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ARTICLE

QUASI-JUDICIAL: A HISTORY AND TRADITION

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The Roberts Court transformed the debate over presidential removal with two conflicting cases. In Trump v. Slaughter*, the Court overruled* Humphrey's Executor *and embraced a maximalist unitary executive. It rejected the "quasi-judicial" and "quasi-legislative" categories from* Humphrey's *that were the foundation for independent regulatory commissions. But in* Trump v. Cook*, the Court preserved removal protections for Federal Reserve Governors and emphasized the distinctive history of monetary administration. Commentators agreed that the two opinions were in tension.* Slaughter *may have ended the* Humphrey's *paradigm, but* Cook *suggests that some of that older world may have survived.*

This Article illuminates the distance between Slaughter *and* Cook *by recovering a tradition of quasi-judicial administration from seventeenth-century England to the New Deal. Lawmakers throughout American history have grafted judge-like norms, processes, and procedures onto modes of administration that performed judge-like functions or handled sensitive money-related tasks. At the same time, lawmakers worked to shield many quasi-judicial administrators from hierarchical political control with a variety of tools: removal restrictions, fixed terms, multimember decisionmaking structures, and many other devices. Our point is not that all quasi-judicial administrators must be independent. Instead, our claim focuses on a robust history of Congress wielding broad discretion to decide when and where to create insulated judge-like administrators. The lost tradition we describe is the missing*

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link in explaining Wiener v. United States *and making sense of the result in* Cook. *And that same tradition gives us one of the strongest repudiations of the unitary executive theory.*

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"When an agency 'executes' a congressional mandate against private parties, it exercises executive power—no ifs, ands, or quasis about it."

— Chief Justice John Roberts, *Trump v. Slaughter*[1]

"It [is] necessary . . . to consider the nature of this [Comptroller of the Treasury] office . . . ; in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary *quality as well as Executive; perhaps the latter obtains in the greatest degree . . . . [A] modification by the Legislature may take place in such as partake of the* judicial *qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed."*

— James Madison, 1789[2]

"I do not consider myself as the advocate of the government, but as a judge *called to decide a question of law with the impartiality and integrity which characterizes the* judician. *I should consider myself as dishonoring the high-minded government, whose officer I am, in permitting my judgment to be warped in deciding any question officially by the one-sided artifice of the professional advocate."*

— Attorney General William Wirt, 1820[3]

INTRODUCTION

The Roberts Court has now done what most experts expected and many feared. In *Trump v. Slaughter*,[4] the Court embraced what one of us

1. 146 S. Ct. 2283, 2302 (2026).

2. 1 Annals of Cong. 611–12 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (emphasis added).

3. Letter from William Wirt to John C. Calhoun (Feb. 3, 1820) (on file with Nat'l Archives, Rec. Grp. 60, General Records of the Department of Justice, General and Miscellaneous Letter Books, 1818–1913, vol. A2, at 67, 68), https://catalog.archives.gov/id/72689150?objectPage=71 [https://perma.cc/W6NE-TP86] (emphasis added).

4. 146 S. Ct. at 2294.

has called the "maximalist" Unitary Executive Theory (UET).[5] The unitarian majority overruled *Humphrey's Executor*,[6] in the process depriving so-called independent regulatory commissions of their constitutional foundation.[7] The *Slaughter* holding allows the President to remove Federal Trade Commissioners at will.[8] *Slaughter* rejected the idea that Congress may insulate modern agencies from presidential removal by calling their work quasi-legislative or quasi-judicial.[9] The author of the majority opinion, Chief Justice John Roberts, treated these as the commands of the Constitution.[10]

But on the same day, another Roberts-authored opinion refused to abide by *Slaughter*'s vision. In *Trump v. Cook*, the Court refused President Trump's attempt to remove Federal Reserve Governor Lisa Cook.[11] If history was a set of clear commands in *Slaughter*, things were more complicated, more nuanced, once the Court trained its gaze on the Federal Reserve system. Roberts treated monetary administration as historically distinctive.[12] The long history of monetary policy in America *required* greater respect for insulated administration (never mind Roberts's maximalist reading of the text of Article II in *Slaughter*).[13]

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5. Beau Baumann, It's Taft's Nightmare, Passing Political Time (Dec. 12, 2025), https://bbaumann.substack.com/p/its-tafts-nightmare [https://perma.cc/T2DE-BE8X] [hereinafter Baumann, Taft's Nightmare]. The maximalist UET is a reading of Article II that demolishes any clear limitations on presidential control over the administrative state. See id. For a defense of the maximalist UET, see generally Adrian Vermeule, What Is "The Unitary Executive"?, New Digest (May 22, 2025), https://thenewdigest.substack.com/p/what-does-the-unitary-executive-mean [https://perma.cc/RB4G-UMJ9].

6. 295 U.S. 602 (1935).

7. *Slaughter*, 146 S. Ct. at 2302 ("If anything more is left of *Humphrey's*, we overrule it." (emphasis omitted)).

8. Id. at 2291.

9. Id. at 2302.

10. Id. at 2292–95; see also Beau J. Baumann, The Case Against the Unitary Past: Seven Opinions on Legal History and the Unitary Presidency 9–15 (2026) (unpublished manuscript) (on file with the *Columbia Law Review*) (discussing and deconstructing one approach to legal history that treats the past as a series of inviolable commands operating on the present); Andrea Scoseria Katz & Jane Manners, "Lost to History": Uses and Abuses of the Past in *Slaughter* and *Cook*, Just Sec. (July 10, 2026), https://www.justsecurity.org/145132/lost-history-slaugther-cook-scotus/ [https://perma.cc/SC6V-722N] ("Confronted with a historical record that does not support its theory, the Court presents clear-cut answers where the sources supply none and disregards or ignores evidence that cuts the other way. The result is a folk history whose myths point in only one interpretive direction.").

11. 146 S. Ct. 2234, 2246 (2026).

12. See id. at 2249 ("For present purposes, it is sufficient to observe that any definition of 'cause' in this context must reflect the Federal Reserve's unique historical status and role.").

13. See id. at 2246 ("To accept any one of those arguments would in effect transform the Federal Reserve's for-cause protection into at-will employment—an interpretive leap out of step with the statute Congress enacted and our Nation's tradition of central banking

Experts' reception of the twin opinions in *Slaughter* and *Cook* was embodied in a bit of gallows humor. One law professor's joke started spreading the same day that the opinions were handed down: "I hope the guy who wrote *Slaughter* doesn't run into the guy who wrote *Cook*. That would be a really rough conversation."[14] The same sentiment was echoed by Professor Lev Menand, who wrote that the opinions "read like they had been written by two different people."[15] People who agree on little else on questions related to the UET could at least find common ground on the idea that *Slaughter* and *Cook* lacked a unifying rationale or approach to legal history.[16]

Like much of the constitutional adjudication that occurs at One First Street, the Roberts Court's actions in these cases are made more legible by understanding the stories that guided the Justices.

While today we see *Humphrey's Executor* as the bane of the conservative legal movement and a key ballast of the New Deal order, many New Dealers themselves attacked the decision because they shared an ideological commitment to presidential power with the Roberts Court conservatives.[17] They constructed a narrative that the quasi-judicial and quasi-legislative

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protected from political interference."); *Slaughter*, 146 S. Ct. at 2334 (Sotomayor, J., dissenting) (criticizing the majority's "radical theory of unitary executive power").

14. Adam Liptak, Supreme Court Turbocharges Presidential Power, N.Y. Times (July 23, 2026), https://www.nytimes.com/2026/07/23/us/politics/the-docket-presidential-power-trump.html (on file with the *Columbia Law Review*) (emphasis added) (internal quotation marks omitted).

15. Lev Menand, The Federal Reserve Exception to the *Slaughter* Rule, Just Sec. (July 7, 2026), https://www.justsecurity.org/145707/slaughter-categorical-rule-cook-exception/ [https://perma.cc/56Y6-WXLN] [hereinafter Menand, Fed Exception].

16. See, e.g., *Cook*, 146 S. Ct. at 2281 (Barrett, J., dissenting) ("[T]he Court's holding is in serious tension with *Trump v. Slaughter* . . . ."); id. at 2274 (Thomas, J., dissenting) (writing that the majority "endorses a contradiction"); Zack Beauchamp, Trump's Quest for Untrammeled Power Just Got a Big Boost, Vox (June 30, 2026), https://www.vox.com/policy/493735/trump-power-agencies-slaughter-supreme-court [https://perma.cc/9HRM-YVA9] ("The rulings do not make sense together unless you see *Cook* less as law than policy."); David Dayen, Two Rulings that Are Impossible to Reconcile, Am. Prospect (June 29, 2026), https://prospect.org/2026/06/29/supreme-court-two-rulings-impossible-to-reconcile/ [https://perma.cc/SXJ9-GZ2E] ("There is no way to hold the two rulings together at once."); Dan McLaughlin, Chief Justice Roberts Tries to Save the Fed From Democracy and the Constitution, Nat'l Rev. (June 29, 2026), https://www.nationalreview.com/2026/06/chief-justice-roberts-tries-to-save-the-fed-from-democracy-and-the-constitution/ (on file with the *Columbia Law Review*) (arguing that the history of monetary administration in *Cook* could not exempt the Fed from the reading of Article II in *Slaughter*); Ilya Somin, Can the Supreme Court Slaughter *Slaughter* Without Cooking *Cook*?, Reason: Volokh Conspiracy (June 29, 2026), https://reason.com/volokh/2026/06/29/can-the-supreme-court-slaughter-slaughter-without-cooking-cook/ [https://perma.cc/KX5W-N7VV] ("It seems to me highly likely, though not certain, that the answer is 'no.'").

17. See Beau J. Baumann, Remembering Congress in the *Myers*-to-*Humphrey's* Interregnum, 175 U. Pa. L. Rev. (forthcoming 2027) (manuscript at 8), https://ssrn.com/abstract=5376943 [https://perma.cc/VX3M-K4XZ] [hereinafter Baumann, Remembering Congress].

categories were creatures of judicial activism made up in the moment to frustrate President Roosevelt's New Deal program.[18] Ironically, the New Dealers handed that narrative of judicial activism to the earliest generations of the conservative legal movement.[19] The New Dealers' story forms the Roberts Court's collective memory of *Humphrey's* and guides its vindication of the UET.[20]

Lured by a folk narrative about the past, the Justices of the Roberts Court have worked themselves into a dangerous position. A maximalist UET erases nuance and works pure a vision of the state as the manifestation of one person's will.[21] In the *Slaughter* oral arguments, even the pro-presidentialist Justices asked anxious questions about how far the UET might go, searching in vain for some limiting principle that would save adjudicatory administrators and Article I judges.[22] But the majority opinion in *Slaughter* did not engage with the significant originalist

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18. For a powerful example of this New Deal narrative, see Robert E. Cushman, The Independent Regulatory Commissions 8 (1941) ("The use of the term 'quasi,' for which the best synonym is 'not exactly,' is a confession of vagueness, an announcement that precise definition is impossible.").

19. Baumann, Remembering Congress, supra note 17 (manuscript at 8); see also In re Aiken County, 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("*Humphrey's Executor* is perhaps best explained by the fact that it was decided in 1935 on what became known as Roosevelt's 'Black Monday.' It was one in a line of decisions issued . . . by a Supreme Court seemingly *bent on resisting President Roosevelt and his New Deal policies*." (emphasis added)).

20. See Baumann, Remembering Congress, supra note 17 (manuscript at 8–9). On collective or constitutional memory, see also Jack M. Balkin, Memory and Authority: The Uses of History in Constitutional Interpretation 6 (2024) (discussing the normative implications that flow from the use of constitutional memory to surmise constitutional meaning); Reva B. Siegel, The Politics of Constitutional Memory, 20 Geo. J.L. & Pub. Pol'y 19, 21 & n.5 (2022) ("We could describe constitutional memory as a form of collective memory forged through constitutional interpretation."); Jed Handelsman Shugerman & Zachary Shugerman Handelsman, Memory Warriors, Pluralists, and Abnegators: An Essay on Pluralist Originalism in Jack Balkin's *Memory and Authority*, 13 Tex. A&M L. Rev. 609, 620–21 (2026) (labeling Unitary Executive Theorists "Right-Wing Legal Memory Warriors" and discussing how their myopic view of history has enabled the Roberts Court to expand and insulate presidential removal power).

21. See Baumann, Taft's Nightmare, supra note 5 (noting that many conservative legalists have attempted to contain the UET precisely because its maximalist pretensions would create a state that "is the embodiment of one man's will").

22. See, e.g., Transcript of Oral Argument at 17, Trump v. Slaughter, 146 S. Ct. 2283 (2026) (No. 25-332), 2025 WL 3542394 (Kavanaugh, J.) (asking what could save the Federal Reserve system from the logic of the UET); id. at 18 (Kagan, J.) ("I think the question that these questions go to, right, is, if you take your logic at face value, it seems to include a great many things."); see also id. at 14–15 (Sotomayor, J.) (questioning whether the logic of the UET "could be limited"). Because the critics of the Hughes Court were mostly New Dealers, see supra note 19 and accompanying text, this new historical understanding is filled with irony. By developing a narrative that delegitimized *Humphrey's Executor*, the New Dealers provided a warrant that would later be seized upon by the conservative legal movement to destabilize much that the New Dealers had accomplished.

literature deconstructing the UET.[23] And the Court warped the historical record even further in *Cook* in an effort to justify a carve-out for the Fed.[24] Chief Justice Roberts's reliance on a gerrymandered historical precedent—the First and Second Banks of the United States—collapses upon scrutiny of the sources he cited.[25] Indeed, citing an earlier version of this Article, Justice Sonia Sotomayor accused her colleagues of "feign[ing] ignorance" to reach their preferred result.[26]

The "quasi-judicial" category is not the problem. It is the solution, just as it has been a traditional concept and strategy in England and America for over four centuries.[27] In response, this Article provides the history the Court neglected to provide us in this new post-*Slaughter* world. Contrary to Chief Justice Roberts's assertion "no ifs, ands, or quasis,"[28] throughout history England and the United States had scores of quasi-judicial officers enforcing legislation and regulating private parties.[29] These officers were assigned judge-like duties, norms, and procedures—and often enjoyed protections from removal and other forms of structural independence to insulate them from hierarchical control.[30]

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23. See *Slaughter*, 146 S. Ct. at 2327–29 (Sotomayor, J., dissenting) (citing to the work of numerous originalist scholars that the majority failed to engage with when endorsing the UET); Katz & Manners, supra note 10 (explaining why Founding Era history is not a "ringing . . . endorsement of the Unitary Executive Theory").

24. Menand, Fed Exception, supra note 15.

25. See, e.g., Trump v. Cook, 146 S. Ct. 2234, 2254 (2026) (fighting off dissenting Justices by emphasizing the First and Second Banks of the United States). This emphasis on the Banks of the United States channels scholarship from Professors Aditya Bamzai, Aaron Nielson, and Daniel Tarullo. See Aditya Bamzai & Aaron L. Nielson, Article II and the Federal Reserve, 109 Cornell L. Rev. 843, 851–52 (2024) (arguing that the Banks of the United States suggest a Fed exception to the UET so long as the Fed "does not take on regulatory powers attenuated from its monetary functions"); Daniel K. Tarullo, The Federal Reserve and the Constitution, 97 S. Cal. L. Rev. 1, 68–81 (2024) (similarly drawing on the Banks to flesh out a Fed exception). But the comparison between the Fed and the Banks of the United States has been pilloried by experts in the history of banking in the United States. See, e.g., Lev Menand, The Unitary Executive and the Federal Reserve, 94 Fordham L. Rev. 2089, 2094 (2026) [hereinafter Menand, UET and the Fed] ("The Historical Practice Exception route does not work because nothing like the Federal Reserve Board existed at the founding. The oft-invoked First Bank is no precedent for limits on the president's power to remove Federal Reserve Board members because the First Bank was not part of the government."). And even Bamzai and Nielson did not think the Banks of the United States could save the entire Fed from the UET's clutches. See Bamzai & Nielson, supra, at 908 ("[B]ecause at least some of the Fed's activities go beyond those of the First and Second Banks, there is a significant argument under *Seila Law* and *Collins* that the President can remove the Fed chair, . . . Board of Governors, and perhaps others . . . involved in the Fed's quintessential regulatory functions."). So the Court's opinion in *Cook* is inexplicable even with the conservative originalist scholarship it drew upon.

26. *Slaughter*, 146 S. Ct. at 2343 (Sotomayor, J., dissenting).

27. See infra Parts II–III.

28. *Slaughter*, 146 S. Ct. at 2302.

29. See infra Parts II–III.

30. See infra Parts II–III.

We do not argue that all quasi-judicial administrators must be independent, that most such officials were insulated from removal, or that every historical example fits into a single constitutional category. The historical record is messy. It contains variation, experimentation, contradicting trends, and shifting approaches back and forth. But that messiness is a problem for maximalist and exclusivist theories of presidential control, not for our historical explanations.[31] The unitary theorists are what they say they are: unitary and exclusive. Our history documents pluralism, flexibility, and legislative discretion. It identifies examples of underdeterminacy and even ambiguity in the original 1787 text of the Constitution: The terms "executive power" and "judicial power" were underdetermined and open to functional interpretation and more flexible institutional design choices over time.[32]

We do not need to defend *Humphrey's Executor* in its broadest form. We argue only that Congress has long possessed constitutional discretion to decide when judge-like administration requires protection from hierarchical political authority. When Congress makes that choice, it acts within—not against—the Anglo-American constitutional tradition.

The quasi-judicial tradition has two related dimensions. The first is a long Anglo-American practice of *administrative judicialization*: mixing executive and judicial forms and functions. It is an overlooked but crucial historical fact that English authorities—the same legal authorities that the Framers had read and followed—described judges as being a part of the executive and wielding a subset of the executive power.[33] As a continuation of this tradition of mixed and overlapping powers, Article II administrators have performed judge-like functions and conducted "formal, court-like procedures usually featuring adversarial settings, cross-examination of witnesses, and the taking of full records."[34] Across Anglo-American history, lawmakers gave administrators tasks that looked and felt like judging: taking evidence, resolving claims, applying legal standards to particular facts, exercising equitable judgment, deciding disputes, and issuing reasoned determinations.[35] These officials did not exercise Article III judicial power—they executed law. But they executed laws in forms that

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31. See, e.g., Baumann, Taft's Nightmare, supra note 5 ("That meme understanding of the presidency is now central to the case law associated with the unitary executive. All exercises of administrative authority, the Roberts Court believes, are exercises of presidential authority."); Vermeule, supra note 5 (defending the maximalist UET from criticism).

32. See infra section II.A.

33. See Jed Handelsman Shugerman, Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power, 100 Notre Dame L. Rev. 213, 230–37 (2024) [hereinafter Shugerman, Venality]; infra section II.A.

34. Hiroshi Okayama, Judicializing the Administrative State: The Rise of the Independent Regulatory Commissions in the United States, 1883–1937, at 11 (2019).

35. See infra Part II.

borrowed from courts and that depended on judicial virtues.[36] Relatedly, this mixed tradition is an example of the Constitution's historical underdeterminacy and tradition of flexibility. The quasi-judicial tradition was one thread of many underdetermined, open-ended constitutional concepts—of overlapping checks and balances, in contrast to the many formalist assumptions of the strict separationists.

The second dimension of the quasi-judicial tradition is *administrative depth*.[37] Lawmakers often designed institutions to prevent political superiors from dictating outcomes in particular cases. Removal restrictions were one device for creating that depth, but they were not the only one.[38] Legislatures also used long fixed terms, multimember bodies, mixed appointment structures, decisional finality, reporting requirements, procedural constraints, and other institutional arrangements that complicated direct political control.[39] The point was not to free administrators from

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36. See infra sections II.A, II.D.

37. See Stephen Skowronek, John A. Dearborn & Desmond King, Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive 4–12, 61–64, 193–204 (2021) ("Put simply, the American state *is* 'deep.' Depth, particularly depth added through the expansion of administrative and advisory instruments, is one of the most conspicuous byproducts of political development in the twentieth century."); Baumann, Remembering Congress, supra note 17 (manuscript at 3–4) ("[A]dministrative depth describes Congress's longstanding project from the end of the Civil War to the end of the New Deal to subordinate raw political will in the state by creating layers of administration that could operate outside direct presidential control."); Beau Baumann, On the Dark Side of the Appointments Clause, Law & Liberty (Nov. 13, 2025), https://lawliberty.org/on-the-dark-side-of-the-appointments-clause [https://perma.cc/6UT9-M98T] [hereinafter Baumann, Appointments Clause] ("In newly unsealed primary sources from Congress's own internal constitutional deliberations, lawmakers drew on this largely unimpeded reading of the Appointments and the Necessary and Proper Clauses to devise a modern state defined by administrative depth."). The Fed is a prototypical example of administrative depth. See Beau J. Baumann, Rebuilding State Authority in a Post-Trump America, Law & Pol. Econ. Project: Blog (Oct. 7, 2025), https://lpeproject.org/blog/rebuilding-state-authority-in-a-post-trump-america/ [https://perma.cc/2TRH-P76N] ("Think of the Federal Reserve System, a complex set of interlocking institutions dominated by expert economists who are shielded from political interference through overlapping tools of institutional design. The administrative law field's pioneers prioritized subordinating raw political will to values like the rule of law and expertise.").

38. See Baumann, Remembering Congress, supra note 17 (manuscript at 31–32) (chronicling how, after Myers v. United States, 272 U.S. 52 (1926), Congress "insulated administrators from unbridled presidential will" but was "not primarily concerned with removal provisions").

39. See Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769, 772–73, 784–812 (2013) (arguing that agencies "fall along a continuum" of independence, determined by a combination of structural features including "removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority"); see also Christine Kexel Chabot, The President's Approval Power, 92 Fordham L. Rev. 373, 374–77 (2023) (arguing that Congress can deny the President a true approval power through various tools and alternatives).

law. It was to make administration more lawlike by protecting judgment from presidential domination.[40]

Within those two dimensions, we find three overlapping categories that constitute the "quasi-judicial" tradition as available for depth and insulation from political control: (1) executive offices that contemporaries identified as judicial or quasi-judicial or that contemporaries compared to judges; (2) executive offices with adjudicatory procedures, forms, and functions; and (3) offices granted structural independence borrowing from the neutral-expert judicial model.

Many offices that fell into some of these categories did not protect incumbent administrators from at-will removal. But, often at the same time, many other quasi-judicial administrators were protected from at-will removal.[41] These cases constitute a tradition of case-by-case legislative discretion.[42] They support the default rule in *Wiener* that such offices should be considered independent or insulated unless Congress explicitly said otherwise.[43] This Article shows that *Wiener*'s default rule—and its legal intuitions about core domains of adjudicative independence—rest on a

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40. As Justice Felix Frankfurter explained in *Wiener v. United States*:

> If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

357 U.S. 349, 356 (1958).

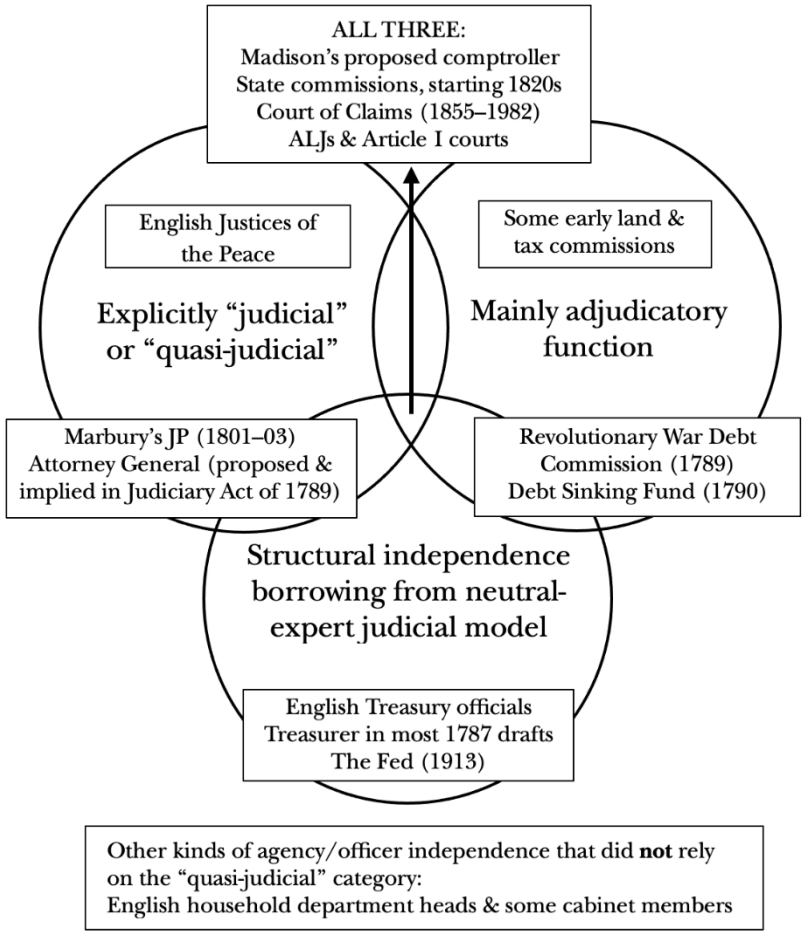
41. See infra sections II.A.2–.B.

42. Cf. *Wiener*, 357 U.S. at 355 ("When Congress has for distribution among American claimants funds derived from foreign sources, it may proceed in different ways. Congress may appropriate directly; it may utilize the Executive; it may resort to the adjudicatory process.").

43. *Wiener* concerned the attempted removal of a member of the War Claims Commission. Id. at 349–50. The Warren Court unanimously held that President Eisenhower's attempted removal of that member was unlawful. Id. at 350, 356. The Commission was straightforwardly quasi-judicial in nature. See id. at 355 (describing the Commission's role in adjudicating claims as having an "intrinsic judicial character"). But Congress did not provide the Commissioners with any statutory protection from removal. See id. at 350 ("This limit on the Commission's life was the mode by which the tenure of the Commissioners was defined, and Congress made no provision for removal of a Commissioner."); see also id. at 352 (reasoning that the lack of a removal provision was irrelevant because the case presented an issue in which inferences "must be drawn from congressional failure of explicitness"). The absence of a removal provision has led to multiple generations of criticism toward the Court's holding in *Wiener*. See, e.g., Aditya Bamzai, Taft, Frankfurter, and the First Presidential For-Cause Removal, 52 U. Rich. L. Rev. 691, 744 (2018) ("[I]n *Wiener*, Justice Frankfurter's opinion . . . pivoted almost 180 degrees from Chief Justice Taft's opinion for the Court in *Myers*—inferring, as a matter of congressional intent, that quasi-judicial officers are presumptively removable only for cause even when a statute fails to include an express for-cause removal provision."). This Article's contribution makes sense of the *Wiener* decision and may justify a presumption against at-will removal for at least some quasi-judicial administrators.

deep historical pedigree stretching from the English legal backdrop, through the Founding Era, to the New Deal.

FIGURE 1: THREE ASPECTS OF THE QUASI-JUDICIAL CATEGORY[44]



When *Humphrey's Executor* used the language of "quasi-judicial" administration, it was not inventing a category from whole cloth.[45] Nor was it referring to a recent Progressive Era innovation. It was drawing on a long-standing vocabulary of institutional design.

English legal theorists and other European commentators highlighted England's mixed constitution—especially the mixing of executive

44. Three aspects of the "quasi-judicial" category with some examples throughout Anglo-American history. See infra Part II for eighteenth-century and early nineteenth-century examples offered here; Part III for the twentieth-century examples offered here.

45. See Baumann, Remembering Congress, supra note 17 (manuscript at 2, 4–5) (showing that the quasi categories were well established long before *Humphrey's Executor* was decided).

and judicial powers.[46] Even after the Constitutional Convention had been debating and drafting for three months, Gouverneur Morris, one of the architects of Article II, was recorded stating that "the Judiciary . . . was part of the Executive."[47] The Ratification debates offered similar understandings.[48] They did not need a label like "quasi-judicial," because the English had not separated executive and judicial power. This mix was the norm, not a special exception.

From seventeenth-century England through the Founding and the nineteenth century, lawmakers mixed administrative authority with judicial forms.[49] They created officers who settled accounts, adjudicated claims, administered public funds, supervised fiscal obligations, and resolved disputes through procedures associated with courts.[50] These officials were not always independent. But the recurring association between judge-like functions and decisional neutrality shaped the way Anglo-American lawmakers understood administration.

Americans specified the Attorney General played such a judicial or "quasi-judicial" role in the late eighteenth century through the mid-nineteenth century. Remarkably, we can find this understanding in Thomas Jefferson's writings that Chief Justice Roberts unwittingly cited in *Slaughter* for the opposite conclusions.[51] The First Congress's Judiciary Act of 1789 created the Office of the Attorney General as implicitly more independent from presidential control and removal, compared to the three department heads (Foreign Affairs, War, and Treasury) established

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46. See infra section II.A.

47. Notes of James Madison (Aug. 15, 1787) (statement of Gouverneur Morris), *in* 2 The Records of the Federal Convention of 1787, at 296, 299 (Max Farrand ed., 1911) [hereinafter Farrand's Records]; see also infra section II.A.1.

48. See, e.g., Letter XV from the Federal Farmer to the Republican (Jan. 18, 1788), reprinted in 20 The Documentary History of the Ratification of the Constitution: Digital Edition 1043, 1043 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 2009), https://rotunda.upress.virginia.edu/founders/default.xqy?keys=RNCN-print-02-20-02-0004-0139 (on file with the *Columbia Law Review*) ("The business of the judicial department is, properly speaking, judicial in part, in part executive, done by judges and juries, by certain . . . executive officers, as clerks, sheriffs, &c. they are all properly limbs, or parts, of the judicial courts, and . . . faithfully . . . decide upon, and execute the laws . . . .").

49. See infra Part II.

50. See infra Part II.

51. Contrast Thomas Jefferson, Notes Concerning the Right of Removal From Office (1780), *in* 4 The Papers of Thomas Jefferson 281, 281–82 (Julian P. Boyd ed., 1951) [hereinafter Jefferson's Notes] ("[W]here the officers of government should have freehold [law] has declared they shall hold during good behavior. Judges—Register Clerks—Attorney General. Where not removable by Executive, reserved expressly to legislature or others."), with Trump v. Slaughter, 146 S. Ct. 2283, 2295 (2026) (claiming that Jefferson understood executive officers to be removable by the President at will (quoting Jefferson's Notes, supra, at 281)). For further discussion, see infra notes 247–253 and accompanying text.

earlier that year.[52] In the same context, Attorney General William Wirt described his office as akin to that of a "judge" in 1820,[53] followed by Attorney General Caleb Cushing specifically using the term "quasi judicial" in 1854 for the same purpose.[54] The term "quasi judicial" spread after the 1820s, including in a unanimous Supreme Court decision in 1849.[55]

The most obvious application of the quasi-judicial tradition is adjudication. Officials who decide claims, impose legal consequences, or resolve disputes through court-like procedures have long been understood to require some measure of decisional neutrality, which Congress has effectuated by instituting removal protection and other methods of insulation.[56] That tradition is the core commitment preserved in *Wiener*.[57]

But this Article also recovers a second and overlooked strand of the same tradition: money-related administration. Fiscal, monetary, tax, debt, banking, and public-accounting functions were repeatedly associated with judicial virtues.[58] Here, the work of scholars like Professor Christine Chabot, who has recovered the Founding Era Sinking Fund Commission, supplies an important foothold.[59] Lawmakers reached for judge-like forms

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52. See Jed Handelsman Shugerman, The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service, 66 Stan. L. Rev. 121, 129–31 (2014) [hereinafter Shugerman, DOJ] (contrasting the limited executive powers and signs that Congress envisioned having power over the Attorney General with the broader powers given to the three other positions composing the first cabinet); Jed H. Shugerman, The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity, 171 U. Pa. L. Rev. 753, 834–36, 844–46 (2023) [hereinafter Shugerman, Indecisions of 1789] (explaining that "the Judiciary Act's specific use of 'at pleasure' for two low-level offices of law enforcement signals stronger protections for other officers in the Judiciary Act," especially when compared with the removal provisions for other offices created in the summer of 1789); infra section II.C.

53. Letter from William Wirt to John C. Calhoun, supra note 3, at 68.

54. Office and Duties of Attorney General, 6 Op. Att'ys Gen. 326, 334, 352 (1854).

55. Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849); see also Nathaniel Wald Donahue, Officers at Common Law, 135 Yale L.J. 1887, 1958–66 (2026) [hereinafter Donahue, Officers]; Brief of Amici Curiae Legal Historians Noah A. Rosenblum and Nathaniel Donahue in Support of the Respondents at 16–17, *Slaughter*, 146 S. Ct. 2283 (No. 25-332), 2025 WL 3230468; infra section II.E.2.

56. See Humphrey's Ex'r v. United States, 295 U.S. 602, 603 (1935) (explaining that Congress can insulate quasi-legislative and quasi-judicial officers from presidential removal to preserve their independence from executive control and coercion), overruled by *Slaughter*, 146 S. Ct. 2283; see also Wiener v. United States, 357 U.S. 349, 353 ("[O]ne who holds his office only during the pleasure of another[] cannot be depended upon to maintain an attitude of independence against the latter's will." (internal quotation marks omitted) (quoting *Humphrey's*, 295 U.S. at 629)).

57. *Wiener*, 357 U.S. at 355.

58. See, e.g., 1 Annals of Cong. 611 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (advocating for a Comptroller of the Treasury that would possess "Judiciary qualit[ies]").

59. See Christine Kexel Chabot, Is the Federal Reserve Constitutional?: An Originalist Argument for Independent Agencies, 96 Notre Dame L. Rev. 1, 5 (2020) [hereinafter

and safeguards because sensitive financial authority seemed to require legality, impartiality, and insulation from ordinary political pressure.[60]

That second strand matters after *Cook*. The Federal Reserve is not best understood merely as an anomaly flowing from the First and Second Banks of the United States.[61] That portion of the *Cook* decision is erroneous.[62] The Fed is part of a broader tradition in which lawmakers treated money-related administration as especially vulnerable to political manipulation and therefore especially in need of institutional depth. From English Treasury and England's other fiscal offices[63] to the early American republic's Sinking Fund Commission,[64] debt commissions,[65] and Madison's proposed Comptroller,[66] to the Court of Claims in the 1850s,[67] the Civil War era's Comptroller of the Currency,[68] and eventually the Federal Reserve and administrative law judges,[69] lawmakers have long worried that financial judgment and adjudication of claims could not safely be reduced to presidential preference. *Cook* recognizes that concern in the specific context of central banking.[70] Our history shows that the concerns that led Congress to create a Federal Reserve defined by its depth run deep into the Anglo-American constitutional project.

Chabot, The Fed] (noting that even Alexander Hamilton, a proponent of a muscular executive, sought administrative depth instead of presidential control when it came to the Sinking Fund Commission).

60. See id. at 5–7.

61. See supra note 25 (collecting citations comparing the Fed and the Banks of the United States).

62. See Menand, UET and the Fed, supra note 25, at 2114–21 (deconstructing the UET-exception arguments premised on the Banks of the United States).

63. Shugerman, Venality, supra note 33, at 258–67.

64. See Chabot, The Fed, supra note 59, at 3–5 (discussing the Founding Era Sinking Fund, "which conducted the same open market purchases of U.S. securities as today's Open Market Committee" and describing the history of "the misuse of funds in England").

65. Christine Kexel Chabot, Interring the Unitary Executive, 98 Notre Dame L. Rev. 129, 160 (2022) [hereinafter Chabot, Interring]; Victoria Nourse, The History of Multi-Member Commissions at the Founding, 1789–1840: New Evidence on Independent Agencies, 76 Duke L.J. (forthcoming) (manuscript at 5–14), https://ssrn.com/abstract=5628110 [https://perma.cc/SL92-VLT6] (discussing the Revolutionary War Debt Commission); id. (manuscript at 23–32) (discussing Founding Era commissions dedicated to taxation and title).

66. See Shugerman, Indecisions of 1789, supra note 52, at 824–34.

67. See infra section II.E.5.

68. See infra notes 414–417 and accompanying text.

69. See infra notes 572, 591 and accompanying text.

70. See Trump v. Cook, 146 S. Ct. 2234, 2242–44 (2026) (discussing the unusual lengths to which different Congresses went in ensuring that monetary policy would be administered by figures ostensibly insulated from politics).

This history also helps us better grapple with the world after Roberts's elliptical opinions in *Slaughter* and *Cook*.[71] Among other open questions, Chief Justice Roberts acknowledged the possibility of tenure protections for "non-Article III courts" and for commissions that "influenced monetary policy," following the tradition of early Congress.[72] It was wise to leave those categories for another day; but when that day comes, the Supreme Court should reaffirm their independence broadly.

Our history demonstrates that *Humphrey's Executor* was right as a matter of history and tradition. But even though *Slaughter* has now

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71. See Trump v. Slaughter, 146 S. Ct. 2283, 2305–06 (2026) (writing that the Court had "no occasion today to define the bounds of what [executive] power entails" and was "leav[ing] those questions" having to do with "'non-Article III courts' . . . for another day" (quoting Transcript of Oral Argument, supra note 22, at 15, 28)); *Cook*, 146 S. Ct. at 2249 (declining to "fully demarcate the contours of 'cause'"). One of us (Shugerman) thinks the *Slaughter* Court could have crafted a more historically legitimate rule by holding more narrowly that the modern FTC, circa 2026, exercises traditional executive enforcement powers that go beyond the kinds of quasi-legislative or quasi-judicial powers that Congress delegated in 1914. On this point, see Daniel A. Crane, Debunking *Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835, 1851–68 (2015) (discussing the development of the FTC as taking on an increasingly executive character since it was established in 1914); Eli Nachmany, The Original FTC, 77 Ala. L. Rev. 1, 54–56 (2025) (arguing that the modern FTC has expanded powers and functions so that the agency is no longer covered by the decision in *Humphrey's Executor*). Such a decision would have retained *Humphrey's Executor* as a precedent—correctly as a matter of law and history—while also holding that the FTC had aggregated or accumulated more traditional executive powers over the past century. In other words, the FTC of 1926 could be independent in its mix of quasi-legislative and quasi-judicial powers, but arguably, the FTC of 2026 was no longer valid under *Humphrey's*.

72. *Slaughter*, 146 S. Ct. at 2306. Note the broader reference to "non-Article III courts," instead of the conventional, narrower label "Article I courts." Id. This perhaps signals a hint of openness to removal protections for Article II adjudicators, especially if they are not principal officers (for example, administrative law judges, administrative patent judges, and adjudicatory commissions). Strangely, the *Slaughter* majority did not focus in on the usual distinction between principal and inferior officers. Contrast id. at 2301 (referring to "inferior officers" only one time in the majority opinion), with, e.g., Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2199–2200 & n.3 (2020) (analyzing the distinction at length), and Ilan Wurman, The Original Presidency: A Conception of Administrative Control, 16 J. Legal Analysis 26, 29–30 (2024) (arguing that the President can remove, but not directly control, principal officers, and inversely, that Congress may insulate inferior officers from removal but not directly control them). Concurring, Justice Neil Gorsuch emphasized presidential removal power over even principal officers. See *Slaughter*, 146 S. Ct. at 2311, 2319 (Gorsuch, J., concurring). Chief Justice Roberts, meanwhile, led his textual analysis with the Appointments Clause's provisions on principal officers. Id. at 2293–96 (majority opinion). This inference is contradicted by the text and the historical record, but taken on its own, this Appointments Clause argument leaves more flexibility for Congress to treat inferior officers and employees differently, because there is no guarantee of presidential nomination, and it grants more discretion to Congress. See U.S. Const. art. II, § 2 (giving Congress discretion to grant the President appointment power only for "inferior Officers"). One day after *Slaughter*, the Roberts Court notably left in place the injunction protecting the Register of Copyrights and Director of the U.S. Copyright Office, whose duties include adjudication and rulemaking. See Blanche v. Perlmutter, 146 S. Ct. 2812, 2812 (2026) (mem.); Overview, U.S. Copyright Off., https://www.copyright.gov/about/ [https://perma.cc/HPS3-DSCW] (last visited Aug. 11, 2026).

overturned *Humphrey's*,[73] it does not follow that the quasi-judicial tradition is empty. The mistake of *Humphrey's Executor* was not that it invoked quasi-judicial administration but that it used the quasi-judicial label without establishing it as a coherent tradition with legal principles. The *Humphrey's* Court leaned on that category to do too much work. Properly understood, the category does not authorize a general fourth branch. The quasi-judicial tradition is narrower. It allows Congress to protect administrative impartiality when political control might undermine good government.

The post-*Slaughter* world requires a limiting principle. The UET offers a deeply unappealing one: If an officer executes law, the President must be able to remove that officer at will.[74] That principle is overly formalistic and at odds with American history. Anglo-American lawmakers have long created officials who execute law while acting in judge-like ways, and they have sometimes insulated those officials when independence was deemed necessary to the office. The better principle is one of congressional discretion.[75] Congress may insulate adjudicatory, fiscal, monetary, or otherwise judge-like administration to prevent hierarchical political control. Our ongoing project shows that the quasi-judicial tradition is *not necessary* for depth, insulation, and removal protections like cause. It is not the only grounds for such discretion. In a forthcoming paper, we will explain that the quasi-legislative category has a pedigree (a history and tradition) for legislative discretion to insulate, too.[76]

This Article proceeds in four Parts. Part I sketches the overarching interpretive method of the quasi-judicial tradition by juxtaposing it against

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73. *Slaughter*, 146 S. Ct. at 2302.

74. See id. at 2297.

75. Both Authors agree that congressional discretion is rooted in the Necessary and Proper Clause of Article I. See U.S. Const. art. I, § 8, cl. 18; Jed Handelsman Shugerman & Gary Lawson, Presidential Removal as Article I, Not Article II, 121 Nw. U. L. Rev. (forthcoming 2026) (manuscript at 21–24), https://ssrn.com/abstract=5736583 [https://perma.cc/P98J-GET3] (rooting the authors' analysis in Article I); Baumann, Appointments Clause, supra note 37 (making a similar argument). Shugerman and Lawson suggest that early legislative precedents—as well as the term "proper" in the Necessary and Proper Clause—limit congressional discretion to set removal conditions or grant life tenure to executive officers. See Shugerman & Lawson, supra (manuscript at 55–56) (explaining that double layers of independent commissions could be understood as an excessive diffusion of accountability that improperly hinders presidential control; and a single head is more likely to clash with a President and hinder a President's policy goals than a multi-member commission with staggered (and often bipartisan) terms). Baumann would not use the precedents in question to narrow Congress's ongoing ability to innovate. Cf. Leah M. Litman, Debunking Antinovelty, 66 Duke L.J. 1407, 1412 (2017) (criticizing an approach to federal statutes that unduly squeezes Congress's ability to innovate). He sees in the quasi categories a broad power that is only meant to be checked, in most all cases, through the political process. See Nikolas Bowie & Daphna Renan, The Separation-of-Powers Counterrevolution, 131 Yale L.J. 2020, 2024–27 (2022) (comparing a "republican" separation-of-powers paradigm from the Founding with a "juristocratic" alternative).

76. See Beau J. Baumann & Jed Shugerman, Quasi-Legislative: A History and Tradition (unpublished manuscript) (on file with the authors).

the falling pillars of the UET and situates the argument in the wake of *Slaughter* and *Cook*. It argues that, despite the Court's overruling of *Humphrey's Executor* in *Slaughter*, *Wiener* remains central. And that centrality is only reinforced by *Cook*'s demand for a history-and-tradition analysis.

Part II reconstructs the early history of the quasi-judicial tradition in Anglo-American jurisprudence. It shows that early modern English and early American lawmakers were operating off of theories of administration that are inconsistent with a simplified vision of presidential command. Instead, lawmakers created administrators who, through procedures, norms, and institutional forms, mimicked courts.

Part III explores the tradition's evolution across the nineteenth and twentieth centuries. All three branches of government used the idea of a quasi-judicial tradition to describe officials who resolved disputes, regulated money, and performed other tasks that mimicked courts.

Part IV focuses on the present; it argues that the quasi-judicial tradition supplies an account of what ought to survive *Slaughter*. The tradition does not give us a general permit for independent agencies. Instead, it fleshes out *Cook*'s emphasis on history and tradition. Because of the history we provide, the *Cook* exception to *Slaughter*'s unitarian dictate *requires* that the Court recognize that Congress possesses considerable discretion to build administrative depth around quasi-judicial administrators. Separately, this tradition provides a frontal repudiation of the UET's maximal pretensions.

We anticipate that some may suggest that we are merely historicizing the old *Humphrey's Executor* regime in an attempted counterrevolution. To the contrary, we think *Humphrey's* was a deeply flawed opinion, relying more on simplistic labels than analysis or history—thus sowing its own demise.[77] Justice George Sutherland did not understand the quasi categories he wielded. He lacked any sophisticated understanding of these concepts and the historical developments they stood for.[78] The *Slaughter* Court may see itself as the antithesis of Justice Sutherland in *Humphrey's*,

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77. One of the greatest constitutional commentators, Edward Corwin, nailed the problem with *Humphrey's* almost immediately, and it had nothing to do with the validity or pedigree of the quasi categories. After referencing the quasi categories, Justice George Sutherland wrote mysterious sections that seemed to indicate that the FTC was not an Article II entity at all. See, e.g., Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) ("The [FTC] is an administrative body created by Congress to carry into effect legislative policies . . . and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive."), overruled by *Slaughter*, 146 S. Ct. 2283. Corwin correctly spotted the conceptual disaster of *Humphrey's*. Where could this agency created to execute the law exist if not in Article II? Asking in a mocking tone, "where is [the FTC commissioner]?", Corwin continued, "is he, forsooth, in the uncomfortable halfway condition of Mahomet's coffin, hovering 'twixt Heaven and Earth?" Edward S. Corwin, The President: Office and Powers: History and Analysis of Practice and Opinion 94 (1940).

78. See *Humphrey's*, 295 U.S. at 624, 628–29 (failing to acknowledge the historical roots of the quasi-judicial concept).

but it mirrors his mistakes in dismissing the history behind the quasi-judicial category. While the Roberts Court's cherry-picking approach to history in *Slaughter* leads to a maximalist interpretation of Article II with no apparent room for exceptions, the majority is obviously unwilling to follow its own textual logic for the Fed in *Cook*,[79] and leaves itself an awkward escape clause toward the end of *Slaughter*.[80] The Roberts Court does not offer itself or lower courts much coherent guidance for applying the *Slaughter–Cook* conundrum to other offices. If we take the provisos from *Slaughter* and *Cook* seriously, if there are exceptions to the UET's domain that are dictated by the history and traditions of the Anglo-American constitutional project, then the quasi-judicial tradition should be inevitable.

Humphrey's old quasi-judicial category is dead . . . long live the new *Slaughter–Cook* quasi-judicial category.[81]

I. FROM THE UNITARY EXECUTIVE'S FAILING HISTORY, THE QUASI-JUDICIAL TRADITION RISES

This Part frames our argument in formal constitutional analysis. The authors practice different constitutional faiths. Shugerman is a public-meaning originalist (at least in theory).[82] Baumann acknowledges that original public meaning is relevant to constitutional interpretation but practices a more eclectic mode of reading the Constitution. For the purposes of this Article, the distance between us is irrelevant. As a matter

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79. See infra notes 591–594 and accompanying text.

80. See *Slaughter*, 146 S. Ct. at 2306 (leaving open "the possibility that some functions traditionally handled outside the Executive Branch may not be encompassed by *Myers*'s general rule").

81. The royalist reference here is intentional. The Roberts Court has implicitly relied on royal practice for its historical claims that "executive power" implied removal, and it repeated that assumption more explicitly in *Slaughter*. See, e.g., Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–93 (2010) (calling the removal power a "traditional" component of "executive power" that the Framers did not take away from the President and relying on the royalist assumptions of Myers v. United States, 272 U.S. 52 (1926), without restating them); *Slaughter*, 146 S. Ct. at 2291 (explicitly arguing that the Framers' view of the President was informed by the royal powers of the King); see also *Myers*, 272 U.S. at 118 ("In the British system, the Crown . . . had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both." (citing Ex parte Grossman, 267 U.S. 87, 110 (1925))). But Justice Sotomayor was correct in her dissent: "The powers held by the English Crown and state governors before ratification did not include a removal power that the legislature could not modify. Instead, Parliament often restricted the Crown's ability to remove even high-level royal officers . . . ." *Slaughter*, 146 S. Ct. at 2327 & n.5 (Sotomayor, J., dissenting).

82. See Jed Handelsman Shugerman, "Heads-I-Win, Tails-You-Lose" Originalism and "Vibe" Originalism 1–2 (Nov. 10, 2023) (unpublished manuscript), https://ssrn.com/abstract=4629679 [https://perma.cc/7XGC-AJ3E] (criticizing recent, internally dissonant permutations of originalism that rely on illegitimate methodology to study original public meaning as unfaithful to an academically rigorous originalism).

of *constitutional interpretation* (within the interpretation–construction distinction[83]), the evidence of original public meaning establishes that the quasi-judicial category was an operational part of our law at the Founding.[84]

To better understand the quasi-judicial function, this Part maps out the overarching framework for understanding the function by contrasting it with what this Article refers to as "the falling pillars" of the UET.[85] While the UET is now recognized as deeply ahistorical,[86] the quasi-judicial function has a long history and tradition from the English legal backdrop all the way through to the New Deal. This Article uses history and tradition within the bounds established by original public meaning at the Founding. Some of our uses of history and tradition fall under the label of constitutional interpretation.[87] Others sound in a minimalist variety of *constitutional construction* that is inoffensive to almost all public-meaning originalists.[88] None of this should distract from the sheer historical weight we present in this Article.

A. *The Unitary Executive's Falling Pillars*

Chief Justice William Howard Taft's opinion in *Myers v. United States* is the foundational UET precedent.[89] Although unitarians disagree on the

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83. See Lawrence B. Solum, The Interpretation–Construction Distinction, 27 Const. Comment. 95, 96 (2010) (defining "interpretation" as "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text").

84. See infra section II.D.

85. Cf. Jed Handelsman Shugerman, Vesting, 74 Stan. L. Rev. 1479, 1481 (2022) [hereinafter Shugerman, Vesting] (describing the UET's originalist pillars).

86. See Beau Baumann, The Unitarians Ran Out of History, Passing Political Time (July 8, 2026), https://bbaumann.substack.com/p/the-unitarians-ran-out-of-history [https://perma.cc/GD5Y-J5JE] (arguing that the unitarians have been so completely routed in the historical literature that they have suffered a "cumulative defeat" legal scholarship has trouble describing); see also Jamelle Bouie, Opinion, This Is Not a Man in Control of Himself, N.Y. Times (Apr. 15, 2026), https://www.nytimes.com/2026/04/15/opinion/trump-iran-power-unitary-executive.html (on file with the *Columbia Law Review*) ("[T]he idea of the unitary executive rests on a fundamental misunderstanding of the American political system. It imagines that government *can* be managed by a single figure, directing each part of the executive branch as an extension of his person. But the American system rests on consensus and collaboration.").

87. For example, the evidence we deploy that predates the Founding is a use of history and tradition that "enriches" constitutional text by providing context about the kinds of prevailing legal traditions against which the Constitution was drafted. See Randy E. Barnett & Lawrence B. Solum, Originalism After *Dobbs*, *Bruen*, and *Kennedy*: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 446–48, 492 (2023).

88. See Solum, supra note 83, at 96 (defining "construction" as "the process that gives a text legal effect"). Some originalists deny the validity of constitutional construction, but this is a minority approach. Barnett & Solum, supra note 87, at 438 & n.17.

89. 272 U.S. 52, 126 (1926) (holding that "[i]n the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary

details, the UET usually turns on either an inherent presidential power to remove federal administrators (usually principal officers[90]) or an implied presidential power to direct the actual exercises of power in the Executive Branch.[91] Modern unitarians are especially preoccupied with the Article II Vesting Clause, which they treat as having created an Article II branch that is an extension of presidential will.[92] Since *Myers*, the political morality of the UET has rallied around a claim of the President's democratic accountability relative to what they call a "Fourth Branch," sometimes decried as the "Deep State."[93] Unitarians often start from the premise that the Constitution requires a single robust executive whom "We the People" may hold accountable for law execution.[94] Key unitarians like Chief Justice Roberts have glommed onto this vision of accountability even though the presidency the Founders created was less an instrument of popular accountability than many unitarians care to acknowledge.[95]

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incident, the power of removal" and that Congress cannot reserve a role for itself in the removal process).

90. See, e.g., id. at 193–94 (drawing a classic removal argument around the distinction between principal or "superior" officers and inferior officers).

91. See, e.g., Gary Lawson, Command and Control: Operationalizing the Unitary Executive, 92 Fordham L. Rev. 441, 461 (2023) (arguing "no federal executive power can be exercised contrary to presidential instructions" and the President must therefore have directive control over executive officers); John C. Harrison, The Unitary Executive Without Inherent Presidential Removal Power 4 (George Mason Univ., Antonin Scalia L. Sch., C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 22-03, 2022), https://administrativestate.gmu.edu/wp-content/uploads/2022/08/Harrison-Revised-FINAL.pdf [https://perma.cc/HJM7-H2JK] ("Congress need give the President no removal power, or may give only restricted removal power, provided that Congress otherwise enables the President to control executive officials and their policy choices."); Michael B. Rappaport, The Unitary Executive: Presidential Control, Not Removal, Divided Argument (Jan. 13, 2026), https://blog.dividedargument.com/p/guest-post-the-unitary-executive [https://perma.cc/25LQ-SPQ6] ("The presidential control view derives more easily from the constitutional text than the removal view.").

92. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L.J. 231, 253 (2001) (arguing that the Article II Vesting Clause vests all executive power as well as most foreign affairs powers in the Office of the President).

93. See Skowronek et al., supra note 37, at 8–9 (describing the "phantom twins" of UET and the Deep State); see also President's Comm. on Admin. Mgmt., Administrative Management in the Government of the United States 29–30, 36, 46 (1937) [hereinafter PCAM Report] (first discussing and popularizing the critique of independent agencies as a "headless 'fourth branch'").

94. Josh Chafetz, Of Multiplicity and Accountability, *in* Building Democratic Capacity: Essays on Administrative Law's Futures (Blake Emerson, Joshua Macey, Sabeel Rahman & Bijal Shah eds., forthcoming) (manuscript at 6–7), https://ssrn.com/abstract=6907421 [https://perma.cc/YZ7G-CN74] (analyzing this idea as it has been articulated by various unitarian scholars).

95. See Jodi L. Short & Jed H. Shugerman, Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law, 65 B.C. L. Rev. 511, 586–87 (2024); Chafetz, supra note 94 (manuscript at 7–8) (arguing that Roberts's belief in the strong democratic accountability of the President is "confused").

Taft's vision of the UET hinged on a triangulated reading of Article II's Vesting Clause, the Take Care Clause, and the First Congress.[96] Generally, modern unitarians have followed Taft's template.[97] But as Professors Andrea Katz, Robert Post, and Noah Rosenblum have argued, Taft was no originalist, and his opinion in *Myers* avoided tying itself to a binding original public meaning of Article II.[98] To rehabilitate the UET in the 1980s, conservative unitarians had to rebrand the doctrine by focusing on the Founding Era.

The modern unitary executive theory arose in the conservative legal movement of the late 1970s and 1980s based on originalist claims,[99] and it became an even more far-reaching version beyond the holding in *Myers*. Whereas *Myers* struck down a Senate veto, the new "maximalist"[100] UET went further to suggest that Congress could not even limit unilateral presidential removal with good-cause protections.[101]

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96. See Myers v. United States, 272 U.S. 52, 115–17 (1926) (Executive Vesting); id. at 122 (Take Care); id. at 119–38 (First Congress).

97. See, e.g., Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197–98 (2020) (relying on Taft's reasoning to overrule a statutory removal provision). Some modern unitarian theorists have downplayed the Appointments Clause, contra Taft. See, e.g., Aditya Bamzai & Saikrishna Bangalore Prakash, The Executive Power of Removal, 136 Harv. L. Rev. 1756, 1833–34 (2023) [hereinafter Bamzai & Prakash, Power of Removal] (arguing that the Appointments Clause "never mentions removal," that its connection to removal restrictions is "hardly obvious," and that the "dominant view" located removal in the Vesting Clause "and not merely" in appointment); Aditya Bamzai & Saikrishna Bangalore Prakash, How to Think About the Removal Power, 110 Va. L. Rev. Online 159, 170 (2024), https://virginialawreview.org/wp-content/uploads/2024/08/BamzaiPrakash_Book.pdf [https://perma.cc/6TFL-PZHK] (rooting a discussion of presidential removal in the Article II Vesting Clause). For an excellent critique of this move, see David B. Froomkin, Textual Tensions in the Vesting Thesis, Regul. Rev. (Oct. 21, 2024), https://www.theregreview.org/2024/10/21/froomkin-textual-tensions-in-the-vesting-thesis/ [https://perma.cc/8TKF-XVF5].

98. See Robert C. Post, The Taft Court: Making Law for a Divided Nation, 1921–1930, at 412 (2023) (noting that Taft weighed functional considerations in his *Myers* decision and did not merely seek to discern original intent); Andrea Scoseria Katz & Noah A. Rosenblum, Becoming the Administrator-in-Chief: *Myers* and the Progressive Presidency, 123 Colum. L. Rev. 2153, 2159 (2023) ("*Myers* is not originalist. Unlike modern originalists, Taft was unwilling to rely solely on original meaning."); see also Baumann, Taft's Nightmare, supra note 5 ("Taft wasn't an originalist . . . . The historical portions of his opinion aren't about original public meaning. For Taft, the president needed the removal power to make sure that his subordinates stayed in line and could work as the embodiments of the president's largely unbridled political will.").

99. See Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, The Making of Presidential Administration, 137 Harv. L. Rev. 2131, 2186–98 (2024) (discussing the rise of a modern UET tied in with the conservative legal movement of the late twentieth century).

100. Vermeule, supra note 5.

101. See, e.g., *Seila Law*, 140 S. Ct. at 2197 ("We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers."); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010) (holding that congressionally imposed good-cause removal protections for members of the PCAOB were "contrary to Article II's vesting of the executive power in the

One of us has described the post-Taft, modern originalist case for the UET as turning on three pillars: the Executive Vesting Clause, the Take Care Clause, and the so-called Decision of 1789.[102] It sometimes relies on assumptions about royal power as an "English Backdrop." Many of these findings will be discussed below, but the following paragraphs briefly sketch out the extent of the UET's falling pillars.

First, scholars have shown that the English Backdrop actually allowed for insulated administrators (including cabinet members and high Treasury officials) who were shielded from at-will removal.[103] This research not only weakens one of the UET's pillars, it demonstrates that the separation of powers was much more underdetermined than unitarians have been willing to acknowledge.

Second, scholars have demonstrated the power of legislatures to insulate administrators from removal with term-of-year tenures.[104] This work has evidenced a developing law of officeholding from the Founding through the twentieth century that is irreconcilable with the maximalist UET.

Third, new scholarship shows that only a minority of the First Congress thought Article II implied presidential removal, with even less support for removal at will.[105] Because the unitarians have relied on statements from the First Congress, the new finding of radical disagreement among the Founding generation is a tremendous blow to the UET.

Fourth, scholars like Professor Christine Kexel Chabot have identified Founding Era commissions that contradict the unitarian model.[106] As

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President"); Morrison v. Olson, 487 U.S. 654, 725–26 (1988) (Scalia, J., dissenting) (criticizing the majority's defense of good-cause removal).

102. Shugerman, Indecisions of 1789, supra note 52, at 755.

103. See Daniel D. Birk, Interrogating the Historical Basis for a Unitary Executive, 73 Stan. L. Rev. 175, 181–85 (2021) ("Parliament created many offices by statute, particularly regulatory and administrative offices, and when it did so it often specified the mode of appointment, the mode of removal, and the tenure of the office."); Andrew Kent, Executive Power, the Royal Prerogative, and the Founders' Presidency, 2 J. Am. Const. Hist. 403, 409–11 (2024) (explaining that the exercise of British royal prerogative powers was increasingly controlled by Parliamentary leaders as the structure of government evolved, and that the President was granted an even more limited set of the monarch's "residual" powers); Shugerman, Venality, supra note 33, at 215–16 ("European monarchs and the English Crown lacked a removal power because they had engaged in long-term bargains with potential officeholders, offering property rights as part of the sale of office.").

104. See, e.g., Jane Manners & Lev Menand, The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence, 121 Colum. L. Rev. 1, 6 (2021) [hereinafter Manners & Menand, Three Permissions] (presenting new evidence that reconceptualizes the law of officeholding in the eighteenth and nineteenth centuries).

105. See, e.g., Shugerman, Indecisions of 1789, supra note 52, *passim*.

106. See, e.g., Chabot, Interring, supra note 65, at 153–90 (cataloguing various such commissions); Chabot, The Fed, supra note 59, at 30–47 (analyzing the operation of the Sinking Fund Commission specifically); Nourse, supra note 65 (manuscript at 4) ("From 1789–1850, Congress created dozens of multi-member commissions on everything from planning the 'seat of government,' to the mint, to patents, to canals, turnpikes, the District

noted already, the UET sometimes has a maximalist flavor. It allows few exceptions to its broadest visions of Article II as the embodiment of presidential will. New Founding Era findings, seemingly coming year after year, have sent shock waves through originalist communities and prompted soul-searching about the UET's historical validity.

Fifth, scholars have demonstrated that Chief Justice Roberts's theory of "presidential superiority" (that the President is "directly accountable" through "regular elections" and is the "most democratic and politically accountable official in Government"[107]) is contradicted by the original design and purpose of the Electoral College and by the structure of congressional elections.[108] There is, according to new scholarship, a mismatch between the political morality guiding the UET and the Founders' actual constitutional designs.

Sixth, scholars have shown that the text and original public meaning of the Appointments Clause did not imply unilateral presidential removal.[109]

Finally, and for good measure, scholars have shown that the American constitutional system pushed back against anything like the UET from the Founding, through the nineteenth century, and in the early twentieth

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of Columbia, bankruptcy commissions, the military, and a whole host of treaty commissions including those related to Indian affairs.").

107. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020).

108. See, e.g., Jeremy D. Bailey, The Idea of Presidential Representation: An Intellectual and Political History 1–41 (2019) (analyzing the design of the Electoral College); John A. Dearborn, Power Shifts: Congress and Presidential Representation 16 (2021) ("The framers of the Constitution made the popular connection indirect in all institutions of the federal government except the House of Representatives."); Chafetz, supra note 94, at 7–9 (juxtaposing unitarians' claims with the formal reality that presidents are "*three* steps removed from the voters" and the practical reality that presidents are "at present elected by the voters of seven [swing] states" constituting "roughly 18% of the population"—which ensure accountability only for the four years reelection looms); Short & Shugerman, supra note 95, at 517, 583–84 ("[W]e note a valid argument that the presidency is structurally and functionally the least representative elected office, as its unitary all-or-nothing design leaves roughly half of the electorate entirely unrepresented.").

109. See, e.g., Shugerman, Indecisions of 1789, supra note 52, at 819 ("The evidence of original public meaning and original methods circa 1787–88 presented in the First Congress was solidly against the presidentialist theory."); Jed Handelsman Shugerman, The Unitary Executive Theorists' Appointments Clause Problems 4 (Jan. 12, 2026) (unpublished manuscript), https://ssrn.com/abstract=6070008 [https://perma.cc/U7T3-KJEW] ("The unitary executive theorists have not cited a single presidentialist (someone who believed Article II implied a presidential power over executive officers) who actually relied on the Appointments Clause for their argument."); Jane Manners & Lev Menand, *Slaughter*, the Symmetry Rule, and What the Decision of 1789 Actually Decided, Yale J. on Regul.: Notice & Comment (Jan. 15, 2026), https://www.yalejreg.com/nc/slaughter-the-symmetry-rule-and-what-the-decision-of-1789-actually-decided-by-jane-manners-lev-menand/ [https://perma.cc/QE48-49R9].

century.[110] Contrary to Chief Justice Roberts's claim of "liquidat[ion]" through practice,[111] there has never been a consensus, tradition, or practice of a general rule of unconditional presidential removal.

These findings have led some originalists who had authored pro-presidential removal amicus briefs in the past to disavow their position in the past year.[112] Leading originalist Caleb Nelson's rejection of the UET[113] was seismic enough to be picked up by the *New York Times* and called a "bombshell."[114]

Slowly, the impact of these findings appears to be trickling up to the Roberts Court. In the oral argument for the *Slaughter* case, Justice Amy Coney Barrett signaled for the first time that the unitarians' longstanding emphasis on the Decision of 1789 was misplaced.[115] Perhaps sensing the collapse of the originalist brief for the UET, Justice Barrett hinted at a different course of action: She seemed to suggest that she found the Founding Era evidence inconclusive but read the "liquidation" of constitutional meaning through the nineteenth and twentieth centuries as

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110. See, e.g., Baumann, Remembering Congress, supra note 17 (manuscript at 7–14) (summarizing the ways in which the quasi categories were developed or reinforced through the Founding, the nineteenth century, and the early twentieth century).

111. Trump v. Slaughter, 146 S. Ct. 2283, 2295 (2026) (internal quotation marks omitted) (quoting Letter from James Madison to Judge Spencer Roane (Sep. 2, 1819), reprinted in 8 The Writings of James Madison 447, 450 (Gaillard Hunt ed., 1908)).

112. Contrast Brief for Separation of Powers Scholars as Amici Curiae Supporting Petitioner at 5, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 6910302 (advancing a pro-UET, anti-*Humphrey's* view, with Professor Rappaport joining as a signatory to the brief), and Brief of Law Professors as Amici Curiae in Support of Petitioners at 2–6, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (No. 08-861), 2009 WL 2372919 (advancing a similar view, with Professor Larson co-authoring the brief), with Rappaport, supra note 91 (staking out a more moderate position), and Shugerman & Lawson, supra note 75 (manuscript 6–7) ("The original public meanings of the Take Care Clause and Appointments Clause do not support an indefeasible presidential removal power . . . .").

113. Caleb Nelson, Special Feature: Must Administrative Officers Serve at the President's Pleasure?, Democracy Project (Sep. 29, 2025), https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure [https://perma.cc/FPU7-Y83Q].

114. Adam Liptak, A Scholar's 'Bombshell' Questioned Trump's Power to Fire Officials, N.Y. Times (Dec. 8, 2025), https://www.nytimes.com/2025/12/08/us/politics/supreme-court-constitution-originalist-trump.html (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting William Baude (@williambaude.bsky.social), Bluesky (Sep. 29, 2025, at 16:57 ET), Bombshell!, https://bsky.app/profile/williambaude.bsky.social/post/3lzyvlfbz4s2w [https://perma.cc/5GDC-SWLQ]).

115. See Transcript of Oral Argument, supra note 22, at 158 (Barrett, J.) ("Let's assume that I think . . . I'll grant you for this purpose that the Decision of 1789, if you just took it in isolation, may be not as conclusive as *Myers* thought it was." (emphasis added)).

supporting the UET.[116] Within a day, originalist scholar William Baude endorsed this pivot.[117]

But in the end, Chief Justice Roberts relied on the same debunked pillars[118] and added a cherry-picked and slippery argument about "liquidat[ion]" (a theory based on a likely misunderstanding of James Madison's Federalist essay about post-Ratification practice as evidence of constitutional meaning).[119] In *Cook,* Roberts created an exception for the Fed with, at best, misleading quotations from a single secondary source about the First and Second Banks of the United States.[120] None of these arguments stand up to historical scrutiny.

This Article shows that the UET (both the original "originalist" argument about the eighteenth century and its back-up "liquidation" theory[121] about nineteenth-century practice) are wrong, especially in the

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116. Id.

117. See Kate Shaw, William Baude & Stephen I. Vladeck, Opinion, At the Supreme Court, Scenes From a Judicial Backlash, N.Y. Times (Dec. 9, 2025), https://www.nytimes.com/2025/12/09/opinion/supreme-court-trump-independent-agencies.html (on file with the *Columbia Law Review*).

118. Trump v. Slaughter, 146 S. Ct. 2283, 2295, 2297–99 (2026).

119. Id. (internal quotation marks omitted) (quoting Letter from James Madison to Judge Spencer Roane (Sep. 2, 1819), reprinted in 8 The Writings of James Madison 447, 450 (Gaillard Hunt ed., 1908)). For a defense of the theory of constitutional liquidation, see generally William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019). For a careful critique of Baude's "liquidation" theory, see generally Jack Rakove, Madisonian Liquidation Unliquidated, 3 J. Am. Const. Hist. 843 (2025). But see William Baude, Liquidation, Then and Now, 3 J. Am. Const. Hist. 869, 869–77 (2025) (replying to Rakove's critique).

120. See Trump v. Cook, 146 S. Ct. 2234, 2243, 2254 (2026) (relying on a single sentence and quotation by Professor Eric Lomazoff that the First and Second Banks were "the 'great regulating wheel' of the early American financial system" to support the broad holding that the Federal Reserve "follows in [the Banks'] lineage" of exercising regulatory power over the economy (quoting Eric Lomazoff, Reconstructing the National Bank Controversy: Politics and Law in the Early American Republic 53 (2018))). Contra id. at 2260–61, 2274–75 (Thomas, J., dissenting) ("The Court's constitutional reasoning depends entirely on an ahistorical analogy between the Board and the First and Second Banks of the United States . . . . [T]he First and Second Banks were banks with no executive power, whereas the Board is unquestionably a federal agency that wields considerable executive power."). For scholarly criticisms of the majority's reasoning here, see Menand, Fed Exception, supra note 15 (discussing Roberts's conflation of the colloquial and legal meanings of "regulate"); Jed Shugerman, Supreme Court Historical Fact-Check, Part 2: Chief Justice Roberts's Misuse of the Banks of the United States (1790–1836), Substack (July 9, 2026), https://jedshugerman977482.substack.com/p/supreme-court-historical-fact-check [https://perma.cc/W7F2-SPRA] ("Roberts took [the quotations] way out of context. Lomazoff explains . . . how the Banks gradually converted their PRIVATE powers in the market into a kind of regulation. In the pages around the quotation . . . [there is not] a single example of PUBLIC powers of execution, regulation, or enforcement.").

121. See *Slaughter*, 146 S. Ct. at 2295 ("This aspect of the President's role was confirmed in the Constitution's first year—and in the years that followed. The result was a 'regular course of practice' that 'liquidate[d] & settle[d]' the President's power of removal . . . ." (quoting Letter from James Madison to Judge Spencer Roane (Sep. 2, 1819), reprinted in

"quasi-judicial" domain and in administrative adjudication. Below, in Part II, this Article discusses three categories of evidence: evidence from the English legal backdrop,[122] evidence from administration at or near the Founding,[123] and a new reconceptualization of the American law of officeholding.[124] These categories alone show that Congress's power under Article I to insulate quasi-judicial functionaries from executive control and removal is a binding part of our law that cannot be ignored.

On its own, this claim does not settle pending disputes. On our reading of the evidence, the actual content of the quasi-judicial function was underdetermined at the Founding. The Founding generation was so quick to insulate quasi-judicial functionaries from executive control and removal that they seldom articulated limits to the quasi-judicial function and left little behind in the historical record. Consequently, some post-Founding construction is required to understand the function's scope and limits.

B. *Toward History and Tradition*

Here, we turn to the ascendant history-and-tradition methodology. The history-and-tradition analysis, if done well, eschews any mechanical search for analogues to modern-day phenomena in favor of analyzing the constitutional significance of durable patterns across time.[125] Those patterns might involve public practices, institutional settlements, political consensus, and the legal justifications of both officials and citizens. That analysis highlights real human practices, public behavior, and the actions of political actors operating under the Constitution. And the history-and-tradition lens should be as attentive to change and contestation as any good legal history. The inquiry focuses on institutional context, levels of generality, patterns of repetition and exception, the reasons contemporaries gave for their practices, and the degree to which those practices reflected constitutional judgment rather than mere political expedience,

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8 The Writings of James Madison 447, 450 (Gaillard Hunt ed., 1908))); see also Kate Shaw, William Baude & Stephen I. Vladeck, Another Major Precedent Crumbles at the Supreme Court. 3 Legal Scholars Assess the Fallout., N.Y. Times (July 1, 2026), https://www.nytimes.com/2026/07/01/opinion/supreme-court-birthright-citizenship-slaughter.html (on file with the *Columbia Law Review*) ("Baude: I agree that *Slaughter's* historical account is not as nuanced as the one I would give: It probably overreads the so-called Decision of 1789, for instance . . . . But I still think the majority opinion is basically right about the long sweep of historical practice.").

122. See infra section II.A.

123. See infra section II.D.

124. See infra section II.B.

125. See Marc O. DeGirolami, Traditionalism Rising, 24 J. Contemp. Legal Issues 9, 27 (2023) ("[W]hat matters for traditionalism is the endurance of practices across time—[or] 'retrospective application'—rather than an inquiry into what the founders or the ratifiers or some other preferred group intended at one moment in time as applications of the text." (footnote omitted) (quoting Marc O. DeGirolami, First Amendment Traditionalism, 97 Wash. U. L. Rev. 1653, 1677 (2020))).

inertia, or coercion.[126] Because traditions are often plural and contested, the method cannot convert every historical episode into binding constitutional law.[127] But a history-and-tradition lens can discipline constitutional interpretation by juxtaposing legal craft with durable historical practices. Its value lies instead in disciplining constitutional interpretation by asking whether present claims of power or limitation can be situated within an intelligible course of historical practice.

In several rights cases, the Court has invoked history and tradition in new ways. In *Dobbs v. Jackson Women's Health Organization*, the Court relied on history and tradition to overrule *Roe v. Wade*.[128] In *New York State Rifle & Pistol Ass'n v. Bruen*, the Court developed a new history-and-tradition standard for assessing the constitutionality of firearms regulations.[129] These examples and others heralded a turn toward a new historical method of constitutional interpretation beyond originalism.[130]

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126. See, e.g., Wolford v. Lopez, 146 S. Ct. 2032, 2054–56 (2026) (Barrett, J., concurring) (discussing the use of history under the two-part test from New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)); Ramos v. Louisiana, 140 S. Ct. 1390, 1400–02 (2020) (discussing the importance of historical context in discussing the right to jury trial); William Baude & Robert Leider, The General-Law Right to Bear Arms, 99 Notre Dame L. Rev. 1467, 1513–14 (2024) (explaining that determining legal principles through history and tradition can be done at a high level of specificity, and that such analysis does "not permit discerning from these [historical] precedents vague and malleable abstract principles"); cf. Charles L. Barzun, The Genetic Fallacy and a Living Constitution, 34 Const. Comment. 429, 433–34 (2019) (defending the legitimacy of arguments about the historical origins of legal rules); W. Kerrel Murray, Discriminatory Taint, 135 Harv. L. Rev. 1190, 1193–98 (2022) (proposing a framework for when and to what extent a "discriminatory predecessor" to a policy impugns the constitutionality of its successor); Charles W. Tyler, Genealogy in Constitutional Law, 77 Vand. L. Rev. 1713, 1717 (2024) ("[G]enealogy is a legitimate form of constitutional argument when it is used to advance conclusions within several widely accepted 'modalities' of constitutional interpretation."); Rachel Bayefsky, *Wolford* and the Problem of Tainted Traditions, Divided Argument (June 30, 2026), https://blog.dividedargument.com/p/rachel-bayefsky-on-wolford-and-the [https://perma.cc/82RU-3SJ4] (analyzing how the different opinions in Wolford v. Lopez, 146 S. Ct. 2032 (2026), "pointed the way toward forms of traditionalist analysis that acknowledge the relevance of moral concerns").

127. See supra note 126; see also Christine Kexel Chabot, Rejecting the Unitary Executive, 2025 Utah L. Rev. 1001, 1006–07 (exploring the problem of a "contested historical record" that has bedeviled originalist literatures).

128. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("We hold that *Roe* and *Casey* must be overruled . . . . [T]he Due Process Clause of the Fourteenth Amendment . . . has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' . . . ." (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))), overruling Roe v. Wade, 410 U.S. 113 (1973).

129. 142 S. Ct. 2111, 2156 (2022) ("At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement.").

130. See, e.g., Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (holding that Establishment Clause jurisprudence must be guided by "analysis focused on original meaning and history"); Houston Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259–60 (2022)

New literatures have sprouted to flesh out the Roberts Court's history-and-tradition approach, characterizing it as a method focused on concrete practices that endure across time, as evidenced by "the practice's use before, during, and after enactment of a constitutional provision."[131]

Professor Marc DeGirolami offered up three factors that might guide a history-and-tradition analysis: (1) *age*—"the antiquity of a practice";[132] (2) *longevity*—"the continuity of the practice across time";[133] and (3) *density*—"the extent to which the practice was used or adopted across space,"[134] (i.e., geographic breadth). These practices may exist either as social practices or official acts.[135] DeGirolami also cautions against over reliance on "outliers."[136]

Our argument is that the quasi-judicial function fits the bill as a tradition that sheds light on Articles I and II under DeGirolami's framework. With respect to age, this Article shows that the quasi-judicial function predates our Constitution.[137] We inherited the notion that some judge-like administrators should be insulated from hierarchical political authority from the English legal backdrop.[138] The quasi-judicial function's longevity is also impressive. In terms of density as geographic breadth, the transatlantic practice of quasi-judicial depth is far denser than removal (which was not an English executive prerogative), and it continued at both the federal and state level throughout America.[139] Indeed, it was brought across the continent as the nation expanded West.[140]

And the function was no outlier. From the English backdrop through the late twentieth century, the quasi-judicial function was a key legal tradition that went largely unopposed.[141] We acknowledge that the quasi-judicial function faced a challenge in the 1920s, but show that this

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(emphasizing colonial practices that were imported into American practice after the Founding).

131. DeGirolami, supra note 125, at 14.

132. Id. at 15.

133. Id.

134. Id.

135. Id. at 14.

136. Id. at 36–37 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022)); see also Barnett & Solum, supra note 87, at 444.

137. See infra section II.A.

138. See infra section II.A.

139. Manners and Menand find a broad practice of insulating adjudicatory executive officers at the federal and state level. See Jane Manners & Lev Menand, The Power to Remove for Cause, 136 Yale L.J. (forthcoming) (manuscript at 19–25), https://ssrn.com/abstract=6303960 [https://perma.cc/TK4X-UNA2] [hereinafter Manners & Menand, For Cause] (providing state law examples); id. (manuscript at 40–55) (providing federal law examples).

140. See infra section II.E.4 (discussing a land commission on the West Coast that was used to settle land claims following the Mexican American War).

141. See infra Parts II–III.

challenge only forced the New Deal generation to double down on the function's internal logic as the blueprint for the Administrative Procedure Act of 1946 (APA).[142]

We add an additional consideration that combines the history-and-tradition standard with extant democratic theory. We think it is worth extra weight that the quasi-judicial function informs the basic structure of the APA.[143] The APA is one of the few statutes that fall into the rarified category of a bona fide *superstatute*.[144] Superstatutes "alter substantially the then-existing regulatory baselines with a new principle or policy," establishing a "new normative or institutional framework."[145] As a special category in the study of legislation/statutory interpretation, these statutes command a special status because they are the products of lengthy deliberation and address pressing social dilemmas.[146] After a lengthy struggle that implicated all three branches of government, the APA provided a new schema of administrative government.[147] It drew on the intellectual architecture of the quasi-judicial and quasi-legislative functions and was the grand culmination of the quasi-judicial function's centuries-long pedigree.[148]

We use the history-and-tradition label in ways that have been blessed by originalists in good standing. Some of the evidence from the English backdrop below explains the original meaning and the original ambiguities of the Constitution, especially the meaning of "executive power," "judicial power," and the degree of separation between them. This evidence problematizes a formalistic rejection of the quasi-judicial tradition by showing that the Founders had only ever experienced an English legal system that considered the *judicial* role as a subset of *executive* authority.[149] Actual examples from the English backdrop of judge-like administrators being insulated from hierarchical political control add up to historical context that sheds light on the original public meaning of the

142. See infra section III.B.

143. See infra section III.B.

144. William N. Eskridge Jr. & John Ferejohn, The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking, 98 Notre Dame L. Rev. 1893, 1894 (2023); see also Antonin Scalia, *Vermont Yankee*: The APA, The D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345, 363 (labeling the APA a "superstatute, or subconstitution, in the field of administrative process").

145. William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216, 1230 (2001).

146. Id. at 1231, 1273.

147. See generally George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics, 90 Nw. U. L. Rev. 1557 (1996) (chronicling the interbranch struggle that preceded the enactment of the APA).

148. See infra section III.B.

149. Cf. Barnett & Solum, supra note 87, at 447 (discussing the use of history and tradition to shed light on "semantic" meaning).

Constitution.[150] Examples from the Founding Era are probative because we assume that the Founders' "actions were consistent with [constitutional] text, especially if their actions went uncontested."[151] The remaining evidence helps us make sense of the underdeterminacy latent in the quasi-judicial function.[152]

C. *The "Quasi-Judicial" Tradition Is Not a Maximalist Theory*

Since at least Justice Antonin Scalia's dissent in *Morrison v. Olson*,[153] the UET has made a series of textual assertions and structural assumptions that lead to a maximalist theory. Over time, it grows difficult to carve out coherent exceptions consistent with maximalist claims. It starts with sweeping textual assertions, like Justice Scalia's interpretation of the Executive Vesting Clause, that the executive power "does not mean *some of* the executive power, but *all of* the executive power."[154] The next step is an assumption of a strictly formal separation of powers (even though there is no "separation of powers" clause in the Constitution).[155] Next come the assumptions that "executive power" implies broad categories of functions, such as Justice Scalia's claim that "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function"[156] (never mind the historical evidence to the contrary).[157]

This is why some scholars have described the fully developed logic of the UET as a "maximalist" theory[158]—its formal logic permits no exceptions. Jack Goldsmith has explained the Roberts Court's version of the theory as: "[T]he president is the executive branch."[159] And following

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150. Cf. id. (arguing that constitutional text can only be understood in full through historical contextualization).

151. Id.

152. See id. at 448 ("A direct appeal to history or tradition could also provide a method for constitutional construction in cases of underdeterminacy.").

153. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

154. Id. at 705 (referring to U.S. Const. art. II, § 1, cl. 1). Note that the Legislative Vesting Clause uses "all," not "the," and the historical record suggests that this wording seems to signify important differences. See Shugerman, Vesting, supra note 85, at 1502–12.

155. Moreover, the First Congress debated and rejected a separation-of-powers constitutional amendment, despite about half of the early state constitutions including one. See Shugerman, Indecisions of 1789, supra note 52, at 797–98; Shugerman, Vesting, supra note 85, at 1503.

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

157. See Shugerman, DOJ, supra note 52, at 128 n.27 (listing numerous sources that illustrate, contrary to Justice Scalia's comment, that "various scholars have shown a lack of consensus concerning . . . the executive function of prosecution").

158. See, e.g., Cass R. Sunstein & Adrian Vermeule, The Unitary Executive: Past, Present, Future, 2020 Sup. Ct. Rev. 83, 84–85.

159. Ross Douthat, Opinion, What If There's No Way to Stop Trump's Approach to Power?, N.Y. Times: Interesting Times (Apr. 17, 2025), https://www.nytimes.com/2025/04/17/opinion/ross-douthat-interesting-times-jack-goldsmith.html (on file with the

this logic, the executive branch—and each executive officer—must represent the will of the President.

UET has been bound up with a vision of administrators as essentially the avatars of presidential will. On this view, administrators step into the shoes of the President when enforcing laws. This basic conception is the heart of the UET. But on its face, the administrators-as-avatars theory offers no obvious exception. And this maximalist character is why every historical counterexample is treated like an existential struggle in the literature. Every time scholars find examples of early administrators who were either unremovable or existed outside of presidential control, the core premise of the UET is wounded. This historical evidence forces unitarians to offer Whiggish narratives of the UET, which could never have survived sustained scrutiny. History is rarely as clean as a maximalist theory would demand.

Our theory, by contrast, is not a maximalist one. We are simply building from a reading of Article I's Necessary and Proper Clause, which permits Congress to regulate the role of hierarchical political authority over administrators when it is necessary and proper.[160] This theory lodges in lawmakers the discretion to insulate administrators from hierarchical political authority when it is in the nation's best interests.

We do not mean to suggest that Congress insulated all quasi-judicial administrators from removal or presidential control. To the contrary, our story is replete with counterexamples. Our claim is narrower: Every generation of Americans acted to insulate quasi-judicial functionaries from removal or presidential control. This is a tradition that existed from the English legal backdrop to the present.

This history and tradition accomplishes two objectives. First, the quasi-judicial tradition is a mortal blow to the maximalist theory of the UET. That the Anglo-American constitutional project has, for centuries, allowed legislatures to regulate the removal and control of administrators is incompatible with an originalist case of the UET. Quasi-judicial administrators were enforcing, executing, and regulating. Nonetheless, English and American legislators found ways to insulate many of these administrators from removal and top-down control.

Second, this approach offers a new post-UET theory of the law that embraces historical underdeterminacy and contestation. Our basic theory is that the quasi-judicial tradition was one thread of many flexible checks and balances. "Executive power" and "judicial power" are two examples

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Columbia Law Review); see also Alan Z. Rozenshtein, Jack Goldsmith & Jen Patja, Lawfare Daily: Jack Goldsmith on *Trump v. United States* and Executive Power, Lawfare (Feb. 12, 2025), https://www.lawfaremedia.org/article/lawfare-daily–jack-goldsmith-on-trump-v.-united-states-and-executive-power [https://perma.cc/9GE6-8BPT] (providing a similar view that the Roberts Court considers that "[a]ll of the executive power is vested in the president").

160. See infra Part IV & Conclusion; see, e.g., Shugerman & Lawson, supra note 75, (manuscript at 16).

of ambiguous, underdetermined constitutional concepts. Over time, and especially after the Civil War, the tradition gained traction and became a solidified feature of U.S. legal tradition. This would suggest that the Supreme Court ought to respect the tradition and allow Congress to insulate quasi-judicial administrators from removal and presidential control.

II. "QUASI-JUDICIAL" IN ENGLAND, THE FOUNDING, AND THE EARLY REPUBLIC

This Part discusses evidence of the quasi-judicial function in early modern England, the Founding Era, and the early republic through to the antebellum period. The quasi-judicial function is characterized by different kinds of "institutionalized autonomy of agency members from elected public officials, especially the president."[161] It is widely accepted that England did not have a formal separation of powers.[162] It is less widely known that English judges were part of the "executive" and wielded "executive power." While seventeenth-century English judges served at the pleasure of the Crown, many nonjudicial officials we would now categorize as a mix of "executive" and "adjudicatory" were unremovable, as their tenures were protected from removal by strict property rules.[163] Over the course of the eighteenth century, England gradually gave more tenure protection to judges, which did not differentiate judges from other officers; instead, it brought common law judges into the sphere of independence already granted to other adjudicatory officials, especially in Treasury.[164] Early Americans adopted this English practice, articulating an early version of the mixed adjudicatory official as judge-like and insulating some judge-like administrators from executive removal and control.[165] That said, more nuanced and well-articulated procedures came later, after the Civil War.

A. *The English Backdrop: The Mixed Constitution and Mixed Judging*

The conceptual origins of the quasi-judicial function in the English legal backdrop have been shrouded by the unitarians' whig histories. By reclaiming two features of the backdrop, we reveal the errors in the unitarian literature and illuminate the origins of the quasi-judicial administration. First, English law did not draw a line between law execution and adjudication. Judges were commonly understood to be engaged in law execution through their interpretations and judgments.[166]

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161. Okayama, supra note 34, at 11.

162. See infra section II.A.1.

163. See infra sections II.A.2 & II.B.

164. See infra section II.A.2.

165. See infra sections II.D.1–.6.

166. See Shugerman, Venality, supra note 33, at 230, 233–34.

So the English did not treat "judicial power" as conceptually separate from executive power. Second, the Crown did not possess a general at-will removal power in the backdrop.[167] Many important officials performing adjudicatory and money-related tasks were protected from removal.[168] Together, these two observations help us see the origins of the quasi-judicial tradition. The Founders inherited a tradition whereby judge-like administrators were often insulated from hierarchical political control.

1. *Judging as Law Execution.* — The English constitutional system was "mixed government."[169] The Crown, the Lords, and the Commons had legal authority because each represented an estate (the monarchy, the nobility, and the propertied gentry, respectively), and their powers overlapped to balance each other and for the law to reflect all three estates.[170] Judges represented no separate estate—they were part of the executive, under the monarchy.[171] The King could participate in legislation, and the House of Lords exercised a mix of legislative, executive, and judicial functions.[172] Under this mixed system, judging was a component of executing the law.[173]

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167. See infra notes 205–206 and accompanying text.

168. See infra notes 207–210 and accompanying text.

169. Alex Zhang, Separation of Structures, 110 Va. L. Rev. 599, 631–33 (2024).

170. Id. at 632.

171. See Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1533 (1991); Philip B. Kurland, The Rise and Fall of the "Doctrine" of Separation of Powers, 85 Mich. L. Rev. 592, 595 (1986) (explaining that early political theorists focused on the division of power between the executive and legislative branches, sidelining the judicial branch); Ann Woolhandler, Judicial Deference to Administrative Action—A Revisionist History, 43 Admin. L. Rev. 197, 214–15 & n.91 (1991) ("[S]eparation of powers doctrine had not clearly separated executive and judicial functions until late in the eighteenth century."); see also M.J.C. Vile, Constitutionalism and the Separation of Powers 113–28 (2d ed. 1998) ("[T]he idea of a separate 'judicial power' had begun in mid-seventeenth-century England. However, the early-eighteenth-century writers . . . placed this 'power' in the House of Lords . . . ."); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 488–90 (1989) (explaining that the executive, or the King, was only stripped of the power to veto legislation and appoint government officials).

172. See Vile, supra note 171, at 113 (discussing Montesquieu's critique that it is not enough that the constitution place the judicial power in the House of Lords, but that this power must additionally be independent from the executive and legislative powers); Farina, supra note 171, at 488–90 (stating that under the English Constitutional system, the King tyrannically subverted the independence of the legislature).

173. See W.B. Gwyn, The Meaning of the Separation of Powers: An Analysis of the Doctrine From Its Origin to the Adoption of the United States Constitution 5 (1965) ("What we now call . . . judicial functions were known then usually as simply 'executive power.'"); Abram Chayes, How Does the Constitution Establish Justice?, 101 Harv. L. Rev. 1026, 1026–30 (1988) ("Perhaps more than any other feature of the Constitution, the judicial branch deserves to be called an invention."); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 49, 67 & n.267 (2001) (noting that "English political theory, until relatively late, regarded judges as executive officials").

Many English and Founding Era sources confirmed that they understood judging as part of the executive power.[174]

The connection between judges and executive power was furthered by the fact that common law judges were creatures of the Crown who served at the Crown's pleasure until the eighteenth century.[175] They were connected with law execution because they helped enforce and apply the King's law. As Sir William Blackstone explained, though the Crown possessed "the whole executive power of the laws," it could not itself carry out the execution of the laws:

> [I]t is consequently necessary that courts should be erected to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.[176]

The framing of courts as under the Crown and executing royal power fit the English mixed-estates system, because courts derived their legitimacy from royal authority. Consider the name of the court that established the common law: "The Court of King's Bench," i.e., curia regis.[177] A panoply of English and colonial sources confirms that the judicial power was conceived of as a subset of executive power before the Founding. Until the eighteenth century, English common law judges served exclusively at the pleasure of the Crown because they had been exclusively the creatures of the Crown and their powers were considered

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174. See, e.g., Letter IV, *in* Four Letters on Interesting Subjects 18, 18 (1776) ("The truth is, the English have no fixed Constitution."); id. at 21 ("[T]he judicial power is only a branch of the executive . . . ."); Letter by J., Bos. Evening Post (May 23, 1763), reprinted in 1 American Political Writing During the Founding Era 1760–1805, at 22, 26 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (observing that the king was "by our English lawyers called 'the universal judge of property'—'the fountain of justice'—'the supreme magistrate of the kingdom, intrusted with the whole executive power of the law'"); John Brand, An Historical Essay on the Principles of Political Associations in a State 126 (London, T.N. Longman & J. Owen 1796) (referring to "the executive power of the Crown, judicial and military").

To his credit, Professor Julian Davis Mortenson provides many examples of such mixed descriptions of judging under the category "executive power," though these sources complicate his argument that the term "executive power" meant executing legislation and did not imply any other powers. See Julian Davis Mortenson, Article II Vests the Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1233–34 (2019). If "executive power" included common law courts and the judicial interpretation of the law of nations, then "executive power" reached far beyond legislation to other kinds of legal interpretation, discovery, and a coordinate power to say what the law is. See id.

175. G.E. Aylmer, The King's Servants: The Civil Service of Charles I, 1625–1642, at 106 (rev. ed. 1974) [hereinafter Aylmer, King's Servants].

176. 1 William Blackstone, Commentaries *266–267.

177. George Burton Adams, The Origin of the English Courts of Common Law, 30 Yale L.J. 798, 798 (1921).

executive.[178] Moreover, English authorities thought that judges wielded a subset of the executive power.[179] English law eventually focused on separating legislative and executive power, but judicial functions remained mixed with the executive.[180] English legal thinkers understood "the courts' jurisdiction and judgment" as a form of "'executive power,' referred generally to judicial orders as 'executions,' and used the terms 'executive' and 'judicial' interchangeably."[181] English sources mixed judicial power with royal prerogatives, executive power, and law enforcement.[182]

Meanwhile, the Crown had granted independence to other officers, especially some of the most powerful officers running the Treasury and in similar financial/fiscal roles with some adjudicatory functions.[183] Surprisingly to modern eyes, independence for quasi-judicial officers and mixed judicial-executive officers thus came before judicial independence. The Crown only gradually included judges in that preexisting domain of

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178. See, e.g., 1 Blackstone, supra note 176, at *266–267; see also Aylmer, King's Servants, supra note 175, at 106, 109–113 (explaining that "judgeships of King's Bench and Common Pleas[] were held during the King's pleasure" and that it was tacitly assumed judges were specially answerable for their decisions in a way other executive officers were not, and were more easily removable); G.E. Aylmer, The State's Servants: The Civil Service of the English Republic, 1649–1660, at 82–95 (1973) [hereinafter Aylmer, State's Servants] ("In arrogating to itself much of the Crown's previous powers of appointment, Parliament made many office-holders dependent upon its own pleasure, often until they legislated or ordered otherwise."); Jed Handelsman Shugerman, Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism, 33 Yale J.L. & Humans. 125, 167–68 (2022) [hereinafter Shugerman, Removal of Context] ("[T]he English thought executive power included judicial power."); Shugerman, Venality, supra note 33, at 235–36 (discussing the lack of distinction between judicial and executive power in Britain at the time the Framers drafted the U.S. Constitution).

179. See Shugerman, Venality, supra note 33, at 230–37.

180. See Woolhandler, supra note 171, at 214–15 & n.91; see also Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 151–52 (1969) ("Many English radicals had developed a doctrine of separation of powers during the Revolution and Interregnum as a means of isolating the legislative functions of Parliament from the executive functions of government."); Malcolm P. Sharp, The Classical American Doctrine of "The Separation of Powers", 2 U. Chi. L. Rev. 385, 395 (1935) (highlighting Thomas Paine's observation that "[s]o far as regards the execution of the laws, that which is called the judicial power, is strictly and properly the executive power of every country" and noting that this sentiment likely reflected "the contemporary thought of Europe and America" (quoting Thomas Paine, Rights of Man, pt. II, ch. IV (1791))).

181. Shugerman, Venality, supra note 33, at 234; Shannon C. Stimson, The American Revolution in The Law: Anglo-American Jurisprudence Before John Marshall 4 (1990).

182. Mortenson, supra note 174, at 1233–34 n.278 (collecting examples); Thomas Egerton, A Coppie of a Wrytten Discourse by the Lord Chauncellor Elsemore Concerning the Royall Prerogative (c. 1604), *in* Louis A. Knafla, Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere 197, 197–201 (1977) (treating the judicial power as an "absolute prerogative" that could be delegated, unlike discretionary royal powers).

183. G.E. Aylmer, The Crown's Servants: Government and Civil Service Under Charles II, 1660–1685, at 93–94 (2002) [hereinafter Aylmer, Crown's Servants] (discussing the temporary switch from life tenure to "pleasure tenure" in the Exchequer, before the gradual shift toward tenure for "good behaviour" in seventeenth-century England).

independent finance/fiscal officers—many of whom we would call "quasi-judicial" with the benefit of historical hindsight.[184]

The mix of judicial and executive power is illustrated by justices of the peace. From our perspective today, these English and American officials wielded powers that might remind us of police officers, prosecutors, regulators, magistrates, and even judges. These were the sorts of hydra-like precedents that the Founders inherited from the English system, and as we shall see below, the Founding generation sometimes protected them from removal.[185]

The leading "separation" theorists of the seventeenth and eighteenth centuries focused on executive and legislative separation—but not a separate judiciary.[186] Locke identified three powers, but he did not include a judicial power among the three: legislative, executive, and federative (his term for "foreign affairs" power, which he also allocated to the executive).[187] In the influential *Oceana*, James Harrington identified a different tripartite division: a "commonwealth" involved "the senate proposing, the people resolving, and the magistracy executing."[188] Harrington placed judges under executive enforcement.[189] Only a small number of English sources referred to "judicial power" as a category, and those outliers disappeared into the eighteenth century.[190]

To support formal separation, Justices often cite Montesquieu's description of "judicial power" or "power of judging," assuming he considered it a formal parallel to legislative and executive power.[191] However, according to leading Montesquieu scholars, he approved of the

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184. See Shugerman, Venality, supra note 33, at 243, 261–64.

185. See infra Part II.

186. See Kurland, supra note 171, at 599 ("[T]he judiciary played little part in the theoretical constructs of Montesquieu, Locke, et al. . . . ."); Chayes, supra note 173, at 1026–30 ("Neither Locke nor Montesquieu imagined the judiciary as having a substantive role in governing the polity.").

187. Kurland, supra note 171, at 595 (citing John Locke, Two Treatises of Government 382–84 (Peter Laslett ed., 2d ed. 1967) (1689)).

188. James Harrington, The Commonwealth of Oceana (1656), reprinted in The Political Writings of James Harrington: Representative Selections 35, 61 (Charles Blitzer ed., 1955) ("Wherefore as those two orders of a commonwealth, namely the senate and the people, are *legislative*, so of necessity there must be a third to be *executive* of the laws made, and this is the magistracy. . . ."(emphasis omitted)).

189. Id. ("[T]he hand of the magistrate is the executive power of the law, so the head of the magistrate is answerable to the people that his execution be according to the law . . . .").

190. See Shugerman, Venality, supra note 33, at 232–33 & n.93.

191. See, e.g., SEC v. Jarkesy, 144 S. Ct. 2117, 2131–32 (2024) (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); Bowsher v. Synar, 478 U.S. 714, 721–22 (1986); see also Note, Montesquieu's Day in Court: Recovering a Classical Understanding of Separated Powers, 139 Harv. L. Rev. 1939, 1942–43 (2026).

English mixed constitution, rather than formalistic separation.[192] He subscribed to the same estates model of monarchy, aristocracy, and gentry/democracy.[193] Because judges represented no estate, they lacked legitimacy to participate in law-making (or law-discovering or law expositing).[194] Montesquieu may have endorsed an independent "judicial power," but it was a much weaker version, more like lay juries, dispute resolution, and simple case-by-case adjudication, unlike English common law courts.[195] Montesquieu's version of judicial power more closely resembled what we would today find in an agency adjudication and call a "quasi-judicial" function.

The creation of a distinct judicial power at the Founding was an important innovation. But the formal creation of a tripart government was not self-defining. Even though it created an independent judiciary with good-behavior tenure wielding the "judicial power," the Constitution did

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192. See Iain Stewart, Montesquieu in England: His 'Notes on England', With Commentary and Translation Commentary, Oxford Univ. Compar. L. Forum (2002), https://ouclf.law.ox.ac.uk/montesquieu-in-england-his-notes-on-england-with-commentary-and-translation-commentary/ [https://perma.cc/3EDX-NSV5] (describing how Montesquieu "admired" the "mixed" English constitution and "simply [did] not envisage complete separation" of powers); Bernard Bailyn, The Ideological Origins of the American Revolution 70–71 (1967) (noting that the system of mixed government appeared "to most of Europe" as "'a system of consummate wisdom and policy'" (quoting Moses Mather, America's Appeal to the Impartial World 8 (Hartford, Ebenezer Watson 1775))); Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 214 (1989).

193. See Vile, supra note 171, at 59 (explaining that the theory of the "balanced constitution," an amalgamation of legislative supremacy, the separation of powers, and mixed government's threefold division of "King, Lords, and Commons," formed the basis of Montesquieu's views); Note, supra note 191, at 1951–52 ("Montesquieu's references to the 'three powers' sometimes meant the King, Lords, and Commons . . . instead of . . . legislature, executive, and judiciary.").

194. Brown, supra note 171, at 1532–33 n.79 (1991) ("[E]ven Montesquieu . . . seemed to treat [the judiciary] somewhat differently from the other two, using the term '*la puissance de juger*' (the ability to judge) consistently in his writings, rather than '*le pouvoir judiciaire*' (judicial power), in contrast to '*le pouvoir executif ou legislatif* (executive or legislative power).").

195. See 1 Charles de Secondat, Baron de Montesquieu, The Spirit of Laws 174–77 (Thomas Nugent trans., Batoche Books 2001) (1748) (advocating for a dispersed judicial power vested in temporary tribunals, a system in which "the judiciary is in some measure next to nothing"); see also John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1995 n.281 (2011) ("Montesquieu had thought the judicial power would be exercised by ad hoc juries . . . ." (citing Vile, supra note 171, at 113–14)); Note, supra note 191, at 1952–53 (noting that Montesquieu's vision entailed "temporary tribunals composed of laypeople, assembled for particular cases and dissolved once their work was complete"). Kurland goes further on Montesquieu: "The judicial branch was noteworthy by its absence in all but name in those programs. In all three plans of government—Montesquieu's, Locke's, and Harrington's—all power was really divided between an executive and a legislature." Kurland, supra note 171, at 595; see also Woolhandler, supra note 171, at 214–15 (noting that theorists did not "clearly separate[]" executive and judicial power until the late eighteenth century).

not flesh out the internal content of this newly created authority. The difference between judicial and executive power remained hazy at best. As noted above, even one of the chief architects of the singular presidency, Gouverneur Morris, clearly articulated this lack of clear separation: Toward the end of the 1787 convention, Morris stated, matter-of-factly, that "the Judiciary . . . was part of the Executive."[196] Other participants in the Ratification debates shared a similar understanding.[197]

Gouverneur Morris's observation in 1787 and these Ratification sources were more like lagging indicators, reflecting the English backdrop more than the new American structure that had just emerged. It is understandable that they were confused or unclear.

One of the most significant historians of the Revolution and the Founding, Gordon Wood, argued that a separate category of "judicial power" emerged in the early American states in their first constitutions, written in 1776 through the 1780s, without concrete experience to establish a formal, discrete line between executive and judicial.[198] The early state constitutions that identified "judicial power" were an early signal of a change, and six included a reference to judicial power in early separation-of-powers clauses: Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia.[199] Then the 1787 Philadelphia Convention marked a turning point in structurally dividing judicial and executive powers, and yet it did not adopt a separation-of-powers clause, even after those five states had included one.[200] The notions of "executive" and "judicial" remained inchoate, and their separation remained underdetermined.

The Supreme Court frequently cites Hamilton's *Federalist* No. 78, describing Article III as establishing a "truly distinct" judiciary with life tenure to ensure the "complete independence of the courts of justice."[201] But those quotations beg the question of what powers the Framers thought

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196. Notes of James Madison (Aug. 15, 1787), *in* 2 Farrand's Records, supra note 47, at 299 ("Mr. Govr. Morris[] suggested the expedient of an absolute negative in the Executive. He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law.").

197. See, e.g., Letter XV from the Federal Farmer to the Republican, supra note 48, at 1043.

198. See Wood, supra note 180, at 150–61, 449–52.

199. Md. Const. of 1776, Declaration of Rights, art. VI, reprinted in 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1686, 1687 (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe]; Mass. Const. of 1780, pt. I, art. XXX, reprinted in 3 Thorpe, supra, at 1888, 1893; N.H. Const. of 1792, pt. I, art. XXXVII, reprinted in 4 Thorpe, supra, at 2471, 2475; N.C. Const. of 1776, Declaration of Rights, art. IV, reprinted in 5 Thorpe, supra, at 2787, 2787; Va. Const. of 1776, Bill of Rights, § 5, reprinted in 7 Thorpe, supra, at 3812, 3813; see also Shugerman, Vesting, supra note 85, at 1503.

200. See Shugerman, Vesting, supra note 85, at 1503.

201. See The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

were executive or judicial, and they beg the question of how much remained of overlapping structures of checks and balances, considering that the constitutional text mixed powers (e.g., Congress's power to create regulations and exceptions over jurisdiction). Neither English lawyers, nor European legal theorists, nor early Americans had worked out those questions by 1776 or 1787.[202] These labels were open-ended signals, not bright-line rules.

Our claim is *not* that the Founders invented the concept of "judicial power," nor that the category was entirely indeterminate or an empty vessel. Our claim, shared by many legal scholars across the ideological spectrum, is that this phrase "judicial power" was a relatively novel textual development without sufficient context or widely understood boundaries.[203] Its contours were inchoate, and the "executive" and "judicial" still overlapped, as in the case of justices of the peace and even the American judges themselves.

Our emphasis on the period's underdeterminacy is not meant to suggest that the Founding created some fourth category of constitutional power. As we emphasized above, all administrators, whether they wield quasi-judicial or quasi-legislative functions, wield executive power. The underdeterminacy of the English legal backdrop serves a different end. It shows that the Anglo-American tradition lacked any clean distinction between law execution and adjudication. That hazy relationship led lawmakers and legal actors to develop a vocabulary for intermixing different aspects of the two categories. The Founding generation, the inheritors of the English legal backdrop's underdeterminacy, naturally defaulted toward an instinct for grafting judicial norms, procedures, and expectations onto certain subsets of judge-like administrators.

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202. Bailyn, supra note 192, at 70–71 ("The clarity of the modern assumption of a tripartite division of the functions of government into legislative, executive, and judicial powers did not exist for the colonists . . . .").

203. See, e.g., Felix Frankfurter & James M. Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1017 (1924) (explaining that "'judicial power' is not self-defining" and, unlike certain inherited legal terms, does not possess a fixed and narrow technical meaning); Charles M. Yablon, Inherent Judicial Authority: A Study in Creative Ambiguity, 43 Cardozo L. Rev. 1035, 1051–58 (2022) (arguing that the Constitution created new questions about federal judicial authority, that "[t]he term 'judicial power' is not defined," and that "there is little in the records of the Constitutional Convention that sheds light on its precise meaning"); Gary Lawson, "The Game" (or How I Learned to Stop Worrying and Love the Major Questions Doctrine), Harv. J.L. & Pub. Pol'y Per Curiam, Summer 2024, at 3, https://journals.law.harvard.edu/jlpp/the-game-or-how-i-learned-to-stop-worrying-and-love-the-major-questions-doctrine-gary-lawson/ [https://perma.cc/XUH4-EQJ6] ("[T]he Constitution vests the 'judicial Power' in federal courts without telling us what that vested power is. Given the relative novelty of the 'judicial Power' as a distinct governmental power in 1788, that is a noteworthy omission." (citation omitted) (citing Steven Gow Calabresi & Gary Lawson, The U.S. Constitution: Creation, Reconstruction, the Progressives, and the Modern Era 145–46 (2020))).

2. *Adjudicative Insulation.* — Because the Constitution lacks a removal provision, unitarians have had to rely on an incorrect, unsupported claim that the Crown possessed a general at-will removal power.[204] The idea here is that this power must have informed the Founding generation's creation of an indefeasible presidential removal power.

As one of us has shown, the unitarians fundamentally misunderstood the pre-Founding history of removal. English law effectively created several forms of tenure by treating many offices as freehold property, similar to real property.[205] Of four such categories of offices—inheritable property; property for life (during good behavior); a fixed term of years; or at pleasure—only the last category presumptively provided removal at will.[206] Effectively, this meant that many administrators were insulated from removal by the Crown.

And insulated officers were no minor exceptions. They included important and powerful positions in the Treasury, the Exchequer, and the Chancery.[207] Many such officials were involved with England's fiscal state, sometimes as judge-like figures. They interpreted and applied tax laws, settled public accounts, supervised revenue collection and distribution, and resolved fiscal disputes. Many of these officials who possessed legal and fiscal duties were not removable at the Crown's pleasure.[208]

Consider the Barons of the Exchequer, who wielded judicial functions within the administration of royal revenue. The Barons combined executive and judicial functions while possessing protections from at-will

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204. See, e.g., Bamzai & Prakash, Power of Removal, supra note 97, at 1790–93 (claiming that Founding Era Americans believed that the Crown's "executive power" included removal authority).

205. See Shugerman, Removal of Context, supra note 178, at 158–59; Shugerman, Venality, supra note 33, at 219–21.

206. Shugerman, Removal of Context, supra note 178, at 158–61 (citing 2 Blackstone, supra note 176, at *36).

207. See Aylmer, King's Servants, supra note 175, at 117 (explaining that it was "strikingly difficult" for the Crown to remove "administrators of the middle rank," such as deputy paymasters, from office); Aylmer, Crown's Servants, supra note 183, at 93 (explaining how removal protections extended into the era of King Charles II); Norman Chester, The English Administrative System, 1780–1870, at 16–23 (1981) ("By 1780, though some offices were still granted for life, most were granted at pleasure . . . . But in practice the difference was not very great . . . . [F]or most office-holders, appointment at pleasure meant in practice appointment for life."); 10 William Holdsworth, A History of English Law 501–04 (1938) (explaining that many offices in Exchequer and Treasury in eighteenth-century England were held for life or for estates of inheritance); 1 Office-Holders in Modern Britain: Treasury Officials 1660–1870, at 12 (J.C. Sainty ed., 1972) (documenting how significant Treasury officers had life tenure and were unremovable into the 1780s); J.C. Sainty, The Tenure of Offices in the Exchequer, 80 Eng. Hist. Rev. 449, 452, 464 (1965) ("[I]n almost every branch of public administration, the officers were on life tenures . . . . The practical result of this was that the Crown's ability to control or dismiss officers was severely limited."); Shugerman, Venality, supra note 33, at 243, 261–65.

208. Shugerman, Removal of Context, supra note 178, at 155–56; Birk, supra note 103, at 206.

removal.[209] Other officials like the Barons—those who decided claims, interpreted legal obligations, assessed accounts, or exercised equitable judgments—had similar protections from removal and hierarchical control. [210]

Similar patterns emerged at the local, retail level of administration. Sheriffs and coroners performed mixed administrative and adjudicatory functions while possessing varying forms of tenure protection.[211] Coroners "investigated unexpected deaths," "tr[ied] inquests," determined whether an accused should be committed, and certified findings to the King's courts.[212] These officials weren't judges. They were administrative officers that developed in ways that combined administration and judgment in a system that failed to distinguish between the two functions.[213]

And the tenure of these administrators did not follow a preexisting model of independent judicial office. To the contrary, their tenure protections were often stronger than common law judges' until the Act of Settlement granted judges good-behavior tenure in 1701.[214] Even then, judicial tenure only lasted during the life of the monarch. It took until 1760 for judicial tenure as we know it today to take shape.[215] The rise of good-behavior judicial office allowed judges to join a complicated world of administrative officials who already possessed a variety of protections from removal.[216]

To be clear, we are describing a patchwork. The evidence does not suggest that all judge-like administrators were protected from removal and insulated from hierarchical political authority. It is the absence of a general rule of at-will removal that simultaneously discredits a portion of the UET literature and illuminates the origins of the quasi-judicial tradition.

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209. Birk, supra note 103, at 206.

210. Id. (citing John Baker, An Introduction to English Legal History 22 (5th ed. 2019)).

211. See id. at 207, 210–13 (discussing protections for certain, but not all, kinds of sheriffs—including "under-sheriffs," "hereditary sheriffs," and "unremovable" sheriffs who held their offices in fee); id. at 208 & n.199 (discussing coroners and noting that the coroners of "most counties" in England enjoyed life tenure, were removable only for cause, and performed mixed executive and judicial functions).

212. Id. at 208.

213. See id. at 207, 208 n.199.

214. See id. at 206 & n.188 (discussing tenure protection for Barons and judges between 1450 and 1701).

215. See Shugerman, Venality, supra note 33, at 236.

216. See id.; see also Aylmer, State's Servants, supra note 178, at 86, 107 (explaining how in the seventeenth century, most appointments were made at pleasure or on good behavior); Aylmer, Crown's Servants, supra note 183, at 93–94 (explaining the incrementalist reforms that led life tenure to fall out of favor in the second half of the seventeenth century).

* * *

The English legal backdrop is a Rosetta Stone for the quasi-judicial tradition. Americans inherited ideas and institutions that intermingled administration and adjudication under the banner of law execution. That history of adjudicatory and fiscal officials led the Founding generation to instinctually graft judicial norms when creating modes of administration that adjudicated claims, settled accounts, administered public funds, or applied equitable standards. When a legislator saw a need for neutrality, judgment, or trustworthiness, they would often reach for the metaphor of judging because of this history. And because many of these officials had been protected from removal and hierarchical political control in the English legal backdrop, lawmakers would only naturally seek to insulate their new quasi-judicial creations when it was necessary and proper.

The result was an enduring Anglo-American instinct for administrative judicialization. Legislators would reach for judge-like norms and procedures when administration required judge-like virtues. Those virtues included impartiality, reasoned judgment, equitable discretion, and decisionmaker independence. This history produced the quasi-judicial tradition. That tradition never removed administrators from Article II. Instead, it supplied legislators with a grammar for making administration more lawlike in the new Republic.

B. *Terms of Office*

One reason that the English legal backdrop was so poorly understood is that modern audiences lost track of a fundamental logic that animated the English and American laws of officeholding. This historical amnesia was rectified by Daniel Birk, Jane Manners, and Lev Menand.[217] Birk showed that the English law of officeholding insulated many important administrators from at-will removal by conceiving of offices as the personal property of their occupants.[218] Critics have noted that Birk's evidence did not include many examples of high English executive, nonjudicial offices in the most relevant years for the Founding.[219] Further research has confirmed Birk's fundamental thesis that English law protected many

217. See Birk, supra note 103; Manners & Menand, Three Permissions, supra note 104.

218. See Birk, supra note 103, at 205 ("A grant of an office from the King was treated as a property right, and thus even the King could not legally remove an officer with tenure absent a breach of the conditions of the grant.").

219. See, e.g., Ilan Wurman, In Search of Prerogative, 70 Duke L.J. 93, 142 n.205 (2020).

officers, even high executive officers,[220] and that the Framers' writings showed they understood and adopted that common law backdrop.[221]

Blackstone himself recognized a mix of tenures. Three out of the four categories were not removable: "For a man may have an estate in [the offices], either to him and his heirs, or for life, or for a term of years, or during pleasure only . . . ."[222] The tenures that were inheritable property, life tenure, or granted for a term of years were all legally protected for those time periods.[223] Removal was more akin to impeachment or property forfeiture, and there was no executive removal power at pleasure.[224]

Manners and Menand show that the American law of officeholding continued those core legal commitments, especially the protected term of years, but Americans abandoned the inheritable office,[225] which left three traditional categories: "at pleasure, on good behavior, or for a term of years."[226] Notably, when administrators are appointed for a term of years, they are protected from executive removal unless other statutory language permits mid-tenure removal.[227] Congress's power to shape official positions and set terms of executive removal reflected Madison's vision for legislative discretion in designing ministerial offices.[228]

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220. See Shugerman, Venality, supra note 33, at 258–68 ("During the Restoration of the Stuart Monarchy after the English Civil War, Charles II relied on redistributing unremovable freehold offices to solidify his return to power. Many of these were 'department heads.'" (footnote omitted) (quoting R.O. Bucholz, Venality at Court: Some Preliminary Thoughts on the Sale of Household Office, 1660–1800, 91 Hist. Rsch. 61, 69 (2018))).

221. See Christine Kexel Chabot, The Interstitial Executive: A View From the Founding, 52 BYU L. Rev. (forthcoming 2027) (manuscript at 13–14), https://ssrn.com/abstract=6156786 [https://perma.cc/X2GF-DM4M] [hereinafter Chabot, Interstitial Executive] (explaining how the Declaration of Independence itself acknowledged the King's power over executive offices and "stopped short of granting the President all of the King's prerogatives"); Manners & Menand, Three Permissions, supra note 104, at 19–27 (discussing how term-of-years offices remained for many offices during the Founding Era); Shugerman & Lawson, supra note 75 (manuscript at 9) (explaining how the Founders rejected the power of the Crown as a guide for presidential power); see also infra section II.D.1 (discussing Madison's proposed comptroller and the parts of Jefferson's 1780 notes that Chief Justice Roberts omitted).

222. 2 Blackstone, supra note 176, at *36–37; see also Shugerman, Removal of Context, supra note 178, at 128 (explaining how unitarians have misinterpreted Blackstone to find support for their position).

223. See Manners & Menand, Three Permissions, supra note 104, at 19–27.

224. See Shugerman, Removal of Context, supra note 178, at 137–38 (noting that "presidentialists tried and failed to insert 'at pleasure' tenure into the Constitution").

225. See Manners & Menand, Three Permissions, supra note 104, at 20 ("In Revolutionary America, the idea of offices as property was roundly rejected.").

226. Id.

227. Id. at 5.

228. See id. at 21 ("To Madison, the duration and terms of ministerial offices . . . were up to the legislature, which would design the tenure 'conformably to the reason of the

The new historical findings have recently been reinforced through the work of Professor Christine Chabot.[229] Examining more than two hundred commissions issued during the Washington, Adams, and Jefferson Administrations, Chabot has found significant evidence to support the legal understanding put forward by Manners and Menand.[230] The evidence shows that fixed terms were used to restrict presidential removal.[231] Chabot's evidence tends to demonstrate that early Presidents acceded to statutory restrictions on their ability to remove administrators.

The quasi-judicial function helped officials understand the relationship between adjudicatory officials and executive power—a heuristic even if the label had not yet been coined. When officials were judge-like or were assigned sensitive functions, early Americans often would insulate them with term-of-year tenures. When it is relevant, we will flag which quasi-judicial administrators were granted term-of-years tenures.

C. *The Treasurer and Attorney General as Judge-Like During the Founding*

The drafting history of the Appointments Clause indicates that the Convention delegates were unsure whether the Treasurer was more like a judge or an executive officer. Early in the Convention, the Virginia Plan assigned judicial appointments to the "National Legislature" and assigned executive branch officers to the "National Executive," but it did not specify the types of officers.[232]

A first draft of the Appointments Clause emerged on July 17: The "National Executive" would "appoint to offices in cases not otherwise provided for."[233] By implication, the legislature alone would appoint officers that were already provided for—judges and the Treasurer. A motion to change this draft and give judicial appointments to the President lost by a vote of 6-2.[234] The draft that emerged from the

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case . . . .'" (quoting The Federalist No. 39, supra note 201, at 242 (James Madison) (Clinton Rossiter ed., 1961))).

229. Chabot, Interstitial Executive, supra note 221.

230. See id. at 24–25.

231. See id. at 37.

232. The Virginia Plan, 29 May 1787, reprinted in Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Madison/01-10-02-0005 [https://perma.cc/G3W6-WSRX] (last visited Oct. 11, 2026).

233. Notes of James Madison (July 26, 1787), *in* 2 Farrand's Records, supra note 47, at 120–21 (approving resolution for sole presidential appointment of "offices . . . not otherwise provided for"). For earlier debates, see Notes of James Madison (June 1, 1787), *in* 1 Farrand's Records, supra note 47, at 65–70.

234. Notes of James Madison (July 26, 1787), *in* 2 Farrand's Records, supra note 47, at 44.

Committee of Detail in August carried forward this language assigning to the legislature the power to appoint judges and treasurer.[235]

The Convention did not revise the Appointments Clause until September 4, the Convention's second-to-last week. This version read: "The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U. S. whose appointments are not otherwise herein provided for."[236] But even after this change, the draft still provided that Congress "may by joint ballot appoint a treasurer."[237]

Unilateral legislative appointment of the Treasurer with no role for the President in the selection process survived until the last day of Convention debates. On September 14, by a vote of 8-3, the Convention deleted this clause and decided to hold the Treasurer to the same presidential nomination and Senate confirmation process as judicial and executive officers alike.[238] The fact that both judges and principal executive officers are appointed the same way suggests that the Founders perceived enough similarity for some executive officers that they should be selected the same way as judges. Moreover, the 1789 statute creating the Treasury Department required the Secretary to report to Congress, highlighting the mixed role of the Treasury.[239]

Professors Larry Lessig and Cass Sunstein, drawing on Founding Era texts, have suggested a distinction between "executive departments" (the label for the Departments of Foreign Affairs and War)[240] and "administrative departments."[241] Executive departments were more political, more subject to presidential control, and less subject to judicial scrutiny and legislative design.[242] Administrative departments were subject to greater legislative control and more independence from the President.[243] These scholars do not use such terms like "quasi-judicial" or "adjudicatory," but notably, the term "political" sometimes rests on the

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235. Committee of Detail, IX, *in* 1 Farrand's Records, supra note 47 at 163, 168, 169, 171 (assigning Congress the power to appoint a treasurer, the Senate the power to appoint judges, and the President the power to appoint other executive officials); Notes of James Madison (Aug. 6, 1787), *in* 1 Farrand's Records, supra note 47 at 177, 183 (giving Senate sole appointment power of Supreme Court judges and ambassadors).

236. Id. at 495 (Journal, Sep. 4, 1787).

237. Id. at 594 (Report of the Committee of Style, Sep. 12, 1787).

238. Id. at 614 (Madison's Notes, Sep. 14, 1787).

239. Act of Sep. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

240. Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 27 (1994).

241. Id. at 44 (quoting W.F. Willoughby, An Introduction to the Study of the Government 251 (1919)).

242. Id. at 44–47.

243. Id.

other side of a legal dichotomy with "judicial."[244] Our "political question" doctrine creates a dichotomy between the "political branches" (legislative and executive) versus the nonpolitical judiciary.[245] If nonpolitical had been associated with judicial-like roles and administration, these Founding Era texts hint at another quasi-judicial understanding of many early offices that Congress designed to serve independently from political influence. Indeed, this phrasing suggests a Founding Era norm that "administration" (including adjudicative and quasi-judicial officers) should be relatively independent or insulated from the more political "executive."[246]

The Founding generation also approached the attorney general as a hybrid role. Thomas Jefferson's writings in 1780 identified the attorney general with judges as enjoying tenure during good behavior.[247] In *Slaughter*, Chief Justice Roberts (and a unitary theorist in an amicus brief upon which Roberts relied) cherrypicked two sentences from these notes[248] while omitting these key passages that contradicted his theory:

> An indefinite appointment to office is during pleasure . . . . Law has so considered it. And where the officers of government should have freehold has declared they shall hold during good behavior. Judges—Register Clerks—Attorney General. Where not removable by Executive, reserved expressly to legislature or others. Aud. B. W. & T. [Boards of War and Trade] Treasurer.[249]

The first sentence implicitly but clearly confirms the historical research summarized above, demonstrating that Anglo-American common law default rules limited executive removal: Jefferson specified that an *indefinite* appointment was "during pleasure," distinguishable from a *definite* appointment (i.e., tenure for *a fixed term of years*), which was protected from removal. Then Jefferson grouped together the Attorney General with judges as officers with tenure during good behavior (likely referring to the Virginia Attorney General under Virginia's 1776 Constitution),[250] while also signaling that the Articles of Confederation

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244. Id. at 44 (quoting W.F. Willoughby, An Introduction to the Study of the Government 251 (1919)).

245. See, e.g., Baker v. Carr, 396 U.S. 186, 210–11 (1962).

246. See Lessig & Sunstein, supra note 240, at 44 (quoting W.F. Willoughby, An Introduction to the Study of the Government 251 (1919)).

247. Jefferson's Notes, supra note 51, at 281.

248. See Trump v. Slaughter, 146 S. Ct. 2283, 2295 (2026) ("Jefferson wrote as early as 1780 that '[t]he power of appointing and removing executive officers [is] inherent in [the] Executive,' as '[h]e who appoints may remove.'" (alterations in original) (quoting Jefferson's Notes, supra note 51, at 281)); Brief of Amicus Curiae Professor Ilan Wurman in Support of Petitioners at 10, *Slaughter*, 146 S. Ct. 2283 (No. 25-332), 2025 WL 2980489 (quoting the same passage).

249. Jefferson's Notes, supra note 51, at 282.

250. See Va. Const. of 1776, reprinted in 7 Thorpe, supra note 199, at 3817 ("The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-

Treasurer and officers appointed to a term of years also were independent of executive removal. Chief Justice Roberts and the amicus also omitted this key sentence: "An indefinite appointment to office is during pleasure. Escheat—clerks of parliament—clerks of council &c."[251] This sentence may seem obscure, but it is yet another piece of evidence confirming historians' recent breakthrough research and other language from the Founders, which distinguish between indefinite offices (removable) and offices held for a specific "term of years" (protected from removal).[252] This formula, a fixed term of years, is the statutory language and set of common law default rules that Parliament and American legislatures used to protect executive officers—often quasi-judicial officers like William Marbury's justice of the peace.[253]

Moreover, the First Congress's Judiciary Act of 1789 created the Office of the Attorney General in texts (and omissions) that signaled more independence from presidential control and removal, relative to the Secretaries of Foreign Affairs, War, and Treasury that were established a few months earlier.[254]

The first draft of the Judiciary Act of 1789 empowered the Supreme Court to appoint the Attorney General and delegated to district judges the power to appoint district attorneys.[255] Even though Congress dropped those clauses, it gave judges more control over other enforcement offices: Presidents could appoint deputy marshals, but judges had the power to remove them.[256]

Even the Judiciary Act's final version hinted at less presidential control. Unlike the statutes that created the Departments of Foreign Affairs, War, and Treasury, the Judiciary Act did not create a new department for the attorney general to supervise.[257] And several legal

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General, to be commissioned by the Governor, and continue in office during good behaviour.").

251. Jefferson's Notes, supra note 51, at 281.

252. See, e.g., Manners & Menand, Three Permissions, supra note 104, at 20–21; The Federalist No. 39, supra note 201, at 242 (James Madison) (discussing "persons holding their offices during pleasure, for a limited period, or during good behavior").

253. See Manners & Menand, Three Permissions, supra note 104, at 23–26 (describing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) as a "case about a President's effort to remove an officer holding an office for a term of years"); Jed Handelsman Shugerman, Presidential Removal: The *Marbury* Problem and the Madison Solutions, 89 Fordham L. Rev. 2085, 2090 (2021) [hereinafter Shugerman, The *Marbury* Problem].

254. See Shugerman, DOJ, supra note 52, at 130–31 (discussing the Attorney General); Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L.J. 561, 571–82 (discussing all four).

255. Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 108–09 (1923).

256. See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87; Shugerman, DOJ, supra note 52, at 130.

257. Contrast Judiciary Act of 1789 § 35 (creating a U.S. attorney position in each district rather than a department in which such offices were placed under the supervision

scholars have noted that while Congress designated the Departments of Foreign Affairs and War as "executive," it did not extend this designation to the Office of the Attorney General (nor to the Department of Treasury, as noted earlier).[258] Moreover, the Foreign Affairs, War, and Treasury statutes included a provision that, at best, only hinted at presidential removal of those department heads with no reference to a constitutional theory for that power; and in context, the presidentialist faction clearly understood they lacked the votes and had to retreat to strategic ambiguity.[259] In fact, even after the so-called "Decision of 1789" debate ostensibly ended in June 1789, the fight over the removal hint in the Treasury bill re-erupted in August 1789, and the question was so contested that all sides shut down Congress for "a precious month," despite urgent matters still pending.[260] Congress re-retreated to strategic ambiguity to punt past the same impasse, which one of us labeled "The Compromise of August 1789."[261] The fact that Treasury triggered a new fight tells us a lot about a commitment to fiscal independence, reflected in Madison's Comptroller proposal for the Treasury bill. These episodes tell us over and over that the ostensible "Decision of 1789" was really a nondecision on Article II.[262]

Here is the quasi-judicial kicker: While the Judiciary Act of 1789 included removal clauses for the marshals and deputy marshals,[263] there is no removal clause for the Attorney General—not even the ambiguous hints of removal that were in the Foreign Affairs, War, or Treasury statutes.[264] Nor were there any textual hints about a President's power to

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of the Attorney General), with Act of July 29, 1789, ch. 4, § 2, 1 Stat. 28, 29 (creating the Department of Foreign Affairs), and Act of Aug. 7, 1789, § 1, 1 Stat. 49, 50 (creating the Department of War), and Act of Sep. 2, 1789, § 1, 1 Stat. 65, 65 (creating the Department of Treasury).

258. See Bloch, supra note 254, at 571–82 (contrasting the Attorney General with the Secretaries of Foreign Affairs, War, and Treasury); Lessig & Sunstein, supra note 240, at 27.

259. See Shugerman, Indecisions of 1789, supra note 52, at 836–40, 844–46 (cataloguing the debates over removal provisions in these statutes, and demonstrating how primary sources reveal that any ambiguities were the product of compromise by the presidentialist minority, and underscore that the majority of Congress rejected broad presidential removal powers).

260. Id. at 834–40.

261. Id. at 834.

262. The House voted to delete a more explicit delegation of presidential power, and instead added a more ambiguous text suggesting presidential removal:

> [T]here shall be . . . an inferior officer . . . who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department.

Act of July 29, 1789 § 2.

263. See Shugerman, Indecisions of 1789, supra note 52, at 844.

264. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

remove district attorneys (the predecessor to U.S. Attorneys), even though the same statute specifies a presidential removal power to remove marshals "at pleasure."[265] Were those omissions related to even less consensus about the President's power to remove or control an attorney general and district attorneys?

This conception of the Attorney General as an extension of the judiciary continued into the nineteenth century. Starting in 1816, the Secretary of State published *The Official Register of the United States*, listing each officer and employee by branch as an official organizational chart and directory.[266] The *Register* listed the Attorney General in the section "Judiciary of the United States" and subsection "Supreme Court" from the first edition in 1816 through 1871, the year after Congress established a Department of Justice.[267] As Andrew Kyung found, private directories mixed their placement of the Attorney General between "judicial" and "executive" in the 1820s through the 1860s.[268] For example, between 1834 and 1846, a private directory listed the attorney general in the Supreme Court section, but then moved the office to the executive branch after 1846.[269]

William Wirt, during his remarkable twelve years as Attorney General under Presidents Madison and Monroe, cultivated norms of *stare decisis* in respecting past Opinions of Attorneys General. He promoted a judicial model for the Attorney General's office:

> I do not consider myself as the advocate of the government, but as a judge, called to decide a question of law with the impartiality and integrity which characterizes the judician. I should consider myself as dishonoring the high-minded government, whose officer I am, in permitting my judgment to be warped in deciding any question officially by the one-sided artifice of the professional advocate.[270]

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265. Id. § 27; see also Shugerman, Indecisions of 1789, supra note 52, at 842.

266. Andrew Kyung, Straddling the Separation of Powers: The Quasi-Judicial Attorney General 7–8 (Apr. 12, 2025) (B.A. thesis, Vanderbilt University) (on file with the *Columbia Law Review*).

267. Id. at 9–10 (citing U.S. Dep't of State, A Register of Officers and Agents, Civil, Military, and Naval, in the Service of the United States on the Thirtieth Day of September 1816, at 13 (D.C., Jonathan Elliot 1816)). The only exception was 1841, when the Attorney General was listed as a "miscellaneous officer," for unknown reasons. Id. at 11 (citing U.S. Dep't of State, A Register of All Officers and Agents, Civil, Military, and Naval, in the Service of the United States on the Thirtieth September, 1841, at 178 (D.C., Thomas Allen 1841)).

268. Id. at 15.

269. Id. at 13–14 (citing Congressional Directory for the First Session of the Twenty-Ninth Congress 55 (D.C., J. & G.S. Gideon 1846); Congressional Directory for the Second Session of the Twenty-Ninth Congress 40 (D.C., J & G.S. Gideon 1847)); see also id. at 15–16 (charting mixed descriptions of the attorney general's office as executive and judicial in 1820 and 1832 (citing 1 Peter Force, The National Calendar and Annals of the United States 126 (1820); 10 id. at 168 (1832))).

270. Letter from William Wirt to John C. Calhoun, supra note 3, at 68.

We will see another attorney general three decades later pick up these same themes, but instead of "judge," he will adopt the term "quasi-judicial."[271]

D. *Founding Era Approaches to Judge-Like Administration*

1. *Madison's Comptroller.* — Just a few days after the Decision of 1789 debate over the new Secretary of Foreign Affairs, the First Congress drafted a bill to create a Treasury Department.[272] Madison proposed a semi-independent comptroller: "[T]he Comptroller should hold his office during ___ years, unless sooner removed by the President . . . ."[273] Each speaker in the debate understood Madison's proposal was for a Comptroller protected from presidential removal—even holding office during good behavior similar to judges.[274] A comptroller would have a supervisory accounting role within the department to check spending, to serve as a check and balance on other Treasury officers, and to adjudicate disputes over government funds.[275]

Repeatedly over the last sixteen years, Chief Justice Roberts has misunderstood this Comptroller debate, from *Free Enterprise Fund*[276] to *Seila Law*[277] and again in *Slaughter*,[278] despite clear explanations from legal scholars and the dissenters at every stage.[279] This is because he reads one

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271. See infra notes 357–358 and accompanying text.

272. Shugerman, Indecisions of 1789, supra note 52, at 826.

273. 1 Annals of Cong. 612 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison). For a fuller explanation of Madison's comptroller proposal, see Shugerman, Indecisions of 1789, supra note 52, at 824–34.

274. Shugerman, Indecisions of 1789, supra note 52, at 829–30. For example, Representative Stone spoke next: "[I do] not know whether the office should be held during good behaviour, as the gentleman [Madison] proposed . . . ." 1 Annals of Cong. 613 (1789) (Joseph Gales ed., 1834). Representative Sedgwick similarly worried that Madison's comptroller "would hold his office by the firm tenure of good behaviour." Id.

275. Act of Sep. 2, 1789, ch. 12, §§ 4–6, 8, 1 Stat. 65, 66–67.

276. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 n.6 (2010) (claiming that "Madison's actual proposal" was that the comptroller would be "dependent upon the President, because he can be removed by him" and "upon the Senate, because they must consent to his [reappointment] for every term of years" (alteration in original) (internal quotation marks omitted) (quoting 1 Annals of Cong. 612 (1789) (Joseph Gales ed., 1834))).

277. See Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2205 n.10 (2020) (repeating this account of the comptroller debate (quoting *Free Enter. Fund*, 561 U.S. at 500 n.6)).

278. Trump v. Slaughter, 146 S. Ct. 2283, 2306 n.5 (2026) (repeating it again (quoting *Free Enter. Fund*, 561 U.S. at 500 n.6)).

279. See, e.g., id. at 2321–22, 2333–34 (Sotomayor, J., dissenting); *Seila Law*, 140 S. Ct. at 2230–31 (Kagan, J., concurring in the judgment in part and dissenting in part); see also Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents at 12–13, *Slaughter*, 146 S. Ct. 2283 (No. 25-332), 2025 WL 3232796 (explaining that removal authority is not and has never been inherent in the Executive since the Founding); Brief of Former Senior White House Lawyers, Government Officials, Federal Judges, Governors, and

sentence from the assumptions of the twenty-first century, rather than reading the full debate as clarifying context and grappling with the recent research about eighteenth-century default rules (as one would have to do to take seriously the application of original-law originalism, original public meaning, original-methods originalism, or history-and-tradition interpretation). Let's first review the new research and then let's reread the debate in that light.

The congressional debate appears confusing if one assumes "unless sooner removed by the president" includes today's default of "removed at pleasure," but the eighteenth century had a different set of background assumptions. The entire series of exchanges in the ensuing comptroller debate makes sense in light of Manners and Menand's research[280] and the eighteenth-century default rule: "unless sooner removed by the president [for cause]."[281] It seems Madison was clarifying that the Senate would not have a veto role over removals—the only real decision of 1789—and he clarified and confirmed that he was not implying presidential removal at pleasure.

In working to grant the Comptroller a term-of-years tenure that would insulate the officeholder from at-will removal, Madison thought that the nature and functions of the office in question were essential:

> It will be necessary, said [Madison], to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not purely of an Executive nature. *It seems to me that they partake of a Judiciary quality as well as Executive*; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts

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Members of Congress Who Were Appointed or Nominated by Republican Presidents, or Who Were Elected as Republicans, as Amici Curiae in Support of Respondents at 2, *Slaughter*, 146 S. Ct. 2283 (No. 25-332), 2025 WL 3243373 (noting that ever since the Founding, Congress and Presidents repeatedly passed and signed "legislation limiting the removal of members of multimember commissions," especially for "those administering economic matters"); Brief of Amicus Curiae Professor Jane Manners in Support of Respondents at 10–11, *Slaughter*, 146 S. Ct. 2283 (No. 25-332), 2025 WL 3230462 (finding that the First Congress "said so explicitly" when it intended offices to be removable at will); Brief of Amici Curiae Legal Historians Noah A. Rosenblum and Nathaniel Donahue in Support of the Respondents at 4–5, *Slaughter*, 146 S. Ct. 2283 (No. 25-332), 2025 WL 3230468 (noting that Madison understood Congress to have "the power and discretion to restrict presidential direction and control" for offices such as the comptroller).

280. See Manners & Menand, Three Permissions, supra note 104, at 20–23 (arguing that Madison knew his colleagues understood an ordinary tenure to not have at-will removal); Manners & Menand, For Cause, supra note 139, at 11–12 (distinguishing between three different tenures and the affiliated removal protections of each).

281. See Shugerman, Indecisions of 1789, supra note 52, at 824–34 (explaining Madison's comptroller proposal and the House debate's illustration of the consensus regarding Congress's removal limitations); Shugerman, The *Marbury* Problem, supra note 253, at 2097–98 ("On whether the president had exclusive removal power, the First Congress decisively answered no.").

> subsisting between the United States and particular citizens: *this partakes strongly of the judicial character*, and there may be strong reasons why an officer of this kind *should not hold his office at the pleasure of the Executive branch of the Government* . . . . I am very well satisfied[] that a modification by the Legislature may take place in such [offices] as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed.[282]

Later in this exchange on June 29, 1789, Madison repeated the same point: "I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each . . . ."[283]

Even though the House did not adopt Madison's proposal,[284] it is striking that Madison—the unitary executive theorists' favorite member of the House—actually rejected their theory when he turned from the Secretary of Foreign Affairs to the mixed judge-like offices in the executive branch.[285] And it is notable that his colleagues understood the legal background to his argument (i.e., original public meaning for both the default rule of a term of years and for the judge-like category of executive offices), even if they did not vote to apply it to that specific office.[286]

This is one of the strongest examples of the instinct behind the quasi-judicial function. Madison, like many of his contemporaries, reached for a metaphor to judges when encountering the Comptroller, a figure who would look backward and "decid[e] upon the lawfulness and justice of the claims and accounts . . . [involving] the United States and particular citizens."[287] For Madison, it followed quite naturally from Congress's creation of a quasi-judicial office that lawmakers needed to insulate the officeholder from direct hierarchical political control.

Thomas Jefferson echoed Madison's same argument for an independent Comptroller himself in 1802, as Professor Deborah Pearlstein found in the archives: "The place of Comptroller of the US is . . . in it's [sic] nature partly Executive, and partly judiciary, as the Comptroller

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282. 1 Annals of Cong. 611–12 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (emphasis added).

283. Id. at 614 (statement of Rep. Madison).

284. Manners & Menand, Three Permissions, supra note 104, at 23.

285. See Shugerman, Indecisions of 1789, supra note 52, at 760 (noting that Madison favored presidential removal for the Department of Foreign Affairs); Manners & Menand, Three Permissions, supra note 104, at 21–22 (noting Madison's support for removal protections for the comptroller).

286. See Manners & Menand, Three Permissions, supra note 104, at 22–23 (charting Congress's repeated use of Madison's "term of years plus statutory removal permissions" approach to insulate officials from removal in dozens of statutes).

287. 1 Annals of Cong. 611–12 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (emphasis added).

decides in the first instance all questions of law arising in matters of account between the US and individuals."[288]

Nor have these materials gone entirely unnoticed in modern debates. When Professor Aditya Bamzai, one of the most ardent unitary theorists, was recently asked directly about these quotations from Madison, he conceded that the Comptroller "could be thought of as a judicial officer having judicial-type functions and perhaps be given some sort of good behavior tenure."[289]

2. *Hamilton's "Independ[e]nt" Revolutionary War Debt Commission.* — New findings from Professor Victoria Nourse's work on Founding Era institutional design choices further illuminate the quasi-judicial category's historical roots in the Founding.[290] One of the challenges that the Founders faced after the adoption of a new Constitution was the weight of the catastrophic debt left over from the Revolutionary War. Alexander Hamilton, the financial architect of the new commercial republic, stepped into the breach with a plan. To first assess the war debt, Hamilton proposed a commission made up of "distinct and Independ[e]nt . . . Officers," answerable only to Congress, to assess the extent of the new Union's debt, the Revolutionary War Debt Commission.[291]

In the summer of 1789, the First Congress passed a law empowering President Washington to nominate "by and with the advice and consent of the Senate" and "appoint such person or persons as he may think proper for supplying any vacancy" on the new Board of Commissioners established to manage the national war debt.[292] In establishing the Commission, Congress treated incorruptibility as a paramount consideration.[293] Instead of nesting the Debt Commission inside one of the new

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288. Letter from Thomas Jefferson to Gabriel Duvall, Chief Justice of the Md. Gen. Ct. (Nov. 5, 1802) (on file with the *Columbia Law Review*). Deborah Pearlstein's archival research from the Maryland State Archive was instrumental in supplying this primary source, as part of her forthcoming work, The President is Not a Prosecutor.

289. The Federalist Society, Welcome & Luncheon Debate: Resolved: The President Has the Indefeasible Power of Removal, at 58:43–59:04, 1:05:04–1:05:23 (YouTube, Jan. 7, 2026), https://www.youtube.com/watch?v=M6XYtHxdOAU (on file with the *Columbia Law Review*).

290. See Nourse, supra note 65 (manuscript at 2) ("Congress and Presidents deemed [independent] commissions necessary to solve some of the most important issues of the day . . . . Congress designed, and Presidents agreed, that the commissioners exercise disinterestedness, and imposed statutory duties of impartiality.").

291. Id. (manuscript at 6) (emphasis omitted) (internal quotation marks omitted) (quoting Letter from Alexander Hamilton to Sen. Benjamin Hawkins (Mar. 12, 1794), reprinted in Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Hamilton/01-16-02-0114 [https://perma.cc/Z2NG-MVXY]).

292. Id. (manuscript at 6) (internal quotation marks omitted) (quoting Act of Aug. 5, 1789, ch. 6, § 1, 1 Stat. 49, 49).

293. See id. (manuscript at 7) (noting the concern that Commissioners must have "such uncorrupted and uncorruptible Integrity as will give Security to the United States" (internal quotation marks omitted) (quoting Letter from Robert Morris to the Office of

departments under presidential supervision, Congress decided the old debt commission should remain independent.[294] Nourse was unable to find any criticisms of the new commission premised on any incompatibility with the Article II executive power.[295]

At the beginning of 1790, Hamilton was calling for a commission to resolve the war debt with "equitable discretion" and "final authority."[296] By that summer, Congress worked to create a new Commission. James Madison's attempt to expand the Commission's membership to five and include Treasury officials was rejected by his fellow lawmakers.[297] The final law enacted by Congress and President Washington provided for a three-member board "to settle the accounts between the United States, and the individual states" with "conclusive" finality:

> It shall be the duty of the said commissioners *to receive and examine all claims* . . . and to determine on all such as shall have accrued for the general or particular defence during the war, *and on the evidence thereof*, according to the *principles of general equity* . . . , so as to provide for the final settlement of all accounts between the United States and the states individually . . . .[298]

This statute created a commission that was quasi-judicial in all relevant senses. The First Congress needed a judge-like body that could resolve disputes with principles of equity. As Nourse noted, Congress tasked the commission in the language of law and courts: equity, evidence, claims, and finality.[299] It looked backward to historical facts put forth by different parties, examined claims, took evidence, applied principles of equity, and resolved competing claims with finality.[300] Contemporaries, such as Virginia Governor Beverley Randolph, called the commissioners "judges,"[301] and commissioners took an oath before judicial officers with a

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Finance (Feb. 18, 1782) (on file with Nat'l Archives, Rec. Grp. 360, Letters and Reports of the Superintendent of Finance, 1781–82, vol. 1, at 333, 333), https://catalog.archives.gov/id/502977744?objectPage=244 [https://perma.cc/KJV8-EXRQ])).

294. See id. (manuscript at 8).

295. See id. (manuscript at 7–8).

296. Id. (internal quotation marks omitted) (quoting Alexander Hamilton, Report Relative to a Provision for the Support of the Public Credit (Jan. 9, 1790), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001 [https://perma.cc/DK9S-SQ7D]).

297. Id. (manuscript at 7–9).

298. Act of Aug. 5, 1790, ch. 38, § 1, 1 Stat. 178, 178 (emphasis added).

299. Nourse, supra note 65 (manuscript at 27–28, 32).

300. Id. (manuscript at 9).

301. Id. (manuscript at 14 & n.95) (internal quotation marks omitted) (quoting Letter from Beverley Randolph to James Madison (June 4, 1790), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Madison/01-13-02-0167 [https://perma.cc/T9JL-CYPK]).

special and explicit requirement of "impartiality."[302] It was only natural that they insulated the Commission from hierarchical control to achieve a judge-like independence and propriety.

The Revolutionary War Debt Commission's work did not disabuse leading officials of the propriety of independent and quasi-judicial commissions. Legislators rejected attempts to lodge their creation in a department or have executive administrators serve on the Commission.[303] Direct presidential or departmental control was abandoned precisely because an independent and quasi-judicial body that reflected sectional balance was understood to be necessary to amicably resolve the debt crisis.[304] The need for impartiality led reflexively to "independence" and quasi-judicial functions.[305] Hamilton repeated his understanding four years after the Commission's creation that it was established as a "distinct and Independ[e]nt" body "with a special and delicate Trust."[306] When pressed, Hamilton refused to provide documents related to the War Debt Commission's work because of its "independence."[307]

3. *The Sinking Fund Commission.* — Hamilton's plans for financial security did not end with the Debt Commission. He also conceived of a Sinking Fund Commission, an independent body guided by the traditional norms of equitable discretion that could purchase securities on the open market.[308] The Sinking Fund Commission was established with five members: the Secretary of the Treasury, the Secretary of State, the Vice President, the Attorney General, and the Chief Justice of the Supreme Court.[309] The scheme essentially revolved around the long-term refinancing of Revolutionary War debt.[310] Commissioners were empowered to make purchases "in such manner, and under such regulations

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302. Id. (manuscript at 16); see also Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2140, 2147, 2168–69 (2019) (highlighting special examples of oaths of "impartiality").

303. Nourse, supra note 65 (manuscript at 12).

304. Id. (manuscript at 5) ("No one at the time, including Presidents Adams and Washington, who signed these laws into being, challenged Congress's constitutional power to create offices of this kind or balked at claims that these entities should be impartial.").

305. See id. (manuscript at 4–5).

306. Id. (manuscript at 9) (internal quotation marks omitted) (quoting Letter from Alexander Hamilton to Sen. Benjamin Hawkins (Mar. 12, 1794), reprinted in Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Hamilton/01-16-02-0114 [https://perma.cc/Z2NG-MVXY]).

307. Id. (manuscript at 10).

308. See Chabot, The Fed, supra note 59, at 3–4 ("The Sinking Fund Commission carried out open market purchases . . . with substantial independence from the President."); Chabot, Interring, supra note 65, at 172–73; Nourse, supra note 65 (manuscript at 15).

309. Nourse, supra note 65 (manuscript at 15).

310. Id.

as shall appear to them best calculated to fulfill the intent of this act."[311] Congress ensured the Commission's subservience by requiring it to send periodic reports on its progress to Congress.[312]

It is unclear whether the Sinking Fund Commission exercised truly quasi-judicial functions, but Congress's decision to install two legal officials (the Chief Justice and the Attorney General) and the agency's exercise of equitable discretion certainly mirror the mixed executive–judicial understanding Founders placed on the Debt Commission—an example of a quasi-judicial approach through mixed membership and mixed roles.

In any case, there was a comparable equation of the commissioners with "trustees."[313] Trust law imposed affirmative obligations, including impartiality and good faith, on trustees.[314] The Commission's relationship with the law of trusts mirrors the same instincts at play with quasi-judicial functions. Like trusts, the new Commission would counteract the impulses for self-dealing and corruption by assigning financial matters to a multimember body bound by law to act impartially. The Founding generation thought it natural that some matters should be insulated from hierarchical political control and were better assigned to multimember bodies. Oversight would occur through Congress, not a chain of dependence leading to the President.[315]

The President's inability to remove at least some of the commissioners is a salient obstacle to the UET.[316] At least two members of the

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311. Id. (internal quotation marks omitted) (quoting Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186).

312. See id. (citing Act of Aug. 12, 1790 § 3).

313. Id. (manuscript at 15–17) (internal quotation marks omitted) (quoting Letter from Alexander Hamilton to John Adams (Dec. 21, 1790), reprinted in Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/06-20-02-0271 [https://perma.cc/NX3K-TJDZ]).

314. Id. (manuscript at 16) (citing Robert G. Natelson, The Constitution and the Public Trust, 52 Buff. L. Rev. 1077, 1128 (2004)).

315. On the Roberts Court's inconsistent reliance on the presidential chain of dependence in administrative law, see generally Short & Shugerman, supra note 95.

316. See Chabot, The Fed, supra note 59, at 35 (noting that most of the Sinking Fund Commission's members "were not subject to any form of presidential control or removal"); Chabot, Interring, supra note 65, at 184–90 (detailing early Congresses' removal protections for U.S. marshals and the various law-enforcement duties assigned to unremovable judges and private parties); Chabot, Interstitial Executive, supra note 221 (manuscript at 20, 22, 35, 39–40) ("[E]arly legislation contradicted the unitary understanding that removal was an exclusively presidential power."). Chief Justice Roberts misunderstood these arguments and evidence in *Slaughter*. Compare Trump v. Slaughter, 146 S. Ct. 2283, 2308 (2026) (surmising that the President could remove the Chief Justice and Vice President from the Sinking Fund Commission even if he could not remove them from their underlying positions), with id. at 2333 (Sotomayor, J., dissenting) (explaining that the conscious decision of the First Congress to appoint two members who could not be removed from their underlying positions by the President to the five-member agency is strong support for the idea that the President's control over the commission was not plenary). The Commission's membership included a list of many of the most important members of the Founding generation—John

Commission—the Chief Justice and the Vice President—could not have been removed by the President.[317] If the President tried to remove a sitting Attorney General from the Commission, that would violate the Commission's statutory mandate, which required the Attorney General to serve as a commissioner.[318]

Professor Chabot has documented how Congress placed Supreme Court Justices and other Article III judges onto adjudicatory commissions, assigning administrative roles on top of their judicial roles. In addition to sitting on the Sinking Fund Commission, Chief Justices served on the board of inspectors for the Mint.[319] In early revenue laws, Congress also delegated to Article III district court judges the duty of administrative fact-finding (reviewable by the Treasury Secretary).[320] These roles can be understood as part of the quasi-judicial tradition. Because these commissions were protected during good behavior, this administrative structure prevented presidential removal at pleasure.[321]

4. *Removals by Judges.* — When creating offices in charge of public monies, lawmakers opted for an alternative mode of accountability that scholars have likened to "removal by judges."[322]

Congress decided corruption in these offices would be rooted out through the criminal legal system, which placed judges in significant control over the livelihoods of administrators. The First Congress crafted provisions that barred those found guilty of various offenses from office.[323] The Collection Act of 1789 provided that officers convicted of bribery "shall . . . be forever disabled from holding any office of trust or profit under the United States."[324] The Treasury Act contained a similar section that provided that officers "guilty of a high misdemeanor" would "upon

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Adams, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison, and John Marshall—none of whom objected to the creation of an independent multimember commission. Chabot, Interring, supra note 65, at 172–73; Nourse, supra note 65 (manuscript at 18).

317. Nourse, supra note 65 (manuscript at 22).

318. Id.

319. Chabot, Interstitial Executive, supra note 221 (manuscript at 45 & n.303) (explaining "that coins shall be 'assayed under the inspection of the Chief Justice of the United States, the Secretary and Comptroller of the Treasury, the Secretary for the department of State, and the Attorney General of the United States'" (citing Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250)).

320. Id. (manuscript at 47) (citing Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122).

321. Id. (manuscript at 7, 10–11).

322. See, e.g., Jed H. Shugerman, The Decisions of 1789 Were Anti-Unitary: An Originalism Cautionary Tale 44 (Aug. 15, 2021) (unpublished manuscript), https://ssrn.com/abstract=3597496 [https://perma.cc/59JV-YLE3] [hereinafter Shugerman, Cautionary Tale]; Shugerman & Lawson, supra note 75 (manuscript at 43–44); see also Chabot, Interring, supra note 65, at 179–80.

323. See Shugerman, Cautionary Tale, supra note 322, at 51.

324. Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46.

conviction be removed from office, and forever thereafter [be] incapable of holding any office under the United States."[325] Later Congresses applied similar provisions to other officers with direct access to taxes, customs, duties, spending, and property.[326]

Again, this mirrored the *real* English backdrop. These removal-by-judges provisions were seemingly inspired by old English statutes that established that an officeholder's failure to faithfully execute an office was cause for removal.[327] Courts were given an important role in the removal of officials through the writs of scire facias, quo warranto, and mandamus.[328] By making removal contingent on judicial processes, the Founding generation again illustrated the conceptual links between corruption, courts, and independence.

5. *Early Commissions*. — During the early Republic, Congress created commissions that housed thousands of assessors and other bureaucratic officials who were charged with assigning taxable values and resolving land disputes. Congress returned to the language of judging, equity, and impartiality in the construction of these new administrative offices.

The Valuation and Enumeration Act of 1798 established one of the earliest tax commissions, the federal boards of commissioners, with several quasi-judicial aspects.[329] The commissions and assessors made incursions into private rights; the relevant statute empowered them to deliver detailed lists of property-related information.[330] The commissions (one per state or major division, composed of multiple geographically representative commissioners deciding by majority vote) were the final administrative authority on assessing property valuations for the federal direct tax on lands, houses, and slaves.[331] Understanding the discretionary nature of the assessments process, lawmakers sought a commission that could embody fairness and "equality."[332] Commissioners reviewed completed assessment lists submitted by lower-level assessors and exam-

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325. Act of Sep. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.

326. See Shugerman & Lawson, supra note 75 (manuscript at 43–46) (discussing various statutes allowing for non-executive removal in the form of removal by judges).

327. Kent et al., supra note 302, at 2147–48, 2165, 2171.

328. See Shugerman, The *Marbury* Problem, supra note 253, at 2102.

329. See Nourse, supra note 61 (manuscript at 24–25) (discussing how, under the Act, the commission and its assessors could issue binding and final legal decisions on private parties).

330. See Act of July 9, 1798, ch. 70, §§ 9–10, 1 Stat. 580, 585–86.

331. See Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288, 1322, 1377, 1417 (2021) [hereinafter Parrillo, Critical Assessment] (discussing that the federal tax boards were told to inquire into all taxation for lands, houses, and slaves, and that the decisions of the boards were final and not subject to judicial review).

332. See id. at 1405 n.523 (internal quotation marks omitted) (quoting 8 Annals of Cong. 1848 (1798) (statement of Rep. Gallatin)).

ined those lists and abstracts for "manifest error or imperfection" in particular valuations or inequalities in relative valuations.[333] The commissions also made broader percentage-based or uniform adjustments across subdivisions when average valuations appeared too low or unequal, applying the discretionary standard of what "shall appear to be *just and equitable*."[334]

Professor Nicholas Parrillo discussed the tax commissions in a piece focused on the nondelegation doctrine, while Nourse offered a more UET-focused analysis.[335] Parrillo called the resulting implementation of the new tax program "the federal government's largest non-military endeavor, as measured by the number of federal officials involved, of the Constitution's first two decades."[336] The plan required presidentially appointed (and Senate-confirmed) commissions that oversaw assessment districts.[337] As Nourse later emphasized, Congress sought "a uniform tax, and the commissions were necessary to achieve that uniformity."[338]

Nourse found in this early example of tax administration more of the Founding generation's demand for judge-like administration:

> Congress charged the Commissioners in the language of justice and equity. The state-level commissions could raise or lower the assessors' valuations "as shall appear to be *just* and *equitable*." Congress took steps to ensure commissioner impartiality, requiring that they swear an oath of impartiality. Failure to take the oath meant that a commissioner would forfeit and pay two hundred dollars (at least $4000 in today's dollars) for "the use of the United States, to be recovered in any court having competent jurisdiction, with costs of suit." If commissioners failed to show up at meetings, Congress imposed a daily fine on the commissioners to be adjudicated in "any court having competent jurisdiction."[339]

For Nourse, the tax commissioners and assessors represent a slightly different model of insulated administration than either the Debt Commission or the Sinking Fund Commission. In all three cases, Congress avoided a delegation of authority to department heads and instead tried to establish each commission as a unique and dependable quasi-judicial

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333. Act of July 9, 1798 § 22.

334. Nicholas R. Parrillo, Nondelegation, Original Meaning, and Early Federal Taxation: A Dialogue With My Critics, 71 Drake L. Rev. 367, 374 (2024) [hereinafter Parrillo, Dialogue] (emphasis added by id.) (quoting Valuation and Enumeration Act of 1798 § 22).

335. Compare id. at 375 (framing the article as a response to "thoughtful critiques" of his previous work by "nondelegation reformers"), with Nourse, supra note 65 (manuscript at 21–30) (discussing a variety of independent boards in connection with the UET).

336. Parrillo, Dialogue, supra note 334, at 375.

337. See Nourse, supra note 65 (manuscript at 24).

338. Id. (emphasis omitted).

339. Id. (manuscript at 25) (footnotes omitted) (first quoting Act of July 9, 1798 § 22; then quoting § 27; then quoting § 6).

entity.[340] But the tax administrators were more interwoven with a department, in this case the Treasury. Congress specifically gave the Secretary of the Treasury the power to require commissioners to provide reports, but that review power did not include a supervisory reversal power.[341] Nourse concluded from Congress's grant of specific authorities to the Treasury that the Secretary could not assert the greater power of reversing the commissions' decisions.[342] She quotes Treasury Secretary Oliver Wolcott, who disclaimed the power to overrule the commissioners.[343] As Parrillo noted, it appears that the tax commissioners were untenured and served at the President's pleasure.[344] Nevertheless, even with removal power, neither the Secretary nor the President could exercise final control over the tax commissioners' judgments.[345] That Congress created yet another group of quasi-judicial administrators who were practically independent only further underscores the instinct running through the whole early Republic period.

Before proceeding, reactions to Parrillo's work are telling. Parrillo argued that the tax administrators wielded what we would today call legislative (or quasi-legislative) powers. Professor Philip Hamburger later contested whether Parrillo's administrators were really wielding legislative power.[346] But Hamburger does not dispute that Congress created independent administrators wielding quasi-judicial functions. He acknowledges that these officers' powers were "judicial in nature."[347]

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340. See id. (manuscript at 26) ("In each case, Congress created the terms and conditions of the offices, and here with extraordinarily exhaustive instructions.").

341. Id. (manuscript at 26–27).

342. Id. (manuscript at 27).

343. Id.

344. Parrillo, Critical Assessment, supra note 331, at 1328 n.178 ("The Valuation and Enumeration Act said nothing about the commissioners' removal. The standard printed commission given to the commissioners said they would 'hold the same [offices] . . . during the pleasure of the President of the United States for the time being.'" (alteration in original) (quoting Untitled Printed Commission Starting With Text, "John Adams, President of the United States of America" (1798) (on file with R.I. Hist. Soc'y Elisha Reynolds Potter, Sr. Papers, Box 1, Folder 14, catalog number MSS 629 SG 2))).

345. Nourse, supra note 61 (manuscript at 26–27) (explaining that the limits placed on the Secretary of the Treasury's statutory powers, including the inability to override commissioners' judgments, undermine "the idea that the executive had full control of the commissions' decisions").

346. See Philip Hamburger, Nondelegation Blues, 91 Geo. Wash. L. Rev. 1083, 1204–05 n.566 (2023) ("But [Parillo's] objections assume that the revisions made by commissioners were examples of delegated legislative power. In fact, they clearly were not understood to be legislative in nature, and they therefore cannot be taken as showing an acceptance of delegated legislative power.").

347. Id. at 1211. As Hamburger described the tax commissioners' powers, he observed: "Determinations of facts, including assessments, were understood at common law to be judicial in nature, not legislative." Id. Indeed, Hamburger's own work is very candid about the ways that American administrative entities drew inspiration from judicial norms and

Nourse continued this line of inquiry. She identified land commissions established in 1803 as striking examples of quasi-judicial functions that further undermine the UET.[348] The commissions fit the earliest definitions of quasi-judicial functions because they were "invested by the legislature with the power to decide on the property rights of others . . . [and] act[ed] judicially in making their decision."[349] Predictably, the commissions' duties were described in the language of justice and equity:

> [E]ach board, or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner, all matters respecting such claims, also to administer oaths and examine witnesses, and such other testimony as may be adduced, and to determine thereon according *to justice and equity*: which determination, so far as relates to any rights derived from the articles of agreement above mentioned, or from the three first sections of this act, shall be final.[350]

6. *Marbury as Justice of the Peace.* — There is a longstanding mystery in the pages of one of the most familiar cases in the history of the early Republic: *Marbury v. Madison*.[351] It confused Chief Justice Taft in *Myers*[352] and Chief Justice Roberts in *Slaughter*.[353] This puzzle has finally been solved by legal scholars digging into the surprising law of offices in Anglo-American history.[354] The text of Chief Justice John Marshall's opinion suggested that everything turned on whether Marbury's "legal rights" had vested before the new Jefferson Administration attempted to undo his

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procedures. See, e.g., Philip Hamburger, Is Administrative Law Unlawful? 191 (2014) (discussing the judicial flavor of many of the early executive's actions).

348. See Nourse, supra note 65 (manuscript at 28–32) (noting land commissioners' ability to summon witnesses and to take testimony, as well as the finality accorded to their judgments).

349. Drainage Comm'rs v. Griffin, 25 N.E. 995, 997 (Ill. 1890).

350. Nourse, supra note 65 (manuscript at 28) (emphasis added by id.) (quoting Act of Mar. 3, 1803, ch. 27, § 6, 2 Stat. 229, 230).

351. 5 U.S. (1 Cranch) 137 (1803); see also Shugerman, The *Marbury* Problem, supra note 253, at 2105 ("There has been a long-standing historical puzzle in *Marbury*: why did Chief Justice Marshall conclude that President Jefferson could not withhold the office from Marbury? And why did President Jefferson and Madison fight out a commission if President Jefferson could have simply removed Marbury at will?").

352. See Myers v. United States, 272 U.S. 52, 140–44 (1926).

353. See Trump v. Slaughter, 146 S. Ct. 2283, 2309 n.9 (2026) (assuming Congress's power over territorial offices gave it *discretion* to protect an office, without explaining why Chief Justice Marshall concluded that Congress had used its discretion to protect such an office). Chief Justice Roberts ignored that this question is one of statutory interpretation, default rules, and history and tradition—including the quasi-judicial role of justices of the peace.

354. Manners & Menand, Three Permissions, supra note 104, at 33–34; Manners & Menand, For Cause, supra note 139 (manuscript at 10–11); Shugerman, Venality, supra note 33, at 216–17.

appointment.[355] Notably, neither Jefferson nor Madison removed Marbury from his office, but they tried to undo the appointment by refusing to deliver a commission.

For a long time, this was a mysterious way of approaching the case. Marbury was not an Article III judge with lifetime tenure.[356] He was granted a mere five-year term as a justice of the peace.[357] Nevertheless, Marbury was insulated from at-will presidential removal because of the default rule identified by Manners and Menand that a fixed five-year term without an explicit removal clause meant that it was an unremovable five-year term.[358]

In *Slaughter*, Chief Justice Roberts tried to explain away the *Marbury* problem: "Such justices [of the peace] do not exercise executive power. They instead exercise the judicial power of the District, just as territorial judges exercise the judicial power of their respective territories."[359]

First, it is inaccurate to describe justices of the peace as exercising "judicial power" when they are a better historical example of a mixed quasi-judicial executive office. Legal scholars describe justices of the peace as "quasi-judicial,"[360] and "judge-like,"[361] rather than as judges, and for good reason. One of the most thorough scholars of English law and administration identified how justices of the peace played an increasingly administrative role in early modern England through the eighteenth century.[362] Legal scholars confirm that they were "law enforcement

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355. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) ("[A]s the law creating the office[] gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.").

356. Shugerman, The *Marbury* Problem, supra note 253, at 2089.

357. Id.

358. Manners & Menand, Three Permissions, supra note 104, at 6 n.23; see also Shugerman, The *Marbury* Problem, supra note 253, at 2105 ("Professors Manners and Menand answer that the Federalists enacted the justice of the peace offices with a term of five years—apparently deliberately—to protect Marbury and their other midnight appointments in the District of Columbia from presidential removal power.").

359. Trump v. Slaughter, 146 S. Ct. 2283, 2309 n.9 (2026).

360. See Wynne Muscatine Graham, The Forgotten History of Prison Law: Judicial Oversight of Detention Facilities in the Nation's Early Years, 138 Harv. L. Rev. 1715, 1736 n.146 (2025); Robert M. Ireland, Privately Funded Prosecution of Crime in the Nineteenth-Century United States, 39 Am. J. Legal Hist. 43, 43 n.1 (1995); James E. Pfander & Jacob P. Wentzel, The Common Law Origins of *Ex Parte Young*, 72 Stan. L. Rev. 1269, 1314–15 (2020); Legislation: Civil Deposition Acts, 45 Harv. L. Rev. 176, 178 (1931).

361. See, e.g., Shugerman, The *Marbury* Problem, supra note 253; Richard S. Tompson, The Justices of the Peace and the United Kingdom in the Age of Reform, 7 J. Legal Hist. 273, 273 (1986) (describing the justices as "[a] combination of police inspector, magistrate and county councillor").

362. 4 W.S. Holdsworth, A History of English Law 137, 139–40 (1924) ("[T]he growth of [the justices of the peace's] administrative duties gave rise to the beginnings of a separation between their judicial and administrative functions . . . .").

officers" with "significant administrative and regulatory authority . . . related to infrastructure, the environment, public health and safety, and prisons, as well as to assess taxes, administer the poor laws, set wages and prices, and license wine retailers and alehouses."[363] The term "justice of the peace" seemed to reflect more *peace*—peacekeeping by local enforcement and minor adjudications—than *justice* as judging. Another piece of historical evidence showing that justices of the peace were identified as "quasi-judicial," rather than judicial: Justices of the peace were not granted traditional judicial immunity, and instead, they were among the original officers covered by the new category of "quasi-judicial immunity."[364]

Second, Chief Justice Roberts seems to be closely paraphrasing another explanation from the unitary executive theorists he had cited earlier: Congress had more discretion to make these offices for the District of Columbia unremovable because they had more latitude to exercise its Article IV power to "make all needful Rules and Regulations" for territorial governments like the District.[365] This argument skips a necessary step, and that step turns out to backfire against these unitary theorists,

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363. Birk, supra note 103, at 209; see also Mark Goldie, The Unacknowledged Republic: Officeholding in Early Modern England, *in* The Politics of the Excluded, c. 1500–1850, at 153, 159–60 (Tim Harris ed., 2001) (listing the many administrative and regulatory duties of justices of the peace); Scott Ingram, Constitutional Inquisitors: The Origins and Practice of Early Federal Prosecutors 23–26 (2023) ("Justices of the peace served as the bridge between the court system and the people."); Norma Landau, The Justices of the Peace 1679–1760, at 43 (1984) ("[G]overnors knew that the justices' administrative decisions affected gentlemen's ability to maintain their interests and to wield political influence."); John H. Langbein, The Origins of Adversary Criminal Trial 40–41 (2005) ("The Marian statute employed local magistrates, the justices of the peace (JPs), to conduct th[e] work of reinforcing citizen prosecution."); Allen Steinberg, The Transformation of Criminal Justice: Philadelphia, 1800–1880, at 39–41 (1989) (explaining that the alderman's office provided "the political voice of the working class in municipal affairs"); James R. McVicker, The Seventeenth Century Justice of Peace in England, 24 Ky. L.J. 387, 406–07 (1936) (describing the scope of the authority of justices of the peace); Donna J. Spindel, The Administration of Criminal Justice in North Carolina, 1720–1740, 25 Am. J. Legal Hist. 141, 144–46 (1981) (describing the numerous duties granted to justices of the peace); Ryan Francis Pollock, Note, The Eyes-On Doctrine, 134 Yale L.J. 200, 212, 245 (2024) (explaining that justices of the peace "exercised broad authority in local government").

364. See Scott A. Keller, Qualified and Absolute Immunity at Common Law, 73 Stan. L. Rev. 1337, 1354 n.98, 1358–59, 1373 n.213 (2021) (collecting cases in support of the claim that justices of the peace were entitled to "quasi-judicial immunity" in circumstances when performing judicial acts, so long as these acts were not predicated on power granted by unconstitutional statutes); J. Randolph Block, *Stump v. Sparkman* and the History of Judicial Immunity, 1980 Duke L.J. 879, 887–89 (explaining that justices of the peace received immunity when performing "judicial" acts but were not immune from suit when their actions were deemed "ministerial," and that most of the duties of justices of the peace were labelled "judicial").

365. See U.S. Const. art. IV, § 3, cl. 2; see also Bamzai & Prakash, Power of Removal, supra note 97, at 1776 n.140, 1812 & n.404 (suggesting the more plausible reading of *Marbury*'s holding was that tenure protections of justices of the peace applied only to judicial officers, or more narrowly, territorial officers).

including Roberts: Even if Article IV's Territories Clause was Congress's basis for its discretion to protect the District's justices of the peace, why did Chief Justice Marshall and others circa 1803 believe that Congress had actually done so? The statute did not mention "good behaviour" or the like.[366] The statute simply granted the office for a fixed term of years—which means that Chief Justice Marshall and his contemporaries understood the default rule against removal that Manners and Menand have explained.[367]

Third, Christine Chabot has documented that Jefferson and his Secretary of State, James Madison, followed the same common law understanding, first by acquiescing to Marbury's unremovability,[368] and then in the twenty-two commissions which continued to omit "during pleasure" terms issued to justices of the peace from 1801 through 1808.[369]

Notably, there was a broad consensus in the early republic to protect such a classically "quasi-judicial" office: A Federalist Congress relied on the term-of-years default rule to prevent their removal;[370] Chief Justice Marshall confirmed this default protection;[371] and President Jefferson and Secretary of State Madison followed the same rule in their commissions.[372] Whatever "liquidation" means,[373] it seems like the Federalists and Democratic-Republicans understood and constructed the "term-of-years" default rule against removal and applied it to the quasi-judicial justices of the peace.

Again, the key to understanding one of the most important cases of the early Republic is to understand the quasi-judicial instinct guiding Congress's actions in the background. Marbury's lawyer, Charles Lee, asserted that justices of the peace "exercise part of the judicial power" and thus "ought . . . to be independent."[374] Lawmakers established the quasi-judicial justice of the peace and constrained the President's power to remove officeholders precisely because independence followed, almost logically, from the justices' functions.

7. *State Constitutions.* — The foregoing evidence from the earliest Congresses is clear. While the authors believe these examples alone show

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366. Shugerman, The *Marbury* Problem, supra note 253, at 2105.

367. Manners & Menand, Three Permissions, supra note 104, at 6 n.23, 25–27; Shugerman, The *Marbury* Problem, supra note 253, at 2105.

368. See Chabot, Interstitial Executive, supra note 221 (manuscript at 50–56) ("Jefferson did not understand . . . Justices of the Peace to be subject to an Article II power of removal.").

369. Id. (manuscript at 56–59).

370. See Manners & Menand, Three Permissions, supra note 104, 21–24.

371. Id. at 25.

372. Chabot, Interstitial Executive, supra note 221 (manuscript at 55).

373. See Trump v. Slaughter, 146 S. Ct. 2283, 2295 (2026) (referring to the liquidation of the President's power of removal).

374. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 151 (1803).

that the quasi-judicial function is consistent with original public meaning, we offer as additional evidence that the states followed suit at or near the Founding. Recall that in the English backdrop, local officials like sheriffs and coroners with quasi-judicial functions were insulated from removal. Even though many state constitutions explicitly adopted a separation-of-powers framework (unlike the federal Constitution), the states abandoned straightforward formalism.[375]

Many state constitutions intermingled judicial and executive power by grouping attorneys general and prosecutors under sections dealing with judges, judicial officers, and judicial power.[376] The 1776 New Hampshire Constitution even referred to "Executive Courts."[377] Some state constitutions gave legislatures the power to appoint law enforcement officials without any mediating role for governors.[378] Other states assigned this appointment power to judges.[379] The Virginia Constitution of 1776, crafted by James Madison and George Mason, "gave the governor the power to appoint justices of the peace but gave the legislature the power to appoint attorneys general and gave judges the power to appoint sheriffs, coroners, and constables."[380] The Virginia Constitution also grouped together the attorney general in the same clause with judges, giving them all tenure "during good behaviour."[381]

The English tradition of insulating certain administrative officials from executive control and removal when they wielded quasi-judicial law enforcement functions continued to influence state constitutions through the 1830s as new frontier states were admitted into the Union.[382]

E. *The Mid-Nineteenth Century*

1. *State Practice.* — History-and-tradition analyses are not limited to federal law. After all, English tradition counts and so do state practices. State practices are some of the main pieces of evidence discussed in

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375. Jed Handelsman Shugerman, Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence, 87 Fordham L. Rev. 1965, 1989 (2019) [hereinafter Shugerman, Professionals] ("State constitutions . . . adopted separate branches and often declared a separation of powers explicitly, unlike the federal Constitution. Nevertheless, many state constitutions did not reflect Scalia's formalism." (footnote omitted)).

376. Id.

377. N.H. Const. of 1776, reprinted in 4 Thorpe, supra note 199, at 2451, 2452 ("That all public officers for the said colony, and each county, for the current year, be appointed by the Council and Assembly, except the several clerks of the Executive Courts, who shall be appointed by the Justices of the respective Courts.").

378. Shugerman, Professionals, supra note 375, at 1989.

379. Id.

380. Id. at 1990 (citing Va. Const. of 1776, reprinted in 7 Thorpe, supra note 199, at 3817–18).

381. Va. Const. of 1776, reprinted in 7 Thorpe, supra note 199, at 3817.

382. See Shugerman, Professionals, supra note 375, at 1989.

Dobbs[383] on abortion and in Second Amendment cases like *Bruen*[384] and *Rahimi*.[385] Professors Jane Manners and Lev Menand have identified a long Anglo-American tradition of statutory fixed terms of years as removal protections and good-cause requirements, including nineteenth-century state doctrine and practice.[386] They identified a series of statutes and cases in the 1820s through the 1840s protecting New York state bank regulatory commissioners[387] and road commissioners with fiscal duties,[388] and traced similar practices and doctrines in Alabama,[389] Michigan,[390] Pennsylvania,[391] and Ohio.[392]

2. *Bringing the "Quasi-" in.* — Around the same time—the 1820s to 1840s—state judges started to use the phrase "quasi judicial." The label was applied to officials whose work embodied either the procedure of law or more functional similarities to judging.[393]

In 1810, Chief Justice Marshall had used the term "quasi judge" skeptically,[394] but soon thereafter state courts adopted the term with increasing credibility. In 1815, the Pennsylvania Supreme Court referred to a deposition taken by a justice of the peace as a "*quasi judicial proceeding*" but acknowledged that it did not have the same status as a judicial proceeding.[395] The term appeared more often from the 1820s to the 1850s.[396] Professors Nathaniel Donahue and Noah Rosenblum focused on

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383. Dobbs v. Jackson Women's Health Org., 142 S. Ct 2228, 2252–53 (2022) (counting the number of states that had statutes against abortions in 1868).

384. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2142–50, 2152–56 (2022) (tracing the history of state gun law restrictions).

385. United States v. Rahimi, 144 S. Ct. 1899, 1899–1902 (2024) (tracing the history of going armed and surety laws in states in the eighteenth century).

386. Manners & Menand, For Cause, supra note 139 (manuscript at 19–25); Manners & Menand, Three Permissions, supra note 104, at 5–6.

387. Manners & Menand, For Cause, supra note 139 (manuscript at 19–21).

388. Id. (manuscript at 20–21).

389. Id. (manuscript at 22 & n.58).

390. Id.

391. Id. (manuscript at 22).

392. Id. (manuscript at 23 n.60).

393. See, e.g., Newburyport v. Essex Cnty. Comm'rs, 53 Mass. (12 Met.) 211, 223 (1846) (labeling the duties of county commissioners who assign property values a "*quasi* judicial act"); Easton v. Calendar, 11 Wend. 90, 95 (N.Y. Sup. Ct. 1833) (labeling school district trustees' tax assessment functions as "quasi judicial").

394. Scott v. Negro Ben, 10 U.S. (6 Cranch) 1, 6–7 (1810) ("[I]t would be not less strange that the manner in which this *quasi* judge should execute his duty should not be prescribed, and that not even the attempt should be made to preserve any evidence of his judgment.").

395. Gray v. Pentland, 2 Serg. & Rawle 23, 26 (Pa. 1815).

396. See, e.g., Forsythe v. Ellis, 27 Ky. (4 J.J. Marsh) 298, 302 (1830), overruled by Holbrook v. Combs, 12 S.W.2d 281 (1928); Commonwealth v. Chambers, 24 Ky. (1 J.J. Marsh) 108, 157 (1829) (referring to clerks); Ex parte Pool, 4 Va. (2 Va. Cas) 276, 279, 293 (1821).

three state court decisions between 1833 and 1856 using the term "quasi-judicial" similarly.[397]

This label crossed over to federal courts referring to federal offices as validly "*quasi* judicial," first in a unanimous U.S. Supreme Court case in 1849.[398] Another U.S. Supreme Court decision in 1859 used the term "quasi-judicial" to describe the land surveyor general.[399] The term spread throughout the nineteenth century in this context, including use by prominent nineteenth-century legal commentators such as A.V. Dicey,[400] Thomas Shearman, and Amasa Redfield.[401]

In addition to the emerging use of "quasi-judicial" in legal opinions, executive officials also started to embrace the term. In 1854, Attorney General Caleb Cushing described his office as "quasi judicial," more independent from executive and partisan politics and more powerful in limiting the actions of executive officers.[402] Cushing also noted that Congress established the Office of the Attorney General "in organizing the judicial business of the United States."[403]

Representative Thomas Jenckes, the congressional architect of the Department of Justice in 1870, argued that the Attorney General would impose uniform professional norms on law officers so they would be

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397. Brief of Amici Curiae Legal Historians Noah A. Rosenblum and Nathaniel Donahue in Support of the Respondents at 15–16, *Trump v. Slaughter*, 146 S. Ct. 2283 (2026) (No. 25-332), 2025 WL 3230468 (first citing Downer v. Lent, 6 Cal. 94, 95 (1856); then citing *Newburyport*, 53 Mass. at 223; then citing *Easton*, 11 Wend. at 95).

398. Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849).

399. Castro v. Hendricks, 64 U.S. (23 How.) 438, 443 (1859) ("[T]he surveyor general exercises a quasi judicial power . . . .").

400. English legal commentator A.V. Dicey used the term "quasi-judicial" with respect to French administrative courts. A.V. Dicey, Lectures Introductory to the Study of the Law of the Constitution 189 (London, MacMillan & Co. 1885).

401. Thomas G. Shearman & Amasa A. Redfield, A Treatise on the Law of Negligence 186 (New York, Baker, Voorhis & Co. 1869) ("An officer possessing such discretionary powers is spoken of as a judicial or *quasi* judicial officer . . . ."); see also Orchard v. Alexander, 157 U.S. 372, 379 (1895) ("The approval of the evidence offered in respect to settlement and improvement is only quasi judicial."); Montgomery H. Throop, A Treatise on the Law Relating to Public Officers and Sureties in Official Bonds 511–13 (New York, J.Y. Johnston Co. 1892) (describing powers and acts of officers, including justices of the peace, as quasi-judicial); Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers 178–79 (1903) (describing removal protections as "quasi judicial" and as contrasted with arbitrary removal); Donahue, Officers, supra note 55, at 1959–61 ("Over the course of the nineteenth century, courts developed the category of 'quasi-judicial' duties further.").

402. See Caleb Cushing, A Report of the Attorney General, Suggesting Modifications in the Manner of Conducting the Legal Business of the Government, H.R. Exec. Doc. No. 33-95, at 6 (1st Sess. 1854); Office and Duties of the Attorney General, 6 Op. Att'ys Gen. 326, 334 (1854) [hereinafter Cushing Opinion].

403. Cushing Opinion, supra note 402, at 330.

insulated from departmental politics.[404] The Attorney General's opinions had become more authoritative within the executive branch, to be "followed by all the officers of the Government until [they are] reversed by the decision of some competent court."[405] Executive officers—and even the President—would no longer be able to find legal "shelter" from law officers for their questionable actions.[406] Jenckes's conception of the Attorney General's independent authority echoed Cushing's earlier usage of the quasi-judicial label.

Meanwhile, the Supreme Court offered up precedent in *Murray's Lessee v. Hoboken Land & Improvement Co.* that would shape much of what followed.[407] In *Murray's Lessee*, the plaintiffs contended that the issuance of a distress warrant by the Solicitor of the Treasury was unconstitutional because it assigned quasi-judicial functions like assessing debts and authorizing property seizure to a nonjudicial administrator.[408] The Court unanimously upheld the constitutionality of distress warrants under an 1820 act of Congress after detailing some of the same English and early republic precedents described above.[409] The Court emphasized that auditing Treasury accounts was an administrative, not judicial, act, even if it resembled adjudication.[410] Congress could delegate such powers to executive officers without violating Article III, as not all "controversies" involving the United States demanded immediate court involvement—especially in revenue matters.[411] The Court distinguished between public and private rights, reasoning that non–Article III officials could affect the former without first proceeding through judicial procedures.[412]

Murray's Lessee offered a path for rationalizing the delegation of quasi-judicial powers and functions onto federal administrators. What were increasingly called quasi-judicial functions were, according to the Court, merely a species of administrative powers that took on the form of court-like powers and processes.[413] By offering a formalist defense of admin-

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404. See Cong. Globe, 41st Cong., 2d Sess. 3036 (1870) (statement of Rep. Jenckes) ("It is for the purpose of having a unity of decision, a unity of jurisprudence . . . in the executive law of the United States . . . that all . . . law officers . . . shall be subordinate to one head.").

405. See id.

406. See id.

407. 59 U.S. (18 How.) 272 (1856).

408. Id. at 273.

409. Id. at 280, 285–86.

410. Id. at 280–81.

411. Id.

412. Id. at 283–84.

413. See id. at 280 (noting that administrative actions "may be, in an enlarged sense, a judicial act," they should not be "under the judicial power" simply because they "involve the exercise of judgment upon law and fact").

istrative judicialization, *Murray's Lessee* set the formal, legalistic foundation for more nuanced legislative experiments after the Civil War.

The Civil War era also reintroduced independent Treasury officers. President Lincoln proposed giving the Comptroller of the Currency protection from removal by requiring Senate consent—and Congress complied in 1864.[414] One year later, Congress revised this statute to give the President unilateral removal power, but it still required "reasons to be communicated by [the President] to the Senate."[415] Thus, even after this change, the Comptroller of the Currency was still protected by something akin to a good cause requirement.[416] The Supreme Court has too quickly dismissed the relevance of this historical example.[417] In light of the Supreme Court's focus on traditions of good cause versus indefeasible removal, the requirement to show cause to remove the Comptroller of the Currency is further evidence against the notion that presidential removal at will had ever been "liquidated" as a long-standing consensus in practice.

3. *Steamship Safety Inspectors.* — Steamship safety was a crisis in early America. In 1838, Congress passed the Steamboat Inspection Act, requiring steamboat owners (or "masters") to get their vessels inspected annually and their boilers inspected every six months.[418] These inspectors were not federal employees—they were private experts selected by the Article III judiciary, part of a decentralized and local network.[419]

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414. See Act of Feb. 25, 1863, ch. 58, § 1, 12 Stat. 665, 665–66 (amended 1864).

415. See National Bank Act of 1864, ch. 106, § 1, 13 Stat. 99, 100 (codified as amended in scattered sections of 12 U.S.C. §§ 1–11).

416. See id.

417. Compare Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201–02 (2020) (dismissing the Comptroller of the Currency's Civil War removal protection as an aberrational one-year example), with id. at 2232 (Kagan, J., dissenting) (explaining that amendments to the statute creating the Comptroller of the Currency Office still provided removal protections); see also Myers v. United States, 272 U.S. 52, 165 (1926) (dismissing Civil War-era statutory limits on removal because they were "adopted without discussion of the inconsistency [with the Decision of 1789] and were not tested by executive or judicial inquiry").

418. Act of July 7, 1838, ch. 191, §§ 1, 4–6, 5 Stat. 304, 304–05; see also Jerry L. Mashaw, Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861, 117 Yale L.J. 1568, 1633 (2008) [hereinafter Mashaw, Administration and Democracy] ("The Steamboat Inspection Act . . . demanded that steam-powered vessels . . . demonstrat[e] that they had complied with the new statute's safety regulations.").

419. Owners had to petition a district judge to appoint:

> [O]ne or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam engines, steamboat boilers, or other machinery belonging to steam vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection . . . .

Act of July 7, 1838 § 3.

After many more steamship explosions and disasters, Congress created a steamship safety system in 1852, which promulgated rules and adjudicated licensing cases, relying on engineers and scientific experts more than on lawyers.[420] The number of steamship explosions declined by eighty percent.[421]

The statute created steamboat "supervising inspectors," appointed by the President with Senate advice and consent.[422] "Inspectors" were appointed by a panel of three: "The collector or other chief officer of the customs, together with the supervising inspector for the district, and the judge of the district court of the United States for the district in each of the following collection districts . . . ."[423] A three-member panel structure provides more depth—some internal checks and balances—but including an Article III judge in the appointment process adds interbranch checks and balances and suggests a judicial-like dimension to the inspector office. Quasi-judicial, if you will. Congress created a powerful new agency with a mix of depth, regulating private enterprise in fine detail—and yet the congressional debates in either house reflect no constitutional objections, according to legal scholars David Currie and Jerry Mashaw.[424]

4. *The Puzzle of the California Land Commission.* — Although Congress flexed its Article I power to instantiate the quasi-judicial tradition throughout antebellum American history, this power came with discretion. Congress could create court-like administrators but nonetheless choose to subject them to presidential control where countervailing considerations were present.

Congress's discretion in the exercise of its Article I power is illustrated by the California Board of Land Commissioners (CBLC), created by the California Land Act of 1851.[425] After a nearly two-year-long war, the United States and Mexico officially pursued peace by signing the Treaty of Guadalupe Hidalgo.[426] The Treaty required Mexico to cede massive territories to the United States, including much of what is now the Southwest United States. The Treaty also contained provisions ensuring

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420. Act of Aug. 30, 1852, ch. 106, §§ 1, 9, 18, 10 Stat. 61, 61, 63, 70; Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 189–94 (2012) [hereinafter Mashaw, Administrative Constitution].

421. See Mashaw, Administration and Democracy, supra note 420, at 1647.

422. Act of Aug. 30, 1852 § 18; see also Mashaw, Administrative Constitution, supra note 420, at 194.

423. Act of Aug. 30, 1852 § 9.

424. See David P. Currie, The Constitution in Congress: Democrats and Whigs 1829–1861, at 124 (2005) ("Congress responded [to steamboat accidents], without significant debate, by enacting a comprehensive code of steamboat safety . . . ."); Mashaw, Administration and Democracy, supra note 418, at 1628–30 ("[T]he steamboat regulatory statutes raised no questions of constitutionality in either house.").

425. California Land Act of 1851, ch. 41, §§ 1–3, 9 Stat. 631, 631.

426. Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

the protection of property in California.[427] The CBLC was created to realize the Treaty's promises.

The Land Act created a three-member commission appointed by the President with the advice and consent of the Senate.[428] The CBLC was tasked with deciding Spanish and Mexican land-grant claims under the new Treaty. The Act provided that claimants "shall present" their grant-based claims to commissioners.[429] The commissioners then would "decide upon the validity" of the claim and certify the decision to the U.S. District Attorney.[430] Claims not presented within two years would be treated as part of the public domain.[431]

For a long time, the CBLC looked like a clear-cut example of the quasi-judicial tradition. The final Attorney General's Report that influenced the drafting of the APA listed the CBLC as America's first "independent" commission.[432] But these characterizations, so far unchallenged in the administrative law literature, are far from apparent on further examination. The Board's organic statute did not grant its commissioners term-of-year tenure. To the contrary, the statute expressly provided that the commission would continue "for three years . . . *unless sooner discontinued by the President of the United States*."[433] By granting the President the power to "discontinue[]" the entire commission for reasons apparently unrelated to the commissioners' performance in office (given the lack of textual limits on such a power), there is a plausible claim that Congress innovated with a unique at-will removal scheme well suited for a time-limited administrative mission.[434] Congress also signaled presidential control over the Board's activities by granting the President the authority to set the time and place of its sessions.[435]

Overall, the CBLC is a curious creation. In an effort at transparency, this Article offers the CBLC as a potential counterexample. If Congress did subject the CBLC to presidential will in a more unitarian manner, one can only speculate as to its reasons. Congress may have decided that the circumstances warranted greater presidential control over administration.

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427. See id. arts. VIII–IX (stipulating that property "of every kind" in California be "inviolably respected").

428. See California Land Act § 1.

429. Id. § 8.

430. Id.; see also id. § 11 (providing that the commissioners would decide claim validity based upon the terms of the treaty, the "law of nations," "the laws, usages, and customs of the government from which the claim is derived," "the principles of equity," and "the decisions of the Supreme Court").

431. Id. § 13.

432. Comm. on Admin. Proc., Administrative Procedure in Government Agencies, S. Doc. No. 77-8, at 9 (1st Sess. 1941).

433. California Land Act § 1 (emphasis added).

434. Id.

435. See id. § 5.

The CBLC was burdened with tasks touching on foreign relations (the implementation of a treaty) in territories recently obtained through conquest. A darker explanation lurks in plain sight: Congress may not have extended the quasi-judicial tradition to the CBLC because it was a faux-adjudicatory entity that would oversee the property rights of newly conquered peoples of color. Further research will be needed to unpack the importance of the CBLC.

5. *Federal Court of Claims.* — In 1855, Congress created the Federal Court of Claims with three judges, appointed by the President, with the Senate's advice and consent, "to hold their offices during good behaviour."[436] Its sponsors "proposed a confusing amalgam of an agency and a court," without the finality of an Article III court, as scholars have observed.[437] The main sponsor stated about his proposed bill, "I have not made the decision of the board final in any case."[438] After debate, amendments, and compromises, Congress created more of an agency than a court "because Congress continued to cling to the 'legislative model' wherein Congress still retained significant control over monies."[439] The Court of Claims also had some unusual powers "to appoint commissioners to take testimony to be used in the investigation of claims that may come before it."[440]

Congress made this complication even more explicit in 1863, when it amended the act to state that no award would be paid until it had been "estimated for" by the Secretary of the Treasury, and until Congress had validated and authorized the payment.[441] In *Gordon v. United States*, Chief Justice Roger Taney ruled that the Court of Claims did not exercise judicial power because the Secretary of the Treasury or Congress could overrule it: "The real and ultimate judicial power will, therefore, be exercised by the Legislative Department . . . ."[442]

In 1933, the Supreme Court ruled that the Court of Claims was a "legislative court" under Article I, and thus its judges were not protected

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436. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612.

437. Michael Dichio, Logan Strother & Ryan J. Williams, "To Render Prompt Justice": The Origins and Construction of the U.S. Court of Claims, 36 Stud. Am. Pol. Dev. 120, 130 (2022).

438. Id. at 131 (internal quotation marks omitted) (quoting Cong. Globe, 33d Cong., 2d Sess. 71 (1854) (statement of Sen. Brodhead)).

439. Id.; see also Manners & Menand, For Cause, supra note 139, at 45 (commenting on the congressional debate over whether to give the Court of Claims judges protection from removal, illustrating the mixed views about this court's constitutional status); William M. Wiecek, The Origin of the United States Court of Claims, 20 Admin. L. Rev. 387, 395–98 (1968) (explaining how the Court of Claims functionally became an "advisory board").

440. Act of Feb. 24, 1855 § 3.

441. Act of Mar. 3, 1863, ch. 92, § 14, 12 Stat. 765, 768; see also Wiecek, supra note 439, at 400; David A. Case, Article I Courts, Substantive Rights, and Remedies for Government Misconduct, 26 N. Ill. U. L. Rev. 101, 153 (2005); Wiecek, supra note 439, at 400.

442. Gordon v. United States, 117 U.S. 697, 702–703 (1864).

by Article III's rule against the reduction of judicial salaries.[443] The Court endorsed "the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution."[444] The Court explained that the Constitution uses the word "all" in some places, but not for Article III jurisdiction over "controversies."[445] Thus, Article III courts have jurisdiction over many, but not all, cases and controversies, and Congress may assign some "judicial power" over cases and controversies to non–Article III courts.[446]

From 1855 through the 1930s, the Supreme Court held at various times that the Federal Court of Claims was a non–Article III court in a mixed role between branches, serving under the review of both Congress and the executive branch (Secretary of the Treasury), a kind of quasi-judicial role.[447] It then held that the Court of Claims exercised "judicial power" outside Article III, another kind of quasi-judicial institution.[448] And its judges were protected with tenure during good behavior the entire time.

III. THE POSTBELLUM QUASI-JUDICIAL FUNCTION

The quasi-judicial category became more sophisticated after the Civil War. Postbellum America held the perfect conditions for the second prong identified from this tradition: *judicialized administration*. Agencies in this

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443. See Williams v. United States, 289 U.S. 553, 563–64, 571 (1933).

444. Id. at 566.

445. The Court wrote:

> The significance of the use of the word "all" in some instances and its omission in others is commented upon by Mr. Justice Story in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 333–336, and it is there suggested that the word "all," which is used in the earlier part of [section] 2 of the judicial article, was dropped in the latter *ex industria*, and that from this difference of phraseology, perhaps, a difference of constitutional intention may with propriety be inferred. See also 2 Story on the Constitution (4th ed.), p. 458, § 1674 *et seq* . . . . And here the omission to qualify "controversies" by the word "all," as in some other instances, becomes peculiarly suggestive.

Id. at 573.

446. Id.

447. See, e.g., Gordon v. United States, 117 U.S. 697, 698–99 (decided 1864, reported 1885) (holding that the Court of Claims's judgments were subject to review by the Secretary before claims could be paid "subject to the supervision and control of Congress"); Ex parte Bakelite Corp., 279 U.S. 438, 454–55 (1929) ("[T]his Court plainly [i]s of [the] opinion that the Court of Claims is a legislative court specially created . . . [and] undoubtedly and completely under the control of Congress." (citation omitted) (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 144–45 (1872))); Williams v. United States, 289 U.S. 553, 571 (1932) (reaffirming *Bakelite*).

448. See *Williams*, 289 U.S. at 565 (finding that the Court of Claims exercises "judicial power").

period exhibited more nuanced, court-like procedures,[449] and more thickly articulated judicial processes remained connected to a need for insulation from hierarchical political control. And, as demonstrated, the quasi-judicial category was just a new label on that older instinct that drove Madison, Hamilton, and their peers in similar directions.

Slowly, the successes of so-called "independent regulatory commissions" (IRCs) prompted Congress to endow executive departments with judicial functions.[450] This expansion of court-like procedures was based on demands for a higher volume of adjudications that IRCs could not meet on their own.[451] The need for court-like independence across the administrative state was a pressing issue that was resolved only with the New Deal settlement enshrined in the APA.[452]

The history from the end of the Civil War to the end of the New Deal reframes our understandings of *Myers*, *Humphrey's*, and Congress's role in the construction of the modern state. As discussed below, Congress's actions in the 1870s and 1880s already popularized administrative judicialization around publicly salient commissions like the Interstate Commerce Commission (ICC).[453] The importance of new commissions wielding quasi-judicial functions made the quasi categories the stars and organizing principles behind the newly emergent administrative law field. By the time Taft sat down to write *Myers*, the quasi-judicial function had been the dominant heuristic in American administrative law for decades. His opinion, Congress's response, and the *Humphrey's* decision were all shaped by the quasi-judicial category.

The postbellum period is especially consequential for this Article's analysis because it offers a public-facing turn toward administrative judicialization. Multiple generations of Americans were guided by an instinct toward insulating quasi-judicial functionaries from hierarchical political control, but that instinct was merely one thread of many in the Early Republic. In the Gilded Age, Congress turned toward court-like administration in the construction of several publicly salient agencies. In this period, the public and all three branches bought into judicialized administration.

A. *Judicialized Procedures and Removal "Permissions"*

Recall the insights of Jane Manners and Lev Menand: Early American law developed around legislatures' ability to insulate administrators from

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449. See Okayama, supra note 34, at 11 (listing the second feature of administrative judicialization as "formal, courtlike procedures usually featuring adversarial settings, cross-examination of witnesses, and the taking of full records").

450. See infra sections III.A–.B.

451. See infra section III.B.

452. See infra section III.B.5.

453. See infra notes 465–482 and accompanying text.

executive removal with term-of-year tenures.[454] Those beginnings were followed in the nineteenth century by the development of statutory "permissions" that would allow removal for officials with term-of-year tenures in explicit circumstances.[455] The various removal provisions that have been the obsession of administrative law mavens for generations—for example "for cause" removal provisions or in cases of "inefficiency, neglect of duty, and malfeasance in office" (INM)[456]—were narrowly tailored exceptions to a baseline rule that cuts against the basic premise of the UET.[457]

While Congress paused its use of term-of-year protections in the Jacksonian era through the Civil War, many states continued the tradition more robustly through the nineteenth century.[458] States deployed term-of-year tenures and removal permissions when dealing with adjudicatory officials and administrators who dealt with money-related policy,[459] which after the war seeped into the federal law of officeholding.[460] Understanding how INM provisions and for-cause removal interacted with term-of-year tenures helps make the remaining history in this Article more legible to the reader.

B. *A Surge in Independent Commissions*

After the Civil War, the country faced a bona fide crisis in governing authority brought on by a tidal wave of corruption and the surge of new industries that defied traditional modes of regulation.[461] Railroad corporations were a specific challenge to legislative dominance in the postbellum landscape because they generated huge flows of money (and hence, corruption) while defying legislative capacity for direct regulation.

Congress's early drive toward comprehensive railroad legislation was shaped by three sources. First, some states had piloted "weak" railroad commissions that engaged in tasks to help state legislatures devise effective regulations.[462] A second category of "strong" state commissions carried a

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454. Manners & Menand, Three Permissions, supra note 104, at 5 ("Since before the Founding, offices held for a term of years, in the absence of constitutional or statutory language to the contrary, were designed to be inviolable: Short of impeachment, their holders could not be removed before the end of their terms.").

455. Id. at 39–52.

456. Id. at 4.

457. Id at 18.

458. Id. at 39–52.

459. See id. at 43–49.

460. Id. at 52–62.

461. See generally Robert H. Wiebe, The Search for Order, 1877–1920 (1967) (describing America's transformation between Reconstruction and the end of the First World War into a more centralized society with greater bureaucratic order).

462. Manners & Menand, Three Permissions, supra note 104, at 53 & n.300.

ratemaking power.[463] In other words, these commissions could issue legislative rates that carried the force of law. Finally, lawmakers were influenced by the English Regulation of Railways Act of 1873. This Act created a commission for regulating railroads and canals that was essentially a court in everything but name.[464]

Congress's solution was the Interstate Commerce Act.[465] The Act created the ICC,[466] a multi-member adjudicatory body, with members appointed to six-year terms by the President with Senate confirmation, requiring "inefficiency, neglect of duty, or malfeasance" for the President to remove them.[467] These INM protections mirrored judge-like tenure. The ICC was initially adjudicative, and it lacked a ratemaking power.[468] Following an adversarial model, the ICC could take evidence and issue decisions that operated as prima facie evidence in Article III courts.[469] Legislators knew that the ICC was meant to embody court-like virtues that would insulate commissioners from politics.[470] In creating this new quasi-judicial body, Congress saw fit to insulate commissioners from removal with an INM provision.[471] Lawmakers did not scrutinize that position because no one at the time thought it was constitutionally problematic to insulate judge-like administrators from presidential removal.[472] More protracted debates surrounded Congress's decision to include a partisan-

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463. Id.

464. Okayama, supra note 34, at 49 ("The English commission possessed 'all the powers and attributes of a court' and could 'do everything that any other court can do' . . . ." (quoting 16 Cong. Rec. 888 (1885) (statement of Sen. Coke))).

465. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

466. Id. §§ 11–12.

467. Id. § 11. See generally Jed Handelsman Shugerman, The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance, 31 J.L. & Pol. 139, 164–81 (2015) [hereinafter Shugerman, Independent Agencies] (discussing the historical significance of the ICC).

468. See Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 505–06 (1897) (explaining that the ratemaking power is legislative, not administrative or judicial, and that Congress did not intend to give such a large power to the ICC).

469. See Interstate Commerce Act § 14.

470. See Manners & Menand, Three Permissions, supra note 104, at 54–57 (discussing how the Senate's Select Committee on Railroads was largely "receptive" to Illinois Senator Shelby Collum's arguments that statutory provisions should ensure commissioners were "expert and impartial" and thus insulated from "politically motivated interference by the President").

471. See Interstate Commerce Act § 11.

472. Manners & Menand, Three Permissions, supra note 104, at 58–59 ("Despite the [Interstate Commerce Act's] obvious significance at the time, almost no one contested its removal provisions." (footnote omitted) (citing Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920, at 138 (1982))).

balance provision ensuring that a 3-2 balance between Republican and Democratic appointees would prevail on the Commission.[473]

Congress's attempts to sell a court-like agency were successful. In 1894, the Supreme Court upheld Congress's delegation of court-like tools to the ICC, like the power to issue subpoenas during an investigation.[474] A succession of Presidents adhered to Congress's vision and appointed to the ICC a legion of lawyers who ensured the new commission's judicialization from the inside.[475] As new agencies established judicialized procedures, the Supreme Court's case law came to expressly recognize the quasi-judicial function and use its presence to think through legal questions. By 1913, the Court treated as beyond peradventure that Congress's delegation of "quasi-judicial" functions necessarily imposed requirements for judicialized procedures on agencies.[476] Increasingly, the idea of a quasi-judicial function became a heuristic for a three-way conversation between legislators, lawyers, and judges over the legal implications that flowed from the delegation of court-like procedures to non–Article III tribunals.

The ICC's influence on Congress's thinking was explored by Professor Hiroshi Okayama, who argues that the new Commission's court-like functions constituted an important turning point. Okayama shows that Congress, not the judiciary, was responsible for the ICC's "judiciality."[477] Once Congress worked quasi-judicial functions into a high-profile agency such as the ICC, agency judicialization became a habit.[478] The federal judiciary followed this trend. They increasingly treated quasi-judicial commissions like courts and slowly grew more deferential toward agency factfinding conducted through court-like processes.[479]

Americans ate this up. The ICC became a political success story that vindicated administrative judicialization in a public-facing manner.[480] In a

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473. Id. at 59 (discussing Republican Congressman James Weaver's protests that the "bill's staggered terms" would give the next President "the power to place three political partisans on the commission").

474. See Interstate Com. Comm'n v. Brimson, 154 U.S. 447, 476 (1894).

475. See Okayama, supra note 34, at 61.

476. Interstate Com. Comm'n v. Louisville & Nash. R.R. Co., 227 U.S. 88, 91 (1913). In the famed 1913 Rate Case, the Court string cited nearly a dozen cases for the proposition that Congress's decision to delegate "quasi-judicial" functions necessarily required a fair hearing in which the facts support the ICC's orders. Id. at 91–92.

477. Okayama, supra note 34, at 61–63.

478. See id. ("[T]he rise of the ICC was a critical juncture that set off the systemic judicialization of the US administrative state, thereby introducing procedural uniformity to public administration.").

479. Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940, at 36–43 (2014) (narrating the judiciary's movement from de novo review to deferential review of agency factfinding in a discussion of the career of Charles Evans Hughes).

480. See Marver H. Bernstein, Regulating Business by Independent Commission 265 (1955); George Chandler, The Interstate Commerce Commission—The First Twenty-Five

nation plagued by Gilded Age inequalities, Americans viewed the ICC and its regulations as a new mode of ensuring fairness in the national economy. The concern for fairness and the optics of the ICC's court-like proceedings helped make administrative judicialization a political winner. By 1916, Francis Bacon James proclaimed that the ICC was "not only the most efficient but the most democratic *tribunal of justice* ever created."[481] To observers like Felix Frankfurter, the ICC served as a model for a wave of state-level commissions that copycatted Congress's penchant for administrative judicialization.[482]

After the Supreme Court's notorious *Standard Oil* decision,[483] lawmakers again pined for judge-like administrators in the realm of antitrust, modeled after the ICC.[484] Senator Francis G. Newlands (D-NV) tapped ICC staffers to help draft a bill establishing an Interstate Trade Commission as a "semi-judicial body."[485] Newlands explained: "[T]here should be a commission rather than one executive official, because there are powers of judgment and powers of discretion to be exercised. The organization should be quasi judicial in character . . . . Such work must be done by a board or commission . . . independent of executive authority . . . ."[486] While Congress was filled with competing factions who had different views of the legislation, Newlands's quest for a quasi-judicial body had a decisive impact on the new Federal Trade Commission

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Years, 16 Transp. L.J. 53 (1987); Paul Stephen Dempsey, The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure, 95 Marq. L. Rev. 1151, 1160–63 (2012); Shugerman, Independent Agencies, supra note 467, at 144 & n.9.

481. Francis B. James, The Practical Administration of Right and Justice by the Interstate Commerce Commission 12 (1916) (emphasis added).

482. See Felix Frankfurter, A Selection of Cases Under the Interstate Commerce Act at iii (1915) ("Such study is the more imperative now that the International Commerce Act . . . served as the basis for the . . . Federal Trade Commission Act . . . as well as for the regulation of state utilities . . . .").

483. See Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58–62 (1911) (holding that the Sherman Act prohibits only unreasonable restraints on trade).

484. See Okayama, supra note 34, at 90–91 (explaining that reformers coalesced around an antitrust commission "with the ICC as its model").

485. Okayama, supra note 34, at 90 (internal quotation marks omitted) (quoting Letter from Franklin K. Lane, Interstate Com. Comm'r, to Sen. Francis G. Newlands (June 8, 1911)).

486. Hearing Before the S. Comm. on Interstate Com. (Aug. 4, 1911) (statement of Sen. Newlands, S. Comm. On Interstate Com.), reprinted in S. Rep. No. 63-597, app. 15 at 22 (2d Sess. 1914).

(FTC)[487] and attracted support from a bipartisan cross section of lawmakers.[488]

The finished product reflected Congress's obsession with administrative judicialization and further inspired legislators and administrators to pursue this court-like model.[489] The FTC was armed with the ability to issue cease-and-desist orders and sign subpoenas.[490] Private parties would lodge complaints with the FTC, followed by an initial investigation, hearings conducted by an "examiner of the commission" with "experience in trials in the courts," rulings on the admissibility of evidence, and witness testimony.[491]

All told, Congress's turn toward court-like administration was decisive. During the Progressive Era, Congress created several agencies that aped court-like procedures. Because this period coincided with the emergence of a distinct administrative law field in the American legal academy, the quasi-judicial function played a starring role in the law of administration.

1. *The Dominance of the Quasi-Judicial Function.* — From the end of the Civil War to the end of the New Deal, the quasi-judicial function was an idea guiding the development of the administrative law field. Putting aside its tremendous influence on states and municipalities, the Supreme Court's precedents in this period were shaped throughout by the quasi-judicial function. The Court used the quasi-judicial category to think through the requirement of due process,[492] standards of review,[493]

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487. See Okayama, supra note 34, at 91–92 (describing Newlands's role in the creation of the Interstate Commerce Act (ICA) and the influence of the ICA on the subsequently drafted Federal Trade Commission Act).

488. See id. at 92 ("Sen. George Norris (R-NE), for instance, predicted that the commission was 'going to be somewhat similar to a court, or to the [ICC].'" (quoting 51 Cong. Rec. 11597 (1914) (statement of Sen. Norris))).

489. See id. at 23, 25 ("The commissions became model administrative agencies whose judiciality spread to the entire administrative state.").

490. See Federal Trade Commission Act of 1914, §§ 5, 9, 38 Stat. 717, 719–20, 722–23.

491. W. Stull Holt, The Federal Trade Commission: Its History, Activities and Organization 17–20 (1922).

492. See, e.g., Morgan v. United States (*Morgan II*), 304 U.S. 1, 14–15 (1938) (discussing how Congress's decision to vest "quasi-judicial" function in an agency means that regulated parties are entitled to "a fair and open hearing").

493. See, e.g., St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 83–84 (1936) (Brandeis, J., concurring) (distinguishing between judicial review of legislative and quasi-judicial ratemaking and writing that "the Court's duty is to determine merely whether there was evidence upon which reasonable men could have found as the Secretary did, with regard to value and income").

remedies,[494] finality,[495] the right to an administrative hearing,[496] the right to a decision based on evidence obtained,[497] and issues touching on what we today call the UET.[498] Key ideas that we take for granted today like the *Accardi* principle were the product of the quasi-judicial function.[499]

At various points, Justices of the Supreme Court seemed to imply that they were green-lighting a vast expansion of administrative powers because quasi-judicial procedures and decisionmaker neutrality would govern their use.[500] Judicial opinions were, however, merely lagging indicators in a larger intellectual revolution. American administrative law was built on a foundation of the "quasi" categories decades before *Myers* or *Humphrey's*.[501]

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494. See, e.g., Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 514 (1943) (Murphy, J., dissenting) (arguing that because courts routinely pass judgment on administrators' "'quasi-judicial' findings," they are equally competent to require a probable cause showing before lending their aid to enforce an agency subpoena).

495. See, e.g., Overland Motor Co. v. Packard Motor Co., 274 U.S. 417, 421 (1927) (distinguishing between types of agency actions, including "quasi-judicial action[s]" to understand administrative finality (internal quotation marks omitted) (quoting In re Barratt's Appeal, 14 App. D.C. 255, 257 (D.C. Cir. 1899))).

496. See, e.g., *Morgan II*, 304 U.S. at 14–15; Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 304 (1937) (equating the hearing requirement in quasi-judicial proceedings with "the rudiments of fair play" (internal quotation marks omitted) (quoting Chi., Milwaukee, & St. Paul Ry. Co. v. Polt, 232 U.S. 165, 168 (1914))); Morgan v. United States (*Morgan I*), 298 U.S. 468, 480 (1936) (determining that a quasi-judicial proceeding requires a hearing and "evidence adequate to support pertinent and necessary findings of fact").

497. See, e.g., Interstate Com. Comm'n v. Louisville & Nash. R.R. Co., 227 U.S. 88, 93–94 (1913) (explaining that when the ICC acts in a "quasi-judicial capacity," it may not base its determination on extra-record facts and considerations).

498. See, e.g., Humphrey's Ex'r v. United States, 295 U.S. 602, 628–29 (1935) (upholding an INM provision because Congress delegated the FTC quasi-judicial functions), overruled by Trump v. Slaughter, 146 S. Ct. 2283 (2026); Myers v. United States, 272 U.S. 52, 135 (1926) ("Then there may be duties of a *quasi-judicial character* imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." (emphasis added)).

499. The *Accardi* principle is the maxim that "[a]gencies must comply with their own regulations." Thomas W. Merrill, The *Accardi* Principle, 74 Geo. Wash. L. Rev. 569, 569 (2006); see also United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954). Despite its namesake, the earliest case to flesh out the principle was *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.* See 284 U.S. 370, 389 (1932) (holding that the Interstate Commerce Commission "was bound to recognize the validity of the rule of conduct" it prescribed and thus could not "repeal its own enactment with retroactive effect").

500. See, e.g., *Morgan II*, 304 U.S. at 14–15 ("The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principle[] that . . . in administrative proceedings of a *quasi-judicial character* the liberty and property of the citizen shall be protected . . . ." (emphasis added)).

501. See, e.g., Castro v. Hendricks, 64 U.S. (23 How.) 438, 443 (1859) ("[T]he surveyor general exercises a quasi judicial power . . . ."); Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849) ("His position, in such case, in many respects becomes quasi judicial . . . ." (emphasis omitted)).

The new administrative law intelligentsia always knew that the quasi categories had implications for executive removal of administrators: Professor Bruce Wyman's path-clearing treatise on administrative law distinguished "centralized" from "decentralized" administration, using "quasi judicial" to describe insulated removal processes in decentralized systems.[502] Wyman's discussion of the quasi-judicial function shows that turn-of-the-century American lawyers maintained a reflexive expectation that judge-like administrators would be insulated from executive removal. The category's existence was a repudiation of "centralized" gubernatorial or presidential control over administration.[503]

In 1905, Professor Frank Goodnow connected the longstanding phenomenon of administrative judicialization to extant political theory.[504] He used the term "quasi-judicial" to separate apolitical government functions from the "political executive function."[505] Acknowledging separation-of-powers traditions, Goodnow argued for harmony between lawmaking and administration, dividing executive power into "political" (policy-setting) and "administrative" (implementation via "scientific, technical, commercial, or quasi-judicial" tasks).[506] For instance, tax assessments resembled court-like powers, emphasizing independence from presidential politics—a distinction later echoed in *Humphrey's*.[507] Using the idea of court-like administration to understand the nuances of the nascent administrative state was not new. But around the turn of the twentieth century, thinkers like Goodnow highlighted the quasi-judicial category in conceptualizing the new administrative law field.

Law professors normalized the idea of court-like administration. Professor Ernst Freund's influential 1911 textbook divided administrative powers into "Executive," "Quasi Judicial," and "Quasi Legislative," excerpting cases that showed courts accepting agencies' judicial roles and

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502. Wyman, supra note 401, at 177–78.

503. Id.

504. See Frank J. Goodnow, The Principles of the Administrative Law of the United States 65 (1905) ("[T]he executive is under the control of extra-legal political bodies . . . [and] the powers conceded to the executive in the formal constitution may be much less independently exercised . . . .").

505. Id. at 7, 65–68; see also Nathaniel Wald Donahue, What Does *Humphrey's Executor* Mean?, Yale J. on Regul.: Notice & Comment (May 10, 2025), https://www.yalejreg.com/nc/what-does-humphreys-executor-mean-by-nathaniel-wald-donahue/ [https://perma.cc/MML4-R7HG] (arguing that the quasi categories were well represented in Progressive Era political thought).

506. See Goodnow, supra note 504, at 68 ("In the cases which have just been mentioned, the discharge of its functions by the executive authority should be uninfluenced by political considerations, else the work will be done inefficiently or partially, and it may be corruptly.").

507. See id.; see also Thomas M. Cooley, A Treatise on the Law of Taxation 363 (Chicago, Callaghan & Co., 2d ed. 1886) (noting the "fundamental rule that in judicial or *quasi* judicial proceedings affecting the rights of the citizen he shall have notice and be given an opportunity to be heard" and collecting cases).

importing procedural entitlements like notice.[508] Because this was the high point of Freund's influence on the administrative law field, his deployment of the categories was consequential.[509] There was a budding understanding among lawyers that thickly articulated judicial procedure was the price new administrators paid for the wielding of new authorities. Moreover, the core implication of the quasi-judicial function was that court-like administrators could be—and often should be—insulated from politics and hierarchical executive control.[510]

2. *Taft's Struggle with the Quasi Categories.* — Everything up to this point shows that administrative judicialization was an important part of American history and tradition from the English backdrop through at least the 1920s. Two decades into the twentieth century, however, the quasi-judicial category faced a potential obstacle in the personage of Chief Justice William Howard Taft. When President Warren G. Harding nominated him to serve on the Supreme Court, Taft was decades removed from formal legal practice.[511] But even Taft's time away could not obscure the centrality of the quasi-judicial category in the new Chief Justice's conception of the administrative law landscape. In his wilderness years between his defeat in the presidential election of 1912 and his nomination to the Court, Taft gave a series of speeches and drafted short writings that reveal a legal mind catching up with recent developments.[512]

In his wilderness writings, Taft distinguished between a "purely executive" function and the "gradual[ly]" growing categories of "quasi-legislative" and "quasi-judicial" functions.[513] "Despite this acknowledgment, Taft systematically undercut the quasi categories' implications, as seen in his analysis of the Comptroller's role."[514] At the time, the Comptroller of the Treasury was required to use warrants to approve officials' attempts to draw money via an appropriation act.[515] For Taft, the Comptroller was a quasi-judicial administrator because the office was empowered to determine whether a given warrant was compatible with appropriations statutes on a case-by-case basis.[516] Because the Comptro-

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508. See Ernst Freund, Cases on Administrative Law: Selected From Decisions of English and American Courts ix–x (1911).

509. See Ernst, supra note 479, at 9–27 (providing a narrative account of Freund's career that illustrates an ascent across the 1890s, 1900s, and 1910s, before detailing Freund's decline in influence in the 1920s).

510. See id. at 11–12 ("Because public offices were not joined in a hierarchy of authority and control, some other means of keeping them in check had to be found.").

511. Baumann, Remembering Congress, supra note 17 (manuscript at 23).

512. See id. at 23 (discussing Taft's "wilderness years" between 1913 and 1921).

513. William Howard Taft, The Presidency: Its Duties, Its Powers, Its Opportunities, and Its Limitations 10 (1916).

514. Baumann, Remembering Congress, supra note 17 (manuscript at 23).

515. Id.

516. Taft, supra note 513, at 66–67.

ller's determinations were judge-like, Taft reasoned, the President could not revise their judgments.[517] Forebodingly, Taft nonetheless concluded that the President could remove the Comptroller if he disagreed with their case-by-case determinations.[518]

While Taft was writing his *Myers* opinion, the litigants in that case sent the Taft Court a copy of an opinion that typified the mainstream and longstanding view of what the quasi categories implied about executive control and removal.[519] That case was *Woodruff v. Benn*, in which the Pennsylvania Supreme Court held that a governor with a Taft-like conception of executive power unlawfully attempted to remove a member of the state Public Service Commission who was protected by an INM provision.[520]

Woodruff was an annoying reminder for Taft that the quasi-legislative function had swept the administrative law landscape in a short time.[521] The Pennsylvania Supreme Court made the categorical label attached to the Public Service Commission's functions outcome-determinative: If the Commission's functions were quasi-judicial or quasi-legislative in character, then the state legislature could insulate commissioners from gubernatorial removal.[522] The quasi-judicial function's emphasis on insulating judge-like administrators from executive control was a painful reminder that Taft was attempting to swim upstream from one of the most important ideas in American administrative law.

Ultimately, Taft forced the views from his wilderness-years writings into his *Myers* opinion. Taft wrote that there might be special considerations for quasi-judicial functionaries wielding judge-like powers, but when these functionaries ran afoul of the president, they could be removed at will.[523] With Post's new and magisterial history of the Taft Court, we now can see that Taft included this portion of his opinion in an attempt to maintain his majority and tamp down on criticism.[524] Taft's contemporaries understood that his compromise was a veiled attempt at

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517. Id. at 66.

518. Id.

519. Baumann, Remembering Congress, supra note 17 (manuscript at 25).

520. See Commonwealth ex rel. Woodruff v. Benn, 131 A. 253, 255 (Pa. 1925) (holding that the Pennsylvania state legislature could deploy *Myers*-like means for restricting gubernatorial removal over administrators wielding "quasi judicial" functions).

521. See Post, supra note 98, at 408–09 (narrating Taft's reaction to *Woodruff* and how he distinguished it from *Myers*).

522. See *Woodruff*, 131 A. at 258.

523. See Post, supra note 98, at 415 ("Presidential removal power might easily be circumvented by vesting the appointment of inferior executive officers in heads of departments, yet all executive officers appointed by the president were as a matter of constitutional law 'removable at the President's will.'" (quoting Edward S. Corwin, The President as Administrative Chief, 1 J. Pol. 17, 46 (1939))).

524. Id. at 406, 411–16 (describing how Taft created a majority committee that met twice at his house to discuss the opinion).

destroying the logic of the quasi-judicial function.[525] The whole point of that category was that officers following judge-like procedures could be (and often should be) insulated from hierarchical control. If judge-like administrators were allowed to exercise their functions but could still be removed at will, the project of creating the space for judge-like virtues in the modern state would be destroyed.

A progressive group arranged for the country to be blanketed with a pamphlet version of Professor Edward Corwin's blistering critique of Taft's *Myers* opinion.[526] In the preface to that pamphlet, the progressives made their intentions known. *Myers* had to be contested, they indicated, because Taft's reasoning was incompatible with the longstanding logic of the quasi-judicial and quasi-legislative categories.[527]

3. *Congress's Blueprint. —* *Myers* might seem inconsequential. After all, Taft's reasoning was walked back just a few years later in *Humphrey's*.[528] But Taft's zealous disregard for congressional prerogatives forced lawmakers to articulate (behind closed doors) their own constitutional thinking. Within twenty-four hours of the *Myers* decision, lawmakers on Capitol Hill were apoplectic.[529] In part, Senators thought the decision portended the end of the quasi categories.[530] Confusion reigned, and senators turned toward the help they could find.

Recent primary source excavation has revealed that Congress had just built up its own capacities for constitutional deliberation.[531] From 1919 to 1969, both chambers of Congress set up an elaborate procedure of hierarchical and precedential opinions drafting that was housed in the newly created Offices of Legislative Counsel.[532] These Offices centralized

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525. See, e.g., Edward S. Corwin, The President as Administrative Chief, 1 J. Pol. 17, 50 (1939) ("[T]he Chief Justice's conclusion . . . resulted in the paradox that, while the Constitution permitted Congress to vest duties in executive officers . . . to exercise their own independent judgment, it at the same time permitted the President to guillotine such officers for exercising the very discretion which Congress had the right to require!").

526. See H.W.D., Editor's Preface to Edward S. Corwin, The President's Removal Power Under the Constitution, at iii (1927) ("[T]he National Municipal League . . . has prevailed upon Professor Corwin to include the present study in the League's Monograph Series.").

527. See id.

528. See Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935) (claiming that the issue decided in *Myers* was a narrow one, and to the extent that its other discussions "are out of harmony with the views here set forth, these expressions are disapproved"), overruled by Trump v. Slaughter, 146 S. Ct. 2283 (2026).

529. Baumann, Remembering Congress, supra note 17 (manuscript at 31–32) (citing Albert W. Fox, Senate Fight Seen to Strip President of Removal Power, Wash. Post, Oct. 27, 1926, at 1).

530. See id.

531. See Beau J. Baumann, Resurrecting the Trinity of Legislative Constitutionalism, 134 Yale L.J. 2249, 2257 (2025) [hereinafter Baumann, Trinity] (arguing that both the House and the Senate had legislative counsels that "constructed constitutional meaning, set drafting conventions, and helped Congress build its 'hard' and 'soft' powers").

532. Id. at 2256–57.

Congress's legal resources in a way that is unthinkable today. The offices had a vice-grip on statute drafting (just one lawyer in the House Office drafted many of the most important statutes of the twentieth century[533]) and provided lawmakers with binding opinions on Congress's powers under the Constitution.[534] These were the closest Congress has ever come to having equivalents to the Department of Justice's Office of Legal Counsel.[535]

In the eight-and-a-half-year interregnum between *Myers* and *Humphrey's*, the Senate tapped its Office of Legislative Counsel (the SOLC) to organize a response to Taft's unitarian vision in *Myers*.[536] In a set of precedential opinions, the SOLC told the Senate that it could circumvent Taft's reasoning by focusing on beefing up the quasi-judicial and quasi-legislative functions in agencies.[537] Starting in 1928, the SOLC told the Senate that Taft's unitarian vision only applied to purely executive functions.[538] When Congress designed agencies with quasi-judicial and quasi-legislative functions, it insulated those agencies from presidential influence.[539]

The logic here was just articulating mainstream administrative law within the halls of Capitol Hill. To the lawyers of the SOLC, the delegation of quasi-judicial power on an agency allowed insulation from executive control. Again, *that was the entire point of the quasi-judicial function*. The logic up to that point was straightforward: By adopting court-like procedures, virtues, and norms, agencies could receive deference in federal court. The quid pro quo of American administrative law turned on decisionmaker independence and court-like procedures.

The SOLC's work shows that the Senate's lawyers anticipated and enforced the same legal theory that the Hughes Court would later

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533. See Beau J. Baumann, Resurrecting the Trinity of Legislative Constitutionalism: Appendix 1–18, Yale L.J. (May 2025), https://yalelawjournal.org/files/134.7.Baumann Appendix_ng2pawgy.pdf [https://perma.cc/A23A-3M7M] (cataloguing the memoranda and proposed statutes authored by Frederic P. Lee).

534. Baumann, Trinity, supra note 531, at 2256–58.

535. See id. at 2257–58.

536. See Baumann, Remembering Congress, supra note 17 (manuscript at 25–37).

537. Memorandum Upon Constitutionality of Legislation Vesting in Congress Power of Removal of Members of the United States Tariff Commission as Constituted Under the King Amendment, Memorandum from Frederic P. Lee, Off. of Legis. Couns., U.S. Senate, to Sen. William H. King 4 (Sep. 17, 1929) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of Legis. Couns. for the U.S. Senate, Memo Number 110); Memorandum re Constitutionality of Legislation Vesting in Congress the Power of Appointment and Removal of Members of the United States Tariff Commission, Memorandum from Frederic P. Lee, Off. of Legis. Couns., U.S. Senate, to Sen. Robert M. LaFollette, Jr. 3–7 (May 22, 1928) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of Legis. Couns. for the U.S. Senate, Memo Number 76) [hereinafter Memo #76].

538. Memo #76, supra note 537, at 6.

539. Id.

embrace in *Humphrey's*.[540] Because the Senate's constitutional consiglieres embraced administrative judicialization, *Humphrey's* opened the dams for further experimentation. Within a year of *Humphrey's*, the statute drafters of the SOLC set about constructing new statutes that insulated quasi-judicial and quasi-legislative functions from presidential control.[541]

Although the primary sources are in some cases limited, it may turn out that Taft's opinion helped radicalize Congress. It is possible *Myers* forced senators to turn to the constitutional lawyers who adopted the logic of administrative judicialization. And because of how precedential opinions were binding on the SOLC, these opinions guided the next several decades of statute drafting. *Myers* and the response it forced onto Capitol Hill precipitated the adoption of the quasi categories as Congress's formal constitutional theory.

4. *Madison Vindicated?*. — Recall that Madison tried and failed to establish an independent Comptroller of the Treasury and that the norm-based independence of the actual Comptroller established by Congress at the Founding was a source of Taft's separation-of-powers anxiety. In 1921, Congress created a new system with the Budget and Accounting Act.[542] This law created the Government Accounting Office (now the Government Accountability Office or GAO), an Article I agency that is responsible for ensuring Congress's control over the legality of executive-branch spending.[543] The GAO inherited much of the Comptroller's independent, quasi-judicial accounting role but with explicit legislative affiliation.

The head of the GAO, the Comptroller General of the United States, is a powerful official selected through means that mediate presidential influence. A bipartisan, bicameral commission creates a shortlist of potential candidates. The President must choose from the list provided by the commission, and the nominee must be confirmed by the Senate.[544] The Comptroller General serves a fifteen-year term only removable by Congress by impeachment or a joint resolution for specific causes.[545]

This system was, in many respects, a vindication of Madison's proposal. Madison envisioned a check on executive power that might protect

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540. Compare id. at 4 ("Powers of investigation to aid Congress for legislative purposes are not executive powers but are incidental legislative powers"), with Humphrey's Ex'r v. United States, 295 U.S. 602, 627–29 (1935) ("[The FTC] is an administrative body created by Congress . . . to perform other specified duties as a legislative or as a judicial aid. Such a body cannot . . . be characterized as an arm or an eye of the executive.").

541. See Manners & Menand, Three Permissions, supra note 104, at 75 (showing that Congress's output of independent commissions and agencies increased after the *Humphrey's* decision).

542. Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20.

543. Id. § 301.

544. Id. § 302.

545. Id. § 303.

Congress's control over the power of the purse.[546] With the Comptroller General, Congress achieved an Article I safeguard that inherited much of the quasi-judicial instinct present during the Founding.

5. *Challenge and Triumph.* — The final era worth discussing is the New Deal. In the 1930s, there was a bitter contest to determine the fate of the growing administrative state.[547] This was a consequential period for the history and tradition of administrative judicialization because a large portion of the contest was over administrative adjudications' compatibility with preexisting American legal traditions.[548] The anti-administrativist critique of the New Deal state focused on the legal threats posed by the potential arbitrariness of administrative agencies and their officials.[549] All major factions in the lead-up to the Administrative Procedure Act of 1946 (APA) settled on the logic of administrative judicialization, which gave administrative adjudications a starring role in the modern state.[550] The insulation of administrative law judges (ALJs) from hierarchical political control served due process values and helped make the administrative state compatible with longstanding American legal traditions.[551]

This period offers a compelling capstone to this Article's history-and-tradition analysis. In a drawn-out period of contestation, all three branches debated the role of court-like adjudication in the modern state in a series of public-facing documents and decisions. The logic of administrative adjudication was ultimately built into the bones of the modern state through the APA, our administrative law "superstatute."[552] This period cements the same instincts that drove Madison and Hamilton; to maintain faith in quasi-judicial functions, administrative judges had to be insulated from hierarchical political control.

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546. See supra text accompanying note 282.

547. See Gillian E. Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 51–62 (2017) (narrating a clash between anti-administrativists and New Dealers over the legality of the modern state).

548. See id. at 60 ("The constitutionality of administrative adjudication subject to limited judicial review . . . was now incontrovertible . . . .").

549. See Mark Tushnet, Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory, 60 Duke L.J. 1565, 1607 (2011) ("[T]o the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion . . . the government ceases to be one of laws and becomes an autocracy." (alteration in original) (internal quotation marks omitted) (quoting Jones v. SEC, 298 U.S. 1, 23–24 (1936))).

550. See, e.g., Ernst, supra note 479, at 120–25 (discussing how all factions in the fight leading up to the APA converged around a similar notion of "fair play").

551. See id. at 144 ("The history recounted here also remains relevant because it shows that the builders of the new administrative state did not succumb to alien ideologies; rather, they sought to preserve . . . fundamental principles of American government."); id. at 145 (discussing the APA's protection of adjudicatory functions in the service of "fair play").

552. Supra notes 144–146 and accompanying text.

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As it turns out, the biggest threat to the quasi-judicial function, and to administrative judicialization, was never *Myers* but instead post-war belt tightening and legislative exhaustion. After the highwater mark of the Progressive Era, lawmakers were loath to spend money establishing new IRCs. Because there was no concomitant decline in the need for new agency actions, lawmakers fell into the habit of delegating adjudicatory functions to cabinet-level appointees. For instance, the Packers and Stockyards Act of 1921 set an important precedent by delegating tremendous adjudicatory authority to the Secretary of Agriculture.[553] This development threatened the entire intellectual premise of the quasi-judicial category.[554] Slowly, executive departments were judicialized without following the traditional norms of the quasi-judicial category. Because this change in course was not preceded by any public-facing discussion of the appropriateness of normal administrators wielding judge-like functions, the leadup to the APA was complicated by the inconsistent delegation of quasi-judicial functions to a variety of different kinds of administrators.[555]

In the 1930s, the constitutionality of the modern administrative state received a sustained public airing that was shaped by the role of adjudications within executive departments. Critics thought that housing adjudications in departments outside the IRCs created an administrative hydra.[556] Because the administrative "judge" deciding a given case was not insulated from politics and political appointees, the norms of due process that were baked into the quasi-judicial function seemed to be breaking down. The

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553. See Packers and Stockyards Act of 1921, ch. 64, §§ 203–204, 308–310, 42 Stat. 159, 3–6, 16–18 (codified as amended at 7 U.S.C. §§ 193–194, 209–211); Okayama, supra note 34, at 106 ("The passage of the Packers Act was a turning point in the US administrative state judicialization.").

554. See Ernst Freund, Legislative Problems and Solutions, 7 A.B.A. J. 656, 657 (1921) (expressing the view that the Stockyards Act was a fundamental departure from the premises of American administrative law).

555. See Comm. on Admin. Proc., Administrative Procedure in Government Agencies, S. Doc. No. 77-8, at 44 (1st Sess. 1941) (observing that "[t]he methods of hearing and initial decision and the internal procedural structure vary from agency to agency," and describing hearing officers ranging from specialized "trial examiner[s]" to "district engineer[s]" and other agency staff selected for particular proceedings); Emily S. Bremer, The Administrative Procedure Act: Failures, Successes, and Danger Ahead, 98 Notre Dame L. Rev. 1873, 1878 & nn.20–22 (2023) (discussing variation across agencies and the evolution of the FCC's adjudicatory arrangements).

556. See, e.g., James M. Beck, Our Wonderland of Bureaucracy: A Study of the Growth of Bureaucracy in the Federal Government and Its Destructive Effect Upon the Constitution 165–77 (1933) (complaining that the rise of mixed powers in federal agencies was unconstitutional).

combining of all three governmental powers in the hands of uninsulated administrators raised the hackles of constitutional conservatives.[557]

These problems helped shape an interbranch debate about the nature of administration. Over the course of the 1930s and 1940s, several powerful factions offered differing views of the future. But all these powerful groups converged around the logic of administrative judicialization.

Of the different factions, the President's Committee on Administrative Management (PCAM) was most in favor of centralizing power around the presidency.[558] The PCAM's 1937 Report had two overarching messages: (1) the President "needs help" and (2) administration had become too unwieldy.[559] The PCAM's objective was to simplify and reorganize the administrative state around the President and the Executive Office of the President.[560]

From the PCAM's perspective, the IRCs were "a headless 'fourth branch' of the Government."[561] Their vision of a new presidentialist state would have folded IRCs into reorganized executive departments.[562] Despite the PCAM's hostility to IRCs, the presidentialists in its ranks did not dare abandon the quasi-judicial category. Key to the PCAM's policy proposal was a severing of each commission's quasi-judicial functions—their court-like hearings and processes—from everything else.[563] Those quasi-judicial functions would be reorganized into executive departments,

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557. See, e.g., id. (criticizing the concentration of legislative, prosecutorial, and adjudicative powers in administrative officials).

558. Baumann, Remembering Congress, supra note 17 (manuscript at 43–46) (discussing Robert Cushman's research for PCAM challenging independent commissions and *Humphrey's* and noting that not all New Dealers were as dismissive of *Humphrey's* and its limits on the consolidation of executive power in the President); Noah A. Rosenblum, The Antifascist Roots of Presidential Administration, 122 Colum. L. Rev. 1, 32 (2022) ("[PCAM's] constitutionalism and strong defense of separation of powers is what set PCAM apart from its Progressive forebears and made its vision of presidential administration distinctive.").

559. See PCAM Report, supra note 93, at 5 ("The President needs help."); see also Rosenblum, supra note 558, at 36 & n.222 ("He needs help! He needs help to enable him to carry on this enormous business enterprise . . . . [H]e needs more help right in the White House. He hasn't as much help there as he had when he was Governor of New York in Albany." (alterations in original) (internal quotation marks omitted) (quoting Barry Dean Karl, Executive Reorganization and Reform in the New Deal: The Genesis of Administrative Management, 1900–1939, at 244 (1963))).

560. See Rosenblum, supra note 558, at 20–21 & n.109.

561. PCAM Report, supra note 93, at 36.

562. See id. at 5–6, 40 (discussing PCAM's proposal that IRCs would "report directly to the President" and help them monitor and influence the government's ongoing work); Baumann, Remembering Congress, supra note 17 (manuscript at 43–44) (discussing PCAM's criticism of *Humphrey's*).

563. Baumann, Remembering Congress, supra note 17 (manuscript at 46).

but they would retain their insulation from hierarchical control.[564] Even to the most presidentialist faction of the 1930s, the idea that quasi-judicial administrators could be placed under direct presidential control was a nonstarter.

Another faction was the anti-administrativists of the ABA's Special Committee on Administrative Procedure—chaired successively by Louis G. Caldwell, O.R. McGuire, and Roscoe Pound.[565] While they initially decried delegations of legislative and judicial powers, under McGuire, they pivoted to reinforcing siloed and enhanced procedures for quasi-judicial functions, influencing the vetoed Walter–Logan Bill of 1939.[566] The committee now sought to double down on the model of independent commissions granted quasi-judicial functions. As Professor Daniel Ernst notes, their reforms amplified the judicialization already entailed by the quasi categories, revealing conservatives' commitment to the same logic they at first opposed.[567]

Finally, there was the Attorney General's Committee on Administrative Procedure, led by Professor Kenneth Culp Davis, which produced monographs focusing on agencies with quasi-legislative and quasi-judicial powers.[568] Davis appears to have been influenced by scholars like Professor Frederick Blachly and Doctor Miriam E. Oatman, who spent the 1930s documenting the importance of the quasi categories.[569] When the New Deal powers that be tapped Davis to help draft the APA, his work studying quasi-judicial functions across the federal government bore fruit.

The same instinct that guided the Founders and their English forebears received its highest articulation in the APA. As Professor Emily Bremer, one of the great scholars of the APA, concluded, the superstatute's infrastructure was rooted in the quasi-judicial and quasi-legislative categories.[570] Davis's work had solidified what many already knew: The quasi categories were the key ideas guiding the foundation of American

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564. PCAM Report, supra note 93, at 5–6, 40.

565. Baumann, Remembering Congress, supra note 17 (manuscript at 46).

566. Id.

567. Ernst, supra note 479, at 137.

568. This Committee is famed for having provided the "intellectual foundation" for the APA. Emily S. Bremer, The Rediscovered Stages of Agency Adjudication, 99 Wash. U. L. Rev. 377, 380 (2021) (internal quotation marks omitted) (quoting Kenneth Culp Davis, Walter Gellhorn & Paul Verkuil, Present at the Creation: Regulatory Reform Before 1946, 38 Admin. L. Rev. 511, 513–14 (1986)).

569. See Kenneth Culp Davis, Book Review, Laws. Guild Rev., Dec. 1940, at 35, 35 (reviewing Frederick F. Blachly & Miriam E. Oatman, Federal Regulatory Action and Control (1940)) ("Unlike so many who write and speak on themes of bureaucracy and absolutism, the authors not only comprehend but painstakingly set forth the rudimentary facts, and more, about what federal administrative agencies are doing and how they do it.").

570. See Emily S. Bremer, Presidential Adjudication, 110 Va. L. Rev. 1749, 1752 (2024) ("[T]he APA is based on a conception of administrative action as exclusively quasi-legislative and quasi-judicial, and fundamentally not executive." (emphasis omitted)).

administrative law. The APA's core distinction is between rulemaking (quasi-legislative actions) and adjudication (quasi-judicial actions).[571] Reflecting the quasi-judicial function's emphasis on due process and decisionmaker independence, the APA created space for agencies to develop formal, court-like procedures. New ALJs are protected from removal by the Merit Systems Protection Board, which must find cause to justify the removal of ALJs.[572] The APA's hearing provisions balance administrative efficiency with due process and separation-of-powers concerns, insulating quasi-judicial roles while formalizing quasi-legislative processes.[573]

IV. WILL THE ROBERTS COURT STRIKE OUT OUR ADMINISTRATIVE UMPIRES?

The tradition described in this Article is in significant tension with a maximalist UET that would consume quasi-judicial functionaries.[574] This was on display in the *Slaughter* oral arguments as the Justices searched in vain for some limiting principle that would save adjudicatory administrators and Article I judges.[575] The answer to the Court's dilemma has been obscured by a narrative that captured the American legal imagination.[576] Starting in the 1930s and 1940s, and escalating over the last four decades, the opponents of the Hughes Court's actions in *Humphrey's* tried to delegitimize *Humphrey's* by discrediting the quasi-judicial function.[577] This effort was successful; by the time the conservative legal movement was ascendant in the 1980s, the narratives about *Humphrey's* had cemented in the "collective memories"[578] of American lawyers the idea that the quasi-judicial function was *made up* in the 1930s. The Roberts Court's dilemma is downstream from this collective amnesia.

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571. See id. at 1752–53.

572. Id. at 1751 (citing 5 U.S.C. § 7521).

573. See id. at 1781.

574. See Vermeule, supra note 5 (describing a "maximalist" UET that requires the President to wield control over all executive branch officers).

575. See Transcript of Oral Argument, supra note 22, at 14–15 (Sotomayor, J.) (questioning whether the logic of the UET "could be limited"); id. at 17 (Kavanaugh, J.) (asking what could save the Federal Reserve System from the logic of the UET); id. at 18 (Kagan, J.) ("I think the question that these questions go to, right, is, if you take your logic at face value, it seems to include a great many things.").

576. See supra Part III.

577. See Baumann, Remembering Congress, supra note 17 (manuscript at 2) (explaining that the dominant narrative around *Humphrey's* was that its "quasi categories were made up in the moment by the Hughes Court bent on thwarting Roosevelt's New Deal"). For a powerful example of this New Deal narrative, see Cushman, supra note 18, at 8 ("The use of the term 'quasi,' for which the best synonym is 'not exactly,' is a confession of vagueness, an announcement that precise definition is impossible.").

578. See Baumann, Remembering Congress, supra note 17 (manuscript at 7 & n.45) (elaborating on this concept).

The irony of this moment is that the Roberts Court's salvation is hidden in plain sight. The quasi-judicial tradition reflects all their anxieties over subjecting monetary policy and administrative adjudications to unmediated presidential control. The greatest barrier to deploying this tradition is the unitarians' own dismissal of the quasi-judicial and quasi-legislative functions. But as this Article shows, the *Humphrey's* Court did not invent either concept. Rather, a unanimous Hughes Court saw the long tradition that has been hidden by our collective amnesia.

This Part offers the normative case for preserving the quasi-judicial tradition. It emphasizes immediate doctrinal implications, a Burkean conservatism, and a concern over the values that would be sacrificed if the quasi-judicial tradition were abandoned.

A. *Doctrinal Implications*

The last twelve months have seen an intersection of two transformative forces. First, the Supreme Court has long pursued the vindication of the UET. Second, the two presidencies of Donald Trump have been rooted in a politics of presidential self-aggrandizement. During Trump's second term as president, these two forces created tremendous consequences for administration as the government deployed the Court's precedents as warrants for new presidential powers. In his first term, Trump proclaimed, "I have an Article II, where I have the right to do *whatever I want* as president."[579] When he came to power a second time, Trump pushed aggressive theories of Article II power. Trump has worked to abolish disfavored federal agencies.[580] He has pursued the power to unilaterally overturn agency rulemakings, to obstruct Congress's power of the purse, and to use the federal criminal justice system to target his enemies.[581] This is a presidency focused on the "personalization of power."[582]

In effect, the maximalist UET has come home to roost. Trump has flexed the powers bestowed on him by the Supreme Court's embrace of the UET. The scope of his refashioning of the state speaks for itself:

> President Trump has "removed" from office . . . two commissioners of the [FTC], a member of the Federal Reserve Board of Governors[], three commissioners of the Consumer Product Safety Commission, a member of the Merit Systems

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579. Nick Bednar, The Meaning of Article II and 'Executive Power' to Trump, Lawfare (Mar. 20, 2025), https://www.lawfaremedia.org/article/the-meaning-of-article-ii-and-'executive-power'-to-trump [https://perma.cc/KK34-S5CA] (emphasis added) (internal quotation marks omitted).

580. Id.

581. Id.

582. Washington Center for Equitable Growth, Equitable Growth Presents: Reimagining the Federal Government, at 10:20 (YouTube, Dec. 12, 2025) https://www.youtube.com/watch?v=KJ4zfDozMf0 (on file with the *Columbia Law Review*).

> Protection Board (MSPB), a commissioner of the Nuclear Regulatory Commission, two commissioners of the Equal Employment Opportunity Commission, the chair of the Federal Election Commission, the chair of the [NLRB], three members of the Privacy and Civil Liberties Oversight Board, the director of the Consumer Financial Protection Bureau, the chair of the Federal Labor Relations Authority, the director of the Office of Government Ethics, the commissioner of the Bureau of Labor Statistics, three members of the Tennessee Valley Authority Board of Directors, the head of the Office of Special Counsel, the Librarian of Congress, the Archivist of the United States, three directors of the board of the Corporation for Public Broadcasting, and the President of the United States Institute of Peace.[583]

All aspects of administration—from monetary policy, to Congress's control over the administrative state through the power of the purse, election law, adjudicatory agencies, and policymaking—are being touched by Trump's campaign.

If one takes this Article's historical analysis seriously, the "MAGA" revolution in government is an illegitimate imposition of presidential control over administration—the bogeyman "Deep State"—that has been abetted by the Roberts Court. In some ways, the MAGA revolution follows the ideological presidentialism that has driven the UET since Justice Scalia's dissent in *Morrison*, and maybe since *Myers*: The President controls *all* the executive power, so all administrators are extensions of presidential will that must be made accountable to the White House. In other ways, however, the Trump era goes far beyond Chief Justice Taft's and Justice Scalia's models of separation of powers. The Trump executive branch has transgressed Congress's legislative powers, dismissed and desiccated Article III judicial power, and attacked the civil service that Chief Justice Taft wanted to protect. But all these dangers were obvious to the Framers, who feared unchecked executive power, and the Justices' blind spots to this history and these risks are even more remarkable after the rise of the bipartisan imperial presidency.

But the quasi-judicial tradition belies these amnesiac pitches for presidentialism and the simplistic slogans about "democratic accountability" versus the "fourth branch," the bureaucrats, the elites, the Swamp, and the "deep state" bogeyman. The most straightforward reading of our evidence—along with a mountain of evidence by other legal scholars—is that the UET's historical claims are wrong.

This Article shows different generations of Americans insulating many kinds of quasi-judicial functionaries from executive control and removal. This is an existential challenge to the UET because none of the administrators covered by the quasi-judicial tradition ever exercised

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583. Emily S. Bremer & William N. Eskridge Jr., The Unitary Executive and the Due Process State, 101 Notre Dame L. Rev. 1, 1–3 (2026) (footnotes omitted).

Article III judicial power. They were administrators wielding executive power.[584] The invocation of the quasi-judicial tradition with adjudicatory administrators was always just the recognition of an institutional form that adopted court-like processes.[585] With different kinds of money-related administrators, the invocation was always just an aspirational mode of thinking through questions of institutional design.[586]

At a lower level of focus, this Article has substantial doctrinal consequences. First, Congress possesses the power to insulate adjudicatory functionaries from presidential removal and control. This complicates the ongoing MAGA attempt at regime change. Consider the MSPB. This Board is quasi-judicial. Its core functions in the realm of government personnel management include:

- adjudicating individual adverse action appeals (removals, suspensions, demotions);[587]
- reviewing whistleblower retaliation claims;[588]
- issuing case-specific orders (reinstatement, back pay, attorney's fees);[589] and
- creating precedent through adjudicatory decisions, not general rules.[590]

The MSPB is the classic quasi-judicial agency with little or no power to act in a quasi-legislative capacity. Whether you are a public-meaning originalist or a traditionalist, this Article shows that Congress possesses the power to insulate agencies like the MSPB from presidential control and removal.

Then there is the other side of the quasi-judicial tradition. Trump's actions have imperiled the independent administration of monetary policy. In *Cook*, the Roberts Court was desperately looking for a reason to carve out an exception for the Fed. And over a year before deciding *Cook*, the Court signaled in *Trump v. Wilcox* that it wanted to distinguish the National Labor Relations Board from the validly insulated Federal Reserve Board.[591] The *Wilcox* order relied on a strained metaphor with the First and Second Banks of the United States and a legal fiction that they were "quasi-private" (ironically enough, given Roberts's dismissive sentence in

584. See supra sections II.A, II.D.6, II.E.2.

585. See supra Part III.

586. See supra sections II.C, II.D.1–.3, II.E.1, III.B.

587. Jon O. Shimabukuro & Jennifer A. Staman, Cong. Rsch. Serv., R45630, Merit Systems Protection Board (MSPB): A Legal Overview 4 (2019).

588. Id. at 15.

589. Id. at 1.

590. Id. at 3; 5 U.S.C. § 1204.

591. Trump v. Wilcox, 145 S. Ct. 1415, 1417 (2025).

Slaughter, "no ifs, ands, or quasis.").[592] In *Cook*, Roberts tried a different approach, twisting the historical sources to suggest that the Banks "regulated."[593] The problem for the majority is that the First and Second Banks of the United States cannot serve as the basis for a Fed exception because, unlike the Banks, Congress has delegated to the Fed broad formal executive powers for public regulation.[594] This approach to creating exceptions based on legal fictions and cherrypicked sentences is illegitimate and unreliable.

This Article provides a better path. Whether it was officials in the powerful English Treasury and Exchequer, justices of the peace on both sides of the Atlantic, Madison's proposed Comptroller, Hamilton's Sinking Fund, the Revolutionary Debt Commission, state banking regulators and road commissioners, the reformed OCC, or the Fed itself, generations of English and Americans have sought to insulate money-related administration from presidential control.[595] This reflects a concern going all the way back to the Founding that giving the President any beachhead at all into money-related administration could doom the Republic.[596] While it is true that some of this Article's historical examples in this money-related category also possessed adjudicatory or other court-like functions, history betrays a different side of the quasi-judicial tradition. Americans connected money-related administrators to judges because they wanted to find a way to create institutions that could adhere to the highest virtues of judicial offices. Whether fiscal policy, monetary policy, taxation, or banking regulation, Americans have reached for the quasi-judicial tradition when they have encountered sensitive administrative roles.

This history and tradition supports Congress's discretion to protect executive officials who adjudicate or otherwise reflect judicial functions. This evidence also defends *Wiener* and its default protection of adjudicatory officials' independence. As Justice Felix Frankfurter wrote for a unanimous Court in *Wiener*:

> And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are

592. See id. ("The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States."); Trump v. Slaughter, 146 S. Ct. 2283, 2302 (2026).

593. See Trump v. Cook, 146 S. Ct. 2234, 2254 (2026) ("So when [the Founders] established the First Bank of the United States, they guaranteed its independence from Presidential control. Their successors did the same for the Second Bank. That enabled both banks to serve as the 'great regulating wheel' of the early American financial system." (quoting Eric Lomazoff, Reconstructing the National Bank Controversy: Politics and Law in the Early American Republic 53 (2018))).

594. See supra notes 25, 120.

595. See supra sections II.C, II.D.1–.3, II.E.1, III.B.

596. See supra sections II.C, II.D.1–.3, II.E.1, III.B.

> members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government," . . . as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference. "For it is quite evident," again to quote *Humphrey's Executor,* "that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."[597]

The history of the "quasi-judicial" role and a general tradition (though not a universal rule) of its independence strengthen the case for *Wiener*'s default rule of statutory interpretation for adjudicative officials: Courts should require good cause for removals of adjudicative executive officials, unless the statute specifies removal at pleasure.[598] Frankfurter relied on "the philosophy of *Humphrey's Executor,* in its explicit language as well as its implications."[599] Even in our new, post-*Humphrey's* world, the historical analysis in this Article is a sufficient foundation to preserve and extend *Wiener*.

B. *The Values at Stake*

1. *Due Process.* — One side of the quasi-judicial tradition has always concerned judge-like administrators and the need to insulate them from direct executive control. As argued above, this reflects the Anglo-American tradition of judicial independence. This tradition was so well established even before the Founding that an intergenerational chain of Americans insulated judge-like officers from direct executive control.[600] In the postbellum era, this instinct led to a sort of evolutionary process through which administrative structure became more sophisticated and judicialized. As administration became more court-like, the American public and their lawyers were only emboldened in their demands for the norms of due process that had been associated with courts of law. One of the great controversies of the early twentieth century was how to create an administrative state that comported with due process.

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597. Wiener v. United States, 357 U.S. 349, 353 (1958) (citation omitted) (first quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26 (1935); then quoting id. at 629); see also Transcript of Oral Argument, supra note 22, at 15–16 (Roberts, C.J.) (discussing whether the War Commission in *Wiener* is comparable to the Court of Appeals of the Armed Forces or the Tax Court).

598. See *Wiener*, 357 U.S. at 356 ("[N]o such power [to remove an official without cause] is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.").

599. Id.

600. See supra Parts II–III.

Through these processes, the quasi-judicial tradition helped propel the construction of what Professors Emily Bremer and William Eskridge call the "due process state."[601] Across the twentieth century, administrative law became bound up with evolving notions of due process, which guided the evolution of the administrative law field. On an institutional level, the interbranch embrace of impartial ALJs in the APA settlement defused many of the most pressing issues associated with the rise of a modern state.[602] The institutional heralds of the quasi-judicial tradition have only thickened our collective association between administration and due process. In 1976, the Supreme Court unanimously held that citizens entitled to federal safety-net programs were entitled to due process before they could be stripped of their benefits.[603] Administrative law now imposes a due process requirement on quasi-judicial functions across a large swath of the administrative state.

This all tees up a doctrinal grenade that is waiting for any unitarians who dare to disregard the quasi-judicial tradition. Recall that our notions of due process in different administrative law contexts came to require decisionmaker neutrality and independence. If quasi-judicial functionaries are subjected to the UET as purely executive administrators, do their actions still satisfy our commitment to due process? A worse outcome that seems plausible is that the doctrinal answer might be yes, but that our notions of due process will, in the long run, be degraded.

The unitarian political morality, it should be said, does not require the Court to pull the pin out of this grenade. Unitarians have long advocated a muscular chief executive with the power to manage our unwieldy state.[604] But even unitarian literature acknowledges that no president could oversee the results of the many thousands of adjudications that take place across the administrative state.[605] The institutional credibility of the presidency is best served by investing those who wield executive power with the highest virtues we associate with judging—due process, decisionmaker neutrality, decisions based on the record, notice, etc.

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601. Bremer & Eskridge, supra note 583, at 16.

602. See id. at 14 ("The position and powers of the ALJ . . . were designed to ensure that the ALJ is able to 'command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it.'" (quoting Comm. on Admin. Proc., supra note 432, at 43)).

603. See Mathews v. Eldridge, 424 U.S. 319, 331–32 (1976).

604. See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1165 (1992) ("Unitary executive theorists read [the Article II Vesting Clause and the Take Care Clause] as creating a hierarchical . . . executive department under the direct control of the President . . . [who] alone possesses *all* of the executive power . . . .").

605. See, e.g., Bremer & Eskridge, supra note 583, at 6–7 ("[T]he President cannot personally execute all the laws and must therefore be able to rely upon a huge number of subordinate officers and employees.").

And the due process state is still reflected in the Roberts Court's recent case law. In *Free Enterprise Fund*, the Court was sure to set aside ALJs for special treatment as the unitarian Justices held that the Public Company Accounting Board violated the separation of powers.[606] Later, in *Seila Law*, the Court again paid homage to the quasi-judicial tradition by reserving exceptions to the UET rooted in *Humphrey's Executor* and the role of administrators wielding non-policymaking functions.[607] And then in *Slaughter*, the Court signaled that it might protect "judges of 'non-Article III courts,'" officers who shape monetary policy, and officers with an investigatory role connected to legislative functions.[608] The unitarian Justices' apparent concern for quasi-judicial functionaries was—as discussed in the Introduction—on full display in the *Slaughter* oral arguments.

2. *Rule of Law Values.* — As discussed throughout this Article, the quasi-judicial tradition has been driven by an instinct tied to the Anglo-American constitutional project and notions of judicial independence. As different generations of Americans interacted with modes of administration that aped judicial processes and functions, they instinctually imported the norms of judicial independence to the design of their new creations.

This process reflects a connection between the quasi-judicial tradition and the rule of law. On our view, the tradition has reinforced judicial independence by reinforcing Americans' association between state-sponsored adjudication and the highest aspirations of Article III courts. Entering an administrative tribunal and encountering a body that mimics the norms of Article III courts only habituates Americans to the larger values that fly under the banner of the rule of law.

Erasing the quasi-judicial tradition is therefore a threat to the rule of law as a lived experience. If the maximalist assumptions of *Slaughter* remain unchecked by more careful historical analysis, and subject adjudicatory administrative proceedings to the unchecked will and whim of the President, then notions of decisionmaker independence become difficult to maintain. Moreover, a system set to embody raw political will may have a hard time maintaining other virtues imposed on administration by the quasi-judicial function. Our fear is that an administrative state that abandons the virtues of the quasi-judicial tradition will end up becoming a foil to the rule-of-law traditions that have defined the Anglo-American constitutional project. Agency adjudications across the federal government dwarf the caseload of Article III courts.[609] Many Americans

606. Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).

607. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2198–200 (2020).

608. Trump v. Slaughter, 146 S. Ct. 2283, 2305–06 (2026) (quoting Transcript of Oral Argument, supra note 22, at 15, 28).

609. See Jonah B. Gelbach & David Marcus, Rethinking Judicial Review of High Volume Agency Adjudication, 96 Tex. L. Rev. 1097, 1098–1101 (2018) (discussing the

will encounter administrative adjudications and take that experience in as a *court* in the colloquial sense. If the adjudicators they encounter do not embody the virtues of judicial neutrality, these Americans may come out of their experiences with a degraded sense of the rule of law.

CONCLUSION

The Court has done away with *Humphrey's Executor*'s general defense of so-called independent commissions.[610] Completing the arc of the New Dealers' ahistorical attack on *Humphrey's*, the Court in *Slaughter* rejected the quasi categories.[611] But in *Cook*, the Court embraced a method for finding exceptions rooted in our history and traditions.[612] In the moment, the Court used that approach to preserve the administrative depth that is baked into the bones of the Federal Reserve.

If this was the long-awaited vindication of the UET, then it was a Pyrrhic victory. Because *Humphrey's* itself mimicked parts of the Anglo-American constitutional project, the *Cook* history-and-tradition proviso is set against the baseline rule in *Slaughter*. Future cases need to focus on what kinds of administrative depth carry historical pedigrees.

This Article starts the task of historical excavation in the uncertain world *Slaughter* and *Cook* have created. It is not attempting to restore the New Deal settlement. Our narrow claim, backed by strong historical evidence, is that the quasi-judicial tradition is a central part of the Anglo-American constitutional project. Through this tradition, lawmakers have simultaneously grafted judge-like norms, process, and procedures onto administrative bodies while insulating these bodies from hierarchical political control.

This history is incompatible with the maximalist UET, which begins from the premise that the President must control the execution of federal law. The story presented is messier. Where they deemed it necessary and proper, lawmakers often created bodies that vindicated Congress's statutes that were separated from the President by layers of administrative depth. The purpose of this depth was not lawlessness or a lack of accountability. Lawmakers have used the quasi-judicial tradition to make administration compatible with the rule of law. The tradition flows from the basic premise that legality sometimes requires distance from command. The rule of law is imperiled when the state becomes the embodiment of one person's will.

The tradition we describe was not invented by the Hughes Court in the heat of the moment. Scholars have dismissed the quasi categories

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vastness of annual agency adjudications to problematize the value of appellate, Article III judicial review).

610. *Slaughter*, 146 S. Ct. at 2291, 2302.

611. See id. at 2302 ("When an agency 'executes' a congressional mandate against private parties, it exercises executive power—no ifs, ands, or quasis about it.").

612. Trump v. Cook, 146 S. Ct. 2234, 2246 (2026).

because of their imprecision. These scholars aren't wrong. The quasi-judicial category was never a clean heuristic. And it was often mistakenly taken to mean that administrators wielded real Article III judicial power. But regardless of the imprecision and lack of clarity around the term, there can be little doubt that the quasi-judicial tradition carries an astounding pedigree. If one believes history and tradition are relevant to constitutional meaning, then the Roberts Court fundamentally erred when it tried to erase the term "quasi-judicial" and invalidated its tradition of independence.

We can use this history to better understand the world after *Slaughter*. Congress cannot use the quasi-judicial category as a talisman. But nothing in Article II requires Congress to expose quasi-judicial administrators to presidential domination. Between these poles lies a space for legislative judgment.

That conclusion also reframes the stakes of *Wiener*. *Wiener* should not be understood as a lingering anomaly from the age of *Humphrey's Executor*. It is the vital doctrinal remnant of a deeper tradition. The War Claims Commission at issue in *Wiener* did not exercise Article III power. It administered a statutory scheme.[613] But it did so by resolving claims in a manner that required neutrality, judgment, and independence from political retaliation.[614] That is why the case remains so important after *Slaughter*. If *Humphrey's* was too vague and laconic, *Wiener* was closer to the core of the tradition we describe. It identified a form of administration that could not perform its legal function if its members served as instruments of presidential preference.

This Article is the latest of many that question the historicity of strict separation-of-powers jurisprudence. Time and again, legal historians have shown that the Constitution is a more pragmatic document than many formalists would admit. The quasi-judicial tradition reflects a sustained effort to reconcile administration with the rule of law. Preserving that tradition does not weaken our constitutional system. It respects the Anglo-American canon's regard for balanced power, legality, and decisionmaker neutrality.

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613. See Wiener v. United States, 357 U.S. 349, 349–50 (1958).

614. See id. at 353 (explaining that the "sharp differentiation" between officials removable at will by the President and those who are not stems from the difference in functions and whether they require "absolute freedom from Executive interference").