONSTITUTION*, 1866-1876, at 183 (1902). See generally *infra* Section II.A (discussing conflicts between President Johnson and Congress).

15. See *infra* Section II.A.

16. See W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 667, 690-91 (1935) (discussing the role of the Supreme Court in the "counter-revolution of 1876"); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 215 (2004) ("Lawyers, judges, and legal scholars have too often assumed that the Court's supremacy somehow passed without challenge in this period – a historical blind spot . . . . But statements about the judiciary's place in the constitutional system, especially those of the Justices themselves, must be seen for what they were: partisan claims in contested territory.")

17. WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC* 86-89, 93 (1907) [hereinafter DUNNING, *RECONSTRUCTION*]; see also WILLIAM ARCHIBALD DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS* 254 (1898) [hereinafter DUNNING, *ESSAYS*] (describing the determination of President Johnson to "sustain the [C]onstitution" against the "radicals in Congress").

18. DUNNING, *ESSAYS*, *supra* note 17, at 261.



powers that public opinion and presidential vetoes had proved incapable of enforcing. Steeped in Lost Cause historiography, then-Professor William Howard Taft wrote that only federal judges could effectively determine when a statute impermissibly constrained the presidency – a task he thought “d[id] not involve politics at all or anything like legislative discretion.”<sup>19</sup> When he joined the Supreme Court as Chief Justice in 1921, Taft turned this Lost Cause dogma into Supreme Court doctrine. In the 1926 decision of *Myers v. United States*,<sup>20</sup> the Court declared the Reconstruction Congress’s actions unconstitutional – the first time it had ever limited Congress’s power to structure the executive branch.<sup>21</sup> The Court also authorized future presidents to violate similar statutes, an ongoing practice that members of the Court, academia, and the executive branch have continued to condone a century later.<sup>22</sup>

In this Article, we argue that Taft’s ongoing counterrevolution is misguided. Rather than treat the separation of powers as a legal principle of interbranch entitlements secured by judicial enforcement, we contend that the separation of powers is a contingent political practice reflecting the policy needs, governance ideas, and political struggles of the moment. This fundamentally unsettled constitutional framework is not a problem for constitutional law to solve. It is a central normative feature of American constitutional government. A provisional constitutional structure, comprised of statutes, advances the normative values of nondomination, the rule of law, and political equality – that is, the values underlying the republican separation of powers.<sup>23</sup> The juristocratic counterrevolution, by design and in its effects, undermines each of these values.

As a principle of constitutional governance, the separation of powers is historically contingent, institutionally arbitrary, and inherently provisional.<sup>24</sup> It comprises a set of broad, vague, conflicting, and contested political ideas (thinly

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19. WILLIAM HOWARD TAFT, POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS 167 (1913).

20. 272 U.S. 52 (1926).

21. *Id.* at 163-64, 176.

22. See, e.g., Statutory Restrictions on the PLO’s Wash. Off., 42 Op. O.L.C. 1, 8 (2018), <https://www.justice.gov/sites/default/files/opinions/attachments/2021/01/19/2018-09-11-plo-office.pdf> [<https://perma.cc/YD9C-R69U>] (relying on *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 576 U.S. 1, 29 (2015), to conclude that existing federal statutes could not constitutionally restrict the President’s power to allow foreign diplomats to maintain offices in Washington, D.C.).

23. We define and elaborate these values in Section I.A.

24. Cf. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2270 (2018) (arguing that structural norms reveal the provisionality of constitutional design); Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. (forthcoming 2022) (manuscript at 4) (arguing that constitutional norms are “normative, contingent, and arbitrary practices” implementing constitutional principles).

connected to sparse and ambiguous constitutional text) and a set of overlapping, interacting institutions that participate in the messy work of national governance.<sup>25</sup> There is no essential or immutable separation of powers.

Statutes on this account are foundational to the design of constitutional government, but not because statutes comprise evidence of some settled constitutional meaning or interbranch acquiescence. Rather, legislation *constitutes* the separation of powers; it offers a durable, though not immutable, means of state-building.

Presidents and members of Congress have long disagreed with one another about whether a particular bill is consistent with the Constitution's separation of powers – disagreement reflected in the broader polity, and on the Court. We also believe, as do most, that some readings of the Constitution are better than others. But the *republican* separation of powers relies on representative institutions using political negotiation, statecraft, and the check of public opinion to decide which reading of the Constitution's abstract commitments to build upon.<sup>26</sup> It rejects a *juristocratic* process by which five jurists who disagree with Congress and the President about which reading of the Constitution's unfinished blueprint is best can invalidate all institutional arrangements that reflect an alternative, yet still plausible, interpretation.

To be sure, the Constitution uses some explicit language to lay out the terms of engagement between Congress and the President. Article II, for example, guarantees the President's power "to grant Reprieves and Pardons."<sup>27</sup> But even these explicit rules are remarkably underdetermined. The Constitution does not specify whether other institutions beyond the President may also grant amnesty, nor does it specify whether a President may sign a statute imposing time, place, and manner restrictions on how the pardon power may be exercised. Instead, as Dean John Manning writes in his rejection of a "freestanding separation of powers doctrine,"<sup>28</sup> the Constitution's Necessary and Proper Clause gives Congress broad authority to "compose the government" by enacting legislation that prescribes not only its own powers but also the powers of the other branches.<sup>29</sup> De-

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25. See, e.g., M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 649 (2001); Strauss, *supra* note 2, at 581, 604.

26. Cf. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 6-7* (2010) (describing how statutes have transformed the American constitutional system over time).

27. U.S. CONST. art. II, § 2, cl. 1.

28. Manning, *supra* note 1, at 1944.

29. *Id.* at 2005.

spite the Constitution's writtenness, therefore, readers "have no basis for displacing Congress's default authority" merely by showing that a statute regulates another branch's powers.<sup>30</sup>

Our account of the separation of powers – which we call the *republican separation of powers* in contrast with the *juristocratic separation of powers* – argues that Congress and the President, working through the interbranch legislative process, should decide whether any particular institutional arrangement is compatible with the Constitution's separation of powers. That is, it is for the representative branches to decide whether a bill validly exercises the Necessary and Proper Clause to carry into execution the powers and interrelationships of Congress, the President, and the executive branch.<sup>31</sup> When the Supreme Court confronts a statute that allegedly violates the separation of powers, the normative values underlying the republican separation of powers suggest that the Court should defer to the judgment of the representative branches about what the Necessary and Proper Clause tolerates. We are aware of no statutory design, enacted to date, that we think would violate this standard. Our argument thus repudiates the separation-of-powers counterrevolution, and the demise of the many statutes that it has laid to waste.

In arguing that the separation of powers is a political principle that should be realized through the political process of lawmaking, not judicial review, we recognize that our current moment of hyperpartisanship and antidemocratic politics might prompt unease. A central problem of American political polarization, however, is the *inability* to act collectively, despite pressing social problems and public concerns. A constitutional doctrine oriented to striking down those legislative compromises that do materialize, merely because they depart from

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30. *Id.* Although we agree with this observation, we part ways with Dean Manning's efforts to discern such a separation-of-powers principle in the Constitution's more specific textual provisions – an approach that we argue simply shifts the normative and jurisprudential problems to a different interpretive step. *See infra* Section III.A.

31. In developing this argument, we share some of Professor Jesse Choper's premises about the national political process as a safeguard of the separation of powers. *See* CHOPER, *supra* note 6, at 260-379 (1980); *cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 (1954) (arguing that it is Congress, and not the Supreme Court, that is "vested with the ultimate authority for managing our federalism"). But we part ways with Choper's normative structure and its prescriptive implications. Perhaps because of the examples that motivated his theory, Choper did not focus on the role of statutes in comprising the separation of powers, and his argument that courts should abstain, under the political-question doctrine, from interfering with executive-congressional relations would protect presidential dispensation in many contexts. Our approach centers the normative significance of statutes in constituting provisional constitutional meaning and the problem of presidential dispensation, *see infra* Section IV.A, and, accordingly, it defends a role for courts in the enforcement of the separation-of-powers compromises reflected in statutes, *see infra* Section IV.B.

one (or five) jurist's contested idea of a more desirable interinstitutional template, is a doctrine that inhibits those rare moments of effective self-rule.

This casts a different light on Justice Frankfurter's familiar observation that "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency."<sup>32</sup> It is not just that a legal doctrine designed to cover these "remotest contingencies" unduly inhibits those innovations in governance that enable the state to meet contemporary problems and changing normative commitments. It is also that such an approach to constitutional adjudication misperceives the features of governance that sustain a working constitutional government. We thus orient our prescription of broad judicial deference around characteristics of provisionality, political compromise, and statecraft—qualities vital to structuring, and sustaining, a republic constituted by statutes.

The Article aims to reconstruct the republican separation of powers in the American constitutional imagination—not because it came first but because we think it is more normatively compelling. Part I elucidates the republican conception in early constitutional theory and practice. Part II documents the juristocratic counterrevolution and offers a historical explanation of its doctrinal and cultural ascendance. The anti-Reconstruction roots of the juristocratic separation of powers reveals the contingency of its current form. Once put in historical context as a twentieth-century phenomenon, as opposed to an eighteenth-century branch of Madisonian thought, we can ask whether there is anything in how it is currently applied that should make us want to preserve it.

Part III takes up that question. It deconstructs the analytical features of the juristocratic separation of powers and their implications for the values of political equality, nondomination, and the rule of law. The juristocratic conception rests on a set of (incompatible) arguments about presidential dispensation. Each is flawed on its own terms, and, moreover, the Constitution supplies no principle for how to choose among them. Instead, the juristocratic separation of powers relies on historical practice—not to contextualize the political development of the state but to produce myths about its fixed character. Ultimately, then, the juristocratic separation of powers makes the discretion of five Justices supreme over institutions that better represent political equality. Judicial domination inhibits the statutory design of the state and makes government less answerable to the people. It also makes it more difficult to hold the President accountable under the law.

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32. *New York v. United States*, 326 U.S. 572, 583 (1946) (plurality opinion).

Political morality and the norms that comprise it are fundamental features of American constitutional democracy.<sup>33</sup> The concern, however, is that our current separation of powers does more to undermine than to promote them. The separation-of-powers counterrevolution is the story of a mythic constitutional presidency increasingly emboldening individual incumbents to defy statutory enactments, finding legitimation and vindication through an ever more politicized judiciary. Perhaps counterintuitively, the legalistic turn has resulted in both juristocracy and a “more than kingly” Executive.<sup>34</sup> Part IV charts a doctrinal path back to the republican separation of powers and investigates, through a few case studies, what its recovery would mean in practice.

## I. THE REPUBLICAN SEPARATION OF POWERS

There is no “single canonical version” of the separation of powers.<sup>35</sup> Since the seventeenth century, the term has been used to describe a loosely interconnected bundle of political ideas, including the diffusion of power, the articulation of functions, and checks and balances.<sup>36</sup> This bundle of ideas has always overlapped and coexisted somewhat amorphously with other political commitments—for example, “mixed government” in early English history or representative democracy in the new American republic.<sup>37</sup> The purposes underlying the separation of powers are equally sprawling and contradictory, ranging from promoting efficacy and ensuring political accountability to providing for impartial administration and advancing lawmaking in the public interest.<sup>38</sup> From its

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33. See Renan, *supra* note 24, at 2197-2202.

34. 2 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 427 (Washington, Gov't Printing Off. 1868) [hereinafter TRIAL OF ANDREW JOHNSON].

35. Manning, *supra* note 1, at 1993; see also W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 128 (1965) (“[S]eparation of powers theorists—and even the same theorist at different times—have not been agreed about the institutional arrangements which satisfy the requirements of the doctrine . . .”); VILE, *supra* note 7, at 2 (“The ‘doctrine of the separation of powers’ is by no means a simple and immediately recognizable, unambiguous set of concepts.”).

36. See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132-33 (2000); VILE, *supra* note 7, at 13; Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 438 (2013); see also GWYN, *supra* note 35, at 3 (contending that many commentators improperly conflate the doctrines of the separation of powers and checks and balances, “frequently suggesting that the two doctrines are identical”).

37. See VILE, *supra* note 7, at 2. See generally *id.* at 131-92 (describing the development of the separation-of-powers concept in early America).

38. See GWYN, *supra* note 35, at 127-28.

inception, theorists disagreed on the nature of the functions at issue, the qualities of separateness that mattered, and the institutional mechanisms through which its objectives should be maintained.<sup>39</sup>

Despite these disagreements, the theories underlying the separation of powers can be divided between two traditions that advance competing sets of normative values. On one side is a *republican* tradition, first advanced in the seventeenth century, whose adherents promoted the separation of powers as a strategy for achieving liberty from arbitrary rule. English natural-rights theorists such as John Locke and William Blackstone, French egalitarians such as Jean-Jacques Rousseau and the Marquis de Condorcet, and the most influential supporter of the separation of powers, the Baron de Montesquieu, all agreed that liberty required living in a state in which everyone was bound by the same fundamental rules that were negotiated and amended to accord with the consent of the governed.<sup>40</sup> In particular, these republicans defined liberty as *nondomination*, or freedom from a situation in which an inferior's decisions are constrained without reciprocation by a superior's discretion.<sup>41</sup> Analogizing a ruling tyrant to a slave master, they argued that the only way for anyone to be free from domination was to eliminate distinctions between the rulers and the ruled, subjecting rulers to the same *rule of law* that governed everyone else: "the view of the majority."<sup>42</sup> More significantly, in order for this rule of law to be free from domination – and not imposed by a superior's will – some republicans urged that laws must be developed under conditions of *political equality*, allowing "each individual to make an equal contribution to the expression of [the] majority view."<sup>43</sup> Although republican theorists never settled on a single version of the separation of powers, what united their efforts was the sense that dividing governmental responsibilities among different institutions was a strategy consistent with political equality for developing a rule of law that could prevent domination by a single person or group.

This republican separation of powers was once dominant in the United States. But it has been subtly replaced since the early twentieth century by a competing *juristocratic* tradition, whose adherents have promoted the separation of

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39. For example, Locke's influential classification of powers into legislative, executive, and federative ignored the judiciary entirely. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 365, 366-68 (London, A. Churchill 1690). By contrast, Blackstone emphasized a distinct judicial branch of government. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*260.

40. See *infra* notes 44-68 and accompanying text.

41. See PHILIP PETTIT, *REPUBLICANISM* 51-79 (1997); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 36-57 (1998); VILE, *supra* note 7, at 63-75, 111-15, 193-99, 210-13.

42. NICOLAS DE CONDORCET, *On Freedom*, in CONDORCET: *POLITICAL WRITINGS* 181, 184-85 (Steven Lukes & Nadia Urbinati eds., 2012).

43. *Id.* at 184.

powers not as a method of achieving nondomination and political equality, but as a counterrevolutionary strategy for limiting legislative power. Before describing the origins of the juristocratic separation of powers in the wake of the Civil War, we begin with a simplified sketch of the normative values underlying the republican separation of powers as it developed in early English theory and eighteenth-century American practice.

*A. The Theory of the Separation of Powers in England*

*1. Nondomination*

When the French judge, the Baron de Montesquieu, surveyed the world's governments in his 1748 treatise *The Spirit of Laws*, he described "the Constitution of England" as the ideal form of government because it was the only one designed to promote "political liberty."<sup>44</sup> Like other republicans of his era, Montesquieu defined liberty as the freedom of individuals to do "whatever the laws permit" with "a tranquility of mind, arising from the opinion each person has of his safety."<sup>45</sup> This sort of republican liberty was distinct from the negative freedom from active interference by a superior.<sup>46</sup> It was also distinct from the positive freedom to take whatever actions a person wanted regardless of their circumstances.<sup>47</sup> Rather, republican liberty referred to the freedom to make choices without being dependent on the arbitrary discretion of another.<sup>48</sup> Republicans such as Montesquieu recognized that if a person's freedom to act was dominated by the uncontrolled will of another person, their choices would be constrained even if the other person declined to interfere. Even the friendliest and least intrusive slave master could always change their mind and exercise their reserve power over anyone they enslaved.<sup>49</sup>

To Montesquieu, England's "constitution" – the unwritten arrangement of statutes, customs, and institutions that constitute England's fundamental law – effectively mitigated the possibility that a ruler could dominate everyone else. It was the product of centuries of contestation against concentrated power. In 1215, English landowners forced King John to sign a charter, Magna Carta, that pro-

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44. See MONTESQUIEU, *supra* note 7, at 214-16 (emphasis omitted).

45. *Id.* at 214, 216.

46. PETTIT, *supra* note 41, at 51-79; SKINNER, *supra* note 41, at 36-57.

47. See sources cited *supra* note 46.

48. See sources cited *supra* note 46.

49. PETTIT, *supra* note 41, at 57.



hibited the Crown from levying “aid” or other specified taxes without “the general consent of the realm.”<sup>50</sup> Despite this pledge, kings and queens spent the next four centuries resisting the need to assemble “parliaments” of the realm to request additional taxes, while representatives of the realm extracted additional concessions from the Crown by withholding their consent for new taxes until the Crown agreed to redress specified grievances.<sup>51</sup> Eventually, this informal practice of negotiation settled into a formal practice of lawmaking through which the House of Commons and House of Lords proposed legislation to which the Crown could assent. The Crown, meanwhile, continued to assert for itself a “royal prerogative”: a grab bag of residual powers that included the power to enact some legislation and to appoint and dismiss the ministers and judges responsible for enforcing the law.<sup>52</sup>

By the time Montesquieu reviewed England’s constitution in 1748, Parliament had twice attempted to define the scope of the Crown’s prerogatives by statute. In the 1640s, Parliament and the Crown fought a series of civil wars over Parliament’s position that “the King hath no prerogative, but that which the law of the land allows him.”<sup>53</sup> Although King Charles II ultimately ascended to a restored Crown in 1660, Parliament’s victories on the battlefield forced the Crown to acknowledge the supremacy of enacted statutes.<sup>54</sup> Yet within two decades of the restoration, James II declared that he would not always abide by statutory compromises that his predecessors had reached if such statutes interfered with his ability to exercise his core traditional powers.<sup>55</sup> Parliament formally repudiated James II’s position in 1688, declaring that “the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie . . . is illegall.”<sup>56</sup> Leading a so-called “Glorious Revolution” that deposed the Crown for the second time in fifty years, Parliament invited a new set of monarchs to take the

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50. Magna Carta, ch. 12, 14 (1215); see ROBERT TOMBS, *THE ENGLISH AND THEIR HISTORY* 71-73 (2014).

51. See TOMBS, *supra* note 50, at 80-81; F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 179-84 (1908).

52. See MAITLAND, *supra* note 51, at 422.

53. *The Case of Proclamations* (1610) 77 Eng. Rep. 1352 (KB); see TOMBS, *supra* note 50, at 210, 220-42; RICHARD CUST, *THE FORCED LOAN AND ENGLISH POLITICS* 334-37 (1987); MAITLAND, *supra* note 51, at 306-09; Jess Stoddart Flemion, *The Struggle for the Petition of Right in the House of Lords: The Study of an Opposition Party Victory*, 45 J. MOD. HIST. 193, 193, 196 (1973). For more on the seventeenth-century English civil wars, see BLAIR WORDEN, *THE ENGLISH CIVIL WARS* (2010); and MICHAEL BRADDICK, *GOD’S FURY, ENGLAND’S FIRE* (2008).

54. See, e.g., TOMBS, *supra* note 50, at 249-50 (providing examples of instances in which King Charles II was unable to circumvent legislation).

55. MAITLAND, *supra* note 51, at 302-06. See generally STEVE PINCUS, *1688: THE FIRST MODERN REVOLUTION* (2009) (surveying the reign of James II and England’s Glorious Revolution).

56. Bill of Rights 1688, 1 W. & M. sess. 2 c. 2.



throne on the condition that they assent to this restriction in a statute that became known as the Bill of Rights.<sup>57</sup>

To Montesquieu, the constitution that followed the Glorious Revolution secured liberty because the need for statutory compromises prohibited either Parliament or the Crown from unilaterally persecuting political opponents.<sup>58</sup> “To prevent the abuse of power, ‘tis necessary that by the very disposition of things power should be a check to power,” he wrote.<sup>59</sup> He explained that England allocated among its governing institutions “three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law.”<sup>60</sup> (He sometimes called this third power “the judiciary power.”<sup>61</sup>) Although all governments exercised the same three powers, Montesquieu observed, most governments concentrated all three powers in the same institution.<sup>62</sup> England, by contrast, split powers among different institutions, giving each institution sufficient *political* leverage to keep any other institution from persecuting law-abiding people. To prevent the legislature from “arrogat[ing] to itself what authority it pleased,” England’s constitution gave the Crown “a share in the legislature for the support of his own prerogative . . . [:] the power of refusing laws.”<sup>63</sup> To counterbalance the executive, Parliament could propose legislation regulating what executive officials could do, or, on its own, “examin[e] in what manner its laws have been executed,” and punish executive officials who abused their power.<sup>64</sup> Magistrates and juries could enforce Parliament’s legislation only in “a form and manner prescribed by law.”<sup>65</sup> And if these inferior courts proved abusive or insufficiently independent, England’s highest judicial body – the upper house of Parliament – could review their legal conclusions and try particularly intimidating defendants in a court of impeachment.<sup>66</sup>

Montesquieu regarded the separation of powers as dynamic, the consequence of negotiation between the legislature and the executive that turned on their roles in the lawmaking process. In fact, he never used the phrase “separation of powers” in his work, nor did he call for the three powers he described to

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57. *Id.*

58. MONTESQUIEU, *supra* note 7, at 215-16.

59. *Id.* at 214.

60. *Id.* at 215-16.

61. *Id.*

62. *Id.* at 216-17.

63. *Id.* at 216-18, 224, 227.

64. *Id.* at 225.

65. *Id.* at 218.

66. *Id.* at 225-27.

be legally separated from one another. Indeed, as one close reader later wrote, it would be impossible for competing political departments to protect liberty “unless these departments be so far connected and blended as to give to each a constitutional control over the others.”<sup>67</sup> The legislature’s power to control the executive by statute and investigation—and the executive’s power to control the legislature by veto—forced members of both institutions to negotiate as statesmen accounting for the public good rather than as lawyers attempting to enforce “parchment barriers.”<sup>68</sup>

## 2. Rule of Law

For Montesquieu and other theorists of the separation of powers in England, the mechanism that actually prevented one person from arbitrarily dominating another was the rule of law. As Montesquieu wrote, republican liberty was the freedom from domination to do “whatever the laws permit” — not the freedom from all unwanted legal restraints.<sup>69</sup> The ultimate source of the rule of law in England was the many statutes agreed upon by Parliament and the Crown. Although the Commons, the Lords, and the Crown all had the power to veto unfavorable bills to sustain their existing prerogatives, once they assented to a statute, they effectively offered their “consent” to new legal restraints that would last until the statute was repealed or amended.<sup>70</sup>

The binding nature of this statute-based rule of law became clear during the two occasions in the seventeenth century when the Crown maintained that it possessed a “dispensation” power to ignore or dispense with statutes that it considered unconstitutional.<sup>71</sup> In 1648, for instance, a barrister named Charles Dallison even offered a comprehensive defense of this idea to explain why he fought in the English Civil Wars on behalf of Charles I.<sup>72</sup> From Dallison’s perspective, there were some prerogatives that were “so *inseparably* annexed to the Crowne,

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67. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (writing that Montesquieu “did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other”).

68. THE FEDERALIST NO. 48, *supra* note 67, at 308.

69. MONTESQUIEU, *supra* note 7, at 214-16.

70. BLACKSTONE, *supra* note 39, at \*149-51. *See generally* MARK KNIGHTS, POLITICS AND OPINION IN CRISIS, 1678-81 (1994) (surveying the relationship between the Crown and Parliament in late-seventeenth-century England).

71. MAITLAND, *supra* note 51, at 302-05.

72. CHARLES DALLISON, THE ROYALIST’S DEFENCE: VINDICATING THE KING’S PROCEEDINGS IN THE LATE WARRE MADE AGAINST HIM 71, 93 (London, 1648).

as that they cannot be *severed* by Act of Parliament.”<sup>73</sup> When a statute inhibited the Crown’s capacity to govern, Dallison argued that the Crown could act “*contrary* to the expresse words of that Statute” with the expectation that judges would “determine which Acts of Parliament are binding, and which void.”<sup>74</sup> He argued, in other words, that the Crown could dispense with unconstitutional laws that had snuck past a veto, leaving it to the judiciary to enforce the line separating the legislative and executive powers. Forty years later, James II repeated this reasoning as he rejected statutory compromises that his predecessors had reached if such statutes interfered with his ability to exercise his traditional core powers.<sup>75</sup>

But the idea of an executive dispensation power backed by judicial review was so threatening to the rule of law that it contributed to the English Civil Wars in the 1640s and the Glorious Revolution in the 1680s—both of which ended with Parliament deposing the sitting monarch in part for violating existing statutes.<sup>76</sup> As John Locke argued in his 1689 *Two Treatises of Government*, royalist critics of statutory limits on the Crown “have a very wrong notion of Government, [when they] say, that the People have incroach’d upon the Prerogative when they have got any part of it to be defined by positive Laws.”<sup>77</sup> To the contrary, the reason the separation of powers was valuable was because it allowed Parliament and the people “to get Prerogative determin’d in those points wherein they found disadvantage from it,” preventing the Crown from dominating others as an abusive tyrant.<sup>78</sup> Contemporaries agreed that Parliament’s power to “abridge[]” the Crown’s prerogatives by statute ensured that “our Government may truly be called an Empire of Laws, and not of Men.”<sup>79</sup>

Yet while Locke and other republicans thought “the Legislative is the supreme Power,” they did not think the power was itself unlimited by any rule of law.<sup>80</sup> Locke observed that future monarchs could always defend their prerogatives by vetoing proposed legislation.<sup>81</sup> In addition, the English constitution empowered the Crown to check Parliament and “mitigate the severity of the Law”

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73. *Id.* at 43.

74. *Id.* at 43, 48.

75. MAITLAND, *supra* note 51, at 305-06; see PINCUS, *supra* note 55, at 154.

76. See MAITLAND, *supra* note 51, at 302-06.

77. LOCKE, *supra* note 39, at 385-86.

78. *Id.* at 385.

79. JOHN TRENCHARD, AN ARGUMENT, SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 2 (London, 1697).

80. LOCKE, *supra* note 39, at 371, 355-65.

81. *Id.* at 371-73.

by pardoning people who violated it.<sup>82</sup> Most importantly, Parliament was always checked “by a Law antecedent, and paramount to all positive Laws of Men”: the consent of the governed.<sup>83</sup> For Locke, the history of England illustrated that abusive power in any form could credibly be checked either by the veto power or by appeals to the public, whose right to revolt against authority it considered dominating reserved “that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth.”<sup>84</sup>

Notably, in assigning to the people and their representatives the power to determine whether the rule of law had been violated, Locke and other republicans reserved little role for the judiciary. As Montesquieu wrote a few decades after Locke, the judicial power was “in some measure next to nothing.”<sup>85</sup> Courts were, in his view, “no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor.”<sup>86</sup> The English judge William Blackstone similarly observed in his *Commentaries* that the purpose of an independent judiciary was not to protect the executive from the legislature, but rather to protect ordinary people from potentially abusive prosecutors by requiring the prosecutor to persuade a popular jury that a defendant deserved to be punished.<sup>87</sup> In fact, Blackstone warned his readers that nothing was “more to be avoided” than a judiciary “joined with the executive,” because English history was full of claims, such as Dallison’s, that tried to use judicial opinions to build the Crown’s prerogative into a claim of absolute power.<sup>88</sup>

### 3. Political Equality

The rule of law promoted by republican theorists of the separation of powers was not just any law, but laws proposed and adopted with the consent of the governed. As Locke argued in *Two Treatises of Government*, the supreme source of law in any society was not the Crown, but the people.<sup>89</sup> Imagining a mythical state of nature in which all governments were formed by people entering into social contracts with one another, Locke argued that the “Power of making Laws” was “a delegated Power from the People” that the people alone could determine

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**82.** *Id.* at 383, 385.

**83.** *Id.* at 391, 383-85.

**84.** *Id.* at 391.

**85.** MONTESQUIEU, *supra* note 7, at 221.

**86.** *Id.* at 232.

**87.** BLACKSTONE, *supra* note 39, at \*258-60.

**88.** *Id.* at \*260.

**89.** See LOCKE, *supra* note 39, at 319.

how to exercise.<sup>90</sup> In Locke's view, when a king or any other institution tried to check a legislature by disregarding the enacted will of the people, the king was effectively in "Rebellion," guilty of taking away "this decisive power, which no Body can have but by the appointment and consent of the People."<sup>91</sup>

Yet republican theorists were well aware that few laws are adopted unanimously; any theory of government that relied on "public opinion" as the source of law needed some explanation for why laws were not inherently dominating when they constrained people who disagreed with them.<sup>92</sup> The answer reached by the eighteenth-century republican Marquis de Condorcet was that once an individual consents to enter society, laws are not dominating when "the view of the majority" governs and "each individual [can] make an equal contribution to the expression of [the] majority view."<sup>93</sup> He and other republicans believed that if everyone in a community is treated as a political equal with the same limited power to make and apply the law, then everyone can protect themselves from abusive legislation by expressing their opposition, declining to enforce the laws as jurors, and seeking to change the laws by forming new majority coalitions.<sup>94</sup> As Jean-Jacques Rousseau recognized, disagreement over even fundamental laws was inevitable, which was why, for political equality to effectively protect liberty, a nation must always be "at liberty to change even the best laws, when it pleases."<sup>95</sup>

One consequence of this republican perspective on political equality was an embrace of the provisional nature of the English separation of powers, which could always be amended by statute. As Thomas Paine wrote in his 1791 *Rights of Man*, "[t]here never did, there never will, and there never can exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controuling posterity to the 'end of time.'"<sup>96</sup> To argue that one generation could enact a fundamental law that could

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90. *Id.* at 364.

91. *Id.* at 447-48; *cf. id.* at 389 (describing the dangers in allowing even good rulers to transgress the enacted will of the people because "what had been done only for the good of the People" could be used as precedent by later rulers to construct "a right in them to do for the harm of the People").

92. *See, e.g.,* JEAN-JACQUES ROUSSEAU, A TREATISE ON THE SOCIAL COMPACT: OR THE PRINCIPLES OF POLITIC LAW 27, 60-61, 89 (London, T. Becket & P.A. De Hondt 1764).

93. CONDORCET, *supra* note 42, at 184-85.

94. *Cf.* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 90 (1999) ("[Locke] regarded what we call our politics, specifically our *legislative* politics (and the electoral politics associated with it), as the primary forum where our thinking and disagreement about justice takes place.").

95. ROUSSEAU, *supra* note 92, at 88.

96. THOMAS PAINE, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION 11 (London, J.S. Jordan 1791).

permanently bind its successors would be to argue that one generation could enslave future generations—a claim incompatible with republican liberty.<sup>97</sup> Paine and other republicans did not reject the idea of a binding rule of law. But they maintained that “[a] law not repealed continues in force, not because it *cannot* be repealed, but because it *is not* repealed; and the nonrepealing passes for consent.”<sup>98</sup>

### *B. The Separation of Powers in Early American Practice*

The normative values underlying the separation of powers in eighteenth-century England—a definition of freedom as *nondomination*, protected by a *rule of law* enacted by *political equals*—found fertile soil in the new American republic. Focusing on the practice of the separation of powers—or the means through which it characterizes constitutional government rather than limits it—casts early debates over the separation of powers in a new light. To illustrate the republican separation of powers in practice, we briefly describe a debate in the First Congress over the President’s power to remove executive officers. We focus on this debate not only because it elucidates the ways in which Americans saw a provisional and politically enforced separation of powers as consistent with a written constitution, but also because this debate—later mythologized as the “Decision of 1789”<sup>99</sup>—becomes central to the juristocratic counterrevolution of the late nineteenth century.

As recounted by others, the 1789 congressional debate concerned a bill to establish a new department of foreign affairs.<sup>100</sup> An early iteration of the bill specified that the Secretary of Foreign Affairs would be “removable from office by the President of the United States.”<sup>101</sup> But several members of the House objected that Congress should not give the President this unilateral power to fire an officer. Although the Constitution vested the “executive Power” in the President and empowered him to appoint principal officers “with the Advice and Consent of the Senate,”<sup>102</sup> the Constitution did not state whether or how a President could remove such officers. Instead, it specified only that Congress could pass “necessary and proper” laws for carrying into execution the President’s

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97. *Id.*

98. *Id.* at 15–16; cf. ROUSSEAU, *supra* note 92, at 38, 147–48, 156 (proposing that the ideal republican government would periodically “wind up and renew [its] spring” by holding mandatory assemblies in which each generation could repeal all bad laws).

99. See *infra* pp. 3029–33.

100. See GIENAPP, *supra* note 1, at 125–26.

101. 1 ANNALS OF CONG. 473 (1789) (Joseph Gales ed., 1834).

102. U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 2, cl. 2.

powers, and that the Senate could remove civil officers after impeachment by the House of Representatives.<sup>103</sup> In light of the Senate's role in confirming officers, the objecting representatives argued that Congress should allow the President to remove the Secretary of Foreign Affairs only with the Senate's consent.<sup>104</sup>

The objecting representatives inspired a range of arguments and constitutional interpretations over the removal power. Some members argued that impeachment should be the only method by which an officer could be removed.<sup>105</sup> Others argued that the Constitution did not allocate the removal power, and therefore legislation could bestow the power on the President alone.<sup>106</sup> Some reasoned that the power to remove an officer was incidental to the President's power of appointment.<sup>107</sup> And still others observed from the practice of states that many executives lacked the power of removal.<sup>108</sup>

James Madison – who two years earlier had been a major participant in drafting the Federal Constitution – spoke up in the middle of this debate. Treating the issue as a question of the separation of powers, Madison argued that the line separating the Senate from the President was not a legal question for which the House could wait “until the Judiciary is called upon to declare its meaning.”<sup>109</sup> He observed:

There is not one Government on the face of the earth, so far as I recollect, . . . in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the Government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent.<sup>110</sup>

Madison thus encouraged his colleagues to consider the constitutionality of the bill as a question of choosing among several potential interpretations of the Constitution. If the Senate and President disagreed with the House's own assessment, they could each decide to veto the bill rather than pass it. As for the courts, Madison could not see “in what way this question could come before the

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**103.** *Id.* art. I, § 8, cl. 18; *id.* art. I, § 3, cl. 6.

**104.** 1 ANNALS OF CONG. 473-75 (1789) (Joseph Gales ed., 1834).

**105.** *Id.* at 477.

**106.** *Id.* at 502-03.

**107.** *Id.* at 473-75.

**108.** *Id.* at 490.

**109.** *Id.* at 520.

**110.** *Id.*



judges . . . .”<sup>111</sup> Even if it could, he urged “that the decision may be made with the most advantage by the Legislature itself.”<sup>112</sup>

Implementing this understanding of the legislature’s role as the primary interpreter of the separation of powers, Madison urged his colleagues to adopt an interpretation that would protect the President’s autonomy. From Madison’s perspective, the best interpretation of the Constitution was one that vested all “executive” power in the President subject to the express qualifications of Article II.<sup>113</sup> He therefore concluded that the House should not give the Senate a role in removing executive officers, but should instead protect the President’s ability to faithfully execute the laws that Congress passed.<sup>114</sup>

Yet Madison’s point was not that the Constitution’s separation of powers *forbade* Congress from regulating the removal of officers.<sup>115</sup> To the contrary: two weeks later, when the House considered the establishment of a treasury department, Madison argued that Congress had the power to protect the tenure of certain financial officers from the will of the President. “Surely the Legislature have the right to limit the salary of any officer,” he said during this second debate.<sup>116</sup> “[I]f they have this, and the power of establishing offices at discretion, it can never be said that, by limiting the tenure of an office, we devise schemes for the overthrow of the executive department.”<sup>117</sup>

Rather, Madison’s position was that the Constitution did not resolve all questions on its own, particularly when it came to drawing the boundary between Congress’s powers and the President’s powers.<sup>118</sup> As Madison later elabo-

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**111.** *Id.* at 521.

**112.** *Id.*

**113.** *See id.* at 481-82.

**114.** *See id.*

**115.** *Cf.* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1073 (2006) (“[T]he Decision of 1789 did not endorse the view that Congress lacked authority to modify the Constitution’s grant of removal power to the President.”).

**116.** 1 ANNALS OF CONG. 638 (1789) (Joseph Gales ed., 1834).

**117.** *Id.*

**118.** *See id.* at 520-21 (“As I think it will be equally constitutional, I cannot imagine it will be less safe, that the exposition should issue from the legislative authority than any other; and the more so, because it involves in the decision the opinions of both those departments, whose powers are supposed to be affected by it.”); *see also* GIENAPP, *supra* note 1, at 128-29 (discussing how many aspects of the Constitution “remained deeply underdetermined” during the removal debate).



rated, “[p]ublic opinion sets bounds to every Government, and is the real sovereign in every free one.”<sup>119</sup> The role of government was not merely to “obey[]” public opinion but also to “influenc[e]” it.<sup>120</sup> Madison pointed to Great Britain, and emphasized how its distribution of powers had changed over time as public opinion shifted: “Those who ascribe the character of the British Government to the form alone in which its powers are distributed [and] counterpoised, forget the changes which its form has undergone.”<sup>121</sup> Even some members of Congress who disagreed with Madison on the substantive requirements for removal emphasized the House’s responsibility to use legislation to construct the separation of powers.<sup>122</sup>

Unable to reach consensus on the constitutional nature of the removal power and who should possess it, a narrow majority of the House ultimately approved language more obliquely describing how the department of foreign affairs would function — “whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy” — language that, for some members, implied that the President could unilaterally remove executive officers.<sup>123</sup> But when the bill reached the Senate, most senators strongly disagreed with this inference. After the first day of debate, the Senate appeared poised to amend the bill to require Senate approval before the President could remove executive officers — preserving what the senators regarded as their constitutional prerogative.<sup>124</sup>

This debate worried Vice President John Adams. Nominally a member of both the executive branch and the legislative branch because of the Vice President’s role as president of the Senate, Adams thought the Constitution made the Senate too powerful.<sup>125</sup> In private letters to senators during the 1789 debate, Adams argued that the Senate’s veto power over appointments, treaties, and war

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**119.** James Madison, Notes for the *National Gazette* Essays (Dec. 19, 1791 – March 3, 1792), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-14-02-0144> [<https://perma.cc/F4QH-HS8B>].

**120.** *Id.*

**121.** *Id.*

**122.** See, e.g., 1 ANNALS OF CONG. 521 (1789) (Joseph Gales ed., 1834).

**123.** *Id.* at 601. Other members urged that the new language was confusing and unclear, resulting in “a weak, decrepit explanation, which the President may not easily understand. For if he supposes the constitution totally silent [on removal], he can hardly draw authority from your law . . . .” *Id.* at 606 (statement of Rep. Theodore Sedgwick).

**124.** Cf. WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY 113-14 (Edgar S. Maclay ed., 1890).

**125.** See Three Letters from John Adams to Roger Sherman on the Constitution of the United States, Letter III (July 17, 1789), reprinted in 6 THE WORKS OF JOHN ADAMS 432, 432 (Charles Francis Adams ed., 1851).

“lessen[ed] the responsibility of the president” and could bring the entire government to a partisan standstill.<sup>126</sup> Adams also unfavorably compared the qualified veto the U.S. Constitution gave the President with the absolute veto the British Constitution gave the Crown.<sup>127</sup> Because the President could be “overruled” by a two-thirds vote of the House and Senate, Adams feared that Congress might “attack his constitutional power” even if the President tried to “defend himself, or the constitution, or the judicial power.”<sup>128</sup> From Adams’s perspective, it was possible that “more than two thirds of the nation, the senate, and house . . . [would] demand a law which will wholly subvert the constitution.”<sup>129</sup>

In light of these observations, Adams privately encouraged senators to oppose any legislation that would eliminate what few powers the President could arguably exercise without Senate involvement.<sup>130</sup> When the debate over the foreign affairs bill resumed, members who had earlier opposed giving the President a unilateral removal power now offered arguments in support.<sup>131</sup> This round of “recantations” stunned Senator William Maclay of Pennsylvania, who watched with horror as colleagues “flew over to England; extolled its Government; wished, in the most unequivocal language, that our President had the same powers; said, let us take a second view of England; repeating nearly the same thing.”<sup>132</sup> The Senate split ten-to-ten—allowing Adams to cast the tiebreaking vote.<sup>133</sup> Senator Maclay observed “that everybody believed that John Adams was the great converter.”<sup>134</sup>

The final version of the bill thus did not expressly empower the President to unilaterally remove the Secretary of Foreign Affairs, but alluded to such a power.<sup>135</sup> In succeeding debates over the President’s power to remove executive officers, members of Congress, executive-branch officials, and jurists returned

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**126.** *Id.* at 433, 433-35.

**127.** See Three Letters from John Adams to Roger Sherman on the Constitution of the United States, Letter I (July 17, 1789), *reprinted in* 6 THE WORKS OF JOHN ADAMS, *supra* note 125, at 428, 429.

**128.** See Three Letters from John Adams to Roger Sherman on the Constitution of the United States, Letter II (July 17, 1789) *reprinted in* 6 THE WORKS OF JOHN ADAMS, *supra* note 125, at 431.

**129.** Letter III from John Adams to Roger Sherman, *reprinted in* 6 THE WORKS OF JOHN ADAMS, *supra* note 125, at 432.

**130.** MACLAY, *supra* note 124, at 114-15.

**131.** *Id.* at 115-16.

**132.** *Id.* at 115.

**133.** *Id.* at 116.

**134.** *Id.*

**135.** Act of July 27, 1789, ch. 4, 1 Stat. 28, 29.

to this “Decision of 1789,” regarding it as evidence of a constitutional default rule that the President could remove executive officers when a statute was silent on the question.<sup>136</sup>

Yet even more important than Congress’s resolution of the removal question was *how* Congress sought to resolve it. Congress and the executive branch – represented by Vice President Adams – deliberated and negotiated before adopting one among several plausible interpretations of the separation of powers. Their conclusion did not establish a *legal* precedent that prohibited future Congresses from reaching a different interpretation. It was not even clear which interpretation of the Constitution they adopted. Rather, the result reflected the republican separation of powers in practice: representative institutions, through negotiation and statecraft, constituting the separation of powers by statute.

The political nature of early separation-of-powers questions in the United States is further illustrated by the limited role played by the Supreme Court. In the first seventy years of the United States’s history, Congress and the President determined for themselves how the Constitution separated the legislative and executive powers. When the Court weighed in on these legislative–executive debates, it was merely to enforce whatever statutory conclusions the other two branches had reached.<sup>137</sup> Notably, in the 1838 opinion of *Kendall v. United States ex rel. Stokes*,<sup>138</sup> the Court rejected the argument that an executive officer could ignore a statute that interfered with the President’s allegedly exclusive power to direct and control subordinate officers. Such an argument, the Court reasoned, “would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution,” and would assert a principle “which, if carried out in its results . . . would be clothing the President with a

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**136.** See *infra* Part II; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 388–90, §§ 1531–32 (Boston, Hilliard, Gray & Co. 1833) (distinguishing between the Decision of 1789’s discussion of the President’s power to remove officers “in the absence of all such legislation,” and the “speculative question” not at issue in 1789 of whether a statute could limit the President’s removal power). The implications of the “Decision of 1789” for the President’s default power to remove officers absent statutory authorization remain contested. Compare Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism*, 171 U. PA. L. REV. (forthcoming 2022), with Prakash, *supra* note 115.

**137.** The apparent exceptions to this trend – instances in which the Court did decline to enforce certain statutes – tended to involve statutes that were interpreted to give the Court itself responsibilities that the Court did not think it could constitutionally exercise. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

**138.** 37 U.S. (12 Pet.) 524 (1838).

power entirely to control the legislation of congress, and paralyze the administration of justice.”<sup>139</sup> Enforcing the statute, the Court explained that any alternative doctrine “cannot receive the sanction of this court.”<sup>140</sup> This approach would define the federal separation of powers until it was upended after the Civil War.

## II. THE JURISTOCRATIC TURN

In 1885, when the political scientist and future President Woodrow Wilson published his classic account of the U.S. Constitution, he called his work *Congressional Government*. Wilson explained that his title reflected how far American democracy had departed from the assumption of James Madison and John Adams that Congress and the President would each check one another’s power through the negotiated process of vetoes and statecraft. “For all practical purposes the national government is supreme over the state governments, and Congress predominant over its so-called coordinate branches,” Wilson wrote.<sup>141</sup> “Whereas Congress at first overshadowed neither President nor federal judiciary, it now on occasion rules both with easy mastery and with a high hand . . . .”<sup>142</sup>

Wilson described congressional supremacy as the inevitable consequence of a system of government in which the legislature could pass laws to enhance its powers relative to the Executive. He saw a parallel development unfolding in the United Kingdom: the vigorously contested separation of powers once praised by Montesquieu had evolved into a system in which the Crown never vetoed laws because of the House of Commons’s threats to withhold appropriations or other needed legislation.<sup>143</sup> Wilson praised the United Kingdom’s replacement of the traditional separation of powers with a focus on ministerial responsibility and constitutional monarchy, combined with political parties.<sup>144</sup>

Yet as a child who grew up in the Confederacy, Wilson was ambivalent about adopting the same approach in the United States; he noted that a supreme Congress could produce dangerous racial consequences.<sup>145</sup> Twenty years earlier, Congress had emerged from the Civil War with expansive new powers and a

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**139.** *Id.* at 613.

**140.** *Id.*

**141.** WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 52 (Boston, Houghton, Mifflin & Co. 1885) (spelling altered).

**142.** *Id.* at 52-53.

**143.** *Id.* at 311-16; see WILLIAM SELINGER, *PARLIAMENTARISM: FROM BURKE TO WEBER* 8 (2019).

**144.** WILSON, *supra* note 141, at 322-23; see SELINGER, *supra* note 143.

**145.** See WILSON, *supra* note 141, at 32-34, 315-17; Woodrow Wilson, *The Reconstruction of the Southern States*, *ATLANTIC MONTHLY*, Jan. 1901, at 1, 6.

mandate to reconstruct a fractious union of states into a racially egalitarian nation. In the decade that followed the war, supermajorities in Congress wielded their powers to overcome obstacles introduced by reactionary states and a racist President<sup>146</sup> – even going so far as to pass legislation that prohibited the President from interfering with Reconstruction and then impeaching him for violating it.<sup>147</sup> It was only after Reconstruction later became unpopular among white Northerners, Wilson observed, that federalism reemerged as a check on Congress’s power. Yet this reemergence was not because states could once again effectively restrain the federal government. Rather, it was because in decisions like the *Civil Rights Cases* of 1883,<sup>148</sup> the Supreme Court was resurrecting federalism as an amorphous legal principle that forbade civil-rights legislation.<sup>149</sup>

But if the Supreme Court in 1885 was “the only authority that [could] draw effective rein on the career of Congress,” Wilson observed that the Court had not yet attempted to enforce the separation of powers as a similar legal restraint.<sup>150</sup> “Congress has often come into conflict with the Supreme Court by attempting to extend the province of the federal government as against the States,” Wilson later wrote, “but it has never, I believe, been brought to book for any alleged exercise of powers as against its competing branch, the executive, – a fact which would seem to furnish proof of its easy supremacy within the federal field.”<sup>151</sup> Wilson eventually dispensed with his ambivalence about congressional supremacy to express no doubt that the judiciary should never again allow Congress to loot the states and enfeeble the presidency to exalt a race of “dusky children untimely put out of school.”<sup>152</sup> Along with a growing chorus of Southern-born academics, Wilson saw Reconstruction as an “extraordinary and very perilous state of affairs” that the country could not survive twice.<sup>153</sup>

Over the next four decades, Wilson and his academic contemporaries would supply the Supreme Court with a historical account of Reconstruction that would demand the judiciary’s future intervention into the previously ad hoc relationship between Congress and the presidency. After his election as President in 1912, Wilson would also supply the Court with the first case it would use to

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**146.** See ERIC FONER, RECONSTRUCTION 179, 250–51 (Henry Steele Commager & Richard B. Morris eds., First Perennial Classics 2002) (1988).

**147.** See *id.* at 333–35; *infra* notes 172–182 and accompanying text.

**148.** 109 U.S. 3 (1883).

**149.** See WILSON, *supra* note 141, at 34.

**150.** *Id.* at 34–35.

**151.** Woodrow Wilson, *Responsible Government Under the Constitution*, ATLANTIC MONTHLY, Apr. 1886, at 542, 549.

**152.** Wilson, *supra* note 145, at 6.

**153.** *Id.*

impose the judicial restraints on Congress that the Reconstruction Era had lacked. In that decision, *Myers v. United States*,<sup>154</sup> the Chief Justice and former President William Howard Taft would recall the Reconstruction Congress with the same embarrassment and loathing that Wilson and his contemporaries had popularized.<sup>155</sup> To avoid a repetition of that Congress's excesses, Taft would draft the blueprint for the juristocratic separation of powers: the idea that the separation of powers authorized the Court to restrain Congress from reimposing Reconstruction on the presidency.<sup>156</sup>

The path from *Congressional Government's* description of congressional supremacy in 1885 to *Myers's* attempt to shackle it in 1926 would require two developments: a theory for how courts should intervene in interbranch disputes, and a normative argument for why they should do so.

#### A. *The Separation of Powers During Reconstruction*

The congressional supremacy that Woodrow Wilson described in *Congressional Government* began with the formal commencement of the 39th Congress in March 1865, as the Civil War drew to a close.<sup>157</sup> Two months earlier, the outgoing 38th Congress passed the Thirteenth Amendment to formally abolish slavery, and President Abraham Lincoln haltingly proposed his own modest plans to reincorporate Southern states into the Union. But there was little consensus on every other major issue, particularly over how to guarantee the civil and economic rights of black people.<sup>158</sup> Existing disagreements were further widened when the assassination of President Lincoln in April handed the presidency to a Southerner, Andrew Johnson.<sup>159</sup>

A former Democrat and slaveowner from Tennessee, President Johnson had been selected to run as Lincoln's vice president in 1864 in order to lend geographic diversity to the ticket. But Johnson had long been a fervent white supremacist, and he carried his disgust for black people to the White House.<sup>160</sup> In his first months after Lincoln's death, he proposed to return the United States as

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**154.** 272 U.S. 52 (1926).

**155.** See *id.* at 166-68; *infra* Section II.C.

**156.** See *Myers*, 272 U.S. at 175-76; *infra* Section II.C.

**157.** See FONER, *supra* note 146, at 228. Although the House of Representatives followed the typical nineteenth-century practice of not meeting until the following December, the 39th Congress began on inauguration day, March 4, and the Senate immediately began its business in a special session. See CONG. GLOBE, 39th Cong., Special Sess. 1424 (1865).

**158.** *Id.* at 228-46.

**159.** *Id.* at 75.

**160.** See ANNETTE GORDON-REED, ANDREW JOHNSON 11-12 (2011).

closely as possible to how it existed before the Civil War. He announced a general pardon of most ex-Confederates.<sup>161</sup> He declined to intervene when Southern states passed laws that authorized the effective re-enslavement of black people who violated prewar racial hierarchies.<sup>162</sup> And he vetoed civil-rights bills as both unconstitutional and discriminatory against white people.<sup>163</sup> In his veto messages, Johnson expressed the belief that black people were incapable of self-determination without the discipline of white leadership – even if such leadership meant empowering ex-Confederates to subjugate Union-supporting but landless black people who composed the majorities of several states.<sup>164</sup>

Johnson's antediluvian vetoes galvanized even moderate Republicans in Congress to join their more racially egalitarian colleagues in embracing the need for federal intervention in the South. The 39th Congress overrode Johnson's vetoes to enact the Civil Rights Act of 1866 and to renew a bureau to assist refugees and "freedmen."<sup>165</sup> Congress also proposed the Fourteenth Amendment to place its power to pass similar civil-rights legislation on firm constitutional footing.<sup>166</sup> As the relationship between Congress and President Johnson deteriorated, Congress also deployed novel interpretations of existing constitutional provisions to justify an ambitious program of reconstructing the South into a multiracial democracy. Most significantly, Congress overrode the President's veto of the first Reconstruction Act of 1867. Invoking a constitutional clause that requires the United States to "guarantee to every State in this Union a Republican Form of Government,"<sup>167</sup> Congress empowered U.S. military officers to guarantee the civil and voting rights of black Southerners, to govern Southern states as military districts, to try insurrectionists in military tribunals, and to compel the states to adopt racially-progressive constitutions as a condition of escaping federal oversight.<sup>168</sup>

To insulate its Reconstruction program from presidential interference, the 39th Congress also altered the statutory relationship between the President and

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**161.** FONER, *supra* note 146, at 183-84.

**162.** *See id.* at 190-91.

**163.** *See, e.g.*, 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3600-01 (New York, James D. Richardson ed., Bureau of Nat'l Literature, Inc. 1897).

**164.** *Id.* at 3610-11; 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 163, at 3762-64.

**165.** FONER, *supra* note 146, at 250-51.

**166.** *Id.* at 251-60; Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1220-22 (2015).

**167.** U.S. CONST. art. IV, § 4.

**168.** Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 428-29.



the legislature. In 1866, to prevent the President from removing the military officers tasked with administering Reconstruction, Congress passed an appropriation bill with a rider declaring that “no officer in the military or naval service shall in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect.”<sup>169</sup> Although President Johnson may have privately groused that the rider interfered with his duties as commander-in-chief, he signed the needed appropriation bill into law. He also signed a follow-up appropriation bill in 1867 that required “all orders or instructions relating to military operations” to be issued through the General of the Army, Ulysses S. Grant—a requirement that effectively made Grant’s approval a prerequisite for any military orders.<sup>170</sup> To prevent the President from superseding General Grant, this second bill declared that “[t]he General of the army shall not be removed, suspended; or relieved from command, or assigned to duty elsewhere than at [his] headquarters, except at his own request, without the previous approval of the Senate.”<sup>171</sup>

President Johnson did balk, however, at Congress’s effort to give civil officers the same protection from presidential oversight that it had just given military officers. The same day he signed the 1867 military appropriations bill, the President vetoed a proposed Tenure of Office Act, which would have made it a “high misdemeanor” for the President to remove certain civil officers without the advice and consent of the Senate.<sup>172</sup> Although the terms of the Act exempted much of the President’s cabinet, the President wrote in his veto message that the bill unconstitutionally “denied the power of removal by the President.”<sup>173</sup>

President Johnson explained that the Constitution’s grant of “executive Power” to the President vested him with the unregulatable power to remove civil officers—an interpretation that had been “settled . . . by construction, settled by precedent, settled by the practice of the Government, and settled by statute.”<sup>174</sup> For support, the President quoted at length the congressional debate in 1789 in which Madison had argued that the President had the inherent authority to remove officers absent a statute.<sup>175</sup> But whereas that earlier debate had turned on whether Congress *should* allow the President alone to remove executive officers, Johnson now argued that the debate had settled that Congress *could not* require

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**169.** Act of July 13, 1866, ch. 176, 14 Stat. 90, 92.

**170.** Act of Mar. 2, 1867, ch. 170, 14 Stat. 485, 486-87.

**171.** *Id.* at 487.

**172.** Tenure of Office Act, ch. 154, 14 Stat. 430, 431 (1867).

**173.** 6 A COMPILATION OF THE PAPERS OF THE PRESIDENT, *supra* note 163, at 493.

**174.** *Id.* at 496-97.

**175.** *Id.* at 494-95. For Madison’s remarks, see *supra* notes 109-121 and accompanying text.



the Senate's approval to remove a civil officer.<sup>176</sup> Quoting James Kent, a well-known jurist who had earlier written that the President could unilaterally remove officers without statutory authorization, Johnson declared that the 1789 debate "amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as decisive authority in the case."<sup>177</sup>

Congress was unimpressed by Johnson's appeal to precedent, overriding the President's veto the day he submitted it.<sup>178</sup> Its members also became increasingly skeptical that Johnson was the appropriate person to lead the executive branch.<sup>179</sup> Their opposition to Johnson was reinforced by "Colored Conventions" of black people who inundated Congress with petitions calling for Johnson's impeachment.<sup>180</sup> These petitions castigated Johnson for encouraging former Confederates to retake power in Southern states, threatening the "lives and property" of loyal black Americans as well as the democratic goals of Reconstruction.<sup>181</sup> Soon, the President provoked Congress by unilaterally ordering the removal of the officer most in charge of Reconstruction, Secretary of War Edwin Stanton.<sup>182</sup>

Stanton was arguably exempted from the coverage of the Tenure of Office Act, which did not appear to apply to members of President Johnson's cabinet. But the House of Representatives quickly drafted articles of impeachment charging the President with illegally violating the statute.<sup>183</sup> The articles also criticized the President for contemptuously urging voters to reject the legitimacy of Congress's legislation and "attempting to bring [Congress] 'into disgrace.'"<sup>184</sup> The House, in short, saw an opportunity to remove a President who was refusing to faithfully execute its laws. If removed, Johnson would be replaced by the racially progressive president pro tempore of the Senate, Benjamin Wade.<sup>185</sup>

During the impeachment trial before the Republican-dominated Senate, President Johnson's lawyers argued that the President had not really violated the

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**176.** 6 A COMPILATION OF THE PAPERS OF THE PRESIDENT, *supra* note 163, at 493-96.

**177.** *Id.* at 496.

**178.** See Resolution of Mar. 2, 1867 Overriding the Veto to the Tenure of Office Act, ch. 154, 14 Stat. 432.

**179.** See BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE 233-35 (2021).

**180.** DANIEL CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790-1870, at 465-71 (2021).

**181.** *Id.* at 466-70.

**182.** FONER, *supra* note 146, at 333-35.

**183.** See *id.*

**184.** *Id.* at 334-35.

**185.** *Id.* at 335.

Tenure of Office Act. They added that if he did violate the Act, he was justified in so doing because the Act unconstitutionally interfered with the President's exclusive power to remove civil officers.<sup>186</sup> In making this second point, the lawyers raised a novel argument to explain the method by which the President had challenged the Act's constitutionality. The lawyers argued that President Johnson's motivation in firing the Secretary of War was to create a justiciable controversy for the Supreme Court to resolve.<sup>187</sup> They maintained that it was permissible for a President to violate a statute in order to enlist the judiciary to defend his prerogatives.<sup>188</sup>

This argument was revolutionary. Before the Civil War, the executive veto had been the main tool with which presidents defended their claimed prerogatives from congressional interference. But President Johnson's lawyers now argued that even after a bill became a law, the President continued to have the independent authority to evaluate the constitutionality of *existing* legislation and to decline to faithfully execute a law that a court might invalidate. The President's lawyers, in other words, argued that a President was never really bound by an allegedly unconstitutional law: if a bill escaped his veto at its inception, he could wield a second veto by violating the law to initiate a lawsuit challenging its constitutionality.

The House managers seized on the President's double-veto argument and made it central to their position that the President had committed an impeachable offense by attempting to violate a federal statute.<sup>189</sup> Drawing on English history, they observed that Charles I and James II had been deposed in part because they claimed the power to unilaterally violate enacted legislation.<sup>190</sup> The managers quoted language from the English Bill of Rights that explicitly prohibited the Crown from exercising a dispensation power.<sup>191</sup> They also explained that the U.S. Constitution imposed a similar duty on the President to "take care that the laws be faithfully executed."<sup>192</sup> The managers therefore concluded that regardless of the Tenure of Office Act's constitutionality or applicability to Johnson's

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**186.** 1 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 38-42.

**187.** *Id.* at 42.

**188.** *Id.* at 46.

**189.** *Id.* at 109-10.

**190.** See 3 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 125-26; 2 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 466.

**191.** 2 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 466 (referencing Bill of Rights 1688, 1 W. & M. c. 2).

**192.** *Id.* at 53 (quoting U.S. CONST. art. II, § 3).

secretary of war, it was unquestionably unconstitutional for the President to attempt to violate the Act or any other legislation.<sup>193</sup>

This argument merged into the House managers' related claim that the President had violated a statute that fell well within Congress's power to regulate the presidency. Conceding that Article II gave the President the default power to remove executive officers absent statutory authority, the managers observed that Article I empowered Congress to "make all laws which shall be necessary and proper for carrying into execution" that removal power.<sup>194</sup> They therefore called it absurd to suggest that in addition to giving the President a removal power, Article II also implicitly gave him the "more than kingly prerogative"<sup>195</sup> to do so "without any restraint whatever, or possibility of restraint by the Senate or by Congress through laws duly enacted."<sup>196</sup> Even if the Constitution vested the President with the same executive power once possessed by the English monarchy, they added, no monarch had ever been immune from the limitations imposed by a statute.<sup>197</sup> The managers therefore found it far more reasonable to interpret the Constitution as empowering Congress to regulate the President's implied power of removal. "Is not the whole frame of government one of checks, balances, and limitations?" they asked. "Is it to be believed that our fathers, just escaping from the oppressions of monarchical power, and so dreading it that they feared the very name of king, gave this more than kingly power to the Executive, illimitable and uncontrollable, and that too by implication merely?"<sup>198</sup> The managers answered their own question: no.

The managers also responded to the President's argument that the congressional debate from 1789 had "settled" the issue in his favor. They first observed that the 39th Congress could not have been bound by a debate in the First Congress.<sup>199</sup> They then turned the alleged settlement on its head, observing that the "power of regulation of the tenure of office, and the manner of removal, has always been exercised by Congress unquestioned until now."<sup>200</sup> "Certainly no such unlimited power has ever been claimed by any of the earlier Presidents as has now been set up for the President by his most remarkable, aye, criminal answer," they said.<sup>201</sup> President Johnson himself had signed into law the 1866 military

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**193.** *Id.* at 74, 107-08.

**194.** 3 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 165 (quoting U.S. CONST. art. I, § 8, cl. 18).

**195.** 2 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 427.

**196.** 1 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 96.

**197.** *See* 2 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 231, 466.

**198.** 1 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 98.

**199.** *Id.* at 97.

**200.** *Id.* at 100.

**201.** *Id.* at 99.

appropriation act, which prohibited the President from removing military officers absent a court-martial. “In the snow-storm of his vetoes,” the managers asked, “why did no flake light down on this provision? It concludes the whole question here at issue.”<sup>202</sup>

Few, if any, Republican senators in 1868 disagreed with the House managers about the impeachability of a President’s violation of a statute or the unimpeachability of the Tenure of Office Act. But two of the Act’s authors in the Senate insisted that President Johnson had not violated the Act’s literal terms.<sup>203</sup> Although some historians have proposed less principled reasons for these senators’ opposition,<sup>204</sup> the two defiant senators joined five other Republicans to vote not to convict Johnson, leading to his acquittal by a single vote.

Although the acquittal shocked the nation, it didn’t necessarily repudiate the House managers’ or Republican voters’ understanding of Congress’s powers to regulate the presidency. When the removed Secretary, Edward Stanton, died in 1870, Republican officeholders heaped praise on him for remaining at his post to resist the President’s policy of “imperilling the interests of the freedmen as well as the safety of the nation.”<sup>205</sup>

Later Congresses also reaffirmed the constitutionality of the Tenure of Office Act even as they amended its coverage as a matter of policy. When Ulysses S. Grant succeeded President Johnson in 1869 on a platform that supported Congress’s Reconstruction program, Congress and the new President loosened the restrictions of the Tenure of Office Act.<sup>206</sup> But the amended Act continued to prohibit President Grant from removing principal officers absent Senate consent, permitting the President only to “suspend” and replace such officers with acting officers, and then only during Senate recesses.<sup>207</sup> Congress also left on the books the military appropriation acts of 1866 and 1867, guaranteeing the continued independence of the generals administering Reconstruction. And in 1872, when Congress and President Grant reorganized the Post Office Department, they authorized the President to remove high-ranking officers in the department

**202.** *Id.* at 102.

**203.** See 3 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 322-23 (opinion of Sen. Lyman Trumbull); *id.* at 333. Even William Dunning agreed upon this point. See DUNNING, ESSAYS, *supra* note 17, at 293 (“The vital principle of our constitution involved in this question could not be brought to a direct issue in the present case on account of a special doubt that arose as to whether the leading provision of the Tenure-of-Office Act applied to Secretary Stanton. At least two of the Republican senators who voted for conviction on the other articles, expressed their inability to resolve this doubt . . .”).

**204.** See, e.g., GORDON-REED, *supra* note 160, at 138-39.

**205.** Henry Wilson, *Edwin M. Stanton*, ATLANTIC MONTHLY, Feb. 1870, at 234, 244.

**206.** Act of Apr. 5, 1869, ch. 10, 16 Stat. 6.

**207.** *Id.*

only with Senate consent.<sup>208</sup> Even after Democrats took control of the House of Representatives in 1875, Congress expanded this tenure protection to include lower-ranking postmasters – an expansion the Supreme Court would review fifty years later.<sup>209</sup>

In the meantime, Congress spent the early 1870s reaffirming its legal authority to pass statutes regulating both the presidency and the recalcitrant state legislatures that had resisted black enfranchisement. But this legal authority soon ran into political challenges. While congressionally supported multiracial legislatures began funding public schools and enacting antidiscrimination laws, armed ex-Confederates formed paramilitary organizations such as the Ku Klux Klan.<sup>210</sup> In the name of “redeeming” their states from “Negro rule,” thousands of white Southerners terrorized black voters away from the polls.<sup>211</sup> When all-white local juries acquitted even the most brazen lynch mobs, Congress authorized federal attorneys to prosecute deprivations of civil rights in federal courts.<sup>212</sup> But these occasional prosecutions were insufficient to deter large-scale purges of Republican voters. By 1875, the South had elected enough Democratic members to the House of Representatives to wrest control from Republicans for the first time since 1859, leading to the end of Reconstruction.<sup>213</sup>

### B. *Dunning and the Idea of Separation-of-Powers Juristocracy*

When representatives of an ascendant white South arrived in the nation’s capital, they brought with them a new ideology: the Lost Cause. Led by the former President of the Confederacy, Jefferson Davis, Southern memoirists and historians in the late 1860s and early 1870s called for a reconciliation between North and South on the shared principles of brotherhood and white supremacy.<sup>214</sup> These writers repeated President Johnson’s call for a return to the prewar racial

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**208.** Act of June 8, 1872, ch. 335, § 2, 17 Stat. 283, 284.

**209.** See Act of July 12, 1876, ch. 179, 19 Stat. 78, 80-81; *Myers v. United States*, 272 U.S. 52 (1926).

**210.** See FONER, *supra* note 146, at 425-44, 454-59.

**211.** See *id.* at xxii, 588-601.

**212.** See RON CHERNOW, GRANT 700-02 (2017); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 113-17 (2008); see also Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 161 (2014) (discussing the Enforcement Acts).

**213.** FONER, *supra* note 146, at 553.

**214.** See DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 259-92 (2003).

and constitutional order, arguing that “the war did not decide Negro equality.”<sup>215</sup> Davis, for example, argued that the South had never fought for slavery, but for a national commitment to the autonomy of states from congressional control. He contended that the entire country should “rejoice in the regained possession of local-self government” by the South and “in the power of people to . . . legislate uncontrolled by bayonets.”<sup>216</sup>

The Supreme Court was the first federal branch of government to heed this new call. Although President Grant supported Reconstruction, he appointed new Justices who were better known for their commitment to corporate power than congressional power or racial equality.<sup>217</sup> At home in the milieu of elite Northern white moderates who grew cynical about whether Southern violence could be purged by the federal government, the Justices began to treat federalism as an implied legal limit on Congress’s capacity to regulate the states – even when Congress was exercising one of its enumerated powers.<sup>218</sup> The Court also transfigured the Reconstruction Amendments from a revolutionary protection of workers’ rights into an antediluvian protection of property rights, holding that “we do not see in those amendments any purpose to destroy the main features of the general system” that predated the Civil War.<sup>219</sup> The Court drastically narrowed Congress’s powers to enforce these amendments in decisions such as the 1883 *Civil Rights Cases*, which struck down a major antidiscrimination law on the theory that recognizing Congress’s power to protect the liberty of individual citizens would empower Congress to “take the place of the State legislatures and to supersede them.”<sup>220</sup> As a sign of the Lost Cause’s influence twenty years after the Emancipation Proclamation, the Court added that it was time for black people to stop being “the special favorite of the laws” by “running the slavery argument

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**215.** EDWARD A. POLLARD, *THE LOST CAUSE: A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES* 752 (New York, E.B. Treat & Co. 1866), *quoted in* BLIGHT, *supra* note 214, at 51.

**216.** BLIGHT, *supra* note 214, at 264.

**217.** *See* DU BOIS, *supra* note 16, at 690; RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877*, at 292-93 (1990).

**218.** *See* *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124-25 (1870); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 129-30* (2019). For an early example of this cynicism, see Letter from Charles Francis Adams to Richard Henry Dana (Apr. 19, 1865), *as reprinted in* 2 CHARLES FRANCIS ADAMS, RICHARD HENRY DANA: A BIOGRAPHY 331 (Boston, Houghton, Mifflin & Co. 1890).

**219.** *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 82 (1873); *see also, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876) (limiting Congress’s power to enforce the Fourteenth Amendment); *United States v. Harris*, 106 U.S. 629 (1883) (same); *United States v. Reese*, 92 U.S. 214 (1876) (same with the Fifteenth Amendment).

**220.** *Civil Rights Cases*, 109 U.S. 3, 13 (1883).

into the ground.”<sup>221</sup> Capturing the pain of black readers, Frederick Douglass lamented, “We have been . . . grievously wounded . . . in the house of our friends.”<sup>222</sup>

It was in this context that Woodrow Wilson wrote his 1885 study of the U.S. Constitution, *Congressional Government*.<sup>223</sup> A young political scientist raised in Georgia during Reconstruction, he observed that Congress had become the supreme institution of American government.<sup>224</sup> Wilson recognized the Supreme Court’s recent federalism decisions as a potential restraint on Congress, but he saw the judiciary as an imperfect check. For one thing, Wilson observed that the Court had never stepped in to defend the presidency as it was now defending the states.<sup>225</sup> For another, Wilson guessed that if the Court had tried to intervene earlier when Reconstruction was still popular, a motivated Congress would have limited the Court’s jurisdiction or threatened to pack the Court with favorable appointments.<sup>226</sup> Wilson concluded that federalism and the separation of powers were therefore bygone relics of an eighteenth-century political imagination that had failed to stand up to modern pressures. From his perspective, Reconstruction had proven that the legal constraints implied by the “paper pictures of the Constitution” were far less effective checks on Congress than the political constraints that had acquitted President Johnson in 1868 and put Democrats in control of the House of Representatives in 1875.<sup>227</sup>

Wilson’s descriptive account of congressional supremacy was widely shared,<sup>228</sup> but his conclusion that politics could provide the only constraint on Congress was not. Instead, some memoirists and Lost Cause historians noticed that the Supreme Court’s recent federalism decisions were constitutionalizing the same legal limits on Congress that President Johnson had earlier called for in his veto messages.<sup>229</sup> “That a similar decision would have been made on the Tenure-of-Office Act, if the question had come before that court, is not now, I think,

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**221.** *Id.* at 24-25.

**222.** BLIGHT, *supra* note 214, at 309.

**223.** WILSON, *supra* note 141.

**224.** *Id.* at 52.

**225.** *Id.* at 34-37.

**226.** *Id.* at 37-39.

**227.** *Id.* at 12-13.

**228.** *See, e.g.*, Henry Brooks Adams, *Civil-Service Reform*, 109 N. AM. REV. 443, 458-60 (1869).

**229.** *See, e.g.*, HUGH McCULLOCH, *MEN AND MEASURES OF HALF A CENTURY* 405-06 (New York, Charles Scribner’s Sons 1889); DUNNING, *ESSAYS*, *supra* note 17, at 269-70; William A. Dunning, *The Undoing of Reconstruction*, ATLANTIC MONTHLY, Oct. 1901, at 437, 441-43 (praising the Supreme Court’s federalism cases for allowing “Southern whites [to make] enormous positive advances in the suppression of the other race,” *id.* at 443).



denied by anybody whose opinion upon a constitutional question is worth anything,” one author wrote.<sup>230</sup> As contemporary writers continued to hammer away at Reconstruction’s premise of racial equality, they slowly rehabilitated Johnson into a heroic defender of constitutional limits on Congress who had tragically failed to stop Reconstruction in part because the Supreme Court had not been able to protect him.<sup>231</sup> “Our literature has become not only Southern in type, but distinctly Confederate in sympathy,” one critic lamented in 1888.<sup>232</sup>

President Johnson’s redemption tour began in 1884, nine years after the final major Reconstruction statute. James G. Blaine was running as the Republican candidate for President. During the 1860s, Blaine had been a moderate member of the House who voted for its impeachment of President Johnson.<sup>233</sup> But Blaine consistently worried that the Republican Party’s embrace of racial equality would cost it political support in the North – an acceptance of racial hierarchy that his progressive colleagues criticized as “Andy Johnsonism.”<sup>234</sup> Working to defeat one civil-rights bill in 1875, he opined that “it was better to lose the South and save the North, than try through legislation to save the South, and thus lose both North and South.”<sup>235</sup> He carried this belief forward in his 1884 presidential campaign, running on a platform of national reconciliation. In a memoir he published during his presidential campaign, Blaine repudiated the most controversial elements of his career, including his vote to impeach Johnson. Although Blaine had also voted for the Tenure of Office Act of 1867, he now called it a “blunder” and an “extreme proposition, – a new departure from the long established usage of the Federal Government, and, for that reason, if for no other, personally degrading to the incumbent of the Presidential office.”<sup>236</sup> He also praised Johnson’s veto message as “a very able document” written by a person

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**230.** McCULLOCH, *supra* note 229, at 405-06; *see also* 2 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS 273-74 (Norwich, The Henry Bill Publishing Co. 1886).

**231.** *See, e.g.*, EDMUND G. ROSS, HISTORY OF THE IMPEACHMENT OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BY THE HOUSE OF REPRESENTATIVES, AND HIS TRIAL BY THE SENATE FOR HIGH CRIMES AND MISDEMEANORS IN OFFICE, 1868, at 164, 169-72 (Santa Fe, New Mexican Printing Co. 1896) (describing the Supreme Court as “the umpire before which all differences [regarding the separation of powers] must be determined,” and arguing that its independence and interpretive supremacy were on trial during the Johnson impeachment); DUNNING, ESSAYS, *supra* note 17, at 269-71 (describing Congress’s impeachment of Johnson as part of an attempt to evade judicial review of the Tenure of Office Act).

**232.** Albion W. Tourgée, *The South as a Field for Fiction*, FORUM, Dec. 1888, at 405, *quoted in* BLIGHT, *supra* note 214, at 220.

**233.** *See* FONER, *supra* note 146, at 241.

**234.** JEFFERY A. JENKINS & JUSTIN PECK, CONGRESS AND THE FIRST CIVIL RIGHTS ERA, 1861-1918, at 110-11, 194 (2021).

**235.** *Id.* at 194.

**236.** BLAINE, *supra* note 230, at 271-74.



who “might confidently have anticipated the verdict of history in his favor.”<sup>237</sup> Nevertheless, Blaine lost a close election that November to Grover Cleveland, who became the first Democratic president since the Civil War.

Many Republicans did not share Blaine’s antipathy toward Congress’s power to regulate the removal of officers – including the Republicans who sat on the Supreme Court.<sup>238</sup> In the 1879 case *Embry v. United States*, for example, the Court considered a deputy postmaster whose job had been suspended by the President under the terms of the Act.<sup>239</sup> The postmaster sued for his lost salary, complaining that the President had no constitutional power to remove Senate-confirmed officers like him without the consent of the Senate.<sup>240</sup> The postmaster’s theory was, remarkably, the opposite of President Johnson’s theory from his impeachment trial. But the Solicitor General responded with the same argument made by the House managers: Congress had full power to regulate the suspension or removal of officers by statute. “If constitutional warrant for the exercise of the legislative power is sought, it is readily found in the general grant of authority to make all laws necessary and proper,” he wrote. “The tenure-of-office acts are clearly within this grant . . . .”<sup>241</sup>

Like Madison in 1789, the Solicitor General in *Embry* also expressed incredulity that a court could invalidate a statute merely because an individual alleged that it violated the separation of powers. “[W]hat reason can be given for limiting the legislative power? Whose constitutional right is taken away by it? Is it alleged to be that of the Senate or President?” he asked. “The Senate united in the legislative act and the President has accepted its authority. The claimant is not guardian of their rights . . . .”<sup>242</sup> In other words, the Solicitor General maintained that if the Tenure of Office Act interfered with one of the branches, it was up to that branch to defend its prerogatives in the legislative process: “[T]he expediency or justice of [the Act’s] provisions are not revisable by the judiciary.”<sup>243</sup> In a brief opinion, the Supreme Court wrote that it would be unwise for the judiciary to resolve the “important constitutional question which has at times

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**237.** *Id.*

**238.** See, e.g., Geo. S. Boutwell, *Johnson’s Plot and Motives*, 141 N. AM. REV. 570, 572-73 (1885).

**239.** *Embry v. United States*, 100 U.S. 680, 683-84 (1879).

**240.** Brief of Appellant at 4, *Embry*, 100 U.S. 680 (No. 253).

**241.** Brief of Appellee at 3-4, *Embry*, 100 U.S. 680 (No. 253).

**242.** *Id.* at 3.

**243.** *Id.* at 4.

occupied the attention of the political department of the government.”<sup>244</sup> It concluded only that “Congress has full control of salaries” and therefore dismissed Embry’s claim for his lost paychecks.<sup>245</sup>

The Supreme Court also upheld and applied the military appropriation acts that continued to protect military officers from being removed absent a court martial. In 1881’s *Blake v. United States*, the Court interpreted the acts in light of the 1866 Congress’s desire to ensure that military officers would “carry out the policy of Congress, as indicated in the reconstruction acts.”<sup>246</sup> A year later, in *United States v. Perkins*, the Court applied the acts to prohibit the Secretary of the Navy from unilaterally removing a naval cadet.<sup>247</sup>

But while these military appropriation acts survived without controversy, Blaine’s memoir and his defeat in the presidential election of 1884 doomed the civil Tenure of Office Act. The newly elected Democratic President, Grover Cleveland, provoked a standoff with the Republican-controlled Senate when he unilaterally “suspended” various Republican officeholders as the amended Act appeared to allow.<sup>248</sup> In response, the Senate requested information about the President’s grounds for suspending a particular Republican prosecutor in Alabama.<sup>249</sup> To enforce its request, the Senate refused to confirm President Cleveland’s nominees until the President complied.<sup>250</sup>

In a message that rejected the Senate’s request for information as unjustified, Cleveland also condemned the 1867 Act itself as a law “passed under a stress of partisanship and political bitterness” by a Congress “determined upon the subjugation of the Executive to legislative will.”<sup>251</sup> Unwilling to concede the constitutionality of the Act, he and his allies in Congress soon called for its repeal.<sup>252</sup> In 1887, William Ruffin Cox, a Democrat and former general in the Confederate Army, gleefully quoted excerpts from James Blaine’s memoir as he introduced a bill in the House “to remove from the statute-book an obnoxious restriction on the constitutional prerogatives of the President, and leave the law as it stood

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**244.** *Embry*, 100 U.S. at 684-85.

**245.** *Id.* at 684.

**246.** *Blake v. United States*, 103 U.S. 227, 235-36 (1881).

**247.** *United States v. Perkins*, 116 U.S. 483, 484-85 (1886).

**248.** See ALYN BRODSKY, *GROVER CLEVELAND: A STUDY IN CHARACTER* 134-38 (2000).

**249.** *Id.* at 135-37.

**250.** *Id.*

**251.** 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 163, at 379-80.

**252.** See *id.* at 381 (“The constitutionality of these laws is by no means admitted.”); BRODSKY, *supra* note 248, at 138.

from the foundation of this Government up to 1867.”<sup>253</sup> He called the 1867 Act “unconstitutional,” “embarrassing,” and “a measure arising out of the suspicions and mistrust of an internecine war.”<sup>254</sup> But in the Republican-controlled Senate, where fewer members agreed that the Tenure of Office Act was unconstitutional, supporters of repeal focused on the Act’s practical effect. “I think we shall all feel, if all will not confess, that the legislation of 1867, however patriotic, and . . . however constitutional, was a piece of legislation that was improvident,” said Senator William Evarts, a Republican veteran of President Johnson’s bipartisan defense team.<sup>255</sup> His colleagues agreed to repeal “the constraint over the Executive, which was the product of *ad hominem* legislation.”<sup>256</sup>

In the wake of the Tenure of Office Act’s repeal, academic historians joined Blaine and the House Democrats in praising President Johnson as a prescient guardian of the Constitution whose separation-of-powers arguments would one day be vindicated by the Supreme Court—just as his federalism arguments had already been.<sup>257</sup> The most influential of these historians was William Archibald Dunning, a Southerner teaching at Columbia University whose scholarly work and graduate students would dominate mainstream accounts of Reconstruction through the 1960s.<sup>258</sup> At a time when the modern norms of professional historians were still in their infancy, Dunning offered a nominally objective account of Reconstruction that drew heavily on the work of Lost Cause apologists.<sup>259</sup> Illustrating what W.E.B. Du Bois later called “a nation-wide university attitude . . . by which propaganda against the Negro has been carried on unquestioned,”<sup>260</sup> Dunning’s essays characterized Johnson as a person who “felt his duty to sustain the constitution” from “radicals in Congress” who felt “that the constitution should not be sustained.”<sup>261</sup>

On Dunning’s account, the Tenure of Office Act was not simply a novel application of Congress’s power to regulate the executive branch. It was an “asser-

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**253.** 18 CONG. REC. 2698-99 (Mar. 3, 1887); *see also* H.R. REP. NO. 49-3539 (Jan. 8, 1887) (formally introducing the bill).

**254.** 18 CONG. REC. 2698 (Mar. 3, 1887).

**255.** 18 CONG. REC. 217 (Dec. 16, 1886).

**256.** *Id.*

**257.** *See, e.g.,* ROSS, *supra* note 231, at 166; MCCULLOCH, *supra* note 229, at 405-06.

**258.** *See* James S. Humphreys, *William Archibald Dunning: Flawed Colossus of American Letters*, in *THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION* 77, 77 (John David Smith & J. Vincent Lowery eds., 2013).

**259.** *See* DU BOIS, *supra* note 16, at 719.

**260.** *Id.*

**261.** DUNNING, *ESSAYS*, *supra* note 17, at 254; *see* BLIGHT, *supra* note 214, at 358.

tion of congressional supremacy over the judicial and executive branches of government” in order to effect “congressional supremacy in the conquered South.”<sup>262</sup> According to Dunning, “the ultimate root of the trouble in the South had been, not the institution of slavery, but the coexistence in one society of two races so distinct in characteristics as to render coalescence impossible . . . .”<sup>263</sup> Once slavery ended, it had to be replaced by some set of conditions that “must in essence express the same fact of racial inequality.”<sup>264</sup> Yet rather than embrace this natural inequality, congressional Republicans imposed bayonet rule on the South to enact a disastrous policy in which “the negroes exercised an influence in political affairs out of all relation to their intelligence or property, and, since so many of the whites were disfranchised, excessive even in proportion to their numbers.”<sup>265</sup> President Johnson, by contrast, “had none of the brilliant illusions that beset the . . . radicals as to the political capacity of the blacks . . . .”<sup>266</sup> For his intransigence, Congress attempted to emasculate his power just as it had emasculated the power of the white South.<sup>267</sup>

From Dunning’s perspective, the impeachment of President Johnson

was the result and culmination of a series of assaults on the executive power which for a time carried the centre of gravity of our constitutional system as near to the revolution point on the legislative side as the exigencies of civil war had a few years before carried it on the executive side.<sup>268</sup>

Because the President resisted congressional Reconstruction, Dunning wrote, “his military authority as commander-in-chief was shorn of essential attributes; and his civil prerogative received a terrible blow through the Tenure-of-Office Act . . . .”<sup>269</sup> Impeachment was the logical consequence of “Mr. Johnson’s struggles to tear away the meshes which Congress was so mercilessly weaving about him.”<sup>270</sup> Dunning described the Tenure of Office Act as nothing less than a legislative coup d’état whose objective was to convert the government, “by force, from the balanced system of the fathers into the dominion of a party caucus. Submission to the dictates of this oligarchy was to be enforced through the army,

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**262.** DUNNING, RECONSTRUCTION, *supra* note 17, at 86-89, 93.

**263.** Dunning, *supra* note 229, at 449.

**264.** *Id.*

**265.** *Id.* at 438.

**266.** DUNNING, RECONSTRUCTION, *supra* note 17, at 38.

**267.** *Id.* at 90-91.

**268.** DUNNING, ESSAYS, *supra* note 17, at 260.

**269.** *Id.* at 261 (footnote omitted).

**270.** *Id.*

against all efforts of the President to defend the rights conferred upon him by the constitution.”<sup>271</sup>

In describing the impeachment proceedings, Dunning explained that what was at stake was not simply Reconstruction or President Johnson’s administration, but the future of the separation of powers. Congress “sought to crush once for all the independence of the executive,” and had it succeeded, “the co-ordination of the departments in the American system would have been a thing of the past.”<sup>272</sup> Although Dunning recognized the novelty of Johnson’s argument that a President could violate an allegedly unconstitutional statute, Dunning sympathized with the President’s position that “there is no good reason why he should not take steps toward securing an opinion on the act from the third department of the government” – the judiciary.<sup>273</sup> “For the purpose, then, of defending his right through the courts of law, and for this purpose alone, the preservation of the constitution warrants the executive in transgressing duly enacted legislation,” Dunning concluded.<sup>274</sup> It was only because Johnson violated the Tenure of Office Act and repudiated congressional supremacy that “the Presidential element in our system escaped destruction.”<sup>275</sup>

Dunning’s analysis was not the first to lionize the former President. But it made the argument in legalistic terms. And, as one historian has recently written, “[f]ew challenges to the Dunning view . . . arose during Dunning’s lifetime, as the pervasive racism in American society and the widespread desire to promote sectional reconciliation created a congenial environment for the acceptance of a prowhite Southern view of Reconstruction.”<sup>276</sup> In the wake of his essays, historians from university seminars to high school classrooms described the Reconstruction Congress as full of unprincipled fanatics who would have eliminated all checks on their own authority if not for President Johnson.<sup>277</sup> “Our will alone is the source of law,” declared Radical Republicans in Thomas Dixon’s 1905 novel *The Clansman* – later adapted into the blockbuster film *The Birth of a Nation* – as they impeached Johnson for impeding what Dixon called “the most stupendous crime ever conceived by an English law-maker, involving the exile and ruin of

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**271.** *Id.* at 268.

**272.** *Id.* at 290.

**273.** *Id.* at 292.

**274.** *Id.*

**275.** *Id.* at 303.

**276.** Humphreys, *supra* note 258, at 78.

**277.** DU BOIS, *supra* note 16, at 699-710; C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 77-81 (1955); *see, e.g.*, DAVID MILLER DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON, SEVENTEENTH PRESIDENT OF THE UNITED STATES: A HISTORY* (1903); CHARLES ERNEST CHADSEY, *THE STRUGGLE BETWEEN PRESIDENT JOHNSON AND CONGRESS OVER RECONSTRUCTION* (Columbia University 1896).

millions of innocent men, women, and children.”<sup>278</sup> As W.E.B. Du Bois later wrote, there was “scarce a child in the street that cannot tell you that [Reconstruction] was a hideous mistake and an unfortunate incident . . . [and] that the history of the United States from 1866 to 1876 is something of which the nation ought to be ashamed.”<sup>279</sup>

Even historians who disagreed with President Johnson’s violation of a statute universally accepted that his actions “preserved the constitutional balance between the executive and the legislature.”<sup>280</sup> By 1901, Woodrow Wilson modified his view of congressional supremacy from his earlier account in *Congressional Government*.<sup>281</sup> Instead of describing Congress’s postwar influence as the inevitable consequence of its power to pass all necessary and proper legislation, Wilson now described the leaders of the Reconstruction Congress as having “no scruples about keeping to constitutional lines of policy . . . . The negroes were exalted; the states were misgoverned and looted in their name,” and “the relative positions of the President and Congress in the general constitutional scheme of the government” were almost forever transformed.<sup>282</sup>

Members of the federal bench and bar also began to consider themselves responsible for belatedly vindicating President Johnson’s understanding of the separation of powers. Nowhere was this shift more evident than in the career of William Howard Taft. Born in Ohio shortly before the Civil War, Taft was a lifelong Republican who nevertheless sympathized with the Democratic Party’s criticism of Reconstruction.<sup>283</sup> Although his father served as Attorney General under President Grant, Taft graduated from Yale with a strong belief in “the states’ rights principle” and the need for a “close watch . . . over the encroachments of the general government.”<sup>284</sup> Taft believed that law, not politics, should provide this close watch—particularly after he rapidly ascended from law school to the Ohio judiciary.

When the young Taft was appointed U.S. Solicitor General in 1890, he joined his predecessors in defending laws similar to the Tenure of Office Act as ordinary

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**278.** THOMAS DIXON, JR., *THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN* 152, 160 (1905).

**279.** DU BOIS, *supra* note 16, at 717.

**280.** BURGESS, *supra* note 14, at 194.

**281.** See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 128 (1987) (describing Wilson’s vision for executive independence).

**282.** Wilson, *The Reconstruction of the Southern States*, *supra* note 145, at 8, 11-12.

**283.** See, e.g., Letter from William Howard Taft to Pierce Butler 2-3 (Sep. 16, 1925) (on file at the Library of Congress, William H. Taft Papers, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-276\\_0020\\_1257/?sp=703&r=-1.094,-0.043,3.189,1.427,0](https://www.loc.gov/resource/mss42234.mss42234-276_0020_1257/?sp=703&r=-1.094,-0.043,3.189,1.427,0) [<https://perma.cc/JA7B-HDMY>].

**284.** 1 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 43 (1939).

legislation within Congress's power to regulate federal officers.<sup>285</sup> But he added that the repeal of the Tenure of Office Act reflected "the general policy of Congress in securing to the President control over officers whose duties are purely executive."<sup>286</sup> Over the next few years, as Dunning published his essays and Taft left the Solicitor General's Office to become a federal judge and then a colonial administrator, Taft began to describe this general policy as a constitutional requirement.<sup>287</sup>

Taft's views against the Act may have hardened further during his own tenure as the Governor-General of the Philippines. During his administration, Southern members of Congress repeatedly campaigned "against inflicting 'carpetbag rule' on the Filipinos."<sup>288</sup> Worried about the immigration of brown-skinned people to the United States, these members of Congress "missed no opportunity to remind Northerners to do their part in preventing anything like Reconstruction from ever happening again in America."<sup>289</sup>

By 1906, when Taft was serving in President Theodore Roosevelt's cabinet as Roosevelt's handpicked successor, he publicly argued that it was time for the federal judiciary to begin enforcing the "line between proper legislative limitation upon the mode of exercise of executive power and unconstitutional restriction."<sup>290</sup> According to Taft, the history of Reconstruction and its aftermath had demonstrated that "Congress in its legislation has frequently failed to recognize a thing which the Constitution certainly intended, to wit: freedom of discretion in executive matters for the Chief Magistrate and his subordinates."<sup>291</sup> Taft pointed to the Tenure of Office Act as the most prominent example of an "undue stretch of legislative power." And he argued that the Supreme Court was the only body capable of determining "whether Congress is acting within its constitutional limitations."<sup>292</sup>

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**285.** See Brief for the United States at 3-4, 18, *McAllister v. United States*, 141 U.S. 174 (1891) (No. 238).

**286.** See Supplemental Brief for the United States at 2, *McAllister*, 141 U.S. 174 (No. 238).

**287.** See THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 6 (David H. Burton & A.E. Campbell eds., 2001).

**288.** GAINES M. FOSTER, *GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH 1865 TO 1913*, at 150 (1987).

**289.** BLIGHT, *supra* note 214, at 353; see Adam David Burns, *An Imperial Vision: William Howard Taft and the Philippines, 1900-1921*, at 21 (2010) (Ph.D. dissertation, University of Edinburgh), <https://era.ed.ac.uk/bitstream/handle/1842/4506/Burns2010.pdf> [<https://perma.cc/ZX2F-KBDR>] ("Taft appears to have adopted what was an increasingly accepted [racial attitude] for someone of his class and education.")

**290.** WILLIAM HOWARD TAFT, *FOUR ASPECTS OF CIVIC DUTY* 108 (1906).

**291.** *Id.*

**292.** *Id.* at 59.



Taft's election as President in 1908 did nothing to dispel his view that federal courts had a duty to restrain the worst impulses of legislatures. "There was a time when Northerners who sympathized with the negro in his necessary struggle for better conditions sought to give him the suffrage as a protection to enforce its exercise against the prevailing sentiment of the South," Taft declared in his inaugural address. "The movement proved to be a failure."<sup>293</sup> By promising that the federal government would no longer "interfere with the regulation by Southern States of their domestic affairs,"<sup>294</sup> Taft became the first Republican president ever to publicly repudiate his party's historic commitment to protecting the civil rights of black people.<sup>295</sup> Taft later anticipated the fiftieth anniversary of the Civil War by speaking directly to Confederate veterans, expressing pride in the "common heritage" they shared as well as the "courage and fortitude shown by both sides."<sup>296</sup> He believed "the Negro represented one of the gravest problems that had ever presented itself to the American people" – a "problem" that would be solved not by federal laws, but by vocational training programs.<sup>297</sup>

But the new President was not opposed to federal intervention in all contexts. Taft was elected amid growing concern that federal courts were too readily interfering with labor disputes and the legislative process – an interference that today is identified with the 1905 decision *Lochner v. New York*.<sup>298</sup> In response to this concern, Taft insisted that "the authority of the courts shall be sustained," and that he would oppose any federal legislation "by which the powers of a court may be weakened and the fearless and effective administration of justice be interfered with."<sup>299</sup>

Ever the judge, President Taft redecorated the Oval Office by removing his predecessor's political trinkets and replacing them with bookcases "filled with

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**293.** William Howard Taft, Inaugural Address (Mar. 4, 1909), in 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 163, at 7376.

**294.** *Id.*

**295.** *Id.*; see IRA KATZNELSON, FEAR ITSELF 133-35 (2013) ("This declaration of federal inaction initiated a period, lasting well into the New Deal, when the federal government took a hands-off stance with respect to southern race relations.").

**296.** BLIGHT, *supra* note 214, at 355-56.

**297.** William Howard Taft, Negro Problem: General Summary and Future Outlook 2, 3-6 (undated) (William H. Taft Papers, Library of Congress, ser. 9), [https://www.loc.gov/resource/mss42234.mss42234-592\\_0020\\_1137/?sp=504&r=-1.075,-0.009,3.15,1.41,0](https://www.loc.gov/resource/mss42234.mss42234-592_0020_1137/?sp=504&r=-1.075,-0.009,3.15,1.41,0) [https://perma.cc/WA2E-Q564].

**298.** 198 U.S. 45 (1905).

**299.** Taft, *supra* note 293, at 7378.

law-books, nothing but law books.”<sup>300</sup> But he could not escape the world of politics – or the power of a hostile Congress – by retreating to a world of law. When Taft sought to remove partisan considerations from executive branch appointments by authorizing the employment of officers through competitive civil-service examinations, Taft found it impossible to fully wrest the bureaucracy away from the Senate, who used appointments as major sources of local patronage, particularly in the enormous Department of the Post Office.<sup>301</sup> Like President Johnson before him, he even resorted to defying an act of Congress – this one governing the budget process – that he thought would “permit the legislative branch of the Government to usurp the functions of the Executive and to abridge the executive power in a manner forbidden by the Constitution.”<sup>302</sup>

Taft also witnessed the danger of having subordinates beyond the President’s control. Early in his term, the Chief of the U.S. Forest Service, Gifford Pinchot, began publicly criticizing the administration’s conservation policy.<sup>303</sup> An ideologically progressive holdover from the Roosevelt administration, Pinchot regarded Taft’s Secretary of the Interior, Richard A. Ballinger, as a corrupt conservative in the pocket of mining corporations.<sup>304</sup> When Taft unsuccessfully tried to silence Pinchot by firing him, the House of Representatives conducted hearings into Pinchot’s allegations that humiliated the President.<sup>305</sup> By the end of the Pinchot-Ballinger hearings, even former-President Roosevelt became convinced that Taft was undermining his progressive legacy. Roosevelt ultimately decided to run against Taft in the 1912 election on a third-party, “Bull Moose” ticket.<sup>306</sup>

The 1912 presidential election reinforced for Taft the need for the Supreme Court to protect the presidency from the whims of a legislature prone to demagoguery. He drew upon the prevailing Dunning School ideology to make his defense of the courts persuasive. The Court itself was a major issue of the campaign because former-President Roosevelt ran on a broadly progressive platform

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**300.** DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* 590 (2013).

**301.** 2 PRINGLE, *supra* note 284, at 609-12; see Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 60-62 (2022).

**302.** DONALD F. ANDERSON, *A CONSERVATIVE’S CONCEPTION OF THE PRESIDENCY 89-90* (1973); Rene N. Ballard, *The Administrative Theory of William Howard Taft*, 7 W. POL. Q. 65, 71-73 (1954).

**303.** See GOODWIN, *supra* note 300, at 605-39; STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 190-91 (1982).

**304.** GOODWIN, *supra* note 300, at 605-39.

**305.** SKOWRONEK, *supra* note 303, at 190-91.

**306.** GOODWIN, *supra* note 300, at 676-77.

opposed to *Lochner*-style decisions.<sup>307</sup> Calling the judicial review of statutes “fundamentally hostile to every species of real popular government,”<sup>308</sup> Roosevelt called for new restraints on the Supreme Court’s power to review the constitutionality of federal and state statutes—including a referendum-like “recall” of judicial decisions.<sup>309</sup>

Taft responded that former-President Roosevelt’s hostility to judicial review amounted to a grievous threat to the separation of powers and “the absolute independence of the judiciary.”<sup>310</sup> Confronted with the powerful imagery of judicial injunctions against economic regulations, Taft turned to the Lost Cause, casting Roosevelt as the successor of the Radical Republicans. Even after both Taft and Roosevelt lost in the 1912 election to the New Jersey governor Woodrow Wilson, Taft joined the faculty of Yale Law School and continued to elaborate on his defense of the Supreme Court.

Taft relitigated the 1912 campaign over the following decade in his academic writing and in his personal correspondence with racist historians of Reconstruction, to whom he complained that Roosevelt was ignoring “the failure of the experiments which it seems to me we may forecast from our past experience.”<sup>311</sup>

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**307.** *Id.* at 645, 679; see John Murphy, “Back to the Constitution”: Theodore Roosevelt, William Howard Taft and Republican Party Division 1910-1912, 4 IRISH J. AM. STUD. 109, 114 (1995).

**308.** THEODORE ROOSEVELT, THE NEW NATIONALISM 41 (1910).

**309.** Theodore Roosevelt, *Judges and Progress*, OUTLOOK, Jan. 6, 1912, at 40, 44, 48; see also Mr. Roosevelt’s Columbus Address: A Poll of the Press, OUTLOOK, Mar. 9, 1912, at 528 (reporting on Roosevelt’s proposal and media reactions to it); *The Real Roosevelt*, SATURDAY REV., Mar. 2, 1912, at 262 (criticizing Roosevelt’s new policies on the judiciary as a “monstrous doctrine” meant to secure votes).

**310.** “Great Victory”—Taft, N.Y. TRIB., June 23, 1912, at 1, 3; GOODWIN, *supra* note 300, at 645, 711; Murphy, *supra* note 307, at 120; see also *The Old-New Constitutionalism*, N.Y. TIMES, Aug. 4, 1912, at 436 (describing Roosevelt’s critique of the Court).

**311.** Letter from William Howard Taft, C.J., to James Ford Rhodes 2 (Mar. 26, 1914) (William H. Taft Papers, Library of Congress, ser. 8), [https://www.loc.gov/resource/mss42234.mss42234-523\\_0737\\_1194/?sp=396&r=-0.953,-0.046,2.906,1.313,0](https://www.loc.gov/resource/mss42234.mss42234-523_0737_1194/?sp=396&r=-0.953,-0.046,2.906,1.313,0) [<https://perma.cc/QZ2B-PF8V>]. Taft called himself “a humble student” of Rhodes’s well-regarded history of Reconstruction. *Id.* This was a history in which Rhodes complained that “[n]o large policy in our country has ever been so conspicuous a failure as that of forcing universal Negro suffrage upon the South.” 7 JAMES FORD RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 TO THE FINAL RESTORATION OF HOME RULE AT THE SOUTH IN 1877, at 168 (1906). For correspondence with other Dunning School historians during this period, see, for example, Letter from Hilary A. Herbert to William Howard Taft, C.J. (Apr. 21, 1914) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-139\\_0020\\_1192/?sp=714&r=-0.563,0.075,2.125,0.96,0](https://www.loc.gov/resource/mss42234.mss42234-139_0020_1192/?sp=714&r=-0.563,0.075,2.125,0.96,0) [<https://perma.cc/5PCT-7KUW>] (praising Taft for having “endeared [himself] to the women and the people of the South” by “having done so much towards stamping out the last vestige of sectional feeling”); Letter from William Howard Taft, C.J., to John W. Burgess (July 17, 1913) (William H. Taft Papers, Library of

The example he returned to again and again for why judicial restraint was necessary to prevent “the extravagance of legislatures and of Congresses” was Reconstruction—specifically the Tenure of Office Act of 1867.<sup>312</sup> He wrote in 1916,

It is useful to dwell on this one of many notable instances in the history of every popular government, to refute the proposition upon which the recall of judges, the recall of judicial decisions, the attack upon written Constitutions and upon the system of their judicial interpretation and enforcement is based.<sup>313</sup>

Like President Johnson’s 1867 veto message, he criticized the Act with reference to the first Congress. “It was settled, as long ago as the first Congress, at the insistence of Madison . . . that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President had the absolute power to remove him without consulting the Senate,” Taft wrote.<sup>314</sup> Yet the Reconstruction Congress unilaterally upset this settlement because it regarded Johnson as “an apostate and a traitor to Republican principles”—a choice of words that reflected Roosevelt’s own charges against Taft.<sup>315</sup> Had Congress been compelled to abide by “the wisdom of limitations in a written Constitution” instead of proceeding with its “strained and unfair construction of the Constitution,” the “extreme and passionate feeling entertained by good, moral, patriotic men toward Mr. Johnson” could have been appropriately cabined.<sup>316</sup> Because the Tenure of Office Act “never came before the courts directly in such a way as to invite a decision on its validity,”<sup>317</sup> Taft regarded it as the perfect example of the extremes to which Congress would go toward dominating the presidency and the states if not for judicial review.

But the Tenure of Office Act was also a curious example for Taft to rely upon considering Wilson’s earlier observation that the Supreme Court had never intervened in *any* separation-of-powers disputes. Taft therefore had to make a compelling case for when judges should intervene in such disputes in the future. Reflecting on his own tussles with Congress, Taft conceded that “it is not always easy to draw the line and to say where Legislative control and direction to the

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Congress, ser. 8), [https://www.loc.gov/resource/mss42234.mss42234-519\\_0135\\_0650/?sp=114&r=-0.003,0.209,1.101,0.591,0](https://www.loc.gov/resource/mss42234.mss42234-519_0135_0650/?sp=114&r=-0.003,0.209,1.101,0.591,0) [<https://perma.cc/U78S-PMD9>] (praising the historian for his “sane and patriotic views” regarding the Constitution).

**312.** WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 5, 56–58 (1916).

**313.** *Id.* at 57.

**314.** *Id.* at 56.

**315.** *Id.*

**316.** *Id.* at 57–58.

**317.** *Id.* at 57.

Executive must cease, and where his independent discretion begins.”<sup>318</sup> But Taft wrote that the Framers of the U.S. Constitution intended for the separation of powers to be “more clearly marked and rigid than in the British Constitution.”<sup>319</sup> Because these marks had rarely been litigated, however, he argued that the best interpretation of the U.S. Constitution would conduct a “historical construction of the extent and limitations of [the political branches’] respective powers.”<sup>320</sup>

“Two principles, limiting Congressional interference with the Executive powers, are clear,” Taft continued.<sup>321</sup> “*First*, Congress may not exercise any of the powers vested in the President, and *second*, it may not prevent or obstruct the use of means given him by the Constitution for the exercise of those powers.”<sup>322</sup> Treating these prescriptions as implied limits written into the Constitution itself, he described a half-dozen examples beyond the removal issue of when courts should limit congressional interference “on the ground that the practice of the Executive for a great many years, with the acquiescence of Congress,” could constitute a judicially enforceable precedent.<sup>323</sup> The Supreme Court could assist the President in preventing Congress from encroaching on his unlimited power to nominate officers of his choice.<sup>324</sup> It could cooperate with the President to resist a second military tenure law that interfered with the Commander-in-Chief’s duty to protect the country against invasion or insurrection.<sup>325</sup> It could prohibit Congress or lower courts from compelling the President to disclose confidential information or to submit to subpoenas.<sup>326</sup> It could protect the effectiveness of the President’s pardons.<sup>327</sup> And it could recognize exercises of executive power “created by custom,” such as the President’s power to enter into executive agreements.<sup>328</sup> “It is sufficient to say that the Court is a permanent body, respecting precedent and seeking consistency in its decisions, and that therefore its view of the Constitution, whether binding on the Executive and the legislature or not, is likely ultimately to prevail as accepted law,” Taft concluded.<sup>329</sup> In 1921, five years

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**318.** *Id.* at 124; *see also id.* at 166-67.

**319.** *Id.* at 1.

**320.** *Id.* at 2.

**321.** *Id.* at 126.

**322.** *Id.*

**323.** *Id.* at 136.

**324.** *Id.* at 127-28.

**325.** *See id.* at 128-29.

**326.** *Id.* at 129-32.

**327.** *Id.* at 135.

**328.** *Id.*

**329.** *Id.* at 138.

after he published this defense of judicial involvement in separation-of-powers disputes, Taft was appointed Chief Justice of the United States.

C. *Taft and the Making of Separation-of-Powers Juristocracy*

Taft joined a Supreme Court that had spent the previous three decades studiously avoiding wading into separation-of-powers disputes.<sup>330</sup> But the Court's interpretations of statutes regulating the removal of executive officers had also begun to reflect the emerging historical consensus on Reconstruction. Most notably, in the 1897 case *Parsons v. United States*, a member of the Court denigrated the Tenure of Office Act for the first time.<sup>331</sup> In an opinion that traced the history of the President's removal power from the congressional debate of 1789 through the Civil War, Justice Rufus W. Peckham, a Democrat from New York, quoted at length from James G. Blaine's 1884 memoir in which the Republican presidential candidate called the Tenure of Office Act an "extreme proposition—a new departure from the long-established usage of the Federal Government."<sup>332</sup> Although Justice Peckham explicitly assumed that the Tenure of Office Act had been constitutional, he drew upon the Act's controversial history to conclude that when Congress repealed the Act in 1887, it intended to return the country to an antebellum settlement under which Congress generally declined to limit the President's power to remove executive officers.<sup>333</sup> During Taft's first term on the Court, he went out of his way to cite *Parsons* as a decision that "expressly saved" the question of whether the Reconstruction Congress had acted constitutionally when it "cut down the power of the President" to remove civil and military officers.<sup>334</sup> One year later, the Court heard its first argument in a case that offered the Chief Justice an opportunity to resolve the question himself.

*Myers v. United States* was the first Supreme Court decision to consider the constitutionality of a statute, like the Tenure of Office Act, whose only alleged fault was that it violated a limit on Congress's power to regulate the executive branch. The case involved a statute passed in 1876—when the Tenure of Office Act was still in effect—which authorized the President to appoint postmasters to

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**330.** Rather than evaluate the constitutionality of statutes that allegedly interfered with the executive branch, the Court typically assumed their constitutionality but interpreted them to avoid any constitutional questions. See, e.g., *Shurtleff v. United States*, 189 U.S. 311, 314-15 (1903); *Quackenbush v. United States*, 177 U.S. 20, 27-28 (1900); *McAllister v. United States*, 141 U.S. 174, 179 (1891).

**331.** *Parsons v. United States*, 167 U.S. 324, 338-39 (1897).

**332.** *Id.* at 340 (quoting 2 BLAINE, *supra* note 230, at 273).

**333.** *Id.* at 340-43.

**334.** *Wallace v. United States*, 257 U.S. 541, 545 (1922) (Taft, C.J.) (citing *Parsons*, 167 U.S. at 339).

protected, four-year terms with the advice and consent of the Senate.<sup>335</sup> The law explicitly prohibited the President from removing postmasters during that term without the Senate's approval.<sup>336</sup> When Taft had been President, he had unsuccessfully urged Congress to repeal this statute and place postmasters in the civil-service system, insulating them from the Senate patronage system.<sup>337</sup> The administration of Taft's successor, Woodrow Wilson, went even further, unilaterally firing the postmaster of Portland, Oregon, Frank Myers, to quell a dispute between the postmaster and several members of Congress.<sup>338</sup> Although President Johnson had been impeached for violating a similar statute, a veto message signed in Wilson's name later argued that "Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution."<sup>339</sup> Myers sued the government to collect his lost salary.

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**335.** *Myers v. United States*, 272 U.S. 52, 107 (1926) (citing Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80).

**336.** *Id.*

**337.** See *supra* notes 301-02 and accompanying text.

**338.** See Jonathan L. Entin, *The Curious Case of the Pompous Postmaster: Myers v. United States*, 65 CASE W. RESRV. L. REV. 1059, 1061-65 (2015). It is unclear whether President Wilson was personally involved in the decision to fire Myers. As Professor Jonathan L. Entin writes in another article: "At the time of Myers' ouster, Wilson had been bedridden for more than four months after suffering a stroke early in the fall of 1919. His physical condition prevented him from performing many of the duties of his office." Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 731 (1987). Instead, many of Wilson's duties after October 1919 were performed in his name by his wife and cabinet. See A. SCOTT BERG, *WILSON* 658-60 (2013) (discussing a State of the Union message drafted in Wilson's name by others). In the case of Myers, Wilson's postmaster general told Myers on February 2, 1920, that he was being fired "by direction of President." POWER OF THE PRESIDENT TO REMOVE FEDERAL OFFICERS, S. DOC. NO. 69-174, at 7-8 (2d Sess. 1926). Yet there is no direct evidence indicating that Wilson was aware of the events. To the contrary, Myers asked Edith Wilson to inform the President about his firing in March, and a typed letter in Wilson's name indicated that the President read Myers's letter "with a good deal of sympathy and [was] somewhat disturbed by it." See Letter from President Woodrow Wilson to Postmaster Gen. Albert S. Bursleson (Mar. 25, 1920) (Woodrow Wilson Papers, Library of Congress, ser. 2), [https://www.loc.gov/resource/mss46029.mss46029-107\\_0018\\_1119/?sp=153&r=-0.53,0.04,2.06,1.386,0](https://www.loc.gov/resource/mss46029.mss46029-107_0018_1119/?sp=153&r=-0.53,0.04,2.06,1.386,0) [<https://perma.cc/4NX3-A9DG>]; see also Letter from Frank S. Myers to Edith Wilson (Mar. 22, 1920) (Woodrow Wilson Papers, Library of Congress, ser. 4), [https://www.loc.gov/resource/mss46029.mss46029-267\\_1111\\_1200/?sp=63&r=-0.427,-0.003,1.963,1.321,0](https://www.loc.gov/resource/mss46029.mss46029-267_1111_1200/?sp=63&r=-0.427,-0.003,1.963,1.321,0) [<https://perma.cc/2TCD-VF5H>].

**339.** 59 CONG. REC. 8609 (1920). See *supra* note 338 for the lack of certainty about who authored Wilson's official messages in 1920.



It took Taft eighteen months to finish his opinion in Myers's case, which he called "the most important and critical" of his career.<sup>340</sup> During that time he and his clerks read extensively about the history of the separation of powers from the writings of Montesquieu through the events of his own presidency.<sup>341</sup> Reconstruction again emerged as the decisive episode, one that "strongly convinced" Taft "that the danger to this country is in the enlargement of the powers of Congress, rather than in the maintenance in full of the executive power."<sup>342</sup> As he wrote to his Democratic colleague Pierce Butler, he joined President Johnson in believing that the First Congress had tried to limit Congress's power, only to see those limits transgressed by Reconstruction:

[T]he more I think it over, the stronger I am in the necessity for our reaching the conclusion that we have . . . . As I study the injustice that the radical Republicans did to Andrew Johnson, I am humiliated as a Republican. My father was a just man but I thought he sympathized with those who voted to impeach Johnson. I think the feeling against Johnson growing out of the assassination of Lincoln threw into the extremists of the Republican party a power that led to reconstruction and seriously affected to its detriment our country. I think this is usually thought to be the case, and certainly we ought not to allow such a departure from a long established constitutional construction to influence us in a wise interpretation, enforced by a Congress that was almost a part of the Con-

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**340.** Letter from William Howard Taft, C.J., to Charles P. Taft II at [1] (Oct. 24, 1926) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-285\\_0020\\_1261/?sp=1202&r=-0.718,0.009,2.435,1.188,0](https://www.loc.gov/resource/mss42234.mss42234-285_0020_1261/?sp=1202&r=-0.718,0.009,2.435,1.188,0) [<https://perma.cc/37QZ-DXXL>].

**341.** See Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, 45 J. SUP. CT. HIST. 167, 172-73 (2020).

**342.** Letter from William Howard Taft, C.J., to Thomas W. Shelton 1 (Nov. 9, 1926) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-286\\_0020\\_1239/?sp=441](https://www.loc.gov/resource/mss42234.mss42234-286_0020_1239/?sp=441) [<https://perma.cc/XB49-Q2UX>]; see also Letter from William Howard Taft, C.J., to Casper S. Yost 1 (Nov. 1, 1926) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-286\\_0020\\_1239/?sp=207&r=-0.837,0.04,2.674,1.18,0](https://www.loc.gov/resource/mss42234.mss42234-286_0020_1239/?sp=207&r=-0.837,0.04,2.674,1.18,0) [<https://perma.cc/3XSJ-LU5A>] ("I agree with you that the Senate, with the consent of Congress, has sought to encroach on the Presidential power and has seized the partisan conclusions in the special legislation against Johnson . . . . A study of the legislation made under this inspiration will show that not directly but stealthily through the creation of boards who exercised part of the executive power. It has been sought to divide that power vested in the President by the Constitution . . . .").

stitutional Convention and whose decision lasted without any real controversy from the first Congress down to the one that was controlled by a militant, triumphant and harsh political group.<sup>343</sup>

Taft concluded his *Myers* opinion in a similar vein, writing that for the purposes of judicial review, “a contemporaneous legislative exposition of the Constitution . . . acquiesced in for a long term of years, fixes the construction to be given its provisions.”<sup>344</sup> He dedicated approximately sixty-six pages of his seventy-one-page opinion to a “historical review” of the President’s power to remove executive officers.<sup>345</sup> Once again, this history largely tracked President Johnson’s stated reasons for vetoing the Tenure of Office Act in 1867. Like Johnson, Taft wrote that it had been a “settled constitutional construction” after the “decision of 1789” that Congress had no authority to limit the President’s power to remove Senate-confirmed officers.<sup>346</sup>

In describing Madison’s pragmatic arguments about the benefits of presidential removal, Taft interposed some of his own arguments about why Congress should be *prohibited* from interfering.<sup>347</sup> For example, in 1916, Taft had written that the Constitution’s separation of powers was a “more clearly marked and rigid” version of the separation of powers of the British Constitution.<sup>348</sup> In *Myers*, Taft now credited Madison with making an identical argument that Article II clearly vested the same “executive power” in the President that had existed in “the British system” — one in which “the Crown, which was the executive, had the power of appointment and removal of executive officers.”<sup>349</sup> Similarly, Taft had earlier written that Congress’s ability to account for national interests was often disfigured by competition among its individual members “to shape national legislation for local advantage.”<sup>350</sup> In *Myers*, Taft cited Madison as explaining that when Article II imposed the duty on the President to “take Care that the Laws be faithfully executed,” it was giving the most politically accountable branch of government — the only one elected by the entire nation — the *exclusive*

**343.** Letter from William Howard Taft, C.J., to Pierce Butler, J. 2-3 (Sept. 16, 1925) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-276\\_0020\\_1257/?sp=703](https://www.loc.gov/resource/mss42234.mss42234-276_0020_1257/?sp=703) [<https://perma.cc/83UE-453B>].

**344.** *Myers v. United States*, 272 U.S. 52, 175 (1926).

**345.** See Letter from William Howard Taft, C.J., to Horace D. Taft 1 (Nov. 23, 1925) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-278\\_0020\\_1273/?sp=166](https://www.loc.gov/resource/mss42234.mss42234-278_0020_1273/?sp=166) [<https://perma.cc/R8G3-BQNW>].

**346.** *Myers*, 272 U.S. at 145.

**347.** *Id.* at 115-22.

**348.** TAFT, *supra* note 312, at 1.

**349.** *Myers*, 272 U.S. at 118 (citing *Ex parte Grossman*, 267 U.S. 87, 110 (1925)).

**350.** See TAFT, *supra* note 290, at 103-04.

authority to determine which officers would most faithfully execute the laws.<sup>351</sup> Taft also cited Madison for the idea that “the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide”—even though the electorate had not yet voted for a presidential candidate in 1789, and not all States were even represented in the Electoral College that year.<sup>352</sup> In Taft’s view, it therefore made sense that only this representative official would determine when an officer should be removed.

But the passage of *Myers* in which Taft most clearly reflected the Dunning School’s dominance was Taft’s description of Reconstruction: “a period in the history of the Government when both houses of Congress attempted to reverse this constitutional construction.”<sup>353</sup> Taft described Congress’s Reconstruction legislation as a “radical innovation” passed by congressional extremists whose partisanship blinded them to constitutional limits.<sup>354</sup> Taft wrote that, far from repudiating the congressional settlement of 1789, the “extreme provisions of all this legislation were a full justification for the considerations so strongly advanced by Mr. Madison and his associates in the First Congress for insisting that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies.”<sup>355</sup> Quoting Blaine’s 1884 memoir, Taft described the Tenure of Office Act as “an extreme proposition” motivated by the “abnormal excitement” of a paranoid Congress hostile to President Johnson.<sup>356</sup> “It exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm and destroy the principle of executive responsibility and separation of the powers, sought for by the framers of our Government,” Taft continued.<sup>357</sup> “It was an attempt to redistribute the powers and minimize those of the President.”<sup>358</sup>

Taft did not explain what he meant by the “paralysis” the Reconstruction Congress had allegedly imposed on the President; in fact, he offered no support for the claim that the Reconstruction Congress had done something wrong. Instead, he merely rejected the constitutional interpretation of the Reconstruction

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**351.** *Myers*, 272 U.S. at 117.

**352.** *Id.* at 123.

**353.** *Id.* at 164.

**354.** *Id.* at 167-68.

**355.** *Id.* at 167.

**356.** *Id.* (quoting excerpts from BLAINE, *supra* note 230, in *Parsons v. United States*, 167 U.S. 324, 340 (1897)).

**357.** *Id.*

**358.** *Id.*

Congress by declaring that its legislation deserved no respect. In a telling passage, Taft concluded his opinion in *Myers* not with a description of the 1876 law at issue before him, but with a description of Reconstruction, the constitutionality of which had been challenged by Lost Cause apologists and historians such as Dunning for fifty years:

The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our Government, leading to articles of impeachment against President Johnson, and his acquittal. Without animadverting on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States during a political calm and acquiesced in by the whole Government for three-quarters of a century, especially when the new construction contended for has never been acquiesced in by either the executive or the judicial departments. . . . When, on the merits, we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.<sup>359</sup>

*D. The Juristocratic Separation of Powers after Myers*

Taft's opinion in *Myers* represented a sea change in the judicial review of separation-of-powers questions. Before 1926, the Court had never struck down a statute on the ground that it unconstitutionally regulated the President or executive branch.<sup>360</sup> When Congress or the President believed that the other branch

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<sup>359</sup> *Id.* at 175-76.

<sup>360</sup> Post, *supra* note 341, at 167; see also *id.* ("It was as if fate itself had reserved *Myers* until Taft could take his seat at the center of the Court."). There are two possible exceptions in which the Court considered the relationship between presidential pardons and statutes: *Ex parte Garland*, 71 U.S. 333 (1866), and *United States v. Klein*, 80 U.S. 128 (1871). Both cases arose out of the presidential pardons of ex-Confederates. Yet their holdings turned on constitutional limits outside Article II. See *Garland*, 71 U.S. at 380 (holding that a statute was a bill of attainder and adding that the Court's view was "strengthened" by the President's grant of a pardon after the statute was enacted); *Klein*, 80 U.S. at 142 (prohibiting Congress from compelling the Court to decide a pending controversy against a party, particularly when the party was

was unconstitutionally infringing on its prerogatives, each branch defended itself with the tools available to it, particularly Congress's power to pass statutes and the President's power to veto them. Although these early debates often took the form of legal argument, any result of the debates that actually became statutory law was enforced until the President could convince Congress to amend or repeal the statute.

In the wake of Reconstruction, however, many white people feared that this understanding of the separation of powers gave Congress too much authority to dominate its opponents. As mainstream historians coalesced around an interpretation of Reconstruction in which radicals took over Congress and used its authority to pass extreme and dangerous measures, they called for additional checks on Congress beyond those articulated in the Constitution itself. Some of these proposed checks were purely political. But the most influential of these proposed checks proved to be legal checks, as in Taft's call for federal courts to constrain Congress to whatever "settled constitutional construction" existed before the Civil War.<sup>361</sup>

In this respect, *Myers* not only reflected the growing historical consensus around Reconstruction, but also catalyzed it. Contemporary readers interpreted it as part of a successful effort "to vindicate Andrew Johnson," a President who had earlier "believed and had the courage to say that the Constitution meant precisely what the Supreme Court has now ruled it to mean."<sup>362</sup> Taft himself adopted this view: "We repudiated as invalid the Tenure of Office Act, the defiance of which by Johnson really led to his impeachment," he wrote to his brother the day he announced the decision.<sup>363</sup> In the immediate aftermath of *Myers*, aca-

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seeking to enforce the benefits of a pardon). During President Johnson's impeachment trial, lawyers on both sides discussed *Garland* as a case involving Congress's power to regulate not the President, but officers of the judiciary. See, e.g., 1 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 109-10. The Court in *Myers* did not mention either case. And as late as the *Steel Seizure* case in 1952, when Justice Jackson cataloged examples of category "3" cases in which the President could constitutionally violate a statute, he declined to mention *Garland* or *Klein*; the only Supreme Court case he evidently could think of was *Myers*. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38, 638 n.4 (1952) (Jackson, J., concurring). It is only relatively recently that the Court has interpreted *Garland* and *Klein* more broadly. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323-24 (2016).

**361.** *Myers*, 272 U.S. at 145; TAFT, *supra* note 312, at 56-57.

**362.** James H. Malone, *The Supreme Court Vindicates Andrew Johnson*, 26 CURRENT HIST. 7, 7 (1927).

**363.** Letter from William Howard Taft, C.J., to Hon. Henry W. Taft 2 (Oct. 25, 1926) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-285\\_0020\\_1261/?sp=1236](https://www.loc.gov/resource/mss42234.mss42234-285_0020_1261/?sp=1236) [<https://perma.cc/UWE4-8TS9>]; see also, e.g., Letter from William Howard Taft, C.J., to Horace D. Taft 2 (Oct. 28, 1926) (William H. Taft Papers, Library of

demic and popular historians across the country published books on Reconstruction with titles such as “The Tragic Era,” “The Age of Hate,” “The Dreadful Decade,” and “The Angry Scar.”<sup>364</sup> These books nearly unanimously praised President Johnson for defending the Constitution from “evil, vindictive, and partisan Radicals” – a view that persisted for decades.<sup>365</sup> For example, when President John F. Kennedy wrote his *Profiles in Courage* in 1956, he described Johnson as a “courageous if untactful Tennessean” who had fought to preserve the Constitution by resisting “the extremists in Congress, who had opposed his approach to reconstruction in a constitutional and charitable manner and sought to make the Legislative Branch of the government supreme.”<sup>366</sup>

The few exceptions to this trend came from black and other racially egalitarian historians such as W.E.B. Du Bois, who called these “attempt[s] to re-write the character of Andrew Johnson” and the history of Reconstruction little more than “blatant[] propaganda . . . absolutely devoid of historical judgment or sociological knowledge.”<sup>367</sup> For Du Bois, all of these self-described histories were

based on the same thesis and all done according to the same method: first, endless sympathy with the white South; second, ridicule, contempt or silence for the Negro; third, a judicial attitude towards the North, which concludes that the North under great misapprehension did a grievous wrong, but eventually saw its mistake and retreated.<sup>368</sup>

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Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-286\\_0020\\_1239/?sp=67](https://www.loc.gov/resource/mss42234.mss42234-286_0020_1239/?sp=67) [<https://perma.cc/J6UE-D2JP>] (“I hope [it] will have[] a good effect in preventing the advance of Congress along the path which it has taken of dividing up the President’s power . . . .”); Letter from William Howard Taft, C.J., to Casper Yost [1] (Nov. 1, 1926) (William H. Taft Papers, Library of Congress, ser. 3), [https://www.loc.gov/resource/mss42234.mss42234-286\\_0020\\_1239/?sp=207&r=-0.523,0.035,2.046,1.062,0](https://www.loc.gov/resource/mss42234.mss42234-286_0020_1239/?sp=207&r=-0.523,0.035,2.046,1.062,0) [<https://perma.cc/N9G5-48Y2>] (“I agree with you that the Senate, with the consent of Congress, has sought to encroach on the Presidential power and has seized the partisan conclusions in the special legislation against Johnson to change what for three-fourths of a century has been the recognized construction of the Constitution – recognized by all parts of the Government.”).

**364.** See Mary Ruth Logan Lenihan, *Reputation and History: Andrew Johnson’s Historiographical Rise and Fall* 40, 42 n.2, 53 n.27, 57 n.36 (1986) (M.A. thesis, University of Montana) (collecting citations) <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=4427&context=etd> [<https://perma.cc/P968-2FPW>].

**365.** *Id.* at 44-45.

**366.** JOHN F. KENNEDY, *PROFILES IN COURAGE* 126-27 (1956). The senatorial recipient of Kennedy’s profile in courage was not Johnson but Edmund G. Ross, whose vote to acquit Johnson he called “the most heroic act in American history.” *Id.* at 126 (citation omitted).

**367.** DU BOIS, *supra* note 16, at 720-21; see also, e.g., WOODWARD, *supra* note 279, at 77-80 (describing the racist rewriting of Reconstruction history by Southern historians).

**368.** DU BOIS, *supra* note 16, at 719.

Du Bois observed that the dominant trend among historians effectively “obliterated the history of the Negro in America,” ignoring specific disputes over slavery and abolition democracy as if “a great nation murdered thousands and destroyed millions on account of abstract doctrines concerning the nature of the Federal Union.”<sup>369</sup> As a voice in the wilderness against this trend, Du Bois’s 1935 *Black Reconstruction* attempted to tell the history of the era from the perspective of someone who actually believed in “the equal manhood of black folk.”<sup>370</sup> He wrote that “the failure legally to convict Johnson has remained to frustrate responsible government in the United States ever since.”<sup>371</sup> Johnson and other “legalists may insist that consistency with precedent is more important than firm and far-sighted rebuilding,” Du Bois wrote, but “manifestly, it is not. Rule-following, legal precedence, and political consistency are not more important than right, justice and plain common-sense.”<sup>372</sup>

Taft was very much a participant in the trend Du Bois criticized. With an account of American history that ignored the existence of black people or their relationship to slavery and Reconstruction, he argued that historical practice could reveal the interbranch boundaries fixed by “acquiescence.”<sup>373</sup> He thereby offered the Court a race-neutral method of returning the country to an idyllic prewar state in which the President and the states had been better able to resist congressional influence. After *Myers*, the Court issued many opinions that reviewed the constitutionality of legislative action with a lengthy analysis of historical practice to determine which practices were “settled” before the Civil War and therefore permanently enforceable by the judiciary.<sup>374</sup> These opinions steadily painted legal boundaries over previously contested terrain in disputes that included not only the appointment,<sup>375</sup> regulation,<sup>376</sup> and removal<sup>377</sup> of executive

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**369.** *Id.* at 722-23.

**370.** *Id.* at 726.

**371.** *Id.* at 344.

**372.** *Id.* at 336.

**373.** *Myers v. United States*, 272 U.S. 52, 152 (1926).

**374.** *Cf. id.* at 145; TAFT, *supra* note 312, at 56-57; *see also* FONER, *supra* note 218, at 159 (“Well into the twentieth century, when members of the Supreme Court wished to offer historical background for decisions regarding the Reconstruction amendments, they would cite the works of the Dunning School.”).

**375.** *See, e.g.,* *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020); *United States v. Smith*, 286 U.S. 6 (1932).

**376.** *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

**377.** *See, e.g.,* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).



officers; but also executive privilege<sup>378</sup> and immunity;<sup>379</sup> vetoes of the pocket,<sup>380</sup> legislative,<sup>381</sup> and line-item variety;<sup>382</sup> foreign agreements;<sup>383</sup> and decisions concerning foreign affairs.<sup>384</sup>

*Myers* also had a significant effect on how these separation-of-powers questions reached the Supreme Court in the first place. When President Johnson wanted to challenge the constitutionality of the Tenure of Office Act, he tried to violate it—a decision that led to his impeachment for asserting the “more than kingly” power to dispense with an allegedly unconstitutional statute.<sup>385</sup> Even the early-twentieth-century historians who denigrated the Reconstruction Congress warned that “to recognize any such [dispensation] power in the President would be to enable him to rule with such arbitrariness as to upset the principles and practices of all free government. The President can constitutionally defend his prerogatives with the veto power . . . .”<sup>386</sup> Nor had it been obvious, before *Myers*, how anyone else could challenge the constitutionality of a statute on separation-of-powers grounds. Madison predicted in 1789 that such a decision would never reach the judiciary.<sup>387</sup> And a century later, when an individual plaintiff first challenged the constitutionality of the amended Tenure of Office Act, the Solicitor General scoffed at the idea that anyone but the President and the Senate were the “guardian of their rights” when they had “united in the legislative act.”<sup>388</sup>

*Myers* reflected a very different attitude toward the judicial review of separation-of-powers questions. The case only reached the Court because President Wilson explicitly violated a statute. But the Court did not rebuke the President for violating his constitutional duty to take care that the removal law be faithfully executed. Instead, it held that the same duty prohibited *Congress* from limiting the President’s discretion about when to remove an executive officer who was failing to faithfully execute *other* laws. Moreover, even though *Myers* was seeking

**378.** See, e.g., *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *United States v. Nixon*, 418 U.S. 683 (1974).

**379.** See, e.g., *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Barr v. Matteo*, 360 U.S. 564 (1959).

**380.** See, e.g., *Wright v. United States*, 302 U.S. 583 (1938); *The Pocket Veto Case*, 279 U.S. 655 (1929).

**381.** See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

**382.** See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998).

**383.** See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Goldwater v. Carter*, 444 U.S. 996 (1979).

**384.** See, e.g., *Zivotofsky II*, 576 U.S. 1 (2015); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

**385.** See 2 TRIAL OF ANDREW JOHNSON, *supra* note 34, at 427.

**386.** BURGESS, *supra* note 14, at 183.

**387.** See *supra* note 111 and accompanying text.

**388.** Brief of Appellee at 3, *Embry v. United States*, 100 U.S. 680 (1879) (No. 253).

to apply the statute and not challenge its constitutionality, the Court implicitly allowed anyone – individuals and executive-branch lawyers alike – to argue that a statute signed by the President unconstitutionally interfered with the presidency’s prerogatives. From that point on, subsequent administrations could credibly contend that they would not consider themselves bound by statutes – even statutes they had signed – if the statute violated the separation of powers.

Although *Myers* involved a plaintiff who sought to enforce a statute that the President violated, it didn’t take long after *Myers* before the Court allowed individual plaintiffs to challenge the constitutionality of statutes on separation-of-powers grounds. Two years after *Myers*, Taft authored another separation-of-powers opinion, *J.W. Hampton, Jr. & Co. v. United States*,<sup>389</sup> in which he affirmed that it was the Court’s responsibility to police the Constitution’s separation of the legislative, executive, and judicial powers.<sup>390</sup> Subsequent cases have often quoted Taft’s words to explain the Court’s role in cabining each branch to its assumed position.<sup>391</sup> This trend reached its logical extreme in 2020, when the Supreme Court struck down a statute that protected an executive officer from removal without cause<sup>392</sup> – even though the President who signed the statute into law considered it one of his greatest legislative achievements, and even though the person occupying the office at issue was not protected by the provision. The Court in *Seila Law* extensively paraphrased *Myers* and praised Taft’s “exhaustive examination of the First Congress’s determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point.”<sup>393</sup>

### III. DECONSTRUCTING THE JURISTOCRATIC SEPARATION OF POWERS

As the previous Parts show, the juristocratic separation of powers is not a given or inherent feature of written constitutionalism. In the United States, it was a contingent development fueled in part by what Du Bois called the “counter-revolution of property.”<sup>394</sup> That counterrevolution manifested in part in the Lost Cause reaction to Reconstruction that lived on in the Dunning School’s historiography of the era.

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**389.** 276 U.S. 394 (1928).

**390.** *Id.* at 406.

**391.** See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976).

**392.** See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020).

**393.** *Id.* at 2197.

**394.** See DU BOIS, *supra* note 16, at 580, 667, 690.

To be sure, this counterrevolution was not the only factor that gave rise to the juristocratic separation of powers.<sup>395</sup> But the key insight of Part II is that though the juristocratic separation of powers is today described as a consistent historical practice – what “the Framers and their contemporaries” intended<sup>396</sup> – the practice was begun less than a century ago in the grips of a particular revanchist ideology. *Myers* converted Dunning School dogma – that if only the Court had backed President Johnson, Reconstruction could have turned out quite differently – into separation-of-powers doctrine. By aggrandizing the role of the Court, Taft and his contemporaries were able to provide legal cover for the historic injustice of the post-Reconstruction era.<sup>397</sup>

Having elucidated this juristocratic turn, our aim now is to deconstruct it. The juristocratic approach represents a shift from the republican conception along four dimensions. It imagines a fixed constitutional order (as opposed to a provisional and unfinished template), anchored in the legal entitlements of the branches (as opposed to the ongoing work of negotiation, accommodation, and statecraft). These legal entitlements embolden presidential dispensation: if fixity is the goal, a qualified presidential veto is no longer enough. Reliance on courts, in turn, reinforces the rhetoric of absolutist legal entitlements rather than uncertain political struggles. On this view, a “settled” constitutional order is secured by judicial decisions, rather than revised through legislative politics. Judicial review, meanwhile, legitimates presidential dispensation by imbuing it with legal sanction. Though the four elements needn’t coincide as a matter of logic or analytical thinking, they thus reinforce each other – each working to entrench the others. The figure below offers a visualization of this separation-of-powers counterrevolution.

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**395.** As many scholars have shown, other causes include the New Deal fear of domination by an emergent administrative state and a widely perceived need for a more powerful presidential office. See generally, e.g., Post, *supra* note 341 (describing Taft’s broader views on the importance of a strong Executive); Rosenblum, *supra* note 301 (explaining that the New Dealers embraced the principle of separation of powers as a means of guarding against fascism); SKOWRONEK, *supra* note 303 (describing the struggle between the presidency and Congress for control over the growing administrative state).

**396.** *Seila L.*, 140 S. Ct. at 2197.

**397.** See Jamal Greene, (*Anti*)*Canonizing Courts*, 143 *DAEDALUS* 157, 158 (2014) (arguing that the “tendency to view courts as external to society may be succinctly termed the canonization of courts,” and that this “aggrandizement of courts . . . helps to enable a process of collective neutralization of historic injustice, and racial injustice most particularly”); cf. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 213-14 (2004) (advancing from a comparative perspective the “hegemonic preservation thesis” for judicial review, in which constitutionalization is driven “by attempts to maintain the social and political status quo and to block attempts to seriously challenge it through democratic politics”).

FIGURE 1. TWO MODELS OF THE SEPARATION OF POWERS

ELEMENTS	REPUBLICAN	JURISTOCRATIC
CONSTITUTIONAL CONSTRUCTION	Statutory	Judicial
NATURE OF THE RULE OF LAW	Provisional	Fixed
EXECUTIVE'S ROLE	Veto	Dispensation
FORM OF ARGUMENT	Statecraft	Legal Entitlements

Through these elements, the juristocratic separation of powers undermines each of the normative values advanced in Part I. It leads to judicial domination, which inhibits constitutional imagination and makes government less answerable to the people. And it advances a “superstitious” rule of law – one that misrepresents, or at least misconstrues, the role of statutes in constituting constitutional government.<sup>398</sup> Ultimately, the juristocratic conception makes the discretion of five Justices, unrestrained by any democratic procedure, supreme over institutions whose decisionmaking is more consistent with political equality. Taken together, we argue, the juristocratic separation of powers fails as a normative structure of American constitutional government.<sup>399</sup> It renders each branch in isolation – and all three in combination – less capable of constituting a “respect-worthy” system of governance.<sup>400</sup>

398. See Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91, 100 (2007) (cautioning against wedding the rule of law “to a superstitious view of law”).

399. Aspects of our argument might have implications for the substantive rules restraining government power as well, including those contained in the Bill of Rights. Cf., e.g., Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021) (elucidating the role of statutes and the problems of judge-made constitutional law in constituting our free-speech tradition). But see, e.g., *Raines v. Byrd*, 521 U.S. 811, 828-29 (1997) (distinguishing the role of judicial enforcement “in the protection it has afforded . . . individual citizens and minority groups against oppressive or discriminatory government action” and observing that “[i]t is this role, not some amorphous general supervision of the operations of government, that . . . has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests” (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring))).

400. See Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 105 (2003) (“Legitimacy (where it exists) descends to specific legal acts from the ‘respect-worthiness’ . . . [of the] system, or practice, or ‘regime’ of government.”); cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1813-42 (2005) (unpacking different senses of legitimacy as they relate to the judiciary); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1710-11 (2021) (discussing the relationship between the Court and democratic legitimacy).

A. *Nondomination*

The republican ideal of nondomination entails the ability to make choices freed from the arbitrary control of another. Analogizing to horse-riding, Philip Pettit explains that even when the rider loosens the reins, the horse is not free. For the rider retains “reserve control”; any appearance of choice is only by grace of the rider.<sup>401</sup>

Under the juristocratic separation of powers, the choices of our representative branches about how to structure the federal government by statute are controlled by the Supreme Court’s arbitrary discretion. The Court retains “reserve control” even when it permits a particular statutory design. Indeed, *Myers* itself did not suggest that all presidential exercises of Article II powers were immune from statutory regulation.<sup>402</sup> Although race and Reconstruction had been at the heart of national debates after the Civil War, another major topic was civil-service reform and opposition to corruption.<sup>403</sup> Taft had spent much of his career supporting civil-service reform,<sup>404</sup> and he was careful to include a paragraph in *Myers* declaring that he had no intention of undermining his generation’s anti-corruption measures: if Congress wanted to prohibit presidential removal of certain officers for no reason other than partisanship, it was free to pass a statute doing so.<sup>405</sup> The proviso reserved legislative authority to regulate in those ways that Taft valued, even as the case overrode closely related removal restraints that a majority of Congress had supported and that President Grant had signed into law.

The Supreme Court and legal scholars have spent the century since *Myers* attempting to explain just when it is appropriate for Congress and the President to pass a statute regulating the presidency. That effort has been self-defeating. Three (incompatible) arguments have emerged for how to distinguish “preclusive” Article II authority from Article II powers that Congress and the President

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401. PHILIP PETTIT, *JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD* 1-3 (2014).

402. See *Myers v. United States*, 272 U.S. 52, 127 (1926) (citing *United States v. Perkins*, 116 U.S. 483, 485 (1886)).

403. See generally ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1865-1883* (1961) (cataloguing post-Reconstruction efforts at civil-service reform culminating in the passage of the Pendleton Act of 1883, ch. 27, 22 Stat. 403).

404. See, e.g., TAFT, *supra* note 312, at 58-59, 67; WILLIAM DUDLEY FOULKE, *FIGHTING THE SPOILSMEN: REMINISCENCES OF THE CIVIL SERVICE REFORM MOVEMENT* 213-14 (1919).

405. *Myers*, 272 U.S. at 173-74; Post, *supra* note 341, at 170 (discussing Taft’s attempt to insulate civil-service reform efforts from his holding in *Myers*).

can regulate by statute.<sup>406</sup> None is convincing on its own terms. The Constitution, moreover, supplies no principle through which to choose among them. Instead, the choices of our representative branches about how to structure the federal government by statute are subject to the whim of the reigning Court majority; they are controlled without reciprocation by the Supreme Court's arbitrary discretion.

### 1. Arbitrary Entitlements

*a. Core/periphery.* — After *Myers*, when the Supreme Court considered follow-on challenges to Congress and the President's power to pass a statute regulating the President's removal power, the Court sought to distinguish "core," unlimitable aspects of the President's powers from more peripheral aspects that a statute is free to regulate. In one of the first such cases, *Humphrey's Executor v. United States*,<sup>407</sup> the Court wrote that *Myers* had done nothing more than protect the President's core power to supervise "purely executive officers," such as postmasters.<sup>408</sup> The Court held that the duties of "quasi-legislative or quasi-judicial" officers were more peripheral to the President's own powers, and therefore Congress and the President could freely prevent the President from removing officers of agencies intended to be "independent of executive authority."<sup>409</sup> More recently, the Court refined this analysis into a standard that Congress may not "unduly interfere with the functioning of the Executive Branch."<sup>410</sup> The Court suggested that Congress generally violates Article II when it regulates the removal of officers who wield "substantial executive power."<sup>411</sup>

Then-Professor David J. Barron and Professor Martin S. Lederman provided an extensive defense of this sort of core/periphery distinction in their account of the President's commander-in-chief authority.<sup>412</sup> As Barron and Lederman explain,

The notion is that certain Article II clauses . . . afford the President at least two types of constitutional powers: those that he may exercise on his own but that are regulable by statute, and those that form [a]

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**406.** See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

**407.** 295 U.S. 602 (1935).

**408.** *Id.* at 628.

**409.** *Id.* at 625, 628.

**410.** *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 (2020).

**411.** *Id.* at 2200.

**412.** See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 721 (2008).

‘core’ . . . of the Executive’s powers . . . [or] an infeasible scope of [presidential] discretion.<sup>413</sup>

This core “may vary, depending on the particular authority in question.”<sup>414</sup> In the context of the commander-in-chief authority, Barron and Lederman argue that the Constitution creates a preclusive “superintendence” authority, while other forms of presidential war powers – even tactical decisions on the battlefield – are “peripheral” (meaning amenable to statutory regulation). Barron and Lederman recognize, however, that “it is difficult to ascertain the precise content, or breadth . . . [of] some such superintendence core.”<sup>415</sup>

The difficulty is more fundamental than Barron and Lederman suggest; the core/periphery distinction simply does not supply a judicially manageable standard for courts to delineate presidential dispensation. The structural provisions themselves provide no basis along which to identify a core aspect of the commander-in-chief authority, for example, or to distinguish this core from the power’s otherwise regulable periphery. As illustrated by the 1866 military appropriation act that prohibited President Johnson from giving direct orders to military officers, the relevant history can be used to support some exceedingly limited superintendence “core” or none at all.<sup>416</sup> Moreover, history itself is a problematic source of implied legal limits on a statute, for reasons that we discuss below.<sup>417</sup> Nor are some aspects of presidential power more inherently regulable than others.<sup>418</sup> The pardon power, for example, which is often invoked as the classic plenary power of the presidency, was repeatedly regulated by Parliament.<sup>419</sup>

Functional considerations similarly fail to establish a principled core/periphery framework. The constitutional values at stake are contested and competing.<sup>420</sup> As a result, sorting the same constitutional authority into its core and peripheral components “will ultimately reflect . . . the taxonomist’s estimation of

**413.** *Id.* at 726.

**414.** *Id.* at 728.

**415.** David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1102 (2008).

**416.** See *supra* notes 202-205 and accompanying text.

**417.** See *infra* Section III.B.1.

**418.** See Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 236 (2005) (“However one might segregate presidential powers, none of the potential groupings help justify congressional regulation of particular presidential powers. . . . Nor can one separate executive powers into core and periphery by attempting to ascertain which powers are (and are not) inherently regulable.”).

**419.** See *infra* notes 587-594 and accompanying text.

**420.** See Magill, *supra* note 25, at 604-05.



the relative importance and value of the various powers” — or the various aspects of any one power — and the political and moral tradeoffs of congressional regulation as to that authority.<sup>421</sup> The fundamental disagreement in landmark cases such as *Morrison v. Olson*<sup>422</sup> is precisely over this relative estimation of values. At issue in *Morrison* was whether the President should have “complete control over [a criminal] investigation and prosecution,” as Justice Scalia pressed in dissent. Answering that question ultimately turns on whether it is “unthinkable” as a normative matter “that the President should have such exclusive power, even when [the] alleged crimes [concern] him or his close associates.”<sup>423</sup> For the dissent, any loss of legal accountability for presidential misconduct was not only thinkable but preferable to the alternative of a more politically exposed presidency.<sup>424</sup> As *Morrison* suggests, the disagreement is not isolated to the boundary cases; it goes to the very crux of what it means to vest the executive power in the President. Even accepting the position that judicial manageability emerges from the “outputs” of judicial review, not the constitutional inputs,<sup>425</sup> adjudication has failed to construct any coherent and roughly agreed-upon core.

As we argue below, these are questions that operate at the level of political morality, not legality.<sup>426</sup> They implicate abstract moral principles with no clear connection to articulable legal standards. Even accepting any one account of the principles at issue — for example, presidential control and democratic accountability in the context of the removal authority<sup>427</sup> — there is no apparent connection between the specific institutional mechanism that the Court prohibits (or requires), and the realization or approximation of these abstract and more systemic principles. As Professor Aziz Z. Huq argues in the context of a presidential removal power, “[e]mpirical evidence and political science models . . . show that the power to remove is sometimes unnecessary and sometimes ineffectual to the goal of political control of the bureaucracy.”<sup>428</sup> For instance, a presidential authority to dispense with for-cause removal protections can undermine the President’s ability to credibly commit to certain policy courses.<sup>429</sup> As Huq concludes,

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421. Prakash, *supra* note 418, at 237.

422. 487 U.S. 654 (1988).

423. *Id.* at 710 (Scalia, J., dissenting).

424. *See id.* at 712-13.

425. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1282-83 (2006).

426. *See infra* pp. 3071-73.

427. *See, e.g.,* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

428. Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6 (2013).

429. *Id.* at 44-45, 44 n.211.

“there is no stable positive correlation between presidential control and democratic accountability.”<sup>430</sup>

Recognizing such limitations on judicial manageability, Professor Saikrishna Prakash has in effect flipped the core-periphery allocation, carving out an exceptionally narrow “periphery” and an exceedingly broad “core.” He argues that the Constitution expressly identifies those powers that Congress can regulate—for example, the appointment of inferior officers. For Professor Prakash, these are the *only* powers that Congress and the President can regulate by statute.<sup>431</sup> The Constitution otherwise affords Congress no “generic power” to pass a bill regulating either the executive branch or the courts.<sup>432</sup> The argument relies on an exceptionally narrow construction of the Necessary and Proper Clause, which of course comprises just such a generic delegation of power—specifically to Congress. As others have written, the Necessary and Proper Clause operates as something of “a master provision” allocating to Congress decision-making responsibility to make all laws necessary to implement executive and judicial powers; it is a “broad and explicit (though not limitless) discretion to compose the government and prescribe the means of constitutional power.”<sup>433</sup>

*b. Open-ended/specific clauses.* — Not every scholar has accepted the Supreme Court’s modern approach that distinguishes core Article II powers with which a statute may not interfere from peripheral Article II powers that a statute may regulate. Recognizing the significance of the Necessary and Proper Clause to the statutory regulation of executive (and judicial) power—and the lack of any essentialist limits on these interbranch dynamics—Dean John Manning has argued that the Constitution supplies no “freestanding separation of powers principle.”<sup>434</sup> But in treating the separation of powers as an “ordinary” method of inferring judicially enforceable limits on statutes from the more specific clauses of Article II, Manning effectively resurrects the very essentialist understanding of the separation of powers that he so forcefully repudiates.

Manning relies on a vigorous *expressio unius* argument to distinguish the President’s exclusive powers from those that can be regulated by Congress. He contends that when the Constitution vests a “specific” power in a particular branch of government or describes a specific process by which the government

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**430.** *Id.* at 6; see also *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., dissenting) (“Of course, the right balance between presidential control and independence is often uncertain, contested, and value-laden.”).

**431.** Prakash, *supra* note 418, at 235.

**432.** *Id.* at 230.

**433.** John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 6-7 (2014).

**434.** Manning, *supra* note 1, at 1943.

must operate, the Constitution implicitly prohibits alternative statutory arrangements.<sup>435</sup> For example, Manning argues that the clauses of Article II that vest “executive Power” in the President and require the President to “take Care that the Laws be faithfully executed” both seem “straightforwardly to call for the recognition of sufficient ‘executive Power’ to allow the President to remove subordinates who, in his or her view, are not faithfully implementing governing law.”<sup>436</sup> He therefore concludes that statutes interfering with the President’s removal power are potentially unconstitutional: “because the Take Care Clause speaks directly to the President’s responsibilities over law execution, principles of ordinary interpretation suggest that the extent of any ‘executive Power’ of removal should be determined in light of the duties imposed by [this] more specific clause . . . .”<sup>437</sup>

But this argument has two subtle flaws. First, even the most specific clauses, including the Take Care Clause, reflect abstract principles with many competing meanings. Deeply attuned to this multiplicity of meanings,<sup>438</sup> Manning nonetheless selects one: an allegedly straightforward exclusive removal power. By choosing one among many interpretations of a constitutional provision as the exclusive “specific” meaning, Manning effectively shifts the same level-of-generality problem that he so powerfully criticizes to a different textual home.

Second and more fundamentally, an *expressio unius* argument for interpreting the Constitution fails to depict the structure of American constitutional government. The most relevant example of the problem with such an argument is Article II, Section 4, which provides that “all civil Officers of the United States[] shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>439</sup> This is a specific textual commitment of a removal power to the Senate, one that some members of the First Congress argued was the only method by which an officer could be removed.<sup>440</sup> Yet we are aware of no modern scholar who argues that impeachment should provide the sole mechanism for firing civil officers.

Similarly, Article II, Section 2 provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided

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**435.** *Id.* at 1947-48, 2005-13.

**436.** *Id.* at 2035-36.

**437.** *Id.* at 2037.

**438.** See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836-38 (2016).

**439.** U.S. CONST. art. II, § 4.

**440.** See *supra* note 105 and accompanying text; cf. Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 358 (1927) (emphasizing that the Impeachment Clause is one of “[t]he only provisions of the Constitution which deal[s] directly with the question of removal as it affects civil officers of the United States”).

two thirds of the Senators present concur.”<sup>441</sup> Under the *exclusio* principle, it would be unconstitutional for Congress to pass a statute authorizing the President to enter into agreements with foreign countries, because such a statute would authorize the creation of international agreements outside this finely-wrought constitutional procedure for treaties. Yet the Court has consistently accepted the legality of executive agreements, even as executive agreements have eclipsed treaties in practice.<sup>442</sup>

The *exclusio* principle becomes only more problematic when constitutional governance is viewed from a functional perspective. It is difficult to uphold bicameralism and presentment as the exclusive means of lawmaking, for example, when executive regulations are the predominant form of policymaking in the modern state.<sup>443</sup> The appointments process has been systematically displaced by the role of “actings” in agency leadership.<sup>444</sup> And if presidents could only exercise the recognition power by “receiv[ing] ambassadors and other public Ministers,” *Zivotofsky II*, which concerned a citizen’s passport specifications, would present a very different kind of constitutional case.<sup>445</sup> At a conceptual level, the whole idea of concurrent powers—the famous *Youngstown* “category two”—would seem in tension with a robust *expressio unius* principle.<sup>446</sup>

In short, the textualist defense of presidential dispensation argues that the separation-of-powers principle remains enforceable through the negative implications of the more specific constitutional clauses. Yet those negative implications suffer from the same indeterminacy problems underlying the separation-of-powers principle itself.

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**441.** U.S. CONST. art II, § 2.

**442.** See, e.g., *Field v. Clark*, 143 U.S. 649 (1892); *United States v. Belmont*, 301 U.S. 324 (1937); see also Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1239 (2008) (explaining that executive agreements are “an increasingly common path” for making international law); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1209-17 (2018) (detailing the decline of treaties as “the U.S. government in making binding international obligations has come to rely much more heavily on executive agreements”).

**443.** See, e.g., Strauss, *supra* note 2, at 582.

**444.** Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 617, 625 (2020).

**445.** See *Zivotofsky II*, 576 U.S. 1, 10-14 (2015).

**446.** See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (describing “a zone of twilight in which [the President] and Congress may have concurrent authority”); see also *infra* notes 487-488 and accompanying text (discussing *Youngstown*).

c. “*Royal residuum.*” – Finally, the rise of originalist scholarship about the presidency has led some scholars to transpose a modern understanding of presidential dispensation on Founding-era conceptions.<sup>447</sup> These scholars argue that the President’s authority to violate statutes stems from a “residuum” of kingly authority implicitly preserved in Article II.<sup>448</sup> This account suggests that aspects of the Crown’s royal prerogative implicitly survive in the constitutional office of the President, which includes the power to violate statutes that interfere with Article II.<sup>449</sup>

The problem with this argument is that the Crown did not possess *any* dispensation power at all, at least by the eighteenth century. As detailed above, any such authority was expressly repudiated in the English Bill of Rights.<sup>450</sup> To the extent that Article II retains aspects of the royal prerogative, it would provide a constitutional source of inherent authority for the President – that is, power that the President may exercise even absent statutory authorization – but *not* a basis to violate statutes regulating, for example, the removal of executive officers. As Professors Barron and Lederman observe, “It is common for defenders of presidential prerogatives to conflate inherent . . . powers with preclusive ones, and to assume that any powers granted by Article II must also be immune from statutory limitation.”<sup>451</sup>

d. *Summary.* – As the foregoing shows, the separation of powers is legally vague; there are multiple, incompatible approaches. Legal reasoning does not lead to agreement as to either the standards or methods of decision. Instead, under the juristocratic separation of powers, Congress and the President’s choices about how to design the federal government are controlled without reciprocation by the Supreme Court’s arbitrary discretion. It is arbitrary in the sense just shown: the Court’s disagreement with the political branches is based on the Justices’ sense of what the administrative state should look like, not on any objective

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447. See Mortenson, *supra* note 7, at 1172–74 (labeling this the “royal residuum” theory and advancing an originalist argument against this interpretation of Article II); cf. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001) (“[T]he President enjoys ‘residual’ foreign affairs power under Article II, Section 1’s grant of ‘the executive Power.’” (quoting U.S. CONST. art. II, § 1)); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 237–38 (2002) (“Traditionally, the ‘executive power’ was understood at the time of the framing as including the power of war and peace, and all external relations of the nation.”); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 231–32 (1996) (“The history behind Massachusetts’ 1780 constitution demonstrates the shared understanding that the executive branch should wield strong war-making powers.”).

448. See Mortenson, *supra* note 7, at 1181.

449. *Id.* at 1170–73.

450. See *supra* note 191 and accompanying text.

451. Barron & Lederman, *supra* note 412, at 741.

or agreed-upon criteria. And it lacks reciprocation because Congress and the President, our representative branches, are unable to negotiate with the Court to accept their interpretation. The Solicitor General and members of Congress of course can submit briefs to attempt to persuade the Court. But the Court proceeds as if there is some “answer” to the separation-of-powers question that is exogenous to the process of political negotiation. Put differently, the issue is resolved *on the Court’s own terms*—even when the statute at issue is ultimately upheld. Under the juristocratic separation of powers, the Court thus dominates Congress and the President qua representative institutions of the public.

## 2. *An Impoverished Constitutional Imagination*

Judicial domination compromises the constitutional imagination by forcing everyone else to phrase the separation of powers in the legalistic terms of the reigning Court majority. Perhaps most damaging has been the replacement of legal entitlements for political morality as the vocabulary of modern constitutional discourse. Political morality asks legislators and Presidents to consider not just their own institutional prerogatives, but also how these institutional interests interact with substantive policy goals and current political conditions. But under a system of legal entitlements, those involved in the legislative process—including, and perhaps especially, the President—develop strong institutional incentives to announce and loudly maintain absolutist claims of legal right. This exclusive focus on each branch’s supposed legal entitlements involves a tradeoff with other important values and argument types. It incentivizes participants to abstract away from the practicalities of governance and to press legal absolutes rather than to effectuate workable political accommodations.<sup>452</sup> Reducing the separation of powers to a fight over legal entitlements thus emphasizes institutional prerogatives and provides no constitutional vocabulary for discussing these other stakes.

To illustrate the tradeoff, consider that many modern institutional claims advance political ideologies that the sitting President might reject. The claim of an unregulatable executive-removal power, for example, not only initially reflected a hostility to multiracial democracy but, even in the present, might interfere with substantive policy goals that the political branches would otherwise collaboratively seek to achieve—an independent consumer-protection agency,<sup>453</sup> for example, or the administration of a vaccine according to science-driven decision-

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**452.** Cf. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 325-29 (2002); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 41-43 (2002).

**453.** See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 (2020).

making rather than partisan influence. Such a claim also might sit uncomfortably with the political realities of the moment, as when Taft sought to preserve civil-service protections, or when a future President might decide to shore up norms of institutional independence at the FBI or the Federal Reserve.

Yet because the claim of an exclusive removal power is currently regarded as a legal *requirement* of the presidency—a legal claim that even private parties can advance—there is little that the sitting President can do about it. By contrast, a President who vetoes a bill for interfering with a presidential prerogative must decide whether preserving that institutional commitment is worth it—or how that abstract commitment might be partially realized and partially reimaged in the particular context at issue.

The problem is deeper than what types of administrative designs the juristocratic separation of powers takes off the table. It is also about what argument types constitutional discourse views as legitimate.<sup>454</sup> State building entails constitutional imagination, political judgment, and compromise. As Professor Vicki C. Jackson argues, “[t]he ability to forge and enforce compromises is an essential aspect of any democratic government in a complex society.”<sup>455</sup> But under the juristocratic conception, bargaining, social-science evidence, and political acumen involving what is feasible in hyperpolarized times—all “anti-modalities” of legalist discourse—are erased from the constitutional grammar of government design.<sup>456</sup> The juristocratic separation of powers thus rejects the values and knowledge bases of statecraft, and it imagines that state building is possible without it. Rather than an interbranch process open to data-informed experimentation, interinstitutional accommodation, and political negotiation involving many conflicting interests and goals, the juristocratic separation of powers reduces the structure of the state to an exercise in judicial fiat.

It becomes the task of lawyers to fight over the abstract legal entitlements of the branches—often on behalf of private clients with no institutional stake in the fight and freed of any office-based commitment to advance the public trust. And it becomes the work of judges to divine these legal entitlements from scant and conflicting legal sources and abstract political ideals, even when the claim, premised, for example, on Article II, contravenes the informed judgment of the sitting President working with Congress. Inside the presidency as well, this focus on

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454. Cf. David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 731 (2021) (“[E]ven as this ‘legal grammar’ legitimates various analytical and rhetorical moves, it repudiates others.”).

455. Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 858 (2018).

456. Pozen & Samaha, *supra* note 454, at 768–72 (arguing that such “anti-modalities” create a “resonance gap” between what matters to the citizenry and what matters to constitutional law).



legal entitlements privileges the role of lawyers and the criteria of legal argument. As one of us has written elsewhere, this primacy of lawyers can “subjugate a type of blended judgment—the ability to combine legal and extralegal (moral, policy, and political) considerations in the making of presidential judgment” about how best to achieve the conflicting goals of the state.<sup>457</sup>

A constitutional discourse based on legal entitlements risks crowding out these nonlegal considerations, even in contexts where the legal claim itself is deeply contested, and the moral or policy considerations are especially weighty.<sup>458</sup> It provides a “limited menu of argument types . . . expected to provide definitive answers” precisely where the goal should be more multifaceted contestation and a more provisional understanding of settlement.<sup>459</sup>

Yet an alternative understanding of the Constitution—as the living, changing practice of constituting government—has coexisted, from the beginning, with the more rigid and static conception that today predominates.<sup>460</sup> This alternative understanding manifests in the value of nondomination so central to republican theorists of the separation of powers, at least since Montesquieu. And it is felt in the revisions to the separation of powers that made Reconstruction possible. It is in its moments of dynamism, of *unfixity*, that the separation of powers—as a bundle of permanently contested and fundamentally provisional ideas—has been reimagined and remade to accommodate the shifting policy needs and governance goals of the polity. This is the story of the rise of the administrative state.<sup>461</sup> It is the story of the institutionalization and diffusion of power inside the national security executive in the decades after 9/11.<sup>462</sup> And it might in coming years be the story of a reinvented conception of the legitimate or appropriate jurisdictional bounds in judicial review of federal legislation.<sup>463</sup>

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**457.** Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 893 (2017); cf. Jackson, *supra* note 455, at 858 (“Knowing that the Court will step in to resolve disputes may be more likely to diminish than to enhance the willingness of the legislative branch to engage in compromise.”).

**458.** See Renan, *supra* note 457, at 893–95.

**459.** See Pozen & Samaha, *supra* note 454, at 794.

**460.** See GIENAPP, *supra* note 1, at 4.

**461.** See generally, e.g., SKOWRONEK, *supra* note 303 (arguing that shifts in institutional power among the three branches allowed for the emergence of the modern administrative state); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (describing the evolving separation of powers in administrative law since the eighteenth century).

**462.** See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at xiii (2012).

**463.** See, e.g., Doerfler & Moyn, *supra* note 400, at 1706.

These efforts are, and have always been, messy, contested, and contingent. But they have also been vital to preserving republican freedom from arbitrary rule – or to the answerability of government to the people.<sup>464</sup> Statutory creativity undergirded Reconstruction's efforts to advance racial equality. Legislative innovations involving the presidency marked Progressives' efforts to curb corruption and self-dealing in the exercise of government power. Expansive delegations gave the executive branch tools to confront a dangerously warming planet. A structural constitutional law that disables such transformations in the structure of the state – or erases from the menu of permissible argument types the policy goals of addressing inequality, corruption, or climate change; the social-science learning on agency design; or the political realities of partisanship and polarization in what can realistically be achieved – lives on borrowed time. Such an approach is able to proclaim commitments to a strongly unitary view of the Executive, for example, or to a reinvigorated nondelegation doctrine, only because it obscures the political developments that have in fact sustained the democratic legitimacy of American constitutional governance.

### B. *Rule of Law*

The juristocratic separation of powers is often defended as a realization of the rule of law. The move only works, however, through a perversion of the role of statutes in constituting the constitutional order. Indeed, the use – or misuse – of statutes has been central to the separation-of-powers counterrevolution ever since Taft recast compromise legislation of 1789 as the basis to impugn the work of subsequent Congresses. Rather than evidence of constitutional fixity, however, statutes reveal the provisional commitments of a polity bound by law and changeable through law.

A rule of law defined by legislative interpretations that can be amended by future generations of political negotiators is more consistent with nondomination and political equality than a rule of law defined by judicial interpretations of allegedly settled statutory arrangements. Yet even on its own terms, the juristocratic separation of powers undermines whatever rule of law is “settled” by

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<sup>464</sup> See PETTIT, *supra* note 41, at 186 (arguing that nondomination entails the permanent possibility to contest what government is doing, and that “if the contestation establishes a mismatch with [the people’s] relevant interests or opinions,” the people should be able to force change); BELLAMY, *supra* note 8, at 8 (“[C]onstitutionalism seeks to prevent arbitrary rule – that is, rule that can avoid being responsive to the interest of the ruled . . .”); see also Gerald J. Postema, *Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, in BENTHAM’S THEORY OF LAW AND PUBLIC OPINION 7, 14 (Xiaobo Zhi & Michael Quinn eds., 2014) (“The opposite of accountability is not impunity (freedom from punitive response) but immunity (freedom from answerability).”).

earlier legislation: in normalizing the President’s violation of statutes, the juristic separation of powers makes it more difficult to hold power accountable to law.

1. *Historical Practice and the Rule of Law*

Following Taft’s use of the “Decision of 1789” in *Myers*, jurists and scholars from a range of methodological perspectives have come to interpret historical practice – and, in particular, early statutory enactments – as resolving constitutional ambiguity.<sup>465</sup> The idea seems to be that early statutes “fix” constitutional meaning in ways that future statutes can no longer transgress. This analytical move has gained renewed gusto in recent decades. Indeed, separation-of-powers doctrine has undergone a quiet conceptual reformulation, from its use of “historical gloss” as a reason to *defer* to the political branches<sup>466</sup> to its use as a reason to short-circuit the political process.<sup>467</sup> When the judiciary recognizes historical practice as a reason to leave untouched a longstanding or recurring practice, the

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465. See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (arguing that “[t]he meaning of the constitutional text is fixed when each provision is framed and ratified,” and that this thesis is a “core idea[] of originalist constitutional theory”); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (“Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise.”); Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1920 (2020) (arguing that “courts should give reasonably wide berth to systematic practices that have defined the way the government operates over a prolonged period of time,” and that “[d]epartures from settled institutional practices . . . merit no such deference”).

466. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ . . .”). See generally Bradley & Morrison, *supra* note 5, at 413 (discussing Justice Frankfurter’s emphasis on “the importance of a practice-based ‘gloss’ on presidential power” in *Youngstown*).

467. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020); cf. Stephen Skowronek, *The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition*, 100 AM. POL. SCI. REV. 385, 385 (2006) (analyzing “the movement of ideas across purposes”). See generally Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1410 (2017) (observing that, since 1997, “the Court has, on several occasions, trotted out the idea that legislative novelty signals that a statute is unconstitutional”).

judicial move might be justified as a form of “Burkean minimalism,”<sup>468</sup> institutional forbearance,<sup>469</sup> or comparative institutional competence.<sup>470</sup> These justifications fall away, however, when the Court relies on the novelty of a statutory enactment to disable it.<sup>471</sup>

Yet statutes – or, more precisely, the absence of statutes – have come to assume a peculiar status in constitutional law as evidence of implied legal limits on the discretion of future Congresses and presidents. As Chief Justice Roberts recently declared: “Perhaps the most telling indication of [a] severe constitutional problem’ with an executive entity [created by statute] ‘is [a] lack of historical precedent’ to support it.”<sup>472</sup> In this way, separation-of-powers doctrine has come to treat statutes as evidence of some grand constitutional plan – or at least a legal line in the sand that subsequent Congresses can no longer cross.

As a normative account of the rule of law, this “static version of governance” is difficult to defend.<sup>473</sup> “[N]ovelty is not the test of constitutionality when it comes to structuring agencies,” Justice Kagan recently emphasized in dissent: Congress does not regulate pursuant to “a Rinse and Repeat Clause.”<sup>474</sup> Early statutes can tell us something important about the political constraints and dominant ideologies of governance at any specific moment in time. But historical practice does not provide a legal source from which to infer limits on Congress and the President’s authority to design constitutional government. Even when history does reveal a particular convention or practice, once that convention is openly and notoriously altered through legislation, the provisional settlement no longer exists. Indeed, the very existence of a Supreme Court case involving a new statutory design reveals the *absence* of acquiescence from Congress. Any normative claim to institutional acquiescence has simply evaporated. As Kagan stressed, “each of the agencies the majority [today] fits within its ‘exceptions’ was once new; there is, as the saying goes, ‘a first time for everything.’”<sup>475</sup>

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468. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006); see also Bradley & Morrison, *supra* note 5, at 435.

469. See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 125 (2018).

470. See Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 64–66 (2017). See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 134 (1994).

471. See, e.g., Litman, *supra* note 467, at 1478.

472. *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

473. *Id.* at 2226 (Kagan, J., dissenting).

474. *Id.* at 2241.

475. *Id.* at 2242 (quoting *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012)).

There is a deep analytical disconnect between how statutes emerge and how they are treated in current constitutional argument. Legislative enactments develop in response to specific policy problems, political conditions, institutional challenges, and governance concerns. In this sense, they are institutionally arbitrary: they reflect one path chosen among other plausible alternatives. But lawyers and jurists looking back at this “mass of laws” attempt to retrofit them into a coherent constitutional blueprint. The absence of any particular agency design or congressional restriction, however, does not provide evidence of a considered *rejection* of that regulation’s constitutionality.<sup>476</sup>

To the extent that prior legislative debates *do* reflect a deliberate discussion of the constitutional issue, as in the “Decision of 1789,” such legislative history might reveal the constitutional commitments of a particular legislator or group of legislators. But it does not demonstrate a “collective intent” of the enacting Congress, and certainly not a collective intent of some abstract institution of Congress.<sup>477</sup> There is something decidedly odd about legislative history involving particular statutes informing how the Court infers legal limits on Congress and the President’s constitutional power to enact statutes, when in interpreting legislation itself, the Court has emphasized the problems with legislative history providing just this type of interpretive tool.<sup>478</sup>

Legislation *is* constitutive of the structure of American constitutional government. But it is precisely its provisionality that makes it constitutive—that is, “able to reform itself.”<sup>479</sup> Legislation does not represent a precommitment to avoid some alternative interinstitutional path; rather, it can reflect only the commitment to adhere to the path chosen, unless and until it is changed by future statutes.<sup>480</sup> Legislation thus provides durable but not immutable expressions of governing arrangements. To regard early statutes as evidence of a constitutional precommitment that future Congresses can no longer transgress “smacks more

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**476.** See, e.g., Litman, *supra* note 467, at 1478; cf. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) (“Congress’s deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one.”).

**477.** See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 244 (1992); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2399 (2017); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134 (1989).

**478.** See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“[T]he authoritative statement is the statutory text, not the legislative history . . . [L]egislative history is itself often murky, ambiguous, and contradictory.”).

**479.** BELLAMY, *supra* note 8, at 5; see also *id.* at 175 (“[W]e must accept a continual process of rebuilding the constitutional ship at sea.”).

**480.** See THOMAS PAINE, *RIGHTS OF MAN*, *supra* note 96, at 15 (“A law not repealed continues in force, not because it *cannot* be repealed, but because it *is not* repealed; and the non-repealing passes for consent.”).

of Procrustes than Ulysses.”<sup>481</sup> It marks “the artificially sustained ascendancy of one view in the polity over other[s],” while the underlying values and goals of the state remain fragmentary and contested.<sup>482</sup>

In looking to statutes to construct a provisional constitutional order, the republican conception thus offers a more appealing account of the rule of law—one that better reconciles constitutionalism with democracy.<sup>483</sup> The ability to act in concert notwithstanding fundamental disagreements about the role of the state, the values of presidentialism, the nature of checks and balances, and the characteristics of effective governance—as Professor Jeremy Waldron puts it, “in the circumstances of politics”—is precisely what makes the statutory construction of the separation of powers respect-worthy.<sup>484</sup> As Waldron argues, “[t]he rule of law should not be wedded to a superstitious view of law or to a view that makes the processes of legal change obscure.”<sup>485</sup> In contrast to legal change under the guise of interpretation or the myth of an early statutory consensus, connecting the rule of law to statutes emphasizes that legislation is “a means by which the members of the society can take control of the basic structure of their society, publicly and transparently.”<sup>486</sup>

## 2. *Dispensation and the Rule of Law*

Even as it hangs on a superstitious view of law, the juristocratic separation of powers also makes it more difficult for law to hold the President to account. This is because the Court has made it more acceptable—or sociologically legitimate—for the President to violate statutes.

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**481.** JEREMY WALDRON, *LAW AND DISAGREEMENT* 268 (1999). In Greek mythology, Procrustes “forces travelers to fit into his bed by stretching their bodies or cutting off their legs.” *Procrustes*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/Procrustes> [https://perma.cc/4DUS-XJTT].

**482.** WALDRON, *supra* note 481, at 268; *see also* LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 61 (2013) (“[The] image of commitment over time eats its own tail. The very commitment that we as a political community have lived out is a commitment to openness, rebellion, and a continual straining against the yoke.”).

**483.** *Cf.* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 26-31 (2000) (arguing that “the rule of law entails that a legal system have a set of institutional arrangements sufficient to ensure the degree of stability necessary to guarantee that the law’s settlement function will be performed acceptably,” *id.* at 27, but a system of judicial supremacy is not more stable than alternatives, including legislation, *id.* at 29).

**484.** *Cf.* WALDRON, *supra* note 481, at 108 (“A piece of legislation deserves respect because of the achievement it represents in the circumstances of politics: action-in-concert in the face of disagreement.”).

**485.** Jeremy Waldron, *Legislation and the Rule of Law*, 1 *LEGISPRUDENCE* 91, 100 (2007).

**486.** *Id.*

In 1952, after President Harry S. Truman issued a wartime order to seize steel mills facing a strike, the Supreme Court invalidated the order because it violated existing statutes.<sup>487</sup> In a famous concurring opinion, Justice Jackson contrasted the presidential conduct executing a congressional command (category “1”) or undertaken in the absence of congressional instruction (category “2”), with measures undertaken by the President that are “incompatible with the expressed or implied will of Congress” (category “3”).<sup>488</sup> In the third category, Jackson observed, the President’s “power is at its lowest ebb,” yet it may sometimes be sufficient to overcome a contrary statute.<sup>489</sup> Jackson’s three-category framework in the *Steel Seizure* case is often celebrated as a vindication of the rule of law. But in proposing a legal context for when a President *can* violate a statute—category three—the opinion made every subsequent presidential decision to countermand a statute itself more legalistic, and thus more sociologically palatable.<sup>490</sup> Significantly, although Jackson could find several examples of Supreme Court precedents involving category one and category two, his only example of a category three case in which the President prevailed was *Myers*.<sup>491</sup>

Justice Jackson’s concurrence opened a door that later cases have since marched through. In 2015, for the first time, the Supreme Court “accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”<sup>492</sup> The decision, *Zivotofsky II*, condoned the actions of the George W. Bush and Barack Obama administrations, which refused to enforce a statute that required the State Department to list “Israel” on the passports of U.S. citizens born in Jerusalem.<sup>493</sup> As in *Myers*, the Court invalidated the statute for allegedly interfering with a core executive prerogative, this one the prerogative to recognize foreign countries.<sup>494</sup> As Professor Jack Goldsmith has predicted, the decision’s influence is starkest inside the executive branch itself:

Until *Zivotofsky II*, [executive branch] lawyers had to rely on shards of judicial dicta, in addition to executive branch precedents and practices,

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**487.** *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-87 (1952).

**488.** *Id.* at 635-38, 637 (Jackson, J., concurring).

**489.** *Id.* at 637.

**490.** Cf. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 285-96 (2007) (discussing how judicial review empowers the presidency). See generally Fallon, *supra* note 400, at 1794-96 (discussing the distinctions and interconnections of legal, moral, and sociological legitimacy).

**491.** See *Youngstown*, 343 U.S. at 638 & n.4 (Jackson, J., concurring).

**492.** *Zivotofsky II*, 576 U.S. 1, 61 (2015) (Roberts, C.J., dissenting).

**493.** See *id.* at 5-7 (majority opinion).

**494.** See *id.* at 29-32.



in assessing the validity of foreign relations statutes thought to intrude on executive power. But now they have a Supreme Court precedent with broad arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute.<sup>495</sup>

It is a remarkable thing for the President to violate the law – even an allegedly unconstitutional law. The century before 1926 is replete with examples of presidents complying with the governing statutory regime, even in those nooks and crannies of public law most closely associated with presidential prerogative, such as the commander-in-chief authority.<sup>496</sup> But the more the Court domesticates the idea of presidential dispensation – by reconceptualizing the move in legalistic terms and giving it a judicial imprimatur – the more sociologically palatable and politically costless the practice of transgressing statutory restrictions becomes.

American constitutional development is the story of a President emboldened to openly defy statutory enactments, finding legitimation and vindication through an increasingly politicized judiciary.<sup>497</sup> The separation-of-powers counterrevolution has resulted in both juristocracy and a “more than kingly” presidency.

### C. Political Equality

Judicial domination does not just undermine the rule of law. It also impedes political equality.

Political equality has long been a guiding principle of American constitutional government, even as the United States has never achieved this ideal in practice. Nevertheless, the ideal is approached when disputes about the construction of the American state are resolved not by one special group of people

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**495.** Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015). Goldsmith’s prediction has since been realized; executive-branch lawyers have cited *Zivotofsky II* to justify a President’s failure to comply with certain statutes. See Statutory Restrictions on the PLO’s Wash. Off., 42 Op. O.L.C. 1, 8 (2018), <https://www.justice.gov/sites/default/files/opinions/attachments/2021/01/19/2018-09-11-plo-office.pdf> [https://perma.cc/YD9C-R69U].

**496.** See Barron & Lederman, *supra* note 415 *passim*.

**497.** See, e.g., Ferejohn, *supra* note 452, at 43 (“In view of [increasing judicial involvement in the structure of self-governance], it is no surprise that appointments to both the U.S. Supreme Court and to other federal courts have become partisan political issues.”); see also Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 361 (“The growing ideological polarization of the parties at the elite level has given presidents stronger incentives to choose nominees whose ideological orientations match those of the president’s own party.”).

or even one generation, but by ongoing political contestation among representatives of a community of political equals. For all the deficiencies of Congress and the Presidency in representing such a community of equals, the two institutions do so better than do the Supreme Court Justices, appointed for life with senatorial advice and consent. Yet the juristocratic separation of powers holds that even in the face of genuine disagreement about fundamental questions of state design, the decisions of closely divided Court majorities should overrule the construction of the political branches articulated in statutes. As Professor Jeremy Waldron argues in a related context, constitutional ambiguities today are settled not by voting among members of Congress and the President, but “by voting among Justices – some voting for one conception . . . [and] the others for another, and whichever side has the most votes on the Court prevails.”<sup>498</sup> This is not “an appropriate basis for the settlement of structural terms of association among a free and democratic people.”<sup>499</sup>

By permitting the Court to overrule the considered judgment of the representative branches on how to structure the separation of powers, the juristocratic conception substitutes provisionality with a judicially imagined fixity. In so doing, the juristocratic separation of powers renders the people unable to meaningfully contest the development of the state. Such a citizenry no longer stands in relations of political equality with those once able to contribute to – or oppose – contested features of constitutional governance.<sup>500</sup> Rather, they are “enslaved” by the judgments of those who do (or did) have a say.<sup>501</sup>

This would be so even if the privileged group were the Framers – and even if that generation’s structural understandings were pellucid. Consider, for example, the Constitution’s protection of each state’s “equal suffrage in the Senate,” for which the text of the Constitution appears to foreclose *any* constitutional amendment.<sup>502</sup> Such a provision, construed literally, would disable any future generation from rethinking how to make American democracy more representative of the people. Legal enforcement of this constraint by courts would seem to

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**498.** Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1358 (2006).

**499.** *Id.*

**500.** See Danielle Allen, *A New Theory of Justice: Difference Without Domination*, in *DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES* 27, 38-39 (D. Allen & R. Somanathan eds., 2020) (arguing “for the primacy of political equality within any viable account of justice” and connecting the concept of political equality to “egalitarian access to the instrument of government” and Philip Pettit’s conception of “freedom from domination”).

**501.** See Nikolas Bowie, Comment, *Antidemocracy*, 135 *HARV. L. REV.* 160, 205-08 (2021).

**502.** U.S. CONST. art. V.

require something extraconstitutional—war? secession? an entirely new document?—to permit democratic reform to the structure of national lawmaking.<sup>503</sup> Even if it were clear that this was the original understanding of Article V, it would be difficult to defend such a construction as consistent with political equality.

In the context of most separation-of-powers disputes, moreover, there is no consensus view. As the foregoing showed, the constitutional goals are contested, and the potential constitutional standards are incompatible with each other and limited on their own terms. To the extent that separation-of-powers law is entrenching, then, it privileges the ideological commitments of individual jurists—as *Myers* did Taft’s—not some collective understanding of constitutional constraint. The privileged few are a majority of five, sometimes with highly idiosyncratic ideas about the design of the good state.<sup>504</sup> It is no answer to say that the views of the Court reflect long-term thinking in contrast to the short-term thinking of the political branches. For the Court itself is deeply divided on which way that long-term thinking cuts, and it is divided along similar lines as the polity.

By contrast, the republican conception acknowledges the basic reality that jurists, politicians, and We the People do not agree on what constitutional governance entails, and that we do not know everything we need to know to make government effective for the future. It accepts that new problems and changing moral aspirations will put different burdens on the design of the state over time. But it also recognizes, more fundamentally, that our debates about the structure of the state are in part debates about what we want the state to be able to achieve. Rather than resolve these disagreements through a judicial aristocracy, itself closely divided, the republican separation of powers anchors ongoing contestation and provisional settlements in the principle of political equality.<sup>505</sup>

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503. See, e.g., ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 145 (2d ed. 2003) (describing this proviso in Article V as “totally impregnable”). *But see* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 *COLUM. L. REV.* 2317, 2393–94 (2021) (arguing that reform might nonetheless be thinkable under an alternative approach to constitutional interpretation).

504. See, e.g., *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1997–98 (2021) (Thomas, J., dissenting) (observing that “[f]or the very first time, this Court holds that Congress violated the Constitution by vesting the appointment of a federal officer in the head of a department” and arguing that the decision has no foundation in early constitutional understandings).

505. See WALDRON, *supra* note 481, at 264; BELLAMY, *supra* note 8, at 154 (“[R]epublicanism holds that the arbitrary rule of monarchs and their modern successors can only be avoided by some form of self-rule.”). In aligning with Bellamy, our account of republicanism diverges from Pettit’s and others who have argued from republican premises for judicial review—at least to the extent that those accounts embrace judicial *supremacy*.

Under the republican conception, the separation of powers remains a principle that *characterizes* constitutional government.<sup>506</sup> A President might veto a statute on the ground that she concludes the statute interferes with her constitutional prerogative. A legislator might vote against a statute on the same constitutional ground. And the people might vote out of office a legislator—or a President—whom they view as bucking established constitutional conventions. But disagreement over the design of the government is ultimately resolved through a political process that recognizes and respects the legitimacy of these competing views;<sup>507</sup> it is not resolved by five Justices overruling the more representative branches.

To be sure, party discipline might affect whether the President vetoes legislation, or whether a member of Congress votes to enact it. As scholars have shown, the “separation of parties” is felt in how the separation of powers is practiced.<sup>508</sup> But the significant insights of the separation-of-parties literature should not obscure the strong institutional pressures inside the presidency to resist what might be perceived as a congressional encroachment in proposed legislation. The Attorney General has a longstanding institutional role in considering the long-term implications of statutory designs on the presidency, a function today undertaken in systematic fashion by the Office of Legal Counsel inside the Justice Department.<sup>509</sup> In any event, party influence on the construction of the separation of powers by statute is not in principle at odds with the republican conception. Indeed, political parties are what make it possible for ordinary people to

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506. Cf. Jeremy Waldron, *Non-Normative Principles* 4-5 (N.Y.U. L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 19-50, 2019), <https://ssrn.com/abstract=3463964> [<https://perma.cc/J7A4-UDVH>] (describing “characterizing principles” as those that define the “overall spirit or identity” of a legal system).

507. See WALDRON, *supra* note 481, at 109 (“First, it respects . . . differences of opinion about justice and the common good . . . . Second, it embodies a principle of respect for each person in the processes by which we settle on a view to be adopted as *ours* even in the face of disagreement.”).

508. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

509. See, e.g., Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1707-23 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)) (detailing the role of the Office of Legal Counsel inside the executive branch). Indeed, to the extent that there is an institutional disadvantage in protecting institutional prerogatives, it is with Congress, not the presidency. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438-47 (2012); cf. Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 83-88 (2021) (proposing the creation of a congressional OLC).

understand and participate in politics at the national level.<sup>510</sup> To the extent party discipline affects how the presidency and Congress behave in the legislative process, this could reinforce the ability of those branches to advance the value of political equality.

The concern, then, might be less party discipline than broken parties—an acute worry in current times.<sup>511</sup> Dire problems in U.S. politics have put American constitutional democracy at profound risk.<sup>512</sup> But scholars and jurists misdiagnose, and may exacerbate, these problems of constitutional governance by looking to the juristocratic separation of powers to fix them. Indeed, fear of a broken republican ethos—of the corruption and gridlock of representative institutions—has long driven contestation and innovation in what representative government should institutionally entail. Recent scholarship has reconstructed how parliamentarism emerged in Europe between the 1760s and the twentieth century in response to these concerns.<sup>513</sup> For European theorists of the period, institutional features such as ministerial government were understood to “prevent[] the legislature from acting tyrannically or being seized by a violent faction.”<sup>514</sup> Meanwhile, in the United States, the institutional presidency—including important

**510.** Political scientists have long emphasized the centrality of parties to modern representative democracy, *see* E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 1 (1942), even as they disagree about current directions for reform, *see, e.g.*, FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, *RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF* 20–25, 41 (2018) (arguing that “programmatically competition is the lifeblood of healthy democracy,” and that it is “best served by two large strong parties”); LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* 6 (2020) (observing that political parties “make politics accessible to the masses” in advocating for multiparty democracy); *cf.* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 321–24 (2016) (discussing the significance of parties for a group theory of democratic power). *See generally* Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 *CURRENT LEG. PROBS.* 89, 98 (2020) (“[P]olitical parties (in efficient multipartisan systems) reduce key information and transaction costs for both [the state and its people], making democracy possible” (internal citation omitted)).

**511.** Concern about the existing party system in the United States (and beyond) takes myriad forms, including worries that parties have become too weak to serve their traditional coordinating role, *see, e.g.*, Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 *HOUS. L. REV.* 845 (2017), so polarized and fragmented as to undermine effective governance, *see, e.g.*, Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804, 809 (2014), unrepresentative, *see, e.g.*, Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 *PERSPS. ON POL.* 731 (2009), and disconnected from wider society, *see, e.g.*, PETER MAIR, *RULING THE VOID: THE HOLLOWING OUT OF WESTERN DEMOCRACY* (2013).

**512.** *See, e.g.*, DRUTMAN, *supra* note 510, at 2 (describing the U.S. political system as “a doom loop of toxic politics”).

**513.** *See, e.g.*, SELINGER, *supra* note 143.

**514.** *Id.* at 3.

statutory and norm-governed boundaries between the incumbent and the executive bureaucracy – emerged in part to curb self-dealing and resist a protofascist executive.<sup>515</sup>

These political institutions and norm-governed practices are frighteningly under attack today, even as rigorous debate ensues on the conditions that might better promote negotiation and what Professor Vicki Jackson has termed “pro-constitutional representation.”<sup>516</sup> The republican separation of powers cannot protect American constitutional democracy from anticonstitutional representatives. But it can help focus reform on the qualities of governance needed to make representative democracy work in our constitutional system.

#### IV. RECONSTRUCTING THE REPUBLICAN SEPARATION OF POWERS

In contrast with the juristocratic separation of powers, the republican conception advances the values of political equality, nondomination, and the rule of law. A *provisional* understanding of the separation of powers enables a continuous political community that is also a different – more expansive and inclusive – community than the one that participated in ratification. Further, it grounds the legitimacy of the structure of the state not in some imagined consensus at the Founding,<sup>517</sup> but rather in the permanent possibility of its contestation.<sup>518</sup> It embraces rather than erases genuine disagreement about how to structure an effective government faithful to constitutional design and current moral commitments.

The nature of contestation implicates the institutions of political power. Understanding the President’s constitutional ability to disagree about what the separation of powers tolerates through the *veto power*, not dispensation, recognizes the authority of legislation as a democratically legitimate and durable – though not immutable – instrument of state-building. In looking to *statutes* to construct constitutional meaning, the republican separation of powers also uplifts a different kind of decider: the representative institutions of American democracy. As fundamentally, it privileges a different form of argument. In centering *statecraft*, the republican conception accepts that problems of governance cannot be solved

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515. See, e.g., Renan, *supra* note 24; Rosenblum, *supra* note 301, at 3-5.

516. Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717 (2016).

517. Cf. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) (documenting the spectrum of positions held by early Americans on the questions of constitution-making and state design).

518. See PETTIT, *supra* note 41, at 185.



by dictionary debates over the diction of Article II. Rather, they require leadership, compromise, and creativity—that is, they require the exercise of both political judgment and constitutional imagination. A republican separation of powers thus recognizes that no legalistic definition of “legislative” or “executive” power can safeguard constitutional commitments to multiracial democracy, effective governance, or the peaceful transfer of power. We have the polity that We the People allow our elected representatives to create. If we don’t hold each other to standards of constitutional decency, we can’t expect the Court to save us from the consequences.<sup>519</sup>

There is nothing given—certainly not “original”—about the countervailing juristocratic conception. And, although it is currently dominant, the juristocratic separation of powers does not have to remain so, as a matter of politics or doctrine.<sup>520</sup> This Part recovers the judicial role in a republican separation of powers. To do so, we build on two longstanding jurisprudential ideas—the political-question doctrine<sup>521</sup> and a form of deferential review associated with Professor James B. Thayer.<sup>522</sup> We then illustrate our conception of an appropriate judicial role with reference to existing case law. The Article concludes with three case studies to show what the republican conception would mean in practice.

#### A. *Who Decides?*

The central question distinguishing the juristocratic and republican separation of powers is who should have the primary authority to determine which structures of republican government are compatible with the Constitution’s limits. Whereas the modern Supreme Court trusts only itself to enforce implied legal limits on the political branches, the republican conception embraces an older perspective that “Congress must necessarily decide what government is established . . . [and] whether it is republican or not. . . . And its decision is binding on every other department of the government.”<sup>523</sup>

The republican conception thus anchors in our representative institutions the primary authority to give provisional meaning, through statutes, to the

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**519.** Cf. Postema, *supra* note 464, at 8, 21 (arguing that the “ethos of law” is ultimately “a matter of fidelity neither to law or to government, but rather of fidelity to each other”).

**520.** Cf. Doerfler & Moyn, *supra* note 400, at 1753-71 (discussing proposals to disempower the Supreme Court from conducting judicial review of federal statutes on constitutional grounds).

**521.** Jesse H. Choper provides the leading account of the separation of powers as a political question for courts. See CHOPER, *supra* note 6; see also, e.g., Huq, *supra* note 428, at 70-76 (arguing that presidential removal power should be treated as a political question).

**522.** See James B. Thayer, *Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see, e.g., Manning, *supra* note 433, at 51-54.

**523.** *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).



structure of constitutional government. This conception rejects the judicial construction of implied legal limits on legislation regulating executive-congressional dynamics, even in contexts that pertain to what today might appear as a “core” presidential prerogative. As the foregoing shows, American constitutional development reveals much more disagreement over whether any such core exists than our current theory and doctrine appreciate.

Though we ground our argument in the values of political equality, non-domination, and the rule of law – not textuality – we note that the Constitution itself offers plausible support for this perspective. Article I gives Congress many powers to construct the federal government.<sup>524</sup> Most significantly, the Necessary and Proper Clause empowers Congress to “make all Laws . . . necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>525</sup> From the beginning of the United States’ history, members of Congress, the executive branch, and the judiciary have interpreted this final clause with reference to the “infinite variety, extent and complexity” of possibilities by which “national exigencies are to be provided for, national inconveniences obviated, [and] national prosperity promoted.”<sup>526</sup> Selecting among these possibilities primarily belongs to “the discretion of the national legislature . . . with respect to the means by which the powers [the Constitution] confers are to be carried into execution.”<sup>527</sup>

In contrast with this explicit grant of constitutive authority to Congress, the Constitution is ambiguous (at most) about the outer bounds of how this authority can be exercised to construct the federal government. Several parts of the Constitution expressly limit Congress’s power, specifying where “Congress shall make no law”<sup>528</sup> or “No . . . Law shall be passed.”<sup>529</sup> Article II’s establishment of the presidency is not one of these areas. Instead, any limits Article II imposes on appropriate legislation must be implied. Implied limits are always subject to competing reasonable interpretations: the grant of any particular power to the President can be read either as an exclusive power that cannot be taken away, or, alternatively, as a default allocation that can be regulated by statute. Under the

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**524.** *E.g.*, U.S. CONST. art. I, § 8, cl. 9 (authority to constitute inferior judicial tribunals); *id.* cls. 12-16 (authority to raise and support armies, a navy, and the militia); *id.* cl. 17 (authority to construct the “Seat of the Government of the United States”).

**525.** *Id.* cl. 18.

**526.** Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 105 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

**527.** *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21 (1819).

**528.** U.S. CONST. amend. I.

**529.** *Id.* art. I, § 9, cl. 3.

republican conception, resolving these conflicting interpretations, provisionally, is the role of Congress and the President working through the legislative process.

B. *Building on Existing Theories of Judicial Deference*

The republican conception necessitates a shift in the locus of authoritative decisions on the separation of powers from the judiciary to the political process. As a matter of constitutional doctrine, that move can be framed either in terms of jurisdiction or merits. When the political character of the constitutional decision is instantiated in a statute, we find the distinctions between the two less illuminating than the shared concerns underlying them—for reasons we elaborate below. We thus build out our conception of the judicial role in a republican separation of powers by drawing on both traditions.

1. *The Political Character of the Separation-of-Powers Decision*

The political-question doctrine is the name for when a court declines to consider an issue before it because the case presents an issue of political discretion rather than legal right. As the Supreme Court recently observed, the doctrine entails “[t]he question . . . whether there is an ‘appropriate role for the Federal Judiciary’ in remedying the problem [at issue]—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere.”<sup>530</sup> This idea resonates with the claim at the crux of our thesis: the separation-of-powers principle implicates real and meaningful constitutional commitments, but it does not translate into a set of legal concerns for courts to enforce, nor a category of implied *legal* principles for courts to develop.<sup>531</sup>

Identifying a question as political thus “signal[s] as adamantly as possible that neither [of the political branches], nor litigants, nor the public can look to the judiciary to resolve” the structural question at issue.<sup>532</sup> In recognizing the statutory decision as authoritative on the separation-of-powers question presented, the judiciary accepts the political resolution even if the Court would assess the constitutional question differently—that is, even if the Court would find the constitutional resolution reflected in the statute erroneous.<sup>533</sup> It is in this

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**530.** *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

**531.** See *CHOPER*, *supra* note 6, at 260-63, 298-308.

**532.** Richard H. Fallon, Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1487 (2020).

**533.** See *id.* at 1496.

sense that the republican conception understands the separation of powers to pose a political question.

In application, however, courts tend to operationalize the political-question doctrine as a form of judicial abstention, rather than as an elimination of a potential constitutional defense. In the context of interbranch disputes, the difference between these approaches is crucial. For example, imagine that the President violates a statute on the ground that she believes it to contravene legal limits inferred from Article II, and a plaintiff harmed by the statutory violation sues. If a court abstains from resolving the dispute, the legal remedy for the *statutory* transgression is eliminated.<sup>534</sup> By contrast, if a court instead declines to recognize implied legal limits as a constitutional defense, then it would enforce the statute.<sup>535</sup> Our approach calls for the latter, enforce-the-statute outcome.<sup>536</sup>

We reject the alternative understanding—treating political questions as questions of judicial abstention—because we believe such an approach would make constitutional democracy less capable of handling structural contestation. It would give a single person (the President) the power to trump the decisions of an otherwise interbranch and supermajority process (i.e., the legislative process). Perhaps counterintuitively, then, when the Court treats the political-question doctrine as a reason to dismiss the case, the Court makes the resolution of such questions through the political process *less* effective. As Barron and Lederman observe, this form of the political question strategy is “hardly . . . a neutral solution”; it “inevitably tilt[s] the constitutional structure decidedly in favor of executive supremacy.”<sup>537</sup> In contrast, when the Court enforces the statute, it recognizes an interbranch and supermajoritarian resolution of the separation of powers as authoritative.

## 2. *Reinterpreting Thayer*

This judicial role stands in stark contrast to the concept of Thayerian deference as it has been operationalized in separation-of-powers theory, although we

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**534.** This is how *Zivotofsky* was initially resolved by the D.C. Circuit. See *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1232–33 (D.C. Cir. 2009).

**535.** Cf. *United States v. Nixon*, 418 U.S. 683, 712–13 (1974) (holding that the President could not defy a special prosecutor’s subpoena by reference to separation of powers and executive privilege).

**536.** Professor Aziz Z. Huq has argued that courts should reach this outcome by treating removal disputes as political questions, see Huq, *supra* note 428, at 70–76, even as other scholars have tended to assume that a court applying the political-question doctrine would not enforce the statute but rather abstain in the context of a separation-of-powers claim, see *CHOPER*, *supra* note 6.

**537.** Barron & Lederman, *supra* note 412, at 724.

think it follows from the logic of Thayer's argument as well. Thayer posited that courts should defer (on the merits) to the legislative resolution of a constitutional question unless it is "very clear[ly]" wrong as a matter of constitutional interpretation.<sup>538</sup> The difficulty is that what any one jurist concludes is clearly wrong or "repugnant"<sup>539</sup> depends on that jurist's potentially idiosyncratic methodological commitments and normative priors.<sup>540</sup> There is not consensus about how to interpret the Constitution; indeed, there is not consensus about what type of document the Constitution even *is*.<sup>541</sup> There is ongoing contestation about not only how to read constitutional silence, but also the significance of constitutional text.<sup>542</sup> It is difficult to call something "clearly wrong" in the context of widespread disagreement over the appropriate goals, methods, and constraints of the separation of powers.

To illustrate the problem, consider one of Thayer's own examples of a "clearly wrong" piece of legislation for which deference would be unwarranted. "[I]f the legislature were to vest the executive power in a standing committee of the House of Representatives," he wrote, "every mind would at once perceive the unconstitutionality of the statute."<sup>543</sup> Yet when *Bowsher v. Synar*<sup>544</sup> presented the Court with a statute nearly identical to Thayer's example of obvious unconstitutionality, the Justices divided on how to apply the separation of powers.

Policing the boundaries of permissible interpretation, if one accepts implied legal limits on Congress's power, confronts the same problems elaborated above.<sup>545</sup> There is neither an agreed-upon "essential" separation of powers nor judicially manageable standards for how to translate any particular abstracted ideal into the very concrete, complex, and inherently provisional features of modern governance.

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538. Thayer, *supra* note 522, at 144.

539. *Id.* at 142.

540. Cf. Manning, *supra* note 433, at 79-81 (arguing that "under [an] essentially Thayerian view" the legislative veto should be deemed unconstitutional). *But see infra* Section IV.D.1 (discussing constitutional arguments in defense of the legislative veto).

541. See, e.g., GIENAPP, *supra* note 1, at 4-8.

542. See, e.g., Davis A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4-5 (2015).

543. Thayer, *supra* note 522, at 141 (quoting *Grimball v. Ross* (Ga. Super. Ct. 1808), in THOMAS U. P. CHARLTON, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR COURTS OF THE EASTERN DISTRICT OF THE STATE OF GEORGIA 175, 178 (1805-1811)); see also Manning, *supra* note 433, at 79-81 (making similar formalist moves with respect to implied legal limits on Congress's ability to alter the impeachment process or the removal power).

544. 478 U.S. 714 (1986).

545. See *supra* Section III.A.

Rather than agree with Thayer that a court should defer to the legislature unless it is “clearly wrong” by the lights of any particular jurist, we think the principles underlying Thayerian deference should lead the judiciary to accept as authoritative the separation-of-powers arrangements reached through the legislative process.

Echoing Madison’s argument from 1789, Thayer explained that his call for judicial deference was intended to respect the legislature’s power “not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs.”<sup>546</sup> Thayer cautioned that constitutional principles comprise “maxims of political morality”<sup>547</sup> vital to a functioning constitutional democracy. But reliance on courts to police the substantive content of political morality jeopardizes those very maxims. As Thayer concluded:

[T]he safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.<sup>548</sup>

### C. *A Garcia for the Separation of Powers*

The republican separation of powers is not merely a theoretical approach to American adjudication. It has also been implemented in the context of federalism decisions, and a latent version of it stirs in the separation-of-powers jurisprudence of Justice Kagan.

In the aftermath of Reconstruction, federalism emerged as a judicially enforceable limit on Congress’s exercise of power – one thought to be implied by the text of the Tenth Amendment. This jurisprudential understanding of federalism developed through much of the twentieth century; valid exercises of Congress’s power to tax or regulate commerce could be declared invalid if they transgressed an unsettled boundary protecting the inherent sovereignty of the states. But in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court abandoned a judicial role in protecting “traditional governmental functions” from federal

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<sup>546</sup>. Thayer, *supra* note 522, at 136.

<sup>547</sup>. *Id.* at 130 (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 126 (London, MacMillan & Co. 3d ed. 1889)).

<sup>548</sup>. Thayer, *supra* note 522, at 156.

regulation.<sup>549</sup> Overruling *National League of Cities v. Usery*,<sup>550</sup> the Court in *Garcia* observed that its earlier tests had sought to determine “whether the federal statute at issue unduly handicaps ‘basic state prerogatives’ . . . [but] did not offer an explanation of what makes one state function a ‘basic prerogative’ and another function not basic.”<sup>551</sup>

Such an approach, the *Garcia* Court reasoned, is not only conceptually “unworkable,”<sup>552</sup> but also misunderstands the role of history in the analysis of constitutional structure. “Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort,” the Court explained; “the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.”<sup>553</sup> The earlier frameworks, *Garcia* suggested, failed to appreciate the contingency of American political development. “The problem is that neither [a] governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society,” the Court explained.<sup>554</sup> “Any rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”<sup>555</sup> The “science of government,” the Court concluded, “is the science of experiment.”<sup>556</sup>

Under the logic of *Garcia*, federalism remains a principle important to American constitutionalism and continues to guide Congress and the President as they legislate with respect to the states. Because of federalism, for example, courts might presume that the federal government does not intend to interfere with

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**549.** 469 U.S. 528, 530 (1985) (quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976)).

**550.** 426 U.S. 833.

**551.** 469 U.S. at 540 (quoting *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 686-87 (1982)).

**552.** *Id.* at 531.

**553.** *Id.* at 544.

**554.** *Id.* at 545-46.

**555.** *Id.* at 546.

**556.** *Id.* (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821)).

familiar state functions unless a statute clearly expresses the federal government's intent to do so.<sup>557</sup> Under *Garcia*, however, neither the Tenth Amendment nor federalism imposes a freestanding limit on Congress's Article I powers.<sup>558</sup>

So too in the relationship between the branches. The separation of powers should continue to provide a characterizing principle that guides Congress and the President as they develop legislation.<sup>559</sup> But so long as Congress and the President are exercising their authority to make laws that they deem appropriate for "carrying into Execution" the powers of the federal government<sup>560</sup>—introducing removal restrictions on the President, legislative vetoes, line-item vetoes, or any number of other institutional reforms tried and untried over time—their handiwork simply does not implicate a judicially enforceable separation-of-pow-

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**557.** See, e.g., *Bond v. United States*, 572 U.S. 844, 858 (2014) (“[I]f the federal government would [‘]radically readjust[] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit[] about it.” (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994))); see also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“[W]e must assume Congress does not exercise [its Supremacy Clause power] lightly.”). Some worry that this has caused a form of “backdoor” constitutionalism, which scholars alternatively critique, see, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598, 646 (1992) (arguing that the Court’s federalism clear-statement rules “amount to a ‘backdoor’ version of . . . constitutional activism” and cautioning that this “quasi-constitutional law . . . submerge[s] a variety of hotly contestable normative and empirical issues”), or defend, see, e.g., Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1381 (2010) (defending federalism canons of statutory interpretation with reference to “ideas concerning the continuity of constitutional and statutory interpretation”).

**558.** While we embrace the logic of *Garcia* and argue for its extension to the separation-of-powers context, we note that a fractured Court has not been consistent in applying *Garcia*’s logic even in the federalism context. See, e.g., *Printz v. United States*, 521 U.S. 898, 905, 935 (1997) (invalidating a statutory provision on federalism grounds and reasoning—over a strong dissent—that, notwithstanding the absence of any express constitutional prohibition on commandeering, commandeering is rejected by a combination of historical practice, constitutional structure, and judicial precedent); see Manning, *supra* note 433, at 33-42. More generally, some scholars interpret the post-*Garcia* “anticommandeering doctrine” as a revitalization of Tenth Amendment limits on Congress’s powers. Of note, however, the Court has characterized the doctrine not as a freestanding limit on Congress’s powers, but as an illustration of the principle that the Constitution gives Congress a list of enumerated powers, “[a]nd conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). *But see*, e.g., U.S. CONST. art. I, § 4, cl. 1; *id.* amend. XIV, § 5; *id.* amend. XIX, § 2. Whatever one thinks of the Court’s declination to find explicit authority empowering Congress to direct states, the same cannot be said of Congress’s power to structure the federal executive branch. See *id.* art. I, § 8, cl. 18.

**559.** See Waldron, *supra* note 506, at 4-6, 21-22 (elaborating the concept of “characterizing” principles, including in the separation-of-powers context).

**560.** U.S. CONST. art. I, § 8, cl. 18.



ers principle. Rather, it is the representative branches, working through the interbranch and supermajority legislative process, that determine whether any particular arrangement is compatible with the Constitution's separation of powers — that is, whether it is a valid use of the Necessary and Proper Clause to implement the powers and interrelationships of Congress, the presidency, and the executive branch. When the Supreme Court confronts a statute that allegedly violates the separation of powers, therefore, the normative commitments underlying the republican conception — and reflected in *Garcia* — suggest that the Court should accept as authoritative the judgment of the political branches about what the Necessary and Proper Clause tolerates.

There are stirrings of this approach to the separation of powers in the jurisprudence of Justice Kagan. Dissenting in *Seila Law*, Kagan argued that “[t]he President, as to the construction of his own branch of government, can only try to work his will through the legislative process.”<sup>561</sup> The Constitution, “with great good sense,” establishes “almost no rules about the administrative sphere. As Chief Justice Marshall wrote when he upheld the first independent financial agency: ‘To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument.’”<sup>562</sup> Kagan thus advanced an understanding of the separation of powers that is inherently flexible and incomplete, and she declined to infer legal limits on Congress and the President's authority to design the administrative state by statute.<sup>563</sup> Kagan emphasized that “the right balance between presidential control and independence is often uncertain, contested, and value-laden.”<sup>564</sup> But this mutability, she argues, “is precisely why the issue is one for the political branches to debate — and then debate again as times change.”<sup>565</sup>

Justice Kagan stops short of fully embracing the republican separation of powers, however. She appears to exclude from her framework statutory restrictions that “impede the President's performance of his own constitutional duties.”<sup>566</sup> The contours of this qualification are uncertain and would appear to relate to statutory regulation of any enumerated power of the President. Separately, Kagan's discussion of early American practice seems to suggest that “a *specific* historical understanding,” albeit *only* a specific historical understanding, “can bar Congress from enacting a given constraint” on the exercise of executive

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**561.** *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2227 (2020) (Kagan, J., dissenting).

**562.** *Id.* at 2237 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).

**563.** *Id.* at 2226, 2236–37.

**564.** *Id.* at 2237.

**565.** *Id.*

**566.** *Id.* at 2245.

power.<sup>567</sup> Kagan’s suggestion that prior practice might restrict congressional innovation is puzzling because the remainder of her opinion is a forceful rejection of this antinovelty principle.<sup>568</sup> Thus, while Kagan’s conclusion stops short of a full embrace of the republican separation of powers, the logic of her opinion pushes in its direction. Even as it skirts a complete recovery of the republican separation of powers, her dissent is a striking rejection of the juristocratic counterrevolution.

#### D. Case Studies

This Part develops our prescriptive claim through three case studies. Its aim is not to advance a fully fleshed-out doctrine but to identify the nature of political discretion that the republican conception recovers, as well as the ways in which a broken politics might challenge it.

##### 1. *The Legislative Veto*

Our first case study concerns the legislative veto. In the 1930s, President Herbert Hoover urged Congress to grant the President statutory authority to reorganize the federal agencies.<sup>569</sup> To ensure that Congress would retain ultimate control over such reorganization plans, he proposed that the statute permit one or both houses of Congress to invalidate the President’s action under certain conditions.<sup>570</sup> The first reorganization statute, enacted as part of the Economy Act of 1932, so authorized the President to propose agency reorganizations pursuant to executive orders that would take effect within sixty days – unless disapproved by either house.<sup>571</sup> Presidential reorganizations quickly became a key tool of presidential administration.<sup>572</sup> Though the statutory features changed somewhat over time, presidents regularly used this statutory power, submitting over 100 plans between 1932 and 1984.<sup>573</sup>

Statutes containing legislative-veto provisions soon proliferated beyond the reorganization context. By the 1980s, the legislative veto had been placed “in

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**567.** *Id.* at 2228 (internal quotation marks omitted).

**568.** See *supra* notes 473-475 and accompanying text.

**569.** This background on the legislative veto draws from Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 236-38 (2015).

**570.** See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 277-78 (1993).

**571.** Economy Act, ch. 314, pt. 2, § 407, 47 Stat. 382, 414 (1932).

**572.** See Renan, *supra* note 569, at 236.

**573.** *Id.*

nearly 200 statutes . . . in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.”<sup>574</sup> Indeed, during the 1970s, the legislative veto became a central means of accommodation between the presidency and Congress “in resolving a series of major constitutional disputes . . . [involving] impoundment, war, and national emergency powers.”<sup>575</sup> Canvassing the sweep and impact of the legislative veto on relations between the executive branch and Congress, Justice White described the device as “an important if not indispensable political invention” for resolving significant interbranch disagreements and facilitating a congressional check more adaptable to the needs of modern governance.<sup>576</sup>

The Court first considered the legislative veto in the 1983 case *INS v. Chadha*.<sup>577</sup> *Chadha* concerned a constitutional challenge to the Immigration and Nationality Act, which at the time permitted either house of Congress, by resolution, to invalidate a determination of the Attorney General to allow a deportable alien to remain in the United States.<sup>578</sup> In an opinion that swept far more broadly than necessary to decide the case,<sup>579</sup> the Court held that *any* legislative veto is unconstitutional.<sup>580</sup> *Chadha* is a striking example of the juristocratic separation of powers. Treating the legislative veto as an “essentially legislative” action undertaken without the Constitution’s requirements of bicameralism and presentment, the Court invalidated it for violating the requirements of Article I and the separation of powers.<sup>581</sup>

The republican separation of powers dictates a different course. Article I specifies a process for statutory enactment. But the statute at issue in *Chadha* – the Immigration and Nationality Act – complied with this procedure. That Act made it the law, going forward, that a single house of Congress could invalidate an action of the Attorney General. Although the Supreme Court interpreted Article I’s bicameralism and presentment requirements as if they implicitly prohibited this sort of legislation, the Constitution says nothing about Congress and

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**574.** *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting).

**575.** *Id.* at 970.

**576.** *Id.* at 972, 972-73.

**577.** 462 U.S. 919 (1983).

**578.** 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996).

**579.** *See Chadha*, 462 U.S. at 959-60 (Powell, J., concurring) (“The breadth of this holding gives one pause . . . [since] Congress has included the veto in literally hundreds of statutes, dating back to the 1930’s.”).

**580.** *Id.* at 959 (majority opinion).

**581.** *See id.* at 952, 946-55.

the President's authority to enact a statute delegating policymaking and adjudicatory authority to the executive branch. And it says nothing about Congress and the President's authority to delegate to Congress, *through* bicameralism and presentment, a residual veto over decisions delegated in the first instance to the Executive.

Under the republican separation of powers, a court would not infer from this silence a judicially enforceable limit on Congress's authority to retain a legislative veto in statutory delegations to the executive branch.<sup>582</sup> As Justice White emphasized in dissent, "the constitutionality of the legislative veto is anything but clear-cut"; when *Chadha* was decided, the issue had already "divide[d] scholars, courts, Attorneys General, and the two other branches of the National Government."<sup>583</sup> A republican separation of powers would authorize the political branches, working through the lawmaking process, to decide whether to permit this institutional innovation in governance and under what conditions.

## 2. *Regulating the Pardon Power*

Our second case study concerns statutory regulation of the pardon power. This is an issue with significant political and cultural salience, sparked most recently by a series of seemingly corrupt and self-protective pardons issued by President Donald Trump.<sup>584</sup> Though especially egregious in recent times, the self-serving use of the pardon power is not a new phenomenon. President Bill Clinton used the pardon power to grant clemency to his family and to a financial benefactor, among others.<sup>585</sup> Meanwhile, use of the pardon power to address ra-

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**582.** *See id.* at 980 (White, J., dissenting) ("The power to exercise a legislative veto is not the power to write new law without bicameral approval or Presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed.").

**583.** *Id.* at 976-77 (footnotes collecting sources establishing this division of constitutional views omitted).

**584.** *See, e.g.,* BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 111-36 (2020); Jack Goldsmith & Matt Gluck, *Trump's Aberrant Pardons and Commutations*, *LAWFARE* (July 11, 2020, 8:32 AM), <https://www.lawfareblog.com/trumps-aberrant-pardons-and-commutations> [<https://perma.cc/BV9S-L7Y9>] ("Almost all of the beneficiaries of Trump's pardons and commutations have had a personal or political connection to the president.").

**585.** *See* Goldsmith & Gluck, *supra* note 584; Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 *FED. SENT'G REP.* 5, 5 (2007).

cial injustice and other structural problems with the criminal process has atrophied, and has been haltingly slow in the past.<sup>586</sup> Against this backdrop, the question of whether a statute might regulate the pardon power – by encouraging some uses while discouraging others – has become more pressing.

In English law, there is a long history of Parliament restricting the pardon power of the Crown by statute. The contours of these restrictions were contingent on the social and political contestations that arose around criminal justice and political accountability. They included, for instance, statutory restrictions on the types of homicide eligible for “pardons of grace” in the fourteenth century;<sup>587</sup> prohibitions in the Habeas Corpus Act of 1679 on clemency that caused a subject to be imprisoned beyond the realm; and the prohibition, enacted as part of the 1701 Act of Settlement, that no pardon shall “be pleadable to an impeachment . . . in Parliament.”<sup>588</sup> That the king’s pardon power was plenary within the constraints of the law did not mean – at least by the late seventeenth century – that the king could use the pardon power in contravention of statutory constraint. As one historian explained, after the Bill of Rights of 1689, “the power of pardon was still a special prerogative of the Crown but a prerogative which had been encroached upon by both custom and statute.”<sup>589</sup>

Consistent with this view, when the U.S. Constitution gives the President the power to grant pardons, it vests the President with inherent authority, meaning that its exercise does not depend on statutory authorization. And it arms a President with strong rhetorical arguments in defense of this kingly prerogative. But the Constitution says nothing about Congress and the President’s ability to regulate the pardon power by statute. The pardon power is not a “more than kingly” prerogative.<sup>590</sup>

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**586.** See, e.g., Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 426 (2017).

**587.** See Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 457 (1976).

**588.** Act of Settlement 1701, 12 & 13 Will 3 c. 2; accord Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 57 (1963).

**589.** Grupp, *supra* note 588, at 58.

**590.** Indeed, other aspects of Article II could be construed to imply limits on the President’s authority to pardon. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . . .”); *id.* § 1 (requiring the President to take an oath to “faithfully execute the Office of President”); see also Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2117-19 (2019) (arguing that the purpose of faithful-execution clauses is to limit the discretion of public officials).

The argument that the pardon power is distinctive and somehow independent of Congress's authority to structure administration rests on a misunderstanding of what the pardon process entails. No longer a "private act of grace,"<sup>591</sup> the pardon power—like *all* presidential power in its modern form—has become institutionalized in ways fundamentally intertwined with Congress's authority to constitute and fund the organizations of federal governance. Reform efforts to revitalize or check the pardon power have long focused on new ways to institutionalize it, including through a structure inside the Executive Office of the President or the advisory function of an independent board (as some states have done).<sup>592</sup> The presidency has a fundamental institutional stake in how those structures are designed, and we think there are strong policy arguments against codifying any particular institutional structure. But we do not believe the Constitution supplies courts with the constitutional authority to veto institutional innovations that survive the legislative process.

Instead, while the textual commitment of the pardon power to the President supplies a source of inherent authority and a powerful *rhetorical* argument against statutory regulation, the republican separation of powers would leave judges largely out of the debate over what types of regulations are ultimately permissible. Indeed, whether legislation that regularizes the pardon process would empower or impede the presidency is itself uncertain, contested, and contingent. A wholly personal pardon power is a structurally weaker power. It is structurally weaker in the sense of capacity: it cannot be exercised with the same regularity, given the many other demands on the incumbent's time.<sup>593</sup> It is also structurally weaker in the sense of legitimacy. Pardons like those by President Clinton and, more recently, by President Trump contribute to a sense of the pardon power as "a remnant of tribal kingship" at odds with the principles of a constitutional democracy, especially "if ordinary people have no hope of similar favor."<sup>594</sup>

But what if legislation eliminated the pardon power, say, during the final sixty days of a President's term? Such a statute might raise a reasonable concern that, by extinguishing the pardon power for a specified period of time, the statute could not be said to "carr[y] into Execution" the pardon power. Under the republican separation of powers, however, resolution of that question through

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**591.** *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

**592.** See Barkow & Osler, *supra* note 586, at 387, 425-41; P.S. Ruckman Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 469-72 (2016); Love, *supra* note 585, at 5, 10-12; see also John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 412-16 (2003) (considering how state approaches to pardon-power reform might be applied to the federal pardon power).

**593.** Ruckman, *supra* note 592, at 467-69.

**594.** Love, *supra* note 585, at 5.

the legislative process should nonetheless be authoritative. We think it conceivable, for example, that the heightened risk of corrupt pardons near the end of a President's term—now borne out across several presidencies—might lead a legislator or even a sitting President to conclude that the pardon power can and should be restricted during this period. Although we personally might not agree with this position, the republican separation of powers settles such disagreement by deferring to the more representative institutions of American government working through the lawmaking process.

It bears emphasis that the legislative process itself supplies a powerful political response to a bill that, in the presidency's view, overreaches. The veto can be overcome only by a rare two-thirds majority of both houses of Congress—or a President unwilling to exercise it. These political safeguards do not guarantee any particular institutional design, but they suggest a mechanism for deliberation, compromise, and the exercise of considered judgment on the constitutional obligation to implement a working government. If the constitutionality of a bill so limiting the President's pardon power survived the supermajority process that legislation entails, we think the republican conception would justify the statute's enforcement.

### 3. *Presidential Removal and the Problem of Legislative Bad Faith*

Consider, finally, the possibility of legislation governing presidential removal. Under the republican separation of powers, Congress and the President would have broad authority to structure the impeachment process by statute in advance of any impeachment trial and to decide, for example, what counts as a high crime and misdemeanor,<sup>595</sup> or whether presidential privileges and any testimonial immunity apply in the context of impeachment proceedings.<sup>596</sup> The deference afforded any statutory resolution of these issues might even incentivize Congress and the presidency to negotiate these difficult constitutional questions through the legislative process, and outside of the heated context of an actual or imminent impeachment.

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595. See, e.g., Keith E. Whittington, *Must Impeachable Offenses Be Violations of the Criminal Code?*, LAWFARE (Nov. 19, 2019, 12:19 PM), <https://www.lawfareblog.com/must-impeachable-offenses-be-violations-criminal-code> [<https://perma.cc/A2B9-7P8Y>] (noting and discussing disagreement on what constitutes a high crime or misdemeanor).

596. See, e.g., Jonathan Shaub, *Can a Former President Assert Executive Privilege in an Impeachment Trial?*, LAWFARE (Jan. 29, 2021, 8:01 AM), <https://www.lawfareblog.com/can-former-president-assert-executive-privilege-impeachment-trial> [<https://perma.cc/BV6U-LW2F>] (noting and discussing disagreements involving executive privilege).



By contrast, in centering adjudication, the juristocratic separation of powers shifts our attention to the wrong point in time and the wrong constitutional actor. As the Court itself observed, the risks of protracted litigation and legal uncertainty

would manifest . . . most dramatically if the President were impeached . . . [for] [t]he legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated.<sup>597</sup>

It remains possible of course to imagine a lame-duck President of the same party as Congress deciding to “force the moment to its crisis.”<sup>598</sup> We could imagine such a President encouraging Congress to pass a statute that authorizes the Speaker of the House to remove the new President at will. The context of this legislation—a potentially catastrophic effort to undo the election of a new President—is significant. The ways in which this hypothetical statute would write out of the Constitution explicit restraints on presidential removal under circumstances deeply threatening to electoral democracy thus raise distinct concerns.

We note, however, that those concerns do not entail the question of who has primary authority to give meaning to the separation of powers. Rather, they implicate the capacity of courts to combat antidemocratic “bad faith” by our elected representatives. The question of whether courts effectively can—and whether they should—handle the problem of constitutional bad faith in the legislative context is complex,<sup>599</sup> and we do not attempt to resolve it here. We note that the Court itself has been especially reluctant to do so,<sup>600</sup> in particular, where allegations of bad faith entail political partisanship.<sup>601</sup>

It is possible that ultra vires action—or conduct for which no nonfrivolous claim of constitutionality is even conceivable (on *any* understanding of the Con-

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**597.** *Nixon v. United States*, 506 U.S. 224, 236 (1993).

**598.** T.S. Eliot, *The Love Song of J. Alfred Prufrock*, in *THE PENGUIN ANTHOLOGY OF TWENTIETH-CENTURY AMERICAN POETRY* 78 (Rita Dove ed., 2011).

**599.** For further discussion of this question, see, for example, Richard H. Fallon Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 527–28 (2016).

**600.** See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 897 (2016) (“[T]he norm against constitutional bad faith could be considered the ultimate underenforced norm in the American legal system.”).

**601.** *Cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (finding partisan-gerrymandering claims nonjusticiable).

stitution) – “defines a practically, if not conceptually, necessary limit on the political question doctrine,” as our colleague Professor Richard Fallon argues.<sup>602</sup> Fallon suggests, for example, that even under conditions favoring judicial supremacy, the political branches could not be expected to comply with a judicial ruling directing a presidential impeachment, for such a ruling is devoid of *moral* legitimacy; it has reached “the point of unmistakable judicial overreach.”<sup>603</sup> But Fallon notes that even in jurisdictions that recognize such a limit in theory, any finding of ultra vires action must be exceedingly rare. He cites a comparative law example, in which “the German Constitutional Court claims jurisdiction to determine whether decisions by the institutions of the European Union . . . are ultra vires – in which case they would not be binding in Germany.”<sup>604</sup> But as a matter of practice, the German Court has *never* accepted a claim of ultra vires action.<sup>605</sup> Thus, while ultra vires action might plausibly operate as a practical outer boundary on the authoritative judgment of *any* decider (republican or juristocratic), the category only underscores the extent to which the republican separation of powers would shift the locus of structural decisions away from the Court.

That such extreme statutory hypotheticals are imaginable, moreover, does not mean that they are politically plausible. A central problem of American political polarization is the *inability* to act collectively, despite pressing social problems and societal concerns. A constitutional doctrine oriented towards striking down those legislative compromises that *do* materialize, merely because they depart from one (or five) jurist’s contested idea of what sorts of inter-institutional arrangements might be preferable, is a doctrine that inhibits those rare moments of republican self-rule. A constitutional politics that would result in these extreme statutory scenarios is also, we fear, a constitutional politics that the judiciary alone could not redeem.

Perhaps most fundamentally, we simply resist the premise that one should build separation-of-powers thought around worst-case scenarios and then back into an authoritative judicial role as a result of those imagined extremes. Such a doctrinal approach guts more than it protects, for it impedes the creativity and the imagination necessary to construct a polity responsive to the changing needs of a changing people. Rather than let fanciful hypotheticals drive a juristocratic conception of the separation of powers – an approach wielded not to prevent the

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**602.** Fallon, *supra* note 532, at 1489; *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (requiring that the judiciary “not stand impotent before an obvious instance of a manifestly unauthorized exercise of power”).

**603.** Fallon, *supra* note 532, at 1544, 1544-45.

**604.** *Id.* at 1545.

**605.** *Id.*

just-barely fathomable but to stifle institutional innovation in a host of constitutionally plausible grey zones – we think it is time to recognize the centrality of statutes to the legitimate and crucial work of constituting American constitutional government.

## **CONCLUSION**

The republican separation of powers brings into view a grammar of constitutional leadership in its more multidimensional form. Constructing and, over time, revising the institutional relationships between the political branches entails neither crass politics nor technocratic lawyering. It requires creativity and compromise. The republican conception enables us to reimagine the separation of powers as ongoing, contingent, and provisional chapters in American political development – not as the fumbling, inconsistent, and ad hoc edicts of an unelected judiciary. Rather than perpetuate a revanchist ideology with roots in the Lost Cause dogma, the republican separation of powers invites a changing citizenry to participate – through the institutions of representative government – in the fraught, contested, and crucial work of constructing American constitutional democracy.