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The Contested Removal Power,
1789–2010
Introduction

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

—United States Constitution, Article II, Section 2, Clause 2

The question of the proper interpretation of [Congress's] decision of 1789 is one thing—that of its finality another.

—Edward S. Corwin, 1927

Article II of the Constitution includes a parallel silence. It explains how the president can initiate a treaty and hire an executive official, but it does not explain how to end treaties and fire executive officials appointed by the president. As a result, both powers have been—and continue to be—subjects of political controversy and constitutional debate. This book outlines and analyzes the president’s removal power as a way to more fully understand how the extent and limits of executive power developed within American political and constitutional history.

The uncertainties surrounding the president’s power to remove, in comparison to his powers with respect to foreign affairs, might seem small. And as we will discuss in detail, many scholars consider it to have been settled by the seminal Decision of 1789 passed by the First United States Congress. As a result, there has been little scholarship in political science
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on the removal power. But we believe the overarching question—about the extent and limits of removal power—is important and unsettled. It is important because it bears on a persisting question of scholarly and journalistic interest—namely, the sources and scope of executive power. Moreover, the removal power often has implications for all three branches of government and therefore is closely intertwined with the core principle of American constitutionalism: separation of powers. It has also been at the center of longstanding political debates about competing constitutional and governmental purposes, sometimes resulting in constitutional crisis. The extent and limits of the removal power remain unsettled because the United States Constitution is less than clear; both sides in the debate have very good reasons for taking their positions. On the one hand, Americans desire accountability and a clear hierarchical chain of command; this promotes policy direction and allows for change based on electoral mandates. On the other, many Americans prize independence; this reflects the need for stable and consistent policy execution informed by technical expertise. A relevant Supreme Court case decided in 2010 (discussed in the section just below) reveals the extent to which the constitutional and political questions surrounding removal power remain unresolved and demand more attention and clarity.

*Free Enterprise Fund v. Public Company Accounting Oversight Board*

The removal issue last came before the Supreme Court during the fall 2009 term in *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al.* The Public Company Accounting Oversight Board (PCAOB, or the Board) was created by the Sarbanes-Oxley Act of 2002 as a five-member panel to be governed by the Securities and Exchange Commission (SEC, or the “commission”). The PCAOB was empowered to oversee accounting firms that audit public companies. It could inspect, investigate, and punish. The five members were appointed by the SEC and could be removed by the SEC only for cause and according to a carefully outlined procedure. The petitioners in this case argued that the PCAOB was unconstitutional because it exercised executive powers without the requisite presidential control. The president’s removal power over the SEC commissioners is limited, they contended, and the SEC’s removal power over the Board’s members was also limited. Writing for the Court, Chief Justice John Roberts found the two layers of removal protection between the president and the PCAOB to be unprecedented and unconstitutional. He further wrote that the decision had no effect on prior precedents due to the “multilevel
The Chief Justice presented an orthodox version of what we call in this book the “executive power theory.” Roberts argued that the Constitution divides the powers of government into three and then assigns them to distinct branches. All executive power is vested in the president, who counts on subordinate officers to assist him in the execution of federal law. The president’s removal power is what keeps those officers accountable to him (and, thereby, to American citizens). Roberts relied upon responsibility, a principle first elaborated in 1789 by then–U.S. Representative James Madison and his allies in the First Congress. The principle of responsibility has been central to executive power theorists ever since. As we will see in Chapter 1: “The Decision of 1789,” executive power theorists made the argument that a single, visible chain of responsibility between the president and his officers is essential to making the president accountable to the people. On these grounds of responsibility and accountability the Court found the president’s relation to the PCAOB wanting.

The Supreme Court, in its previous jurisprudence, had legitimized some tenure protections separating the president from certain officers. But in the 2010 PCAOB case, according to the Court, the situation was different: The multilayer structure protected members of the Board by requiring removal by the SEC to be exercised only for cause. If that were the extent of the protection, then no constitutional problem would be present. But according to Roberts, Sarbanes-Oxley went further and “withdraws from the President any decision on whether that good cause exists.” The removal power is vested solely with the SEC, the Court determined, and the SEC is insulated from presidential control. Accordingly, that multilayer protection is unconstitutional precisely because it destroys the central and vital constitutional principle of responsibility — in both of its aspects. It upsets the chain of responsibility: The result of the double layer is “a Board that is not accountable to the President, and a President who is not responsible for the Board.” Equally important, the severing of these bonds destroys the external link between the president and the people. As Roberts put it (quoting The Federalist): “Without a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’” Under the Sarbanes-Oxley Act of 2002, the Court determined, the president cannot superintend the actions of his subordinates and, thus, the people cannot adequately judge the president’s efforts in this regard.

Whereas Roberts begins from the premise that executive power theory is the correct way to construe the removal clause, Associate Justice Stephen Breyer, who authored the dissent (joined by Justices Stevens, Ginsburg,
and Sotomayor), begins from a very different place. Breyer’s view fits within what we will call in this book “congressional delegation theory.” Like Edward Corwin, one of the congressional delegation’s prominent proponents, Breyer thought that the removal power must be construed at the intersection of a structural principle — the separation of powers — and the broad power of Congress under the necessary and proper clause. According to Breyer, neither principle is absolute. As he put it: “Depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President’s authority to remove an officer from his post.” Breyer pointed out that Congress delegated many different kinds of administrative authority to a range of agencies; the nature of the power exercised, as well as the location of the agency, have dictated limitations on the removal power. Breyer saw nothing in the statute at issue that departs from Court precedent: “The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context — and the various ways in which a removal provision might affect that power.”

In his dissent, Breyer defended the statute on three grounds. First: Even though the SEC’s removal power over the Board is limited it has extensive authority over the functioning of the Board. If it cannot exert control over personnel, it can exert control over policy. Second: The removal limitations are appropriate because the Board exercises adjudicatory functions and its members are “technical experts.” These are exactly the type of functions and tasks that Congress has seen fit to shield from unlimited executive removal in the past, and they demand a kind of independence more akin to Article III judges than to normal executive officers. Third — and most important for the purposes of this introduction to the removal power: Even if one grants that the multilayer protection is constitutionally suspect, the Court’s solution does not address the underlying problem. As Roberts wrote for the majority, the removal power is crucial because it is more than a mere “parchment” barrier — it is a real means of exerting control and preventing encroachments. But once the for-cause removal limitation of the SEC over the Board is gone, is the Board any more accountable to the president than before? Breyer responds:

So long as the President is legitimately foreclosed from removing the Commissioners except for cause (as the majority assumes), nullifying the Commission’s power to remove Board members only for cause will not resolve the problem the Court has identified: The President will still be ‘powerless to intervene’ by removing the Board members if the Commission reasonably decides not to do so.
In his majority opinion Roberts wrote that “without a second layer of protection, the Commission has no excuse for retaining an officer who is not faithfully executing the law.” The SEC commissioners may not have an excuse, but they also need not fear for their jobs.

Each opinion—the majority and the dissent—fails to satisfactorily answer the uncertainties of the removal question. The problem with the opinion of the Court is that its solution (i.e., precluding the second layer of removal protection) did not address the underlying problem: the president’s insulation from the officers tenured in the bureaucracy. As for Breyer’s dissent, even if one disagrees with its characterization that this solution accomplishes “virtually nothing,” it does not help all that much. More important, the majority’s underlying basis for its opinion—executive power theory—ought to have made this problem perfectly plain—that is, the logic of the opinion demands more for the president than the Court was willing to grant. Still, Breyer’s dissent fails to supply any principle that might limit the extent to which Congress can shield officers from presidential control. As the majority points out, at oral argument the government was unwilling to concede that even five layers of protection between the president and the Board would be too many. As Roberts explained, such officers would be “safely encased within a Matryoshka doll of tenure protections . . . immune from Presidential oversight, even as they exercised power in the people’s name.” Breyer also practices some sleight-of-hand at the outset to veil the logic of congressional delegation. He places the removal power between the “principle” of separation of powers and the “power” of Congress under the necessary and proper clause: “Neither of these two principles is absolute in its application to removal cases.” But of course we are not dealing with two principles but rather one principle and one power. And the principle of separation of powers depends on specific powers—otherwise it would be a dead letter. Without an analysis showing what countervailing power(s) from Article II might oppose the necessary and proper clause, Breyer cannot explain why Congress could not control if not appropriate executive power as it sees fit.

The case also reveals that the Court’s jurisprudence as to removal power remains unsettled. All sides seemed to agree that two other important cases—Humphrey’s Executor v. United States (1935) and Morrison v. Olson (1988)—were crucial, but why and how they might be relevant was the subject of disagreement. For instance, the petitioners assumed that the president’s relation to the SEC was akin to the president’s relation to other so-called independent regulatory commissions (IRCs). That is, the petitioners took for granted the independence of the SEC in that it was not subject to the plenary control of the president, whether through supervision of policy or through removal. But as Breyer pointed out during oral
argument, there is no statutory provision limiting the president to for-cause removal of the commissioners. Michael Carvin, counsel for the petitioners, pointed out that the SEC had always been considered similar to the Federal Trade Commission (FTC)—despite the statutory anomaly—and thus both agencies were governed by the limits sanctioned by Humphrey’s. But shocked by Breyer’s willingness to distinguish the SEC from other IRCs, a surprised Carvin noted, “If this court wants to say that—that those people are subject to the President’s plenary [authority].” At this point Associate Justice Antonin Scalia interjected, “I’d love to say that. That would be wonderful.”13 Later, Solicitor General Elena Kagan (the future Supreme Court associate justice) made the case that the logic of Humphrey’s did not call into question the status of the PCAOB, which prompted this telling exchange between Kagan and Scalia:

General Kagan: I understand the temptation to say something like, well, we don’t really much like Humphrey’s Executor, but we are stuck with it, but not an inch further.

Chief Justice Roberts: I didn’t say anything bad about Humphrey’s Executor.

(Laughter.)

Justice Scalia: I did, I did.

(Laughter.)

General Kagan: But this in . . .

Justice Scalia: We did overrule it, by the way, in — in Morrison, didn’t we?14

Scalia, of course, authored the lone dissent in Morrison. As we explain in Chapter 6: “The New Unitarians,” that dissent is a seminal document in the recent argument from the unitary executive—indeed, it marks the first time a modern Supreme Court Justice uses the term “unitary executive” in an opinion. Despite the Chief Justice’s efforts in PCAOB to leave the major removal precedents undisturbed, what is important here is that the logic of the majority’s opinion has much in common with Scalia’s dissent in Morrison. So even if there is no evidence that the four conservative justices who joined the Court since Scalia intend to overrule Humphrey’s, it is fair to say that there is some uncertainty about the grounds of agency independence and where Humphrey’s might apply, as well as about the relation between Humphrey’s and Morrison. As Breyer pointed out in an extraordinary appendix to his dissent, the Court’s ruling in the PCAOB case could potentially affect hundreds or perhaps thousands of jobs across the federal bureaucracy.
The Removal Power and American Political Development

The PCAOB decision is important at an even more fundamental level: It reminds us of the uncertainty of Article II. The Constitution speaks of something called “the executive power” without defining it. The Constitution tells us the president has that “something” — it seems to exist outside of, and prior to, the Constitution — yet never spells it out with respect to specific powers. This problem has received much attention in foreign affairs, but it has remained understudied in the context of domestic affairs generally and the removal power in particular. But even if the removal power has not been a subject of political science scholarship, debates over the removal power have a rich tradition in American political and constitutional development.

The differences between the opinion of the Court in PCAOB and the dissent take us all the way back to the First Congress, when it first debated the removal power in the Decision of 1789. When creating the major departments of government after approval of the new Constitution, members of the House had to decide whether the executive officials would be removable by the president. This, in turn, led to a discussion about whether the Constitution granted this power to the Congress and whether it could delegate removal power as it saw fit. As we discuss in detail in Chapter 1, four positions emerged from that debate that echo to this day:

1. **Impeachment**: The Constitution provides the impeachment process as the only means to remove executive officials.
2. **Advise and Consent**: The Constitution requires that the Senate give its advice and consent to a removal.
3. **Congressional Delegation**: The Constitution provides Congress with the authority to delegate this power where Congress pleases.
4. **Executive Power-Theory**: The Constitution locates this power in the president.

As is well known, James Madison embraced the executive power theory (number 4 above), and this position won a narrow victory in the House and the Senate in 1789. Even though executive power theory won the day, it is important to note that Madison and his allies might easily have lost. Madison was just one among several members of the Congress who had helped write the Constitution, and, as was noted during the 1789 debate in the House, Alexander Hamilton had previously supported the advise and consent position in *The Federalist*. More important, just as each position disagreed on the details of separation of powers under the Constitution, so too each position implicated a competing normative claim about the respective roles of Congress and the presidency. According to executive
power theory, conferring the power of removal by statute enhances the power of Congress but unduly weakens the executive and, thereby, undermines democratic accountability. According to advise and consent theory, giving the removal power to the president alone would make administration too political, or at least discourage worthy individuals from serving in executive office. Alternatively, why not split the difference in the name of flexibility and, following the argument for congressional delegation of power, allow Congress to limit the president’s power in certain instances?

Given the good arguments for alternatives to executive power theory, it would be strange if the 1789 decision had actually settled the debate. As even the most cursory reading of American political history will reveal, debates about executive power are reoccurring. With each realigning or “great” president, constitutional lines of authority are tested and reconfigured. Or, as scholars of the presidency in American political development have shown, presidents aspire to “order shattering” in the sense that new presidents seek new sources for governing authority. They aim to transform the constitutional order by transforming the presidency itself. The development of the two-party system, for example, changed constitutional design with respect to the executive’s veto power and Congress’s impeachment power in the sense that presidents can expect veto overrides and impeachments to be rare. And, as Justice Robert Jackson noted in his famous Youngstown concurrence (1952), presidents in the twentieth century have more power than presidents in the nineteenth century in part because democratization of presidential selection has made the presidency the center of public attention. However, as Stephen Skowronek has argued, the problem for presidents is that each transformation becomes more and more difficult. With each rejection of the old way, the resources for presidential accomplishment narrow. At the same time, other institutions increase their own ability to thwart and even direct the trajectory of presidential initiatives.

We should expect, then, to find that both the justification for and the exercise of executive removal power would meet resistance throughout American political and constitutional development. Moreover, given the tendency of debates concerning the role of the executive to be constitutional debates, we should expect periodic returns to the interpretative positions of the Decision of 1789. When members of Congress object to arguments made on behalf of presidential removals, they should find that advise and consent theory or congressional delegation offer convenient interpretative and normative arguments. But this is not all: We should also expect that the arguments do not always fit the circumstances under which they arise. The rise of party patronage, for example, complicated the formal arrangements of separation of powers. Likewise, the rise of the
administrative state has reoriented the congressional argument away from control and toward independence, even if control is still the objective.

Status of the Scholarship

Scholars have not yet sufficiently considered the removal power in American political development, but it has received some attention in the field of constitutional law. The removal power is implicated in the now quite extensive scholarly debate over the so-called unitary executive. The question of the scope of executive power heated up in the law-review literature after President Ronald Reagan’s efforts to gain a measure of control over the bureaucracy. A vigorous debate erupted over the constitutional and historical legitimacy of his efforts. This literature is now vast, so here we examine a few of the leaders of this debate.17

The unitarians argue that the president has constitutional authority to control all exercises of executive power. They differ on the forms this executive control should take: first, the president could control the statutorily authorized discretion of his subordinates—that is, he could supplant their discretionary action with his own; second, he could have a more limited power to nullify the discretionary actions of subordinates; and third, he could have the power to remove his principal subordinates with whom he disagrees.18 Unitarians rest their case primarily on the text of the Constitution. They argue this document identifies a trinity of governmental powers and then vests these powers in particular governmental institutions. The vesting clause of Article II vests executive power in “a” president—indeed, there is no other recipient of executive power in the Constitution.19 Other constitutional clauses relating to executive power, such as the take-care clause or the opinions in writing clause, must be read in light of this fundamental vesting of power.20 Though the Framers clearly understood that the president could not exercise executive power by himself—the Constitution itself mentions “heads of departments” and “principal officers”—this does mean they sanctioned the exercise of executive power outside the supervision of the president. In choosing a single chief executive, the Framers sought to ensure such goods as unity, energy, and responsibility.

Nonunitarians, by contrast, argue that the Constitution gives the president no such plenary authority; rather, it leaves to Congress much power to structure and supervise the execution of federal law. They argue that the unitary executive is actually an invention of the twentieth century and has little in common with the executive embodied in the Constitution. The nonunitarians also rely on a construction of the relevant constitutional
clauses. First, they suggest the vesting clause is a thin reed on which to place so much weight. They argue that the vesting clause begs the question as to what constitutes executive power. Perhaps more important, though, nonunitarians argue that there are simply too many other clauses that are inconsistent with the unitarian reading of the vesting clause.

Some opponents of the unitarians also argue that the practice of the Framers conflicts with unitarian theory. They argue that whereas unitarians see the substance of executive power to be a simple whole, the Framers understood it to be a compound that included political and administrative aspects. In this view, “The framers meant to constitutionalize just some of what we now think of as ‘the executive power,’ leaving the balance to Congress to structure as it thought proper.”21 Put simply, Congress has significant authority to structure and supervise this nonpolitical, administrative sphere.

There have been, at best, only two book-length examinations of the removal power. One is Edward S. Corwin’s The President’s Removal Power Under the Constitution, published in 1927, and the other is Steven G. Calabresi and Christopher S. Yoo’s The Unitary Executive: Presidential Power from Washington to Bush, published in 2008.22 Corwin’s book remains one of the very best studies of the removal power, but it is very old, and it was intended to be a critique of Chief Justice William Howard Taft’s opinion in Myers v. United States (1926). Calabresi and Yoo’s book is more recent and more comprehensive. Because it attempts to provide an exhaustive account of the way that presidents from George Washington to George W. Bush have exercised removal powers, it is an invaluable reference. But Calabresi and Yoo are most interested in the accumulated weight of the precedents set by chief executives. Left out of their account are the causes and qualifications of the events they examine and the counterarguments made on behalf of Congress. As a result, their narrative is frequently too focused on the executive branch and too inattentive to the changes in the arguments made during debates over removals over the course of American political development. More broadly, these two books are alike in that each argues for a particular resolution of the removal-power puzzle: Corwin argues for the congressional delegation position, and Calabresi and Yoo argue for executive power theory. Although this kind of constitutional analysis is important, it tends to omit what is perhaps most interesting for political scientists and historians.23

Far from being put in place in 1789 and then simply utilized by subsequent presidents, the removal power has provided the occasion for many stirring and revealing political and constitutional debates throughout U.S. history. If we assume that the question has been settled, then we miss the opportunity to examine how the meaning of executive power altered and was altered by domestic political events. There is a rich tradition in
opposing executive power theory—serious political thinkers and actors such as Noah Webster, Henry Clay, Daniel Webster, Joseph Story, James Kent, Louis Brandeis, and arguably Alexander Hamilton all opposed the Decision of 1789. And even among the presidents who defended an exclusive executive removal power, there are often some important discontinuities. Even though, for example, Thomas Jefferson, Andrew Jackson, Grover Cleveland, and Franklin D. Roosevelt all argued for presidential control over removals, each made different arguments to defend their position. Important discontinuities also emerged among the critics of executive power.

Plan of the Book

We believe that the frequency and depth of the debates about the removal power offer an important way to understand the development of the presidency and separation of powers. Our goal is not to endorse one position—indeed, we are suspicious of any single solution to the constitutional and political problems that removals present. Instead we show how the arguments resurface throughout American political development but take on somewhat new shapes each time they surface. We also show that the opponents of executive power theory often face a strategic problem: Because advise and consent favors Senate control (and later Senate control over patronage), the argument for congressional delegation is more attractive to more members of Congress. But the argument for congressional delegation lacks the emphasis on the stability and independence of executive officials and instead drifts toward congressional control.

In Chapter 1: “The Decision of 1789” we undertake a detailed examination of that seminal outcome from the First Congress. As we mentioned above, this debate was the occasion for the emergence of the four proposed solutions to the removal question that would provide the boundaries and terms for the continuing debate on this question throughout history. Our first goal is to provide readers a brief overview of the evolution of the debate as it unfolded over the course of six days. Our second goal is to illuminate the constitutional logic of the four removal positions. As will become apparent, the debate was marked by incredible depth and seriousness. The major participants argued for their positions with much rigor and nuance. Each position was grounded in a coherent constitutional and political rationale, providing future participants in the removal question with a wealth of knowledge to draw upon.

In Chapter 2: “From Responsibility to Rotation” we examine the initial assertions of executive power theory by presidents, particularly Thomas Jefferson (1801–1809) and Andrew Jackson (1829–1837). In
Skowronek’s language, these two were the first “reconstructive” presidents in early American history—meaning they were the most free to shatter their political order and remake its contours. Yet both served during early eras when political parties had not yet been accepted as “legitimate” (to borrow Richard Hofstadter’s famous term), and therefore both executives had to defend partisan decisions to remove the sitting officials. Jefferson defended the president’s power to remove, and he returned to the argument that Madison and congressional allies made in 1789. In this understanding of executive power, Jefferson emphasized responsibility while omitting textual arguments based on Article II. Like Jefferson, Jackson beat an incumbent political coalition in the national vote and needed to replace the current officeholders with his own. Like Jefferson, Jackson returned to the argument of responsibility, but he changed it by adding the principle of rotation in office. And unlike Jefferson, Jackson also returned to the constitutional arguments made in 1789 and then expanded them. The debate over control over the National Bank presented the most significant separation of powers crisis up to that point in the nation’s history, and it forced Jackson to articulate a new theory of presidential representation to defend the president’s power to remove.

In Chapter 3: “Jackson to Johnson: The Rise of Congressional Delegation” we examine the rise of congressional delegation, beginning with the Whigs and ending with the impeachment (and ultimate acquittal) of Andrew Johnson (1865–1869), who became president following the assassination of President Abraham Lincoln. When presidents returned to the argument for executive power theory, their critics responded with alternatives based on the advise and consent position and the congressional delegation positions. The Whigs, in particular, connected the removal debate to their larger assault on executive power and offered the first serious and sustained arguments on behalf of congressional participation in—and even control over—removals. These arguments, however, were complicated by the patronage interests among members of Congress, a consequence of the Tenure of Office Act of 1820. Congressional delegation won out over advise and consent, in part because advise and consent would favor the Senate but not the House. This movement between the two positions can be seen first in the development of Daniel Webster’s arguments against executive power theory; and second in the awkwardness of the efforts to impeach and remove Johnson.

In Chapter 4: “The Revenge of Executive Power: From the Tenure of Office Act to Myers v. United States” we chronicle the resurgence of executive power theory after the triumph of congressional delegation with the impeachment of Johnson. The new ascendence of this theory is visible in the efforts of four presidential administrations during Reconstruction (and echoed in the landmark Supreme Court case Myers v. United States
of 1926). During Reconstruction Presidents Grant, Hayes, Garfield, and Cleveland all battled with Congress over removals and sought to reassert executive authority despite the Tenure of Office Act of 1867. Only Grover Cleveland, the first Democrat elected to the White House since James Buchanan in 1856, was successful and oversaw the full repeal of the Tenure Act during his first administration. Cleveland would also elaborate a full-throated defense of executive power theory much like his party’s founder, Andrew Jackson. Myers represents the Supreme Court’s first significant consideration of removal. Taft, writing for the Court, struck down a law that had required congressional participation in the removal of executive officials and affirmed broad authority for presidents to remove officeholders without limitations. The case also deserves attention for the importance it gave to the Decision of 1789: The Chief Justice as well as the two primary dissenter undertook extensive historical analyses to ascertain the meaning of the decision of the First Congress as well as the extent to which that was settled by subsequent presidents and Congresses. We follow these historical arguments with care. Then we examine the constitutional grounds for the two positions in Myers: executive power versus congressional delegation. We show why the confrontation of these two constitutional understandings could not produce a middle ground.

In Chapter 5: “The Progressive Era and Independent Regulatory Commissions” we show how the failure to find a middle ground resulted in a new institutional arrangement, beginning in the late nineteenth and early twentieth centuries with the creation of independent regulatory commissions. On the removal question, the IRCs, which included statutory restraints on executive removal, seem awkward in light of previous debates. Ostensibly being independent, they were designed to exist outside the political influences of Congress and the president. Some Progressive thinkers argued that this arrangement was actually superior to the traditional separation of powers scheme in that it finally provided a place for expertise and technical knowledge for the administration of law in a complex industrial age. In reality, however, the argument in favor of IRCs proved to be another manifestation of Congress’s hostility toward the strong assertion of executive power by the White House. Beneath the veneer of their case for independent expertise, members of Congress in fact hoped to tame the increasing use of discretionary and unilateral power by presidents well into the twentieth century. Their arguments reflected portions of both the advise and consent position as well as the congressional delegation position.

Finally, in Chapter 6 we examine the rise of unitarians and the challenges that the unitarian school has posed to the modern administrative state. Although no one has prevailed in convincing the Supreme Court to declare IRCs unconstitutional, as demonstrated by Free Enterprise Fund v. PCAOB, unitarians have had some success in calling into question the
underlying rationale in federal courts. Beginning with Richard Nixon, presidents in the last third of the twentieth century argued that IRCs constitute a “headless fourth branch” of government where accountability for the administration of the law had been severed from any link to the people. Nixon demonstrated the absence of any substantive difference between the powers wielded among those agencies labeled “independent” and those under the direct control of the president. Nixon, however, failed to capitalize, and Congress—angered by Nixon’s bold assault on its prerogatives—claimed new roles for itself in the conduct of war, the budget, and even prosecution. Later, during the Reagan administration, the unitarian school abandoned the political arena and instead saw the legal profession as a vehicle to define executive power theory and consolidate its achievements thus far. In the absence of support from political parties, their strategy focused on a judicial vindication of executive power theory.

A Possible Objection

Before we turn to the debate of 1789, we should address a concern that inevitably arises in work of this kind. That concern is something like the following: Is it not the case that these debates are simply debates about power? Like most debates about executive power or the filibuster, is it not the case that the argument depends not a principle but rather on which party is in power? To be sure, this is a bigger question than this book, and in attempting an answer, we do not claim to settle once and for all the debate between those who believe that it is possible to disentangle ideas from politics and those who believe it is not.

We believe that the arguments about removals can tell us a great deal about executive power more substantially. At its highest level this debate forces everyone to articulate “the” foundation for executive power, especially in domestic affairs. To explain whether the president or the Congress should control removal power, or why a commission member should be independent, it is necessary to first explain which constitutional clauses are implicated, how they should be construed, and how they relate to one another. This, in turn, requires some explanation of the meaning of the term “executive.” As a large literature has shown, how we define that word has enormous consequences for liberal constitutionalism.

But we need not take the high road; a lower road is of equal, if not greater, interest. If we concede that arguments about removals have little to do with abstract theories of the executive and more to do with control over governmental authority and offices, we would still say that the arguments about removals can tell us a great deal about the development of the presidency—and the development of executive power—over time.
This is because it is not enough for someone in the 1830s or the 1980s to reach for a standard argument that the Constitution requires a particular reading of the vesting clause. Rather, that person will have to persuade others that such a reading remains applicable to a particular set of political circumstances. As a result, that person will have to make choices about which arguments to emphasize and which to conveniently forget. If that person has a certain kind of ambition, they will want to put that argument in a way that is consistent with their own professional reputation or institutional loyalty. By looking at these choices, we can get a better view of the way the competing views of executive power have affected the presidency and separation of powers.

Students of American political development have long considered the interplay among ideas, institutions, and politics. And despite considerable disagreement about the extent to which any one affects the others, scholars have shown how ideas rise out of particular political contexts and that ideas can direct and/or affect politics. The removal power offers a good opportunity to continue this examination.