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Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies

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ARTICLES

IS THE FEDERAL RESERVE CONSTITUTIONAL? AN ORIGINALIST ARGUMENT FOR INDEPENDENT AGENCIES

*Christine Kexel Chabot**

Originalists have written off the Federal Reserve’s independent monetary policy decisions as an unconstitutional novelty. This Article demonstrates that the independent structure of the Federal Reserve dates back to a Founding-era agency known as the Sinking Fund Commission. Like the Federal Reserve, the Commission conducted open market purchases of U.S. securities with substantial independence from the President. The Commission’s independent structure was proposed by Alexander Hamilton, passed by the First Congress, and signed into law by President George Washington. Their decisions to create an independent Commission with multiple members to check the President and one another—and to include the Vice President and Chief Justice as Commissioners who could not be replaced or removed by the President—belie the notion that such independence violated the newly minted Constitution. The Sinking Fund Commission establishes that the Federal Reserve’s independent structure has an impeccable originalist provenance and does not violate the Constitution.

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INTRODUCTION

President Trump has been greatly vexed by his inability to control the Federal Reserve's monetary policy decisions.¹ This should come as no surprise, as the Federal Reserve's Federal Open Market Committee has more power over the national economy (and perhaps over the upcoming presidential election) than any other agency. The President might ask the Supreme Court for help, and his request would find support in originalist arguments that the Committee's independence unconstitutionally restricts the President's executive power² and circumvents the Appointments Clause.³ Accord-

1 See Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 18, 2019, 2:25 PM), <https://twitter.com/realDonaldTrump/status/1174388901806362624> ("Jay Powell and the Federal Reserve Fail Again. No 'guts,' no sense, no vision!").

2 See U.S. CONST. art. II, § 1, cl. 1. Ever since Peter Strauss launched the modern academic debate about independent agencies, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583 (1984), numerous scholars have challenged the independence of the Federal Reserve as inconsistent with Article II. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY

ing to leading originalists, independent agencies, such as the Open Market Committee, have relatively recent pedigrees that cannot possibly be “ascertain[ed by] the original meaning of the U.S. Constitution” or supported by “sources such as James Madison, Thomas Jefferson, and Alexander Hamilton.”⁴ The Federal Reserve’s critics contend that the original meaning of Article II precludes an independent structure and requires the President to “determine the policies” pursued by the Federal Reserve.⁵

This Article demonstrates that Alexander Hamilton, the First Congress, and President George Washington did not share these assumptions about the unconstitutionality of independent agencies. Alexander Hamilton himself proposed an obscure independent agency, known as the Sinking Fund Commission, which conducted the same open market purchases of U.S. securities as today’s Open Market Committee. The Commission’s independent structure was also passed by the First Congress and signed into law by President Washington.⁶ In its “Act Making Provision for the Reduction of the Public

EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 6 (2008); *see also* PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* 107 (2016) (“[A]s presently designed, the Reserve Banks are almost certainly unconstitutional.”); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 43, 96–97 (noting that the Federal Reserve is an “institution created without regard to the basic principle of separation of powers upon which our government was founded”).

3 U.S. CONST. art. II, § 2, cl. 2. Originalists have asserted broader Appointments Clause requirements in apparent conflict with Reserve Bank presidents’ role on the Committee. *See* Gary Lawson, *The “Principal” Reason Why the PCAOB Is Unconstitutional*, 62 VAND. L. REV. EN BANC 73, 77–78 (2009) (noting that officials might count as “principal officers because of the nature and scope of their authority”); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 450, 462 (2018) (noting that Article II’s original appointments requirements extended beyond persons who exercised significant authority of the United States and had power to bind third parties); *see also* CONTI-BROWN, *supra* note 2, at 113 (arguing that regional bank presidents violate Article II’s requirements for appointments of principal officers).

4 Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 823 (2018).

5 CALABRESI & YOO, *supra* note 2, at 6.

6 Existing surveys provide limited and divergent analyses of the Sinking Fund Commission. *Compare* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1291 (2006) (noting Commissioners’ general independence from executive appointments and removal), *and* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 43–44 (2012), *with* CALABRESI & YOO, *supra* note 2, at 53 (explaining that the Commission still included a majority of “executive branch members” who “were obviously removable at will”), SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 280 (2015) (noting that Congress “expressly authorized the president to approve the commissioners’ decisions” to purchase debt in the form of U.S. securities, although removal provisions for the Chief Justice were “less clear”), SAIKRISHNA BANGALORE PRAKASH, *Double Duty Across the Magisterial Branches*, 44 J. SUP. CT. HIST. 26, 33 (2019) (noting that the Commission “assigned executive duties to federal judges”), Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1339 (2019) (arguing that both approbation and removal at will ensured presidential control of the Sinking

Debt,” Congress authorized open market purchases of debt, in the form of U.S. securities, “under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General.”⁷ This statute thereby established an independent structure in which Founders who occupied key principal offices became *ex officio* members of the Sinking Fund Commission: John Adams (President of the Senate/Vice President), John Jay (Chief Justice), Thomas Jefferson (Secretary of State), Alexander Hamilton (Secretary of the Treasury), and Edmund Randolph (Attorney General).

The Sinking Fund Commission carried out open market purchases of U.S. securities with substantial independence from the President. President Washington had no power to initiate open market purchases without approval of a majority of the Commission, and the Commission’s multimember structure allowed it to make purchasing decisions independently of a unified executive policy. The Commission’s decisions reflected diversity of opinion and even cabinet members’ public disagreement, as reflected in Thomas Jefferson’s dissent from purchases urged by Alexander Hamilton.⁸ Congress also circumvented the President’s appointments power by designating existing officers as *ex officio* Commissioners. In addition, Congress eliminated the President’s power to replace or remove Commissioners when it placed the Chief Justice and Vice President on the Commission.

The Sinking Fund Commission’s independent structure was not merely enacted into law, but it was proposed by Alexander Hamilton, who was both a Framers of the Constitution and President Washington’s Secretary of the Treasury. The legislation was then passed by the First Congress, with opportunity for votes and input from many members who “had helped to compose or to ratify the Constitution itself,”⁹ and subsequently signed into law by President George Washington. One would expect all of these actors to have a clear grasp on the original public meaning of the Constitution,¹⁰ as well as a

Fund Commission), and LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY, 1789–1801*, at 351 (1948) (briefly noting the Commission’s role in repaying debt). Earlier surveys do not discuss the Commission. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 *WM. & MARY L. REV.* 211 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994).

7 Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186.

8 See *infra* discussion surrounding notes 306–09.

9 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 3–4 (1997) (noting that the First Congress included James Madison, Oliver Ellsworth, Elbridge Gerry, Rufus King, Robert Morris, and William Paterson).

10 See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020) (“[T]he practice of the First Congress is strong evidence of the original meaning of the Constitution.”); *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (noting that an act “passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument” offers “contemporaneous and weighty evidence” of the Constitution’s “true meaning” (quotation marks omitted) (quoting *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S.

strong dedication to the structural commitments established therein.¹¹ Their decisions to form an independent Sinking Fund Commission belie the notion that an independent agency structure violated the newly minted Constitution.

Although Alexander Hamilton was in general a proponent of a singular and energetic executive,¹² Hamilton's writings about sinking funds acknowledge the countervailing importance of insulating the Commission's purchases from political influence. By the time Hamilton proposed a sinking fund in the United States, sinking funds had already had a lengthy track record in England. Problems with the misuse of funds in England were well known and described in widely read treatises such as Adam Smith's *The Wealth of Nations*.¹³ Hamilton echoed Adam Smith's concerns when he questioned whether funds set aside for repayment of debt would tempt political actors to wrongfully divert funds to more politically expedient uses.¹⁴ The Commission's independent structure marks a deliberate and important decision *not* to entrust a single elected President with absolute control over the execution of federal laws. Hamilton proposed that the Commission have complete authority to authorize open market purchases within the parameters set by Congress.¹⁵ While Congress ultimately granted the President power to approve these purchases, the President still shared approval power with the Commission. He had no ability to initiate open market purchases without approval of a majority of the Commission,¹⁶ just as the President today has no power to lower interest rates unless a majority of the Open Market Committee agrees to take action to expand the money supply.

The Sinking Fund Commission's independent structure provides a direct precedent in support of an independent Federal Open Market Committee. In statutes creating both the Sinking Fund Commission and the Open Market Committee, Congress empowered each agency to initiate open market purchases of U.S. securities. In both instances, Congress insulated open market purchases from presidential control by requiring a multimem-

265, 297 (1888)); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) (noting that the "understanding of the First Congress and of the leading participants in the Constitutional Convention" offers a "contemporaneous understanding of the President's removal power"); see also Mascott, *supra* note 3, at 507–08 (analyzing "how the First Congress implemented the Constitution" to confirm a broader understanding of "the original public meaning of 'officer'").

11 See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1028 (2006) (lauding the "earnestness and erudition" of debates over the meaning of the Constitution in the First Congress).

12 THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Decision, activity, . . . and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . .").

13 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 873 (Edwin Cannan ed., Random House 1937) (1776).

14 See *infra* discussion surrounding notes 248–53.

15 See *infra* notes 227–30.

16 See *supra* note 7.

ber agency to approve all purchases.¹⁷ Just as the President's current demands for lower interest rates depend on a majority of the Federal Open Market Committee to take action to expand the money supply, in 1790 President Washington had no power to initiate open market purchases without approval of a majority of the Sinking Fund Commission.¹⁸ The multimember structures of the Sinking Fund Commission and of the Open Market Committee have allowed members of each agency to check the President and also one another by presenting divergent views and dissenting from disputed purchases.¹⁹

Congress also protected members of the Sinking Fund Commission and Open Market Committee from removal by the President.²⁰ The Open Market Committee's twelve voting members include seven Federal Reserve Governors, who may be removed by the President only "for cause," and five Federal Reserve bank presidents, who can be removed by the Governors at will.²¹ This arrangement affords the President greater control over Governors and bank presidents than the President had over some members of the Sinking Fund Commission. The President was incapable of removing or replacing the Sinking Fund Commissioners who already occupied the offices of the Chief Justice and President of the Senate (or Vice President), and served as *ex officio* members of the Commission.²²

Further, statutory provisions establishing *ex officio* Sinking Fund Commissioners suggest that presidents of Federal Reserve banks may serve on the

17 Congress insulated the Sinking Fund Commission from political pressure to misappropriate funds, and it also insulated the Federal Reserve from political pressure to cut interest rates. See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 613 (2010) ("[T]he Fed would be willing to raise interest rates to quell inflation over the long run, though politicians might not for fear of the short-term consequences."); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 553 (2000) ("[P]oliticians have a difficult enough time attempting to influence monetary policy in order to enhance their electoral chances."); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("[T]he Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.").

18 Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186. The Act provided that the "purchases to be made of the said debt, shall be made under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General." *Id.* These Commissioners, "or any three of whom, with the approbation of the President of the United States, shall cause the said purchases to be made in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act." *Id.*

19 See *infra* notes 306–16.

20 The feature allowing officers to "serve a term of years and be removable only for cause before his or her term expires" demarcates "an agency as 'independent.'" Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27 (2010); see also Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1168 (2013).

21 See *infra* notes 43, 54.

22 See *supra* note 7.

Open Market Committee without being appointed by the President.²³ The First Congress did not allow the President any discretion in making appointments to the Commission and specified that certain officers would become ex officio Commissioners.²⁴ Congress's decision to make the Secretaries of State and Treasury and Attorney General ex officio Commissioners may have been a permissible expansion of duties germane to existing executive offices.²⁵ But the Chief Justice was a different matter. The statute placed the Chief Justice on the Commission automatically, even though his preexisting appointment was in the judicial branch and involved adjudicatory functions wholly unrelated to purchase of debt.²⁶ The First Congress failed to provide any appointments process before placing the Chief Justice in an executive office. This suggests that not all members of a multimember agency need to be appointed as executive officers, at least when they serve alongside principal officers properly appointed to the executive branch.

This Article proceeds to address the Federal Open Market Committee's constitutionality as follows. In Part I, it describes the independent structure of the Federal Open Market Committee, and in Part II, the Article outlines originalist arguments that this independent structure violates Article II of the U.S. Constitution. In Part III, the Article describes the independent Sinking Fund Commission, as it was originally proposed by Secretary of the Treasury, Alexander Hamilton, enacted by the First Congress and President Washington, and operated by a five-member Commission comprised of Alexander Hamilton, John Jay, Edmund Randolph, Thomas Jefferson, and John Adams. Part IV concludes that the Sinking Fund Commission provides a direct, Founding-era precedent in support of the independent structure of the Federal Open Market Committee. As this Founding-era history demonstrates, originalists have no ground to reject the Federal Open Market Committee's independent structure as an unconstitutional novelty of the twentieth century. Rather, the independence stemming from the Committee's multimember structure, protections from removal, and limited appointment opportunities has an impeccable originalist provenance that dates back to the Founding of our Republic.

I. THE INDEPENDENT STRUCTURE OF THE OPEN MARKET COMMITTEE

A long-term interest in financial stability has led Congress to shelter the Open Market Committee from immediate political pressure to heat up the economy and expand the money supply through open market purchases.²⁷

²³ See *supra* note 7.

²⁴ PRAKASH, *supra* note 6, at 279 (noting that the sinking fund legislation “directly vested executive functions upon the office of the chief justice”).

²⁵ See *infra* note 338.

²⁶ For an explanation of why the dual appointment does not conflict with Article III, see Prakash, *supra* note 6, at 26, 33 (noting that the Constitution does not “prevent[] someone from being both a judge and an executive”).

²⁷ See Barkow, *supra* note 20, at 29 (explaining that political independence is needed, though, to achieve a “long-term goal of economic growth” because “achieving that goal

The constraints imposed by the independent central banking functions of the Open Market Committee have been compared to a passage from Homer's *Odyssey*,²⁸ in which Odysseus had to be lashed to the mast of his ship in order to resist the immediate temptation of the sirens' songs.²⁹ Politicians naturally covet the Committee's power over the national economy, especially during an election year, and they often wish "to influence monetary policy in order to enhance their electoral chances."³⁰ But Congress gave the Committee an independent structure and limited the President's control over the Committee's monetary policy decisions.

The Open Market Committee has twelve voting members and is one part of the Federal Reserve System. Many aspects of the Federal Reserve System have not drawn serious constitutional challenges,³¹ and criticisms have focused on the hybrid and independent structure of the Open Market Committee. The Committee draws seven members from the System's "central governing Board," which is currently known as the Board of Governors, and five remaining members from presidents who direct "a decentralized operating structure of 12 Reserve Banks."³² The Committee's hybrid structure has led one member of Congress to describe the Federal Reserve as a "pretty queer duck" constitutionally speaking.³³

The Committee's decisions to sell or purchase U.S. securities are a "key tool used . . . in the implementation of monetary policy" and fulfill a dual mandate to strengthen the national economy by maintaining stable prices and full employment.³⁴ Congress granted the Committee exclusive and

often requires politically unpopular actions in the short term"); accord Bressman & Thompson, *supra* note 17, at 613–14; Ramirez, *supra* note 17, at 553.

28 CONTI-BROWN, *supra* note 2, at 2 (noting metaphor and that Odysseus is typically "referred to in central banking circles by his Latin name Ulysses").

29 HOMER, *THE ODYSSEY* 273 (Roger Fagles trans., 1996).

30 Ramirez, *supra* note 17, at 553.

31 Less controversial functions include traditional regulatory activities of the seven-member Board of Governors and regional Reserve Banks' provision of financial services for banks in their respective Districts. BD. OF GOVERNORS OF THE FED. RSRV. SYS., *THE FEDERAL RESERVE SYSTEM PURPOSES & FUNCTIONS* 10, https://www.federalreserve.gov/aboutthefed/files/pf_2.pdf (noting the Board's "responsibility for supervising and regulating certain financial institutions and activities"); *id.* at 14 ("[E]ach Reserve Bank acts as a 'bank for banks.'").

32 *Structure of the Federal Reserve System: About the Federal Reserve System*, BD. GOVERNORS FED. RSRV. SYS., <https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-system.htm> (Mar. 3, 2017).

33 CONTI-BROWN, *supra* note 2, at 106 (quoting Representative Patman); see also *id.* at 107 ("[A]s presently designed, the Reserve Banks are almost certainly unconstitutional.").

34 *Policy Tools: Open Market Operations*, BD. GOVERNORS FED. RSRV. SYS., <https://www.federalreserve.gov/monetarypolicy/openmarket.htm> (Mar. 16, 2020). The Federal Reserve's "approach to the implementation of monetary policy has evolved considerably since the financial crisis" of 2008, with expansions of "holding[s] of longer-term securities through open market purchases," *id.*, as well as additional monetary policy tools including interest on required reserve balances and excess balances, and overnight reverse repur-

independent authority to direct and regulate open market operations.³⁵ Although the sales or purchases of U.S. securities could also be conducted by private actors, when the Committee effectuates monetary policy through open market purchases, it executes laws empowering the Committee to regulate the value of money under Article I, Section 8 of the U.S. Constitution.³⁶ Congress requires the Open Market Committee to ensure that its purchases are made “with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.”³⁷ In addition, Congress has directed the Open Market Committee to “maintain long run growth of the monetary and credit aggregates commensurate with the economy’s long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.”³⁸

The Banking Act of 1935 established the Federal Open Market Committee’s current, independent structure.³⁹ In addition to the independence generally associated with a multimember group,⁴⁰ all of the Open Market Committee’s voting members possess substantial independence from the President in both their appointments and tenure in office.⁴¹ The Act provides that the seven members of the Board of Governors will serve as ex officio members of the Open Market Committee. While these Governors are initially “appointed by the President, by and with the advice and consent of the Senate,”⁴² the Governors’ fourteen-year terms and staggered vacancies will almost certainly subject a President to some Governors appointed by earlier administrations. Governors also serve for fourteen-year terms “unless sooner removed for cause by the President.”⁴³ For-cause protections from removal allow the Governors to make monetary policy decisions independently of the President, and these tenure protections have allowed Jay Powell to ignore President Trump’s instructions without being fired from his post as Governor.⁴⁴

chase agreements. See *Policy Tools*, Bd. GOVERNORS FED. RSRV. SYS., <https://www.federalreserve.gov/monetarypolicy/policytools.htm> (Apr. 15, 2020).

35 12 U.S.C. § 263(b) (2018).

36 U.S. CONST. art. I, § 8.

37 12 U.S.C. § 263(c).

38 *Id.* § 225a.

39 See CONTI-BROWN, *supra* note 2, at 30. The current twelve-member structure is set forth in 12 U.S.C. § 263(a).

40 Barkow, *supra* note 20, at 26 (noting that “a multimember design” is a “[t]raditional [i]ndependence”).

41 12 U.S.C. § 263(a).

42 *Id.* § 241.

43 *Id.* § 242. Provisions allowing officers to “serve a term of years and be removable only for cause before his or her term expires” is the design feature “that is most often used to demarcate an agency as ‘independent.’” Barkow, *supra* note 20, at 27.

44 The President’s power to demote Powell from his position as Chair of the Board of Governors would not necessarily prevent Powell from serving as Chair of the Open Market Committee. The President may designate from among existing Governors a chairman once every four years, 12 U.S.C. § 242, and the Act’s “for cause” protections may not pre-

The five remaining members of the Open Market Committee “shall be presidents or first vice presidents of Federal Reserve banks,”⁴⁵ and these bank presidents are accountable to the Governors in both their appointment to and removal from office. The Act provides that bank presidents or vice presidents who serve as “representatives of the Federal Reserve banks” shall be “elected annually” by boards of directors of the regional Federal Reserve Banks.⁴⁶ In practice, this provision has resulted in an annual rotation of representatives along geographic lines mandated by statute.⁴⁷ The President of the New York Federal Reserve Bank always serves as one representative, and presidents from distinct geographic clusters of Reserve banks fill the remaining four seats “on a rotating basis.”⁴⁸ In order to become a Federal Reserve bank president or vice president who is eligible to serve on the Committee, one must be “appointed by the Class B and Class C directors of the bank, *with the approval of the Board of Governors.*”⁴⁹ The statute places ultimate responsibility for the selection of these officers in the Board of Governors, who must approve the directors’ choices of the president and vice president.⁵⁰

Once appointed, a president has a five-year term and direct control over “all other executive officers and all employees” of her or his Federal Reserve bank.⁵¹ In turn, the statute subjects each Federal Reserve bank to the “supervision and control” of its board of directors.⁵² The Board of Governors exercises “general supervision”⁵³ over Federal Reserve banks and has direct power “[t]o suspend or remove any officer or director of any Federal reserve bank.”⁵⁴ The Act does not require particular grounds for removal and provides only that the “cause of such removal . . . be forthwith communicated in writing by the Board of Governors . . . to the removed officer.”⁵⁵ This struc-

vent the Board of Governors’ chairman from being demoted to a mere Governor before the end of the four-year term. Vermeule, *supra* note 20, at 1178–79. The Chair of the Board of Governors does not necessarily serve as Chair of the Open Market Committee, however, and the Committee’s Rules of Organization allow the Committee to appoint its own chair annually and independently of the President. See Federal Open Market Committee: Rules of Organization, 70 Fed. Reg. 7947, 7948 (Feb. 16, 2005); see also FED. RSRV. SYS., FEDERAL OPEN MARKET COMMITTEE RULES AND AUTHORIZATIONS 5 (2018), https://www.federalreserve.gov/monetarypolicy/files/FOMC_RulesAuthPamphlet_201801.pdf.

45 12 U.S.C. § 263(a).

46 *Id.*

47 *FAQs: How Is the Federal Reserve System Structured?*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/faqs/about_12593.htm (Aug. 17, 2016).

48 *Id.* The Committee’s procedural rules also allow the seven, nonvoting presidents of other Reserve Banks to attend and participate in meetings. 12 C.F.R. § 272.3(d) (2020).

49 12 U.S.C. § 341 (2018) (emphasis added) (noting that the “first vice president” shall be appointed “in the same manner and for the same term as the president”).

50 *Id.*

51 *Id.*

52 *Id.* § 301.

53 *Id.* § 248(j).

54 *Id.* § 248(f).

55 *Id.*; see also Daniel Hemel, *Maybe the Federal Reserve Banks Are Constitutional After All*, YALE J. ON REGUL. (Apr. 4, 2016), <http://yalejreg.com/nc/maybe-the-federal-reserve->

ture grants Governors ultimate responsibility for placing bank presidents in office and allows the Governors to remove bank presidents at will.

The bank presidents' general accountability to the Governors has not led to Governors' complete control over bank presidents' votes on the Open Market Committee. As members of the Open Market Committee, the bank presidents and Governors each cast independent Committee votes, so that "the Reserve Bank presidents and the governors" may be seen to act as "colleagues" and not "hierarchical entities."⁵⁶ Reserve Bank presidents sometimes dissent from decisions taken by a majority of the Committee.⁵⁷ At the same time, bank presidents remain subject to the Committee's procedural rules and are generally intended to provide a minority of votes.⁵⁸ While vacancies on the Board of Governors might, on occasion, deny the Governors a majority of Committee votes,⁵⁹ these vacancies would not deprive the Board itself of the quorum it would need to remove a bank representative who neglected her duties on the Committee.⁶⁰ The five regional bank presidents also cannot form a quorum of the Committee necessary to transact business unless two or more Governors are present at a Committee meeting.⁶¹ This structure limits bank presidents' power to authorize sales or purchases by the Committee without Governors' participation and approval.

As a whole, the Open Market Committee operates with substantial independence from the President. The Governors enjoy fourteen-year terms and for-cause protections from removal before the end of these terms. Federal Reserve bank presidents who serve on the Open Market Committee are not

banks-are-constitutional-after-all-by-daniel-hemel/. *But see* CONTI-BROWN, *supra* note 2, at 114–15 & n.20 (noting that under 12 U.S.C. § 614, "all three classes" of a Federal Reserve Bank's directors would "have to fire the Reserve Bank president, who is removable at the pleasure of the board"). Section 614's provisions allowing directors to "dismiss . . . officers or employees . . . at pleasure" discuss corporate structure of all organizations approved to do foreign banking and seem unlikely to qualify more specific provisions awarding the Governors general supervisory power and ability to fire the Reserve Bank's officers and directors. 12 U.S.C. § 614 (2018).

56 CONTI-BROWN, *supra* note 2, at 115.

57 See Daniel L. Thornton & David C. Wheelock, *Making Sense of Dissents: A History of FOMC Dissents*, 96 FED. RESRV. BANK ST. LOUIS REV. 213, 213 (2014) (noting that "[d]issenting votes are not unusual" at Federal Open Market Committee meetings); *id.* at 216 fig.2 (recording significant numbers of dissents cast by presidents from 1957–2013).

58 Procedural rules provide that the Committee will generally take actions at in-person meetings, 12 C.F.R. § 272.4(a) (2020), and that the Committee requires a quorum of seven members in order to "transact[] business," *id.* § 272.3(c).

59 Presidents have often left extended vacancies on the board, including three instances in the Obama administration in which Governors were a "four-to-five minority." CONTI-BROWN, *supra* note 2, at 116–17.

60 See Federal Reserve System: Rules of Organization, 82 Fed. Reg. 55,496, 55,496 (Nov. 22, 2017) (to be codified at 12 C.F.R. pt. 265) ("[I]f there are three or fewer Board members in office, then a quorum consists of all Board members currently in office.").

61 The Open Market Committee's Rules of Procedure provide that "[s]even members . . . constitute a quorum of the Committee for purposes of transacting business." 12 C.F.R. § 272.3(c) (2020).

placed in or out of office directly by the President. Instead, these bank presidents are appointed and supervised by the Governors, who themselves have only limited accountability to the President.

Although some commentators have questioned whether the Committee's structure is so independent that it violates current Supreme Court precedent,⁶² one need not spend long on those arguments here. Governors enjoy tenure protections based on the President's ability to remove them only for cause before the end of their fourteen-year terms, and this structure aligns with limitations on executive removal power approved by the Supreme Court in *Humphrey's Executor v. United States*.⁶³ There, the Court validated a materially identical independent agency structure when it upheld a statute granting for-cause protections from removal to officers who served fixed terms on the Federal Trade Commission.⁶⁴ In turn, the Governors' ability to remove Federal Reserve bank presidents at will provides a constitutionally adequate level of presidential oversight for bank presidents. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court approved an analogous arrangement granting SEC Commissioners power to remove Accounting Oversight Board members at will.⁶⁵ The Court found that this structure

62 See CONTI-BROWN, *supra* note 2, at 115, and appointments clause litigation, *infra* note 67; see also Mark F. Bernstein, Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 112 (1989) (arguing that Reserve Bank presidents' role also involves "problems raised by a delegation to private individuals"). Concerns about checking the President's power would not seem to be resolved by studies emphasizing Congress's role. See generally SARAH BINDER & MARK SPINDEL, *THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE* (2017).

63 *Humphrey's Ex'r v. United States*, 295 U.S. 602, 619, 627–28 (1935) (affirming the constitutionality of the Federal Trade Commission Act's provision that Commissioners with fixed terms "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office" under 15 U.S.C. § 41); see also *Morrison v. Olson*, 487 U.S. 654, 691 (1988) ("good cause" removal protection for a limited term independent counsel did not "unduly trammel[] on executive authority" under Article II).

64 *Humphrey's Ex'r*, 295 U.S. at 627–28. The Court distinguished *Shurtleff v. United States* as a case in which the officer lacked a fixed term of office and might be understood to possess "life tenure" absent the President's ability to remove him for reasons other than those provided by statute. *Id.* at 622–23 (citing *Shurtleff v. United States*, 189 U.S. 311 (1903)). Although Chief Justice Roberts recently authored a majority opinion suggesting that *Humphrey's Executor* does not authorize for-cause protections in agencies exercising "significant executive power," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020), Justice Kagan's partial dissent countered that the Court had granted Congress "broad discretion" to afford such protections "for almost a century." *Id.* at 2236 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); see also *Morrison*, 487 U.S. at 689 (the legality of for-cause protections did not "turn on whether" an official "is classified as 'purely executive'"); *id.* at 689 n.28 (noting that "to some degree" the "powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive'"). The suggestion that the Constitution forbids independent, multimember agencies who wield executive power is inconsistent with the First Congress's decision to vest significant executive power in an independent Sinking Fund Commission. See *infra* discussion surrounding note 188.

65 561 U.S. 477, 509 (2010).

would provide adequate “[p]residential oversight,” because the President would possess as much control over Accounting Oversight Board members as he had over SEC Commissioners, who were presumed to be removable by the President only for cause.⁶⁶

On the Appointments Clause question, a series of cases brought in the 1970–80s addressed whether Federal Reserve bank presidents could serve on the Committee without appointments as principal officers. None of these cases held that the bank presidents’ presence on the Committee violated the Appointments Clause,⁶⁷ and the lone district court to rule on the merits did not require presidents to be appointed as principal officers.⁶⁸ Although the district court determined that Reserve Bank presidents exercised “vast powers” akin to those of principal officers when they served on the Committee,⁶⁹ the quasi-private nature of their open market operations meant that these duties could “be performed by private individuals” and not just officers of the United States.⁷⁰ Further, the five Federal Reserve presidents on the Committee have no power to bind the government or issue final Committee purchasing decisions without the Governors, who are properly appointed principal officers. The Governors’ participation is required by the Committee’s procedural rules, which mandate a quorum of seven committee members “for purposes of transacting business.”⁷¹

These challenges to the constitutionality of the Federal Reserve pale in comparison to originalist arguments for broader executive power to remove

66 *Id.* (invalidating for-cause removal protections for Board members and approving a structure in which the SEC Commissioners could fire Board members at will).

67 All court of appeals decisions based their rulings on lack of standing or equitable grounds for declining to reach the merits of the constitutional argument. *See* *Comm. for Monetary Reform v. Bd. of Governors of the Fed. Rsvr. Sys.*, 766 F.2d 538, 542–44 (D.C. Cir. 1985) (holding that businesses’ and individuals’ financial harm from high interest rates was not “fairly traceable” to Reserve Bank president’s actions); *accord* *Reuss v. Balles*, 584 F.2d 461, 467, 469 (D.C. Cir. 1978) (holding that a member of the House of Representatives and bondholder did not have particular or redressable injury). Two other courts relied on equitable grounds when they declined to hear Senators’ suits based on inability to vote on confirmation of bank presidents. *See* *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561, 565 & n.4 (D.C. Cir. 1987); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 882 (D.C. Cir. 1981).

68 *See* *Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 523 (1986), *aff’d on other grounds*, 836 F.2d 561, 565 (D.C. Cir. 1987).

69 *Id.* at 519.

70 *Id.* at 523.

71 12 C.F.R. § 272.3(c) (2020). The exception permitting a smaller quorum when the Committee has “fewer than seven members in office,” *id.*, has never eliminated participation of Governors, and, as of 2017, the number of Governors has never dipped below four, Federal Reserve System: Rules of Organization, 82 Fed. Reg. 55,496, 55,496 n.4 (Nov. 22, 2017) (to be codified at 12 C.F.R. pt. 265). At the very least, Governors’ ability to supervise bank presidents through removal at will and quorum requirements suggests that bank presidents are inferior officers “whose work is directed and supervised at some level” by the Governors. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

and appoint members of the Open Market Committee. Originalist arguments go to the heart of the Committee's independent structure, and they are no longer purely academic. In *Seila Law*, the Supreme Court recently invalidated the Consumer Financial Protection Bureau's independent structure as a "historical anomaly."⁷² Much of the controversy focused on the fact that the Bureau was run by a single independent director, rather than the multimember structure typical of other independent agencies. In his majority opinion, Chief Justice Roberts ruled that *Humphrey's Executor* did not permit "an independent agency led by a single Director and vested with significant executive power."⁷³ Roberts instead recognized the President's power to remove the Bureau's director at will pursuant to a general rule, which Roberts based on "text, first principles, the First Congress's decision in 1789" and other precedent.⁷⁴

Justice Thomas joined this opinion in relevant part and also wrote a separate opinion, which was joined by Justice Gorsuch. Justice Thomas's opinion touched on historical sources and urged the Court to overrule *Humphrey's Executor* as "an unfortunate example of the Court's failure to apply the Constitution as written."⁷⁵ Justice Kagan's partial dissent argued that text and originalist sources pointed in the opposite direction. She accused the majority of "second-guess[ing] . . . the wisdom of the Framers and the judgment of history,"⁷⁶ especially considering that the "First Congress gave officials handling financial affairs . . . some independence from the President."⁷⁷ *Seila Law* thus illustrates the primacy of originalism on the Supreme Court, as well as the majority's willingness to apply originalist arguments to limit or eliminate the removal protections validated in *Humphrey's Executor*. The Part below provides background on originalist arguments against independent agencies and how they have been applied to the Federal Reserve.

II. ORIGINALIST CHALLENGES

Originalists dispute the constitutionality of the Federal Reserve's Open Market Committee. They argue that the President's inability to remove or

⁷² *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020).

⁷³ *Id.* at 2201. This part of Chief Justice Roberts's opinion was joined by Justices Kavanaugh, Alito, Thomas, and Gorsuch.

⁷⁴ *Id.* at 2206. As noted below, *infra* sub-subsection II.A.4.a, the Decision of 1789 reflects the First Congress's prominent debate about the President's power to remove the Secretary of Foreign Affairs.

⁷⁵ *Id.* at 2212 (Thomas, J., concurring in part and dissenting in part); *see also Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring in part and dissenting in part) (following the "original public meaning of 'Officers of the United States'" in a decision involving the Appointments Clause).

⁷⁶ *Seila*, 140 S. Ct. at 2226.

⁷⁷ *Id.* at 2230 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part). Justices Breyer, Sotomayor, and Ginsburg joined Justice Kagan's opinion.

otherwise direct decisions made by Committee members conflicts with the original decision to vest Article II's "executive power" in a single President of the United States. In addition, the President's inability to appoint Committee members who are presidents of Federal Reserve banks may also conflict with the original understanding of the Appointments Clause. The discussion below addresses removal powers and Appointments Clause concerns in turn.

A. *Original Removal Power*

Originalists have argued that the Open Market Committee's structure unconstitutionally limits the President's constitutional power to direct subordinate officers by firing them at will. As explained by Steven Calabresi and Christopher Yoo, the original "Constitution creates a unitary executive to ensure energetic enforcement of the law and to promote accountability."⁷⁸ This unitary structure "eliminates conflicts in . . . regulatory policy by ensuring" that federal agencies "will execute the law . . . in accordance with the president's wishes."⁷⁹

Originalists have not based these arguments exclusively on the constitutional text. The "executive Power" that Article II vests in the President is vague,⁸⁰ and leading originalists, including Justice Scalia, have acknowledged that Article II does not specify an executive removal power as the mechanism by which the President can effectuate a unitary executive policy.⁸¹ Hence originalists tend to bolster unitary executive arguments with understandings of early historical practice, such as the assertion there were "no independent agencies in seventeenth- or eighteenth-century" North America.⁸² On this view, independent agencies like the Federal Reserve's Open Market Committee have been seen as "modern institutions" that cannot be grounded "in the original meaning of the constitutional text."⁸³

The Sinking Fund Commission marks a jarring departure from this understanding of early historical practice, as its multimember structure and protections from removal display a much greater level of independence than previously contemplated. Originalist scholarship to date has not included a robust discussion of the independent structure of the Sinking Fund Commission, and this omission may best be explained by a progression in originalist thought. Originalism itself reflects a sophisticated and evolving family of the-

78 CALABRESI & YOO, *supra* note 2, at 3.

79 *Id.*

80 Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 11 (2015) (arguing "executive power" is a "vague" phrase which admits of borderline cases).

81 There is "no provision in the Constitution stating who may remove executive officers, except the provisions for removal by impeachment." *Morrison v. Olson*, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting); accord Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1244 n.74 (1994).

82 Calabresi & Lawson, *supra* note 4, at 859.

83 *Id.* at 831.

ories, and the “recognizably originalist” emphasis on “text” and “history”⁸⁴ in prominent judicial opinions and nascent originalist theory from the 1980s and 1990s rests on a relatively general overview of textual and historical evidence.

Only in recent decades have originalists conducted more detailed empirical analysis of early historical practice, and this Article contributes to the literature by unearthing previously overlooked evidence on the constitutionality of independent agencies. The fact that an independent Sinking Fund Commission was recommended by Secretary of the Treasury Alexander Hamilton, passed by the First Congress, and signed into law by President George Washington provides occasion to reassess the governing originalist view of Article II. As explained below, the Sinking Fund Commission’s independent structure is inconsistent with the unitary executive theory. It shows that the original originalists instead took a functional approach and allowed agencies to possess significant independence from the President in the execution of laws authorizing open market purchases. The discussion below provides an overview of developments in the originalist theory of a unitary executive. It then locates this Article’s empirical contribution as a more recent development in the broader scholarly enterprise of ascertaining the original understanding of Article II.

1. Originalist Arguments in Leading Judicial Opinions

Leading jurists have relied on originalist arguments when finding for-cause protections from removal inconsistent with the text of Article II and early historical practice. Originalists place great weight on Chief Justice Taft’s 1926 opinion in *Myers v. United States*,⁸⁵ which relied on Founding-era history and the Decision of 1789 when rejecting restrictions on the President’s power to remove executive officers. As noted by Chief Justice Taft, however, the “exact question” voted on by the First Congress in the Decision of 1789 “was whether it should recognize . . . the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate.”⁸⁶ Likewise, the holding of *Myers* involved a statute that required the Senate to approve the President’s removal of an officer. It did not address an independent, multimember agency or a statute that vested a limited removal power in the President alone.⁸⁷

84 Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 16 (Grant Huscroft & Bradley W. Miller eds., 2011).

85 272 U.S. 52, 106–177 (1926).

86 *Id.* at 114.

87 Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 *COLUM. L. REV.* 353, 397 (1927) (noting that *Myers* does not “determine to any extent the power of Congress to regulate tenure” and Chief Justice Taft’s “reasoning” on this point “is not essential to the decision”).

In 1988, when *Morrison v. Olson* required the Court to decide whether Article II allowed Congress to impose substantive, “good cause” restrictions on the executive’s ability to remove an independent counsel, Justice Scalia’s dissenting opinion laid out the elegant constitutional argument for a unitary executive: “the Founders conspicuously and very consciously declined to sap the Executive’s strength in the same way they had weakened the Legislature: by dividing the executive power” into multiple actors.⁸⁸ Instead, Article II vests power in a single executive actor: “The executive Power shall be vested in a *President of the United States*.”⁸⁹ Justice Scalia explained, “this does not mean *some of* the executive power, but *all of* the executive power.”⁹⁰ While a President will necessarily rely on subordinate officers to carry out his or her policies,⁹¹ Article II’s Vesting and Take Care Clauses require that the President retain adequate control over these officers’ exercise of executive power, which is generally thought to include execution of laws passed by Congress.⁹² Any time a subordinate exercises “purely executive power,” the statute cannot “deprive the President of the United States of exclusive control over the exercise of that power.”⁹³

In *Morrison*, Justice Scalia determined that the investigative and prosecutorial functions assigned to the independent counsel by the Ethics in Government Act amounted to an exercise of “purely executive power.”⁹⁴ Congress’s decision to grant the independent counsel for-cause protection from removal deprived the President of “exclusive control” over her “quintessentially executive” actions.⁹⁵ Under *Humphrey’s Executor*, Scalia explained, “limiting removal power to ‘good cause’ is an impediment to . . . Presidential control.”⁹⁶ Scalia argued that the independent counsel provisions violated Article II, and he criticized the majority for departing from the “judgment of the wise men who constructed our system, and of the people who approved it.”⁹⁷

Although Justice Scalia did not directly target *Humphrey’s Executor* or other independent agencies in *Morrison*,⁹⁸ unitary executives have applied

88 *Morrison v. Olson*, 487 U.S. 654, 698–99 (1988) (Scalia, J., dissenting).

89 *Id.* at 705 (emphasis added) (quoting U.S. CONST. art. II, § 1, cl. 1).

90 *Id.* at 705.

91 PRAKASH, *supra* note 6, at 187 (noting President Washington’s understanding of “[t]he impossibility that one man should be able to perform all the great business of the State”).

92 *Id.* at 65 (“Executive power was most closely associated with the power to execute the law.”).

93 *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

94 *Id.* at 705–06.

95 *Id.* at 706.

96 *Id.*

97 *Id.* at 734.

98 *Id.* at 706–07 (distinguishing *Humphrey’s Executor* on the ground that the Court found the FTC’s quasi-legislative and quasi-judicial work “‘wholly disconnected from the executive department’” (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630 (1935))).

Scalia's logic to attack the Federal Reserve and other independent agencies. The problem, as in *Morrison*, rests in statutes granting heads of these agencies independence from executive control through for-cause protections from presidential removal. Calabresi and Yoo tie this concern directly to the Federal Reserve's independent structure, which leaves Presidents "largely without power to affect monetary policy."⁹⁹ They urge Presidents to assert the right to "legally fire holdover governors of the Federal Reserve Board"¹⁰⁰ and challenge decisions like *Humphrey's Executor* as "unconstitutional limits on the removal power" that "are inconsistent with the unitary executive."¹⁰¹

As noted above, *Seila Law* took an important step in this direction. Five Justices held that the Decision of 1789, as interpreted by Chief Justice Taft in *Myers*, precludes independent, single-member agencies that wield significant executive power.¹⁰² These Justices may be poised to extend the holding from *Seila Law* to similarly situated multimember agencies.¹⁰³ It is less clear that a majority of the Court is ready to invalidate the independent structure of the Federal Reserve, however. The majority in the *Seila Law* opinion held open the possibility that the "Federal Reserve can claim a special historical status."¹⁰⁴ Justice Kagan's partial dissent supported Congress's decision to give "independence to financial regulators like the Federal Reserve Board."¹⁰⁵ The Federal Reserve's constitutional fate will thus turn on both the continued viability of *Humphrey's Executor* as well as the historical record specific to the Federal Reserve.

2. Nascent Originalist Theory

Judicial critiques of independent agencies generally align with embryonic originalist research such as Geoffrey Miller's 1986 critique of independent agencies.¹⁰⁶ Miller's work exemplifies nascent originalist analysis. It focused on the "text of the Constitution" and "the history surrounding the framing and original implementation of the system of separated powers."¹⁰⁷ Along with the text of Article II, Miller's overview of historical practice asserted that the Continental Congress had moved away from multimember

99 CALABRESI & YOO *supra* note 2, at 6.

100 *Id.*

101 *Id.* at 9.

102 *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020).

103 The Supreme Court will review the constitutionality of the independent Federal Housing Finance Agency this term, after this Article goes to print. See *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc), *cert. granted*, 2020 WL 3865248 (July 9, 2020) (mem.). The Agency's single-headed structure makes it an unlikely vehicle for the Court to address the constitutionality of multimember agency structures.

104 *Seila*, 140 S. Ct. at 2202 n.8.

105 *Id.* at 2238 (Kagan, J., dissenting in part).

106 See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 696–97 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing Miller for the proposition that *Humphrey's Executor* was "inconsistent with the text of the Constitution" and "with the understanding of the text that largely prevailed from 1789 through 1935").

107 Miller, *supra* note 2, at 57.

boards and settled on “administrative management by single executive officials,” by the “time of the Constitution.”¹⁰⁸ Miller’s historical overview also declared multimember agencies with for-cause protections a novel “technolog[y] of government,”¹⁰⁹ which did not become part of our Republic “[b]efore the twentieth century.”¹¹⁰ Miller concluded that the “independent agency is a constitutional sport,” or an anomaly “created without regard to the basic principle of separation of powers upon which our government was founded.”¹¹¹

Other studies in the 1980s and 1990s questioned prevailing originalist assumptions about early historical practice. Harold Krent reported that Congress sometimes granted prosecutorial power to private individuals or state officials outside of the federal executive branch.¹¹² Lawrence Lessig and Cass Sunstein built on Krent’s work and related that “the authors of the original practice . . . created a variety of structures” and “did not give the President plenary control” over all institutions created post-Founding.¹¹³ In addition to a “number of settings” in which prosecutorial power and “enforcement of the criminal law was placed beyond the control of the President,”¹¹⁴ other major departments such as Treasury lacked a structure consistent with strong “presidential direction.”¹¹⁵

Unitary executivists Steven Calabresi and Saikrishna Prakash responded by challenging their critics’ reliance on historical practice. Calabresi and Prakash argued that “postenactment behavior of the Congress” relied on by these critics was not only an unreliable source of original public meaning,¹¹⁶ but also was likely to be biased in favor of Congress and stood at odds with their unitary executivist construction of the Constitution’s “plain meaning.”¹¹⁷ As explained below, however, their insistence on a particular *construction* of the Constitution omitted important analytical steps that had not yet been explicated by original public meaning scholars.

108 *Id.* at 69.

109 *Id.* at 72.

110 *Id.* at 65.

111 *Id.* at 96–97.

112 See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–309 (1989).

113 Lessig & Sunstein, *supra* note 6, at 23.

114 *Id.* at 22.

115 *Id.* at 27–29 (discussing the independence of the Comptroller of Treasury and Madison’s views on tenure for offices with “judicial qualities” (quoting 1 ANNALS OF CONG. 636 (Joseph Gales ed., 1834))).

116 Calabresi & Prakash, *supra* note 6, at 554. This argument addresses “original public meaning” but does not acknowledge the possibility of “constitutional underdeterminacy” addressed by later original public meaning scholars. Solum, *supra* note 84, at 23 (emphasis omitted).

117 Calabresi & Prakash, *supra* note 6, at 553–54.

3. Original Public Meaning and the Underdetermined Nature of the Text

Around the same time unitary executives defended their position based on a particular construction of Article II, originalist theory itself was undergoing a significant change. While early studies searched for original intent, Justice Scalia and several prominent scholars urged originalists to shift their focus to original public meaning.¹¹⁸ Justice Scalia understood early historical practice to be an essential part of the inquiry into original public meaning. As he put it, the “understanding of the First Congress and of the leading participants in the Constitutional Convention” offers a “contemporaneous understanding of the President’s removal power.”¹¹⁹

The shift to original public meaning also inspired a more nuanced analytical framework. Original public meaning scholars identified an important distinction between constitutional interpretation, which “discern[s] the semantic content of the Constitution,” and constitutional construction, which “determin[es] the legal effect of the constitutional text.”¹²⁰ This distinction requires the communicative content fixed by the text of Article II to be identified through an “empirical inquiry” into linguistic and contextual facts in the first instance.¹²¹ The preliminary focus on semantic content, or meaning conveyed, operates independently of the ultimate “construction,” which gives “legal effect” to the semantic content and may also be “justified by normative considerations.”¹²² The text may admit a “range of acceptable constructions” that are susceptible to “change over time,” so long as these constructions stay “within the limits imposed by the original meaning of the text.”¹²³

Original public meaning scholars are not the only ones to emphasize empirical analysis of historical evidence of meaning and communicative content.¹²⁴ The public meaning inquiry overlaps with questions relevant to original law,¹²⁵ original intent,¹²⁶ and original methods¹²⁷ families of originalist theory, and even nonoriginalist inquiries for which original meaning is rele-

118 See Solum, *supra* note 84, at 22–23.

119 Scalia, *supra* note 10, at 852.

120 Solum, *supra* note 84, at 23.

121 Solum, *supra* note 80, at 12 (noting that this interpretive inquiry typically turns on linguistic and contextual facts, whereas the ultimate “construction” or “legal effect” will be “justified by normative considerations”).

122 *Id.*; accord Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010) (the “zone of underdeterminacy” left when evidence of linguistic meaning has run out is the “construction zone”).

123 *Id.* at 117–18 (emphasis omitted).

124 See *id.* at 99; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2010) (“It cannot be overstressed that the activity of determining semantic meaning at the time of enactment . . . is *empirical* . . .”).

125 See William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1458 (2019) (“[T]o claim that, *in fact*, our original law actually permits or requires [a thing] is to make an empirical and falsifiable claim . . . that has to be supported by historical evidence . . .”).

vant.¹²⁸ Take the papers of Alexander Hamilton, a key source of historical evidence relied on this Article. Hamilton's writings are a widely cited authority on the original public meaning of the Constitution,¹²⁹ and Hamilton's recommendations for an independent Commission became part of our original law when they were enacted by Congress and the President.¹³⁰ As Hamilton was also a Framers, his views shed light on original intent.¹³¹ And as a lawyer, Hamilton would also have understood the special legal meaning of the Constitution.¹³² Thus, his interpretation and practice under the Constitution would provide evidence relevant to an original-methods approach.

The bifurcated inquiry required to determine original public meaning also calls into question earlier assumptions about the clarity with which the text of Article II dictates a unitary executive and obviates the need to consult evidence of historical practice. Unadorned by construction, the raw text of Article II presents both a vagueness and an ambiguity that appear impossible to resolve based on direct textual interpretation. Article II vests "[t]he executive power" in the President, but it does not explain "what executive power is."¹³³ The open-textured nature of the phrase "executive power" renders it a "vague" term that admits of borderline cases.¹³⁴

Article II is also ambiguous because it has several gaps with respect to the relationship between the President and officers who help execute the law. These omissions stand in stark contrast to express provisions specifying the President's role in initial appointments to office. The Article II Appoint-

126 See Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 84, at 87 ("[T]he proper way to interpret the Constitution . . . is to seek its authors' intended meanings . . .").

127 See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751, 752 (2009); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 *WM. & MARY L. REV.* 1321, 1400–11 (2018) [hereinafter McGinnis & Rappaport, *Language of the Law*].

128 See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 717–18 (2013); William Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349, 2403 (2015) (discussing nonoriginalist uses of original history).

129 Balkin, *supra* note 128, at 702 (writings of Framers such as Hamilton show "what the text" of the Constitution "meant to a member of the lay public").

130 Original law may be especially authoritative because it reflects not only Hamilton's views but also those of a majority of First Congress and President Washington.

131 Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 *HARV. J.L. & PUB. POL'Y* 403, 406 (1996) (noting that Framers such as Hamilton "knew what they were talking about" and their "expertise, knowledge, and reflection influences us in a way that sheer majority will cannot"). The Framers' expertise also explains why Hamilton and other Framers are leading authorities on original public meaning. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *GEO. L.J.* 1, 47 (2018).

132 McGinnis & Rappaport, *Language of the Law*, *supra* note 127, at 1393 (stating that after the Constitutional Convention, Framers such as Hamilton "continued to treat the Constitution as written in the language of the law").

133 JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 244 (1996) (Article II "baldly" vested executive power in the President).

134 Solum, *supra* note 80, at 11.

ments Clause specifies two distinct presidential roles in initial appointments to office: the President shares the power to appoint principal officers with the Senate and may be one of three bodies in which appointment of an inferior officer is vested by law.¹³⁵ But Article II does not provide a list of executive offices that the President may fill, much less spell out the relationship between the President and executive officers after they have been appointed to an office.¹³⁶ The text is especially lacking when it comes to the President's removal power. Article II fails to expressly assign the President a removal power,¹³⁷ explain why removal power ought to be the President's primary mechanism of control over executive officers, or explain how any presidential removal power relates to specific provisions granting Congress power to remove officers through impeachment. All of these omissions show that the text of Article II severely underdetermines the President's power to remove executive officers.¹³⁸ It leaves significant questions about Congress's ability to define attributes of executive offices and place limits on the President's control over executive officers.

The First Congress had to confront the ambiguity of Article II head-on when it established the first great executive departments of government. In *The Federalist*, Alexander Hamilton had opined that the President's removal power would mirror the Appointments Clause and require the Senate to approve the President's decision to remove an officer.¹³⁹ As recounted by Chief Justice Taft, Hamilton's view was not universally accepted but remained part of a "division of opinion" expressed by lawyers, jurists, and members of the First Congress shortly after ratification.¹⁴⁰ In the deliberations leading up to Congress's initial resolution of these issues, known as the Decision of 1789, the First Congress spent "more than a month" debating four possible constructions of the removal power with respect to officers in the Department of Foreign Affairs.¹⁴¹ The Constitution's "silence" on the issue of executive removal power led members of the House of Representatives to address a broad range of arguments.¹⁴²

At one extreme, Article II could mean the "grant of executive power vested the President" with removal power that could not be restricted by Con-

135 U.S. CONST. art. II, § 2.

136 *Id.*

137 See *supra* note 81; Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 166 (2017) (noting that text-based "*originalist* arguments about the removal power . . . are a source of vague embarrassment").

138 Solum, *supra* note 80, at 41 (stating "a legal text is underdeterminate" if the text "produces outcomes for some but not all of the applications in the set").

139 THE FEDERALIST NO. 77, *supra* note 12, at 459 (Alexander Hamilton); RAKOVE, *supra* note 133, at 286 (noting that senatorial consent might "saddle[]" a new President "with holdovers from the prior administration").

140 *Myers v. United States*, 272 U.S. 52, 136 (1926).

141 Prakash, *supra* note 11, at 1023; see also Corwin, *supra* note 87, at 361.

142 JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 133–37 (2018).

gress.¹⁴³ A more limited view of the President’s power might allow Congress to choose whether or not to delegate unrestricted removal power to the President. Even more restrictive views might require the Senate to approve the President’s decision to remove an officer, as had been suggested by Hamilton, or hold that the Congress lacked power to supplement the text’s provision for removal of officers through impeachment.¹⁴⁴ This final view would give the President no more power to remove executive officers than he had to remove independent Article III judges, and raised concerns that it would provide no recourse against officers’ “all-too-common ‘total neglect of the duties’ of office.”¹⁴⁵

James Madison and Alexander Hamilton both had a “change of heart” regarding the President’s removal power and embraced more expansive views of the executive power after this debate was underway.¹⁴⁶ The variety of possible meanings and changes in viewpoints all establish Article II’s ambiguity. The text of Article II encompassed multiple possible meanings with respect to executive removal power, and it failed to communicate a single meaning fixed by the text of the Constitution at the time it “was framed and ratified.”¹⁴⁷ The construction settled on by the First Congress identified a presidential removal power and rejected two of the more restrictive views of removal power (that removal required senatorial approval or impeachment). The construction adopted in the Decision of 1789 did not, however, eliminate all underlying ambiguity in the text of the Constitution.

4. Recovering Original Meaning and Law Through Evidence of Early Historical Practice

a. The Decision of 1789

Given the inherent vagueness and ambiguity of the text of Article II, leading originalists have emphasized early historical practice as evidence of original meaning.¹⁴⁸ This analysis typically focuses on deliberations and

143 Prakash, *supra* note 11, at 1023.

144 GIENAPP, *supra* note 142.

145 *Id.* at 133 (quoting Theodore Sedgwick, *June 16 and 22, 1789*, in 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791, at 865 (Linda Grant De Pauw, Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1976)).

146 Prakash, *supra* note 11, at 1038 n.121 (noting that Hamilton retreated from his earlier call for senatorial approval); *id.* at 1039 (“Though Madison began as a partisan of the congressional-delegation theory, he eventually came to denounce it.”).

147 Solum, *supra* note 80, at 29; see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 15 (2019) (noting that liquidation was needed to resolve ambiguity as to presidential removal power).

148 Evidence of historical practice is relevant to the interpretive inquiry focused on original public meaning. Balkin, *supra* note 128, at 656–57 (explaining that “post-ratification history” may “shed light on adoption history”); Barnett, *supra* note 124, at 71 (“[H]istorical context usually allows us to identify which of multiple competing senses of a term is its most likely public meaning.”).

enactments in which the First Congress created the initial machinery of government under the Constitution, and originalists' detailed analysis of the removal debate leading up to the Decision of 1789 is a prominent example.¹⁴⁹ Part of this prominence reflects the "privileged" interpretive status that jurists have accorded to the First Congress's practices as actions that "reflect" the Constitution's original meaning.¹⁵⁰ As the First Congress acted on the heels of ratification, its understandings are generally thought to offer "weighty" and "contemporaneous" evidence of the Constitution's original meaning.¹⁵¹ This body also had many members who "had helped to compose or to ratify the Constitution itself,"¹⁵² and so the First Congress was exceptionally well situated to grasp the Constitution's original public meaning.

All Founding-era statutes incorporate, at least implicitly, Congress's and the President's interpretations of the Constitution with respect to the particular structure enacted. The enactment of legislation reflects the First Congress's and President's understanding that the laws fall within the bounds of linguistic meaning established by the text of the Constitution.¹⁵³ For example, the decision to exclude senatorial approval of the President's removal decisions in the Decision of 1789 provides evidence, in the form of an original law, that the Constitution *did not require* senatorial approval.¹⁵⁴ Original law can play a powerful role within originalist analysis, especially in areas where the text provides minimal cues. If the First Congress and President Washington had enacted the mirror image of the FTC, for example, it is doubtful originalists would challenge the constitutionality of the FTC's structure today.

That is not to say the "reflected light" of historical practice provides perfect evidence of constitutional meaning.¹⁵⁵ The norm of reason-giving appli-

149 Prakash, *supra* note 11; Scalia, *supra* note 10, at 851–52 (“[Myers] is a prime example of what . . . is known as the ‘originalist’ approach to constitutional interpretation. The objective . . . was to establish the meaning of the Constitution, in 1789, regarding the presidential removal power.”).

150 Baude, *supra* note 147, at 61–62.

151 *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 297 (1888)); *see also supra* note 10.

152 CURRIE, *supra* note 9, at 4.

153 *See Balkin, supra* note 128, at 657 (“[P]ractices of the Washington Administration immediately after adoption of the Constitution are generally . . . relevant to understanding the original meaning of Article II.”); Baude, *supra* note 147, at 61–62 (noting that post-Founding practices have “interpretive relevance” because they “can reflect some information about the Constitution’s *original meaning*”).

154 In this sense, the Decision of 1789 and resulting legislation offer helpful precedent on the initial interpretive question of the linguistic meaning of the Constitution. The Decision is better known as creating another type of precedent on the separate question of constitutional *construction* and whether the Constitution *should be construed* to permit the Senate to approve Presidential removals in other cases. *See infra* text surrounding note 164–65.

155 Baude, *supra* note 147, at 61–62 (quoting William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811 (2013)).

cable to judicial opinions does not generally extend to legislative and executive actions in the political branches. One cannot always expect early legislative and executive decisions to provide the same constitutional reasoning one would expect to see in a judicial opinion.¹⁵⁶ For this type of evidence, actions often speak louder than words. New legislation itself requires the approval of both Congress and the President (or at least a supermajority of Congress),¹⁵⁷ and one may be even more confident of interbranch approval when the executive branch itself was the body to propose a restriction on executive power (as was the case with the Sinking Fund Commission). While there is always the chance that such agreement reflects only “acquiescence” in an arrangement that is more convenient or politically desirable than it is constitutional,¹⁵⁸ the First Congress and the first President seem especially unlikely to ignore or overlook constitutional requirements.

A leading originalist scholar has praised the First Congress’s debates over the meaning of the Constitution,¹⁵⁹ and noted that this body “seem[ed] unlikely” to “casually toss aside . . . constitutional scruples merely to satisfy their policy preferences.”¹⁶⁰ James Madison, for example, was extremely self-conscious about how his work as a member of the First Congress would set the stage for later government practices.¹⁶¹ President Washington manifested a similar concern when he “devoutly wished” that initial “precedents” reflecting the creation and administration of government “be fixed on true principles.”¹⁶² Unlike later practices supported by interbranch acquiescence,¹⁶³ one cannot plausibly argue that the First Congress and President Washington were ignorant or had forgotten the basic structural requirements of the Constitution. Given trepidations that leading figures such as Madison and Washington voiced over precedent, it would be surprising if they were suddenly willing to bargain away constitutional requirements in order to create initial structures of government.

156 See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–67 (1978) (stating “[w]e demand of an adjudicative decision” a “decision which is the product of reasoned argument” and “a kind of rationality we do not expect of the results of . . . voting”).

157 U.S. CONST. art. 1, § 7.

158 Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 686–95 (2016) (describing how political branches’ acquiescence in a particular constitutional practice may reflect ignorance, politics, or coercion).

159 Prakash, *supra* note 11, at 1045.

160 *Id.*

161 See Baude, *supra* note 147, at 9–10 (noting Madison’s concerns). Although initial practice would not have established the “[c]ourse of deliberate practice” required to create a binding line of precedent, Madison also obsessed over the initial creation of government and its potential to lay the groundwork for a settled course of practice in the future. *Id.* at 16, 61.

162 CALABRESI & YOO, *supra* note 2, at 57 (quoting Letter from George Washington to James Madison (May 5, 1789), in 12 THE PAPERS OF JAMES MADISON 131, 132 (Charles F. Hobson & Robert A. Rutland eds., 1979)).

163 See generally Roisman, *supra* note 158.

Under this framework, the Decision of 1789 has provided the leading originalist precedent on executive removal power. As noted above, the deliberations leading up to this decision show textual ambiguity surrounding the President's removal power. The First Congress resolved some of the ambiguity in favor of a construction that created a stronger executive structure and did not subject the President's removal decisions to senatorial approval or leave the issue solely to Congress through impeachment. Its decision marked the beginning of a long period of "acquiescence" in which "there was no act of Congress, no executive act, and no decision of this Court" subjecting the President's removal power to senatorial approval.¹⁶⁴ Only later on did the original constitutional ambiguity give way to further disputes, when Congress decided to include senatorial approval provisions in its 1867 Tenure of Office Act and the House impeached President Andrew Johnson for violating the Act's requirements.¹⁶⁵ In *Myers*, the Supreme Court ultimately resolved the dispute by following the construction adopted by the First Congress.

The Decision of 1789 fails to resolve many other important questions about executive removal power. While the First Congress clearly rejected a constitutional requirement of senatorial approval, scholars disagree whether the decision to give the President unfettered removal power ultimately turned on a constitutional or congressional grant of removal power to the President.¹⁶⁶ The Decision does not address whether Congress may restrict the grounds upon which a President may unilaterally remove an officer. Nor does it address all types of domestic officers, multimember structures, or other officers who could "not be classified as purely executive."¹⁶⁷

Perhaps these distinctions are less important than other things the First Congress did not do when establishing the Department of Foreign Affairs. While one may debate whether the Decision of 1789 enshrined a unitary executive, no one argues that the resulting legislation created an affirmative precedent in favor of independent agencies. The First Congress did not enact key attributes of structural independence for the Department of Foreign Affairs, such as a multimember structure or a provision limiting the President's power to remove its officers.¹⁶⁸ The perceived lack of original precedent for these independent structural attributes is a fundamental reason originalists have condemned independent agency structures such as the Federal Reserve. But as explained below, the existing debate reflects a myopic focus on the Decision of 1789 and has largely overlooked crucial his-

164 *Myers v. United States*, 272 U.S. 52, 163 (1926).

165 *Id.* at 166.

166 Compare Prakash, *supra* note 11, at 1067 ("Congress decided that the President had a constitutional right to remove the Secretary of Foreign Affairs."), with CURRIE, *supra* note 9, at 41 (noting that this dispute culminated in legislation permitting the Secretary to be removed by the President, but with "no consensus as to whether" the president's authority derived "from Congress or from the Constitution itself"), and Corwin, *supra* note 87, at 369 (those who regarded removal as an "incident of 'executive power'" were a "minority of a minority").

167 Prakash, *supra* note 11, at 1071.

168 See Barkow, *supra* note 20, at 26.

torical evidence of the executive and legislative branches' approval of an independent structure for the Sinking Fund Commission.

b. The Independence of Obscure Domestic Commissions

While independent agencies have suffered from a perceived lack of precedent,¹⁶⁹ this perception has more to do with the incomplete state of historical research than actual historical practice. The magnitude of a broader empirical inquiry into early historical practices may help explain why historical research is incomplete. Decades ago, before the advent of advanced search technology, Justice Scalia predicted that examination of the “contemporaneous understanding of the President’s removal power,” along with other important background materials, “might well take thirty years and 7,000 pages.”¹⁷⁰ In the academic literature, a comprehensive study of early historical practices regarding domestic officers had not been completed by the early aughts. And Jennifer Mascott completed her groundbreaking study of original meaning and historical practice for appointments of federal officers only very recently.¹⁷¹

The incomplete historical record explains why Jerry Mashaw expected to find a “largely open and unpopulated” field of early administrative institutions when he began a historical inquiry just over a decade and a half ago.¹⁷² Instead he found that the “volume one of the Statutes at Large” created “multiple regulatory schemes” that “others have largely ignored.”¹⁷³ Importantly, Mashaw’s research on the First Congress’s enactments identified a handful of early instances in which “Congress experimented with independent boards and commissions.”¹⁷⁴ In addition to noting the Sinking Fund Commission, Mashaw explained that “Congress created commissions and boards outside of any of the major departments to oversee the Mint . . . and to rule on patent applications.”¹⁷⁵

Mashaw emphasized the independence reflected in Congress’s decision to bypass an additional appointments process and create commissions and boards that “were made up of already existing officers of the United States.”¹⁷⁶ For example, the Sinking Fund Commission and committee to inspect coinage at the Mint both included the Chief Justice, Secretary of the Treasury, Secretary of State, and the Attorney General.¹⁷⁷ Congress’s “first statute authorizing the issuance of patents” made “the Secretary of State, Sec-

169 Calabresi & Lawson, *supra* note 4, at 859.

170 Scalia, *supra* note 10, at 852.

171 See *supra* note 3.

172 MASHAW, *supra* note 6, at viii.

173 *Id.*

174 Mashaw, *supra* note 6, at 1340.

175 *Id.* at 1291.

176 *Id.*

177 *Id.* at 1301. The committee to inspect coinage at the Mint also included the Comptroller of the Treasury and the Sinking Fund Commission included the President of the Senate and Vice President. *Id.* at 1301–02.

retary of War, and the Attorney General into the Patent Office.”¹⁷⁸ Mashaw also explained that Congress did not give the President authority to replace all of the officers assigned to these bodies: “Some of these ex-officio commissioners could be replaced by the President by replacing the officers. But other Boards of Commissioners contained non-removable officials like the Chief Justice and the President of the Senate.”¹⁷⁹

Mashaw’s discovery of independent commissions has not led unitary executives to abandon their preferred construction of Article II. Their objections challenge the extent to which the Sinking Fund Commission and similar bodies were truly independent of executive control. According to Calabresi and Yoo, neither the Sinking Fund Commission nor other independent commissions described by Mashaw were “described as being independent in the statutes that created them,” and these commissions still included a majority of “executive branch members” who “were obviously removable at will.”¹⁸⁰

Sai Prakash suggests that the Sinking Fund Commission was subject to a different type of presidential control than removal power. Prakash notes that the Act creating the Sinking Fund Commission “expressly authorized the president to approve the commissioners’ decisions” to purchase U.S. securities.¹⁸¹ He claims that this provision allowed the President to “direct” the Chief Justice and other Commissioners “in their executive capacities,” even though Commissioners like the Chief Justice “could not be removed from office, because they did not formally occupy a separate executive office.”¹⁸² Aditya Bamzai has recently reiterated these arguments. He asserts that both approbation and removal at will ensured presidential control of the Sinking Fund Commission.¹⁸³

Taken together, the distinctions raised by Calabresi, Yoo, Prakash, and Bamzai raise further questions about the amount of control the President had over the Sinking Fund Commission. If the President had complete control over the Commission based on his power to remove a majority of Commissioners at will, then why did Congress include additional provisions requiring the President to approve purchases authorized by a majority of the Commission? Indeed, why even bother with a multimember Commission when a single executive officer such as the Secretary of the Treasury would seem far better suited to effectuate the President’s wishes? And did the President’s power to approve the Commission’s purchases give him the same control he would have had if the functions of the Commission were assigned to the Secretary of the Treasury or a single officer he could remove at will?

178 *Id.* at 1302 (citing An Act to Promote the Progress of Useful Arts, ch. 7, 1 Stat. 109 (1790) (repealed 1793)).

179 *Id.* at 1291.

180 CALABRESI & YOO, *supra* note 2, at 53.

181 PRAKASH, *supra* note 6, at 279–80 (noting that the Sinking Fund Commission was one instance in which “early chief justices served as executive officers”).

182 *Id.* at 280–81.

183 Bamzai, *supra* note 6, at 1339.

A final wrinkle is whether the open market purchases conducted by the Commission were quasi-private activities that fell outside the removal and appointments requirements for officers exercising executive power under Article II. Calabresi and Yoo, for example, compare the Federal Reserve to the Bank of the United States,¹⁸⁴ but they do not offer a detailed comparison between the Bank's operation pursuant to a federal corporate charter and the Federal Reserve's open market purchases pursuant to a statutory mandate. The Bank of the United States was originally conceived of as a private institution by Alexander Hamilton,¹⁸⁵ was statutorily barred from purchasing U.S. securities,¹⁸⁶ and did not execute a clearly enumerated sovereign power pursuant to its corporate charter.¹⁸⁷ By contrast, open market purchases made by the Federal Reserve and Sinking Fund Commission have been expressly authorized by statute and execute laws that effectuate sovereign powers to "regulate the Value" of money (for the Federal Reserve) or "pay the Debts" (for the Commission) under Article I, Section 8 of the Constitution.¹⁸⁸ Thus the functions of the Federal Reserve's Open Market Committee and the Sinking Fund Commission cannot be set aside as quasi-private functions that fall outside of Article II's general requirements. The constitutional debate turns squarely on the above questions about the Sinking Fund Commission's independence from presidential control in its exercise of executive power.

This Article sets forth historical evidence addressing these questions in Part III, below. The evidence establishes that the Sinking Fund Commission possessed much more independence than unitary executives have recognized. Historical practice provides compelling evidence that the Constitution allows Congress to limit the President's control over officials who execute statutes effectuating enumerated powers under Article I, Section 8. The Commission's open market purchases executed statutes involving a sovereign power to "pay the Debts" under Article I, Section 8 of the Constitu-

184 CALABRESI & YOO, *supra* note 2, at 54.

185 Bamzai, *supra* note 6, at 1341 (recounting Hamilton's argument that the Bank "shall be under a *private* not a *public* Direction").

186 Congress established the First Bank as a corporate body allowed to sell but not purchase public debt. See An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 7, 1 Stat. 191, 193 (1791) ("The said corporation may sell any part of the public debt whereof its stock shall be composed, but shall not be at liberty to purchase any public debt whatsoever . . .").

187 GIENAPP, *supra* note 142, at 202–47 (recounting debate over sovereign authority to establish the Bank of the United States).

188 U.S. CONST. art. I, § 8. Article I, Section 8 enumerates legislative powers the execution of which Congress may delegate to the executive branch. *Id.* Execution of laws on payment of debt or regulating the value of money falls within both the "thick" and "thin" understandings of executive power. See Julian Davis Mortenson, *The Executive Power Clause*, 167 U. PENN. L. REV. (forthcoming) (manuscript at 5) (stating that under a thin view, the "executive power meant the power to execute. Period."); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 137 (2020) (stating that a thick understanding of the executive power includes "power to execute law").

tion. Yet the President lacked complete control over the Sinking Fund Commission's exercise of that power.

B. *Original Appointments Clause Requirements*

Originalist scholars have also questioned whether current precedent has unduly narrowed the President's role under the Appointments Clause. The Constitution does not guarantee the President an opportunity to appoint an officer unless that individual is both a principal officer as well as an official who exercises significant authority of the United States. Originalist scholars have questioned the Supreme Court's dividing line between principal and inferior officers as well as the Court's dividing line between officers of the United States and employees or other officials who need not be appointed pursuant to Article II.

Gary Lawson has questioned the established dividing line between principal and inferior officers. As noted in *Edmond v. United States*,¹⁸⁹ this test turns on a hierarchical relationship, and "officers who do not answer to other officers" are principal officers.¹⁹⁰ Lawson points out, however, that even subordinate officials might still be "principal officers because of the nature and scope of their authority."¹⁹¹ In other words, "[a]nswerability to another officer is a *necessary* condition of inferior officer status, but it is not necessarily a *sufficient* condition."¹⁹² Lawson cites evidence from the Founding era to support this dual definition: while "inferior" primarily encompassed a hierarchical relationship, this term was sometimes used to connote "scope of authority" instead.¹⁹³ Under this alternative understanding of the term "inferior," one might conclude that the "enormous power" possessed by an entity such as the Public Company Accounting Oversight Board would prevent Board members from qualifying as inferior officers.¹⁹⁴

Lawson candidly admits that evidence of original meaning on this point is "very thin."¹⁹⁵ Still, his argument touches on the problems Peter Conti-Brown has raised with regard to the Open Market Committee. Even though bank presidents may technically be controlled by and inferior to Governors on the Committee, at Committee meetings these bank "presidents' votes count the same as those of their would-be superiors" on the Board of Governors.¹⁹⁶ And the Committee's monetary policy decisions have significant effects on the national economy. In the lone district court case addressing the constitutionality of bank presidents' appointments to the Committee,

189 520 U.S. 651, 662–663 (1997).

190 Lawson, *supra* note 3, at 77.

191 *Id.* at 78 (emphasis in original).

192 *Id.*

193 *Id.*

194 *Id.* at 79 (noting the Board's power "to regulate virtually every aspect of the public auditing process").

195 *Id.* at 80 (developing further argument regarding heads of separately organized departments).

196 CONTI-BROWN, *supra* note 2, at 113.

Melcher v. Federal Open Market Committee, the court noted that members of the Open Market Committee exercised “vast powers” akin to those of principal officers when they cast their votes at committee meetings.¹⁹⁷ It would be difficult to argue that the Committee’s decisions have a trivial effect on the national economy. Instead, it may be that the scope and nature of the Open Market Committee’s decisions are sufficiently important that everyone voting on the Committee should be considered a principal officer.

The district court in *Melcher* avoided the principal officer question when it held that the bank presidents’ participation in the Open Market Committee did not amount to an impermissible exercise of authority of *the United States* under *Buckley v. Valeo*.¹⁹⁸ The Court relied on the fact that the Committee did not have power to bind third parties, because it did “not direct the conduct of anyone other than its own members.”¹⁹⁹ Jennifer Mascott has recently challenged this aspect of *Buckley*’s governing “significant authority” test on originalist grounds. As she notes, “historical evidence suggests that the most likely eighteenth century meaning of ‘officer’ was significantly broader than the modern ‘significant authority’ test implies.”²⁰⁰ Rather than distinguishing between discretionary or ministerial functions, “[i]n the Founding era, the term ‘officer’ was commonly understood to encompass any individual who had ongoing responsibility for a governmental duty.”²⁰¹ Mascott argues that this definition includes some officials who do not have the power to bind third parties outside the government with the force of law, given that the First Congress “appointed as officers the clerks who engaged merely in tasks like recording the receipt of registration certificates from merchant ships importing goods.”²⁰²

As one would expect of an empirical study reflecting historical practice, Mascott’s research does not uncover a perfectly uniform practice with respect to congressionally mandated appointments. She acknowledges several governmental actors for whom the appointments process does not reflect a broader understanding of the term “officer.” In cases where the non-officer had the power to bind third parties, the exceptions often reflected instances where multiple governmental actors shared primary responsibility for the same decision, and a properly appointed officer retained significant responsibility for the non-officer’s exercise of sovereign power. This shared responsibility may reflect the fact that the non-officer acts as a principal officer’s

197 644 F. Supp. 510, 519 (D.D.C. 1986).

198 *Id.* at 520, 523 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

199 *Id.* at 523 n.26.

200 Mascott, *supra* note 3, at 450.

201 *Id.*

202 *Id.* at 462; *see also* *Lucia v. SEC.*, 138 S. Ct. 2044, 2062–63 (2018) (Breyer, J., concurring in judgment and dissenting in part) (noting Congress’s provision of an officer-level appointments process “supports” but does not decide that “Congress viewed the position as one to be held by an ‘Officer’. . . .”).

agent, or the requirement that a principal officer assumes personal liability for the non-officer's binding actions.²⁰³

These exceptions raise questions about how originalists would categorize the actions of Federal Reserve bank presidents on the Open Market Committee. On the one hand, their votes involve ongoing responsibility for a governmental duty. On the other hand, Federal Reserve bank presidents share primary responsibility for open market operations with the Governors, who are properly appointed principal officers. Although presidents of Federal Reserve banks do not act as Governors' agents on the Committee, the Committee's voting and quorum requirements prevent presidents from initiating any open market operations without the Governors' consent.²⁰⁴

The exception identified by Mascott raises significant questions as to whether or not originalists would view open market purchases by a multi-member Commission as actions that must be assigned exclusively to officers appointed in accordance with Article II.²⁰⁵ The First Congress's decision to empower the Sinking Fund Commission to purchase U.S. securities in furtherance of statutorily defined goals provides helpful precedent on this issue. As explained in more detail below, Congress's decision to designate the Chief Justice as an *ex officio* Commissioner—without any separate appointment to an executive branch office—suggests that Appointments Clause requirements do not apply to members of an agency who share decision-making authority with properly appointed principal officers.

III. THE CREATION AND OPERATION OF THE SINKING FUND COMMISSION

Until now, studies of early historical practice have not included an in-depth analysis of the independence of the Sinking Fund Commission. The Commission's open market purchases of U.S. securities pursuant to statutory mandates are the same actions the Federal Open Market Committee can take when it wishes to expand the money supply today. The Sinking Fund Commission arose in a historical context in which open market purchases were needed to prop up the value of fledgling U.S. securities and provide a viable framework for financing repayment of the national debt. The Sinking Fund Commission was a critical part of Alexander Hamilton's plan to secure U.S. credit and provide a sound plan for financing a burgeoning national debt by

203 Mascott, *supra* note 3, at 517 (agency relationships); *id.* at 522 (noting that the deputy was not treated as an officer “[w]here the primary officer” was personally liable “for the deputy’s misdeeds”).

204 See *supra* discussion surrounding note 61. While Mascott noted a further exception for the Bank of the United States and its operation by bank directors who were appointed outside of any Article II process, Mascott, *supra* note 3, at 531, the quasi-private nature of Bank operations does not apply to the Sinking Fund Commission or Open Market Committee's purchases and execution of sovereign government functions.

205 Mascott's general survey of new officers appointed to various Commissions does not address the *ex officio* Commissioners discussed here. This may be because her survey of “personnel expenditures” would not necessarily link any additional expenditures to *ex officio* service in a second governmental office. Mascott, *supra* note 3, at 509–10.

issuing new U.S. securities.²⁰⁶ The discussion below lays out the background of the Sinking Fund Commission as it was recorded in the writings of Alexander Hamilton,²⁰⁷ reports of debate and legislation adopted by the First Congress,²⁰⁸ and Commission meeting records or correspondence authored by Commissioners Alexander Hamilton, John Jay, John Adams, and Thomas Jefferson.²⁰⁹

A. *Secretary Hamilton's Proposal*

The Constitution bound our new nation to honor preexisting debt,²¹⁰ much of which reflected the high “price of liberty,”²¹¹ namely, foreign and domestic loans taken out to fund the Revolutionary War. To add to these concerns, some states also retained significant war debts from their common defense efforts, and collection of funds to repay state debt threatened to compete with federal efforts to collect funds for the national debt.²¹² By 1790, the overall amount of debt was so large that “the country could not have redeemed debt” with current levels of revenue, and “it was dicey whether the United States could cover even the interest on its debt.”²¹³ Con-

206 RICHARD SYLLA & DAVID J. COWEN, *ALEXANDER HAMILTON ON FINANCE, CREDIT, AND DEBT* 78 (2018).

207 Hamilton’s writings include reports submitted to Congress as well as his official correspondence. Unless otherwise noted, the Hamilton papers cited in this study are drawn from the National Archive’s National Historical Publications and Records Commission’s *National Archives: Founders Online*, available at <https://founders.archives.gov/about>. This collection has the advantage of including “documents authored and received by, or related to, individual leaders of the period,” as well as “transcriptions of thousands of documents that have not yet appeared in the published volumes” of existing collections. *About Founders Online*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/about> (last visited Sept. 30, 2020). The Hamilton Papers in the National Archive collection are identical to those gathered in the Rotunda database subscription. See E-mail from David Sewell, Manager of Digital Initiatives, Univ. of Va. Press, to Christine Chabot, Associate Director for Regulation, Institute for Consumer Antitrust Studies, and Distinguished Scholar in Residence, Loyola Univ. Chi. Sch. L. (Apr. 11, 2019, 8:51 AM) (on file with the author). See generally William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* 28 (last updated Nov. 2, 2018) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2718777) (discussing Rotunda database).

208 Reports of congressional debates are drawn from the *Annals of Congress*.

209 Meeting records and correspondence are drawn from the *National Archives: Founders Online* collection described above in note 207.

210 U.S. CONST. art. VI.

211 *Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit* (1790), reprinted in 2 *ANNALS OF CONG.* 2043 (1790). This Article uses the version of the *Annals* paginated according to the “Gales & Seaton’s History of Debates in Congress” headings that is available on the Library of Congress website. See Baude & Campbell, *supra* note 207 (manuscript at 12). Hamilton’s January 9, 1790 Report appears in an Appendix to Volume 2 of this version of the *Annals of Congress*.

212 See SYLLA & COWEN, *supra* note 206, at 72 (explaining the goal of reducing competition for resources between federal and state governments).

213 Richard Sylla & Jack W. Wilson, *Sinking Funds as Credible Commitments: Two Centuries of US National-Debt Experience*, 11 *JAPAN & WORLD ECON.* 199, 208, 212 (1999).

gress asked Hamilton to “devise a plan to repay the nation’s debts,”²¹⁴ and he submitted a Report Relative to a Provision for the Support of Public Credit.²¹⁵ This Report outlined an extensive plan for refinancing state and federal debts and issuing new U.S. securities to meet current obligations to pay interest on existing debt. Hamilton’s plan offered to maintain the United States’ ability to “borrow . . . upon good terms”²¹⁶ by assuming state debts and restructuring interest payments to “bring the expenditure of the nation to a level with its income,”²¹⁷ all without resorting to high taxes that might backfire by inducing smuggling.²¹⁸

While acknowledging that “proper funding” of the national debt could be a “national blessing,”²¹⁹ Hamilton warned that debt was not an unqualified good. He counseled that “the creation of debt should always be accompanied with the means of extinguishment.”²²⁰ Hamilton’s mechanism for committing to extinguish debt was a sinking fund, a basic concept which Hamilton borrowed from eighteenth-century England.²²¹ The sinking fund reflected the “commitment of a borrower to amortize a portion of a debt incurred prior to its maturity.”²²² This commitment makes the debt “more attractive to the lender” while also allowing the borrower to obtain a “lower interest rate” (a benefit which applies whether the true goal of the sinking fund is debt repayment or additional borrowing).²²³ As proposed by Hamilton, the sinking fund would also repay debt through open market purchases of U.S. securities. These purchases would have the additional benefit of stabilizing the value of securities that reflected the existing debt of the United States. The Commission’s open market purchases would protect U.S. credit by stabilizing and “rais[ing] the value” of U.S. securities to par value.²²⁴

214 SYLLA & COWEN, *supra* note 206, at 69.

215 See 2 ANNALS OF CONG. 2041 (1790).

216 *Id.*

217 *Id.* at 2063.

218 *Id.* at 1396, 2056 (noting that “increased . . . duties” would “promote smuggling”).

219 *Id.* at 2070.

220 *Id.* at 2070–71. Hamilton’s critics charged that the sinking fund was not intended to eliminate debt, but was rather a smokescreen designed to perpetuate debt by ensuring good credit. See Sylla & Wilson, *supra* note 213, at 212; see also SMITH, *supra* note 13, at 868 (“A sinking fund, though instituted for the payment of old, facilitates very much the contracting of new debts.”); cf. Sylla & Wilson *supra* note 213, at 213 (“[R]evenues pledged to the sinking fund would likely generate surpluses over and above what was needed to retire the debt in 30 years . . .”).

221 See 2 ANNALS OF CONG. 2045 (1790) (noting benefits of funded debt in Great Britain); see also FORREST McDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 56–58 (1974) (explaining how Hamilton borrowed ideas from Prime Minister Walpole’s sinking fund, which was a mechanism used to “restore financial stability”); JOHN C. MILLER, THE FEDERALIST ERA, 1789–1801, at 40 (1960) (“Hamilton’s model was the British financial system . . .”).

222 Sylla & Wilson, *supra* note 213, at 204.

223 *Id.*

224 2 ANNALS OF CONG. 2045 (1790).

Hamilton recommended that a five-member Commission administer the United States' sinking fund. He proposed that the Commission consist of the following principal officers of the United States: the Vice President of the United States or President of the Senate, the Speaker of the House of Representatives, the Chief Justice, the Secretary of the Treasury, and the Attorney General of the United States.²²⁵

Three or more of these officers could discharge public debt through open market purchases of U.S. securities or by paying down the principal.²²⁶ The Commission would hold funds to make these purchases "in trust" and fund initial purchases from the "nett product of the post-office" in a "sum not exceeding one million of dollars."²²⁷ Although the sinking fund proposal preceded Hamilton's plan for a Bank of the United States, he alluded to a future proposal for such a bank and anticipated that the bank could help facilitate sinking fund purchases in the future.²²⁸

Hamilton proposed a Commission independent of executive control. He contemplated no direct presidential oversight for open market purchases or principal repayments made with post office proceeds. More importantly, he recommended a five-member Commission rather than a single officer (even himself as Secretary of the Treasury) who would be better suited to carry out a unitary executive's directives.²²⁹ Hamilton recommended that Congress specify the five officers who constituted the Commission and bypass the President's nomination of principal officers to the Commission. Three of the five officers proposed by Hamilton possessed great independence from the President. Their primary offices were not subject to any form of presidential control or removal, and two of these officers did not even attain their primary offices through presidential appointments.

The original role of the Vice President illustrates the scope of Commissioners' structural independence. The Vice President's primary function was to serve as President of the Senate and thus, part of both the executive and the legislative branches.²³⁰ Before the Twelfth Amendment, the President served alongside a Vice President who attained office by being runner-up in the presidential election, and Presidents therefore had not yet "assume[d]

225 *Id.*

226 *Id.*

227 *Id.*

228 *Id.* at 2072.

229 *Id.*; cf. THE FEDERALIST NO. 70, *supra* note 12, at 424 (Alexander Hamilton) (stating that "[d]ecision" and "dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number"); Barkow, *supra* note 20, at 37–38 (noting that the "unitary executive model of Article II" will mean "less deliberation and debate" than a "multimember agency").

230 U.S. CONST. art I, § 3 ("The Vice President of the United States shall be President of the Senate . . ."); Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 386–87 (2013) (stating that "[t]he Constitution's original meaning conceived of the Vice President . . . as occupying essentially a legislative position," though it "did not dissociate the Vice Presidency entirely from the executive branch").

the leading role in selecting their running mates.”²³¹ The Constitution afforded the Vice President a “Term of four Years,” which could be cut short only by impeachment and was not subject to a presidential removal power.²³² The Speaker of the House enjoyed similar independence from executive control. The Speaker was part of the legislative branch, and the Constitution authorized the House to both choose its Speaker²³³ and expel members of the House by a two-thirds vote.²³⁴ Finally, the Chief Justice was part of the judicial branch and enjoyed complete independence from executive control after his appointment to office. The Constitution allowed the Chief Justice to serve for life without fear of executive removal, demotion, or reduction in salary.²³⁵ Only the Secretary of the Treasury and Attorney General were Commissioners who held executive offices appointed by the President and confirmed by the Senate, and who arguably served at the will of the President.²³⁶

When considered in modern terms, Hamilton’s proposal offers a striking level of independence from executive control. If the Commission he contemplated in 1790 were assembled today, it would include Hillary Clinton (who as runner-up in the 2016 presidential election would have been Vice President under the original Constitution), Speaker of the House Nancy Pelosi, Chief Justice John Roberts, Attorney General William Barr, and Treasury Secretary Steven Mnuchin. By virtue of their offices, Clinton, Pelosi, and Roberts would be free to make open market purchases without regard to President Trump’s wishes.

Even when Hamilton contemplated a supervisory role for the President, it was limited in scope. This supervisory role involved borrowing funds to supplement independent purchases funded through post-office returns. Hamilton proposed that the Sinking Fund Commissioners “be authorized, *with the approbation of the President of the United States*, to borrow . . . a sum not exceeding twelve millions of dollars.”²³⁷ The President’s “approbation” was

231 Goldstein, *supra* note 230, at 397. *See generally* U.S. CONST. art. II, § 1 (after the President, “the Person having the greatest Number of Votes of the Electors shall be the Vice President”).

232 U.S. CONST. art. II (granting the Vice President the “same Term” as the President and providing for his removal by impeachment).

233 The House has power to “chuse their Speaker and other Officers.” *Id.* art. I, § 2.

234 The United States Constitution Article 1, Section 5 allows the House to “punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”

235 U.S. CONST. art. III, § 1 (“Judges . . . shall hold their Offices during good Behaviour . . .”).

236 Calabresi & Prakash, *supra* note 6, at 651, 659 (arguing that these officers served at will); *cf.* MASHAW, *supra* note 6, at 41 (noting that the “initial Treasury statute . . . appears to make the Secretary of the Treasury responsible primarily to Congress rather than to the President”); *id.* at 43 (arguing the Attorney General’s “initial position” was “hardly” an “extension of the President”).

237 2 ANNALS OF CONG. 2071 (1790) (emphasis added).

essentially a veto power: the President had authority to approve or reject any loans the Commissioners presented to him.

Hamilton's earlier writings in *The Federalist* reveal his understanding that "approbation" provides a limited power. When discussing the Senate's power of "approbation" over the President's nomination of a principal officer, for example, Hamilton noted that the President retained a substantial first-mover advantage in naming the nominee. As described in *The Federalist No. 76*, the President's "sole duty to point out the man who, with the approbation of the Senate, should fill an office" grants the President a "responsibility" as "complete as if he were to make the final appointment."²³⁸ The Senate's power to overrule the President's nomination does not ensure that the "person they might wish" or "a candidate in any degree more acceptable" will later be brought forward.²³⁹ Likewise, if Commissioners had the initial power to pursue certain types or amounts of loans in the first instance, they would retain substantial control over the nature of federal borrowing submitted for presidential approval.

Even if the Commissioners chose to pursue only those loans that the President would likely approve,²⁴⁰ the President would have only an incomplete power over borrowing decisions. This is because the President could not force the Commissioners to take on loans that they were disinclined to seek out in the first instance. The President had no power to remove or otherwise direct the actions of the Vice President and President of the Senate, Speaker of the House, and Chief Justice, at least one of whose votes were necessary for the Commission to take action. And in the context of borrowing, a failure to act could have enormous ramifications for monetary policy. It might require the United States to continue paying debt at a high interest rate rather than obtaining a new loan with a lower interest rate. Or the Commission might refuse to borrow money to fund open market purchases needed to stabilize the value of U.S. securities. Failure to pursue open market purchases would be similar to the Federal Reserve's refusal to purchase U.S. securities in a manner designed to lower interest rates today.²⁴¹

Hamilton had good reason to propose an independent Sinking Fund Commission in 1790. By the time Hamilton proposed a sinking fund in the United States, sinking funds had had a lengthy track record in England. And the English experience displayed widely known problems: sinking fund commitments "were often honored in the breach and sometimes abused,"²⁴² as

238 THE FEDERALIST NO. 76, *supra* note 12, at 457 (Alexander Hamilton).

239 *Id.*

240 Hamilton referred to the possibility of a similar senatorial influence over nominees as the "silent operation" of the power to grant advice and consent. *Id.* Over time, confirmation has granted the Senate only limited power over the President's choice of nominee. See Christine Kexel Chabot, *A Long View of the Senate's Influence over Supreme Court Appointments*, 64 HASTINGS L.J. 1229, 1262 fig.3 (2013).

241 The Federal Reserve does not need to take out loans or secure appropriations to fund its purchases of U.S. securities. See Ramirez, *supra* note 17, at 525 ("The Fed is also remarkably independent of the appropriations process.").

242 Sylla & Wilson, *supra* note 213, at 204.

“fund accumulations were raided over and over for spending purposes other than debt redemption.”²⁴³ The “flaw,” according to Dick Sylla and Jack Wilson, was “to leave Parliament and the king’s ministers in charge” of funds accumulated for debt repayment.²⁴⁴ These political actors often shirked their obligation to pay down debts when the funds could be diverted to other uses. The diverted funds often eliminated the need for an unpopular tax increase and gained immediate favor with the politicians’ constituents. These concerns with sinking funds were well documented by 1776, with the publication of Adam Smith’s famous treatise, *The Wealth of Nations*. As Smith explained in *The Wealth of Nations*, the English often found it politically “expedient” to pay for new expenses with money from the sinking fund, as this resource allowed politicians to cover unforeseen expenses without imposing a new tax.²⁴⁵ Adam Smith labeled the result “the usual misapplication of the sinking fund.”²⁴⁶

Alexander Hamilton’s writings echoed the concerns articulated by Adam Smith.²⁴⁷ When Hamilton first proposed a sinking fund to the Continental Congress in 1782, for example, he urged that it “be inviolably appropriated to the payment of the principal of the said debt and shall on no account be diverted to any other purpose.”²⁴⁸ And when Hamilton continued to propose a five-member Sinking Fund Commission in subsequent legislation in 1795, he again underscored its role in ensuring “inviolable application” of funds to reduce debt.²⁴⁹ Hamilton’s proposal to appropriate the sinking fund “permanently under the direction of Commissioners” was a key part of his plan to “fix” the fund’s “destination unchangeably.”²⁵⁰ “[A] simple appropriation of the sinking fund,” without an independent commission, would not provide “a complete barrier against its being diverted when immediate exigencies press.”²⁵¹ Instead, appropriated funds would surely “tempt the administrators of Government to lay hold of this resource, rather than resort to new taxes.”²⁵²

By 1795, an independent Commission alone did not guarantee a sufficient safeguard for Hamilton—he also recommended that the application of

243 *Id.* at 205.

244 *Id.*

245 SMITH, *supra* note 13, at 873; Sylla & Wilson, *supra* note 213, at 205.

246 SMITH, *supra* note 13, at 873.

247 See Samuel Fleischacker, *Adam Smith’s Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 879, 901 (2002).

248 *Continental Congress Report on a Letter from the Speaker of the Rhode Island Assembly, 16 December 1782*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-03-02-0123> (last visited Aug. 9, 2020).

249 See *Report on a Plan for the Further Support of Public Credit, [16 January 1795]*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-18-02-0052-0002> (last visited Aug. 10, 2020) (remarks on proposition V).

250 See *id.*

251 *Id.*

252 *Id.*

funds become “*part of the Contract with the Creditors*” and therefore clothed “with the character of *private property*.”²⁵³ It was “safe to put the fund so intirely out of the command of the Government” with these contractual commitments, Hamilton reasoned, because amounts pledged to the sinking fund would not “tie[] up” “too great a proportion of the public revenue.”²⁵⁴ Based on his knowledge of past experience in England, Hamilton had good reason to fear a sinking fund placed at the sole disposal of a responsive political actor (be it Parliament or a unitary executive). Instead, Congress could count on its sinking fund directives to be executed more faithfully when administered by an independent Commission and checked by contractual obligations.

B. *The Sinking Fund Act of August 12, 1790*

The First Congress passed “An Act making Provision for the Reduction of the Public Debt” on August 12, 1790.²⁵⁵ The Act authorized open market purchases of U.S. securities that would both “effect a reduction of the amount of the public debt” and benefit the “creditors of the United States, by raising the price of their stock.”²⁵⁶ Congress further directed that all purchases be made in a “manner” and with “regulations . . . best calculated to fulfill the intent of this act.”²⁵⁷ The Act funded open market purchases through surplus revenue from certain duties and loans,²⁵⁸ and it circumscribed purchase power and limited creditors’ potential profits by capping purchases at “market price, if not exceeding the par or true value” of U.S. securities.²⁵⁹

Within this framework, Congress delegated general power over purchasing decisions to a multimember Sinking Fund Commission comprised of five named officers. The Act provided that “the purchases to be made of the said debt, shall be made under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General.”²⁶⁰ The Act assigned the President a limited role in purchases when it allowed him the “approbation” of purchases already agreed upon by three or more members of the Commission.²⁶¹ It specified that the Commissioners, “or any three of whom, with the approbation of the President of the United States, shall cause the said purchases to be made in

253 *Id.* (emphasis in original).

254 *Id.*

255 Act of Aug. 12, 1790, ch. 47, 1 Stat. 186.

256 *Id.*

257 *Id.* § 2.

258 *Id.* §§ 1, 4.

259 *Id.* § 1.

260 *Id.* § 2.

261 *Id.*

such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act.”²⁶²

The structure adopted by Congress modified Hamilton’s proposal. In one change, Congress substituted the Secretary of State for the Speaker of the House,²⁶³ a move which a commentator has subsequently explained as necessary to avoid violating Article I, Section 6’s prohibition on members of Congress holding executive offices.²⁶⁴ While Congress’s substitution of the Secretary of State for the Speaker of the House also meant that three officers on the Commission were subject to removal at will by the President, Congress did not act as though this change would afford the President complete control over all of the Commission’s decisions. Instead, it added an additional control mechanism: approbation. In cases where a majority of the Commission agreed to a purchase, approbation subjected these open market purchase decisions to the President’s approval.²⁶⁵ An approbation power seems to indicate Congress’s choice to grant the President additional power he did not automatically possess under the Constitution, as the approbation power did not appear in other statutes that established Departments in which the President’s removal power was thought to control single officers, such as the Secretary of the Treasury or Foreign Affairs.²⁶⁶

The President’s approbation power was limited, moreover, because it checked only a subset of the Commission’s substantive decisions: those cases in which the Commission desired a purchase that the President did not. In all other cases, the Commission checked the President and had power to block purchases. In particular, the Act stated that

purchases . . . shall be made under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General for the time being; and who, or any three of whom, with the approbation of the President of the United States, shall cause the said purchases to be made.²⁶⁷

No purchase could take place where the President believed that an open market purchase would serve statutory goals, but a majority of the Commission disagreed. The Commission’s checking function addressed one of Ham-

262 *Id.* § 2. A separate section of the Act authorized the President sole power to borrow up to two million dollars for open market purchases. *See id.* § 4.

263 *See id.* § 2.

264 *See Bamzai, supra* note 6, at 1339 (observing that “[t]he substitution suggested that Congress was concerned about” structure and the fact that Article I, Section 6 “barred members of Congress from serving in the executive branch”).

265 Act of Aug. 12, 1790, § 2. Congress funded initial purchases through surplus from duties imposed on imported “goods, wares, and merchandise.” *Id.* § 1. The sinking fund was also supported by surplus from duties imposed on the “tonnage of ships or vessels.” *Id.* Congress also vested power to borrow funds for additional purchases in the President alone. *Id.* § 4.

266 *See, e.g.,* An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789); An Act for Establishing an Executive Department, to Be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789).

267 Act of Aug. 12, 1790, § 2.

ilton's key concerns with sinking funds—the need to limit purchasing power so that funds would not be misused for political reasons.²⁶⁸

The Commission's multimember structure was also especially important. Its five inaugural members were primed to check one another, and Hamilton, Secretary of the Treasury, and Thomas Jefferson, Secretary of State, were known political rivals. Further, the President of the Senate and Chief Justice attained membership on the Commission through offices that were not subject to presidential removal power. Because the Commission required at least three votes to approve a purchase, if Hamilton and Jefferson could not agree on a purchase, the vote of the completely independent President of the Senate and Chief Justice would be determinative. (As noted below, John Jay's missing vote prevented the Commission from acting immediately during a crucial episode in the financial crisis of 1792.) The Commission or any three of its members had the sole power to initiate purchases and were required to approve the timing and amount of open market purchases before they could be approved by the President.

Records of congressional debates on Hamilton's proposed legislation devote little attention to the sinking fund and do not address the constitutionality of its structure.²⁶⁹ Most of the debates focused on the momentous controversy over the assumption of state debts²⁷⁰—a controversy which was famously resolved in the “Room Where It Happens”²⁷¹ (a “behind-the-scenes” deal brokered by Hamilton, Jefferson, and Madison).²⁷² Legislators' scattered references to the Sinking Fund Commission allude to the “permanency and value” that the fund would lend to the United States' pledge to repay its debts.²⁷³ They also praised the sinking fund's ability to be “constantly operating” with purchases designed to stabilize the value of U.S. securities.²⁷⁴

Hamilton expressed no constitutional doubts about the sinking fund's independent structure in his proposal. While it is possible that the subset of remaining historical records fails to capture fully the congressional debate

268 See *supra* notes 248–49.

269 The *Annals of Congress* and leading accounts do not note any debates about the constitutionality of the Sinking Fund Commission. See, e.g., CURRIE, *supra* note 9, at 73–78; McDONALD, *supra* note 221, at 47–65; Miller, *supra* note 221, at 33–54.

270 McDONALD, *supra* note 221, at 53 (noting “conflicting . . . interests” of states with large debts and states who “had retired the better part of their debts”).

271 See LIN-MANUEL MIRANDA, HAMILTON 126–29 (2015) (highlighting the song entitled, “The Room Where It Happens”).

272 MILLER, *supra* note 221, at 48. In “exchange” for the capital's “permanent removal to the Potomac, Jefferson and Madison pledged themselves to change the votes of several southern congressmen in favor of the funding-assumption plan.” *Id.*

273 2 ANNALS OF CONG. 1477 (1790); *id.* at 1398 (noting that the “sinking fund” helps ensure that the United States will undertake “every exertion . . . to discharge the debt”); *cf. id.* at 1405 (questioning whether the Sinking Fund's use of postal revenue would be sufficient to discharge national debt).

274 *Id.* at 1478; *id.* at 1492 (noting an “ample sinking fund” will help “give as certain a value as possible” to U.S. securities).

over the sinking fund's structure,²⁷⁵ Congress seems unlikely to have glossed over a known constitutional concern. As illustrated by the vigorous debate over removal provisions for the Secretary of Foreign Affairs,²⁷⁶ the First Congress was carefully attuned to structural constitutional concerns related to the President's ability to control executive officers. The credit and debt proposals raised a few distinct structural debates, such as whether Article I, Section 8 allowed Congress's enumerated borrowing power to be delegated to Hamilton as Treasury Secretary rather than the President.²⁷⁷ These isolated references to structural constitutional concerns reflect no qualms about the independent structure of the Sinking Fund Commission.

An independent Commission was not merely enacted into law, but it was proposed by Alexander Hamilton, a Framers of the Constitution, as well as the first Secretary of the Treasury. It was then passed into law by the First Congress, with opportunity for votes and input from many members who "had helped to compose or to ratify the Constitution itself,"²⁷⁸ and signed into law by President George Washington. One would expect all of these actors to have a clear grasp of the original public meaning of the Constitution, as well as a strong commitment to honor the structural commitments established therein. Their decision to form an independent Sinking Fund Commission belies the notion that this structure violated the newly minted Constitution.

Thomas Jefferson's vehement dislike for the sinking fund and Hamilton's financial proposals²⁷⁹ provided strong incentives for him to raise a constitutional objection. Instead, Jefferson took his seat on the Commission without any recorded objection to its structure. He sat with Adams, Jay, and two Framers of the Constitution, Edmund Randolph and Alexander Hamilton. All five of these officers—who no doubt had an exceptional understanding of the original public meaning of the Constitution—proceeded to serve on the Commission without recording any objection that its independent structure violated the Constitution. Further, when assuming their primary offices, all of these persons took an oath swearing "to support this Constitu-

275 While the *Annals of Congress* are the best available records of early congressional debates, they were "not published contemporaneously" and were assembled decades later "using the best records available, primarily newspaper accounts." Baude & Campbell, *supra* note 207 (manuscript at 10) (quoting *Annals of Congress*, LIBR. CONG., <http://memory.loc.gov/ammem/amlaw/lwac.html> (last visited Sept. 12, 2020)). It is therefore possible that Congress debated the constitutionality of the Sinking Fund Commission but the *Annals* omitted this debate.

276 Congress debated whether the Constitution permitted removal of the Secretary by impeachment alone, by the President with consent of the Senate, or by the President alone. See *supra* notes 140–44 and accompanying text.

277 CURRIE, *supra* note 9, at 73 n.143 (observing that Madison "objected that Congress should not sidestep the President by giving authority to his agent," while Smith argued that borrowing power could not be delegated to the President at all).

278 *Id.* at 4.

279 Richard Sylla, Robert E. Wright & David J. Cowen, *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 61, 79 (2009).

tion.”²⁸⁰ Presumably their oaths would not allow them to sit on a Commission that violated fundamental structural requirements of the Constitution.

When one groups these Commissioners with the First Congress and President George Washington, who passed and signed the Sinking Fund Commission legislation into law, one would be hard-pressed to think of any other group with a superior understanding of the Constitution’s original public meaning. Their decisions to establish and operate the Sinking Fund Commission provide overwhelming evidence that the Commission’s independent structure was permitted by the Constitution. The Constitution allowed Congress to delegate executive power to a multimember body with substantial independence from the President.

C. *The Sinking Fund Commission’s Independent Decisions to Purchase Public Debt*

The Sinking Fund Commission’s purchase decisions further illustrate its independence from executive control. The Commissioners of the Sinking Fund began purchasing U.S. debt right away. On August 27, 1790, John Adams, John Jay, Thomas Jefferson, and Alexander Hamilton met in New York City.²⁸¹ These four members of the Commission agreed to apply sums “not exceeding fifty thousand Dollars per month . . . towards the purchase of the present Domestic Debt of the United [S]tates.”²⁸² President George Washington approved the purchases the following day.²⁸³ At the end of the year, the Commission reported details of the places, times, and prices of approved purchases to Congress.²⁸⁴

Market fluctuations soon prompted the Commission to expand open market purchases in a manner designed to stabilize the value of U.S. securities. On August 15, 1791, the Secretary of State, Secretary of the Treasury, and Attorney General approved additional purchases in a sum of up to \$400,000.²⁸⁵ In early 1792, a steep market crash and financial panic cried

280 U.S. CONST. art. VI.

281 See *Meeting of the Commissioners of the Sinking Fund, [27 August 1790]*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-06-02-0475> (last visited Aug. 11, 2020) (showing that Attorney General Edmund Randolph was not present).

282 *Id.*

283 *Id.*

284 See *Report of the Commissioners of the Sinking Fund, 21 December 1790*, NAT’L ARCHIVES: FOUNDERS ONLINE (John Adams), <https://founders.archives.gov/documents/Hamilton/01-07-02-0251> (last visited Aug. 11, 2020).

285 See *Meeting of the Commissioners of the Sinking Fund, [15 August 1791]*, NAT’L ARCHIVES: FOUNDERS ONLINE (Thomas Jefferson), <https://founders.archives.gov/documents/Hamilton/01-09-02-0045> (last visited Aug. 11, 2020); see also *From Alexander Hamilton to William Seton, [15 August 1791]*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-09-02-0046> (last visited Aug. 11, 2020) (authorizing purchases with a sum of up to \$150,000).

out for immediate action by the Commission.²⁸⁶ On March 20, 1792, Alexander Hamilton notified John Adams and Thomas Jefferson that the Treasurer had just gone in the market to purchase additional government securities, with funds the Commission had approved earlier.²⁸⁷ These purchases were designed “to maintain or restore the price of Government securities in the face of the panic,”²⁸⁸ and while they had some beneficial effect in the market, they were not enough.²⁸⁹ Alexander Hamilton urged additional measures designed to inject liquidity into a market from which investors were rapidly withdrawing funds. In addition to relaying favorable news about a loan from the Dutch²⁹⁰ and encouraging private banks to lend money at high rates,²⁹¹ Hamilton advised the Commission to approve further purchases of U.S. securities without delay.

Four Commissioners—Hamilton, Jefferson, Adams, and Randolph—met in Philadelphia to consider more purchases.²⁹² They were split equally on purchases proposed by Hamilton and could not agree whether the Act authorized purchases of devalued public securities at a certain fraction of par value.²⁹³ The fifth Commissioner, Chief Justice John Jay, could not cast a deciding vote, because he was out of town and sitting on the Circuit Court in New York City.²⁹⁴ John Adams sent a letter imploring Jay to return to Philadelphia “as speedily as possible” to resolve the matter.²⁹⁵

286 Traditional accounts link the “bubble and crash of spring 1792” to heavily leveraged investments of New York speculator William Duer. Sylla et al., *supra* note 279, at 73.

287 See *From Alexander Hamilton to John Adams, [20 March 1792]*, NAT’L ARCHIVES: FOUNDERS ONLINE [hereinafter Hamilton, *To John Adams*] (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-11-02-0124> (last visited Aug. 11, 2020); *To Thomas Jefferson from Alexander Hamilton, 20 March 179[2]*, NAT’L ARCHIVES: FOUNDERS ONLINE [hereinafter Hamilton, *To Thomas Jefferson*] (Alexander Hamilton), <https://founders.archives.gov/documents/Jefferson/01-23-02-0263> (last visited Aug. 11, 2020). Hamilton reminded Adams and Jefferson that the amounts spent were part of the sum preapproved for purchases on August 15, 1791. See Hamilton, *To John Adams, supra*; Hamilton, *To Thomas Jefferson, supra*.

288 Hamilton, *To John Adams, supra* note 287, at n.1.

289 See *To Alexander Hamilton from William Seton, [21 March 1792]*, NAT’L ARCHIVES: FOUNDERS ONLINE (William Seton), <https://founders.archives.gov/documents/Hamilton/01-11-02-0131> (last visited Aug. 11, 2020) (“Stocks rose a little yesterday in consequence . . . of the Treasurer having entered the Market at Phila.—but today they are down again.”).

290 Sylla et al., *supra* note 279, at 83 (noting that Hamilton “employed news of the Dutch loan to the United States to reassure the markets of the strength of the government’s finances”).

291 See *id.*

292 See *John Adams to John Jay, 21 March 1792*, at n.2 NAT’L ARCHIVES: FOUNDERS ONLINE (John Adams), <https://founders.archives.gov/documents/Hamilton/01-11-02-0126> (last visited Aug. 11, 2020).

293 See *id.* (describing different views on interpretation of purchase restrictions in the Act); Sylla et al., *supra* note 279, at 78 (noting that Adams and Hamilton favored immediate action while Jefferson and Randolph wanted to wait for Jay’s vote).

294 *John Adams to John Jay 21 March 1792, supra* note 292, at n.1.

295 *Id.*

Jay declined this request a few days later. Jay opined that his judicial duties presented a “*primary*” obligation to which his duty to attend the Sinking Fund Commission was “*secondary*.”²⁹⁶ As the Commissioners’ dispute involved a mere “law Question,” however, Jay offered to draft an opinion on this matter and send it to the Commission “Express.”²⁹⁷ Despite doubts that Jay’s written opinion would resolve the impasse,²⁹⁸ the need to “operate immediately, if at all,” as well as the legal nature of the dispute, prompted Hamilton, Adams, and Randolph to accept Jay’s written opinion in the hope that it would resolve the dispute.²⁹⁹ They did so over Jefferson’s dissent.³⁰⁰

Jay finally provided his opinion on March 31, 1792.³⁰¹ He concluded that the Act allowed the proposed purchases of public debt. He opined that the Act’s restrictions operated solely to exclude purchases in which the market price exceeded “the sum actually due from” the United States “in discharge” of its debts.³⁰² Hamilton predicted that Chief Justice Jay’s opinion would “enable” him to “enter the Market more advantageously for the support of the Debt,”³⁰³ and on April 4, four Commissioners met to vote on these purchases. After Chief Justice Jay provided his opinion, Edmund Randolph cast the deciding and necessary third vote and joined Adams and Hamilton in approving up to \$100,000 in additional purchases.³⁰⁴

Jefferson publicly dissented from these purchases on the ground that the purchase prices would exceed the instruments’ true value in a rapidly

296 *To Alexander Hamilton from John Jay, 23 March 1792*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-11-02-0141> (last visited Aug. 11, 2020).

297 *Id.*

298 *To Alexander Hamilton from Philip Livingston, 24 March 1792*, NAT’L ARCHIVES: FOUNDERS ONLINE (Philip Livingston), <https://founders.archives.gov/documents/Hamilton/01-11-02-0144> (last visited Aug. 11, 2020).

299 *Meeting of the Commissioners of the Sinking Fund, [26 March 1792]*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-11-02-0155> (last visited Aug. 11, 2020). The Commission approved a limited set of purchases while they awaited Jay’s input on the legality of further purchases. *Id.*

300 *See id.*

301 *See John Jay to the Commissioners of the Sinking Fund, [31 March 1792]*, NAT’L ARCHIVES: FOUNDERS ONLINE (John Jay), <https://founders.archives.gov/documents/Hamilton/01-11-02-0175> (last visited Aug. 11, 2020).

302 *Id.* (analyzing purchase restrictions created by statutory words “if not exceeding the par or true value thereof”) (emphasis omitted).

303 *Alexander Hamilton to Philip Livingston, 2 April 1792*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-11-02-0182> (last visited Aug. 11, 2020).

304 *See Meeting of the Commissioners of the Sinking Fund, 4 April 1792*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-11-02-0187> (last visited Aug. 11, 2020). The Commission also approved a further amount up to \$200,000 in purchases on April 12. *Meeting of the Commissioners of the Sinking Fund, [12 April 1792]*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-11-02-0225> (last visited Aug. 11, 2020).

collapsing market.³⁰⁵ Jefferson appeared to have regarded inflated purchase prices as an unfair windfall to speculators.³⁰⁶ Jefferson's dissents and attempts to delay purchases may also have been calculated "to injure Hamilton and the political party and financial revolution he led."³⁰⁷ Whatever Jefferson's ultimate motivation, his lone dissent did not stop Hamilton from promptly seeking the President's approval for purchases authorized by three members of the Commission.³⁰⁸ By April 16, the Commission's agent, William Seton, reported numerous beneficial purchases, offering hope that the "public mind" could soon calm and return the U.S. debt to its "proper and real value."³⁰⁹ Interestingly, Hamilton viewed Seton's execution of purchases through a constitutional lens. He discussed payment for Seton's work as a temporary purchasing agent and noted that this ad hoc arrangement reflected Hamilton's decision to "forbear[] to employ some officer of the United States" to execute purchases instead.³¹⁰ By April of 1792, Hamilton understood that the "worst had passed" and that these purchases had their intended effect of stabilizing the market for U.S. securities.³¹¹

This episode illustrates the President's limited control over the Commission's purchase decisions. Even though President Washington approved purchases in response to the 1792 market crash, the Commission initially lacked the majority of votes required to initiate a purchase.³¹² Only after John Jay weighed in did Edmond Randolph authorize the purchases urged by Alexander Hamilton and John Adams and leave Thomas Jefferson as the lone dissenter.³¹³ Because the Act vested decisions of whether or not to initiate purchases in the Commission, a majority of the Commission checked the President and had to sign off before any purchases could be presented to the President for approbation.

The Commission's independent structure prevented it from acting as quickly as it could have to address a financial panic. A single officer directed by the President could have intervened far more quickly. Instead, the Sinking Fund Commissioners had trouble even meeting to vote on open market

305 See *Dissenting Opinion on the Sinking Fund, [12 April 1792?]*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-27-02-0786> (last visited Aug. 11, 2020).

306 See *id.*

307 Sylla et al., *supra* note 279, at 79.

308 See *From Alexander Hamilton to George Washington, [12 April 1792]*, NAT'L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), <https://founders.archives.gov/documents/Hamilton/01-11-02-0228> (last visited Aug. 11, 2020).

309 *To Alexander Hamilton from William Seton, 16 April 1792*, NAT'L ARCHIVES: FOUNDERS ONLINE (William Seton), <https://founders.archives.gov/documents/Hamilton/01-11-02-0234> (last visited Aug. 11, 2020).

310 *From Alexander Hamilton to William Seton, [15 August 1791]*, *supra* note 285. Hamilton's distinction between gig work and more permanent government duties fulfilled by officers tracks the distinction noted by Jennifer Mascott. See Mascott, *supra* note 3, at 534.

311 Sylla, Wright & Cowen, *supra* note 279, at 83.

312 See *supra* discussion surrounding notes 293–95.

313 See *supra* discussion surrounding notes 304–06.

purchases, and John Jay exercised substantial independence by refusing to attend a Commission meeting that interfered with his judicial duties. One might assume that actions such as Jay's may have amounted to a "neglect of duty" and established cause for his removal.³¹⁴ But there are no records showing that President Washington was asked to intervene and direct Jay to attend the critical Commission meeting or otherwise resolve the Commissioners' internal dispute. And Washington had no power to remove Jay from his judicial office.

The Commission's substantive policy decisions also reflected independent votes and opinions rather than a single policy commanded by President Washington. As noted above, Commissioners Hamilton and Jefferson cast publicly opposing votes and openly disagreed about whether to initiate open market purchases during the 1792 crisis. President Washington's apparent power to superintend and remove them did not trump the Commission's multimember structure, result in a unified vote by these executive officers, or lead to either Hamilton's or Jefferson's removal from the Commission. Hamilton's and Jefferson's disagreement divided the Commission and initially prevented it from forming the three-member majority needed to approve purchases during Chief Justice Jay's absence. Only after the Chief Justice provided a written opinion to the Commission did Randolph join Hamilton and Adams in approving the purchases over Jefferson's dissent. The purchases approved during the 1792 crisis bear the hallmarks of independent decisionmaking by the Sinking Fund Commission.

Despite this high level of independence, the Commission was still able to act in time to stabilize the market for U.S. securities. And its fundamental independence still seemed necessary to guard against a political temptation to raid sinking fund reserves for purposes other than repaying debt. It is no surprise that Hamilton continued to propose, and Congress continued to enact, legislation facilitating open market purchases and repayment of debt through the same independent, five-member Commission first adopted in 1790.³¹⁵

IV. THE SINKING FUND COMMISSION PROVIDES A DIRECT FOUNDING-ERA PRECEDENT FOR THE FEDERAL OPEN MARKET COMMITTEE

The Sinking Fund Commission provides a compelling originalist precedent for the independence of the Open Market Committee. Both the Sinking Fund Commission and Open Market Committee have carried out open market purchases in furtherance of statutorily defined goals and execute

314 Jane Manners & Lev Menand, *Presidential Removal: Defining Inefficiency, Neglect of Duty, and Malfeasance in Office*, 121 COLUM. L. REV. (forthcoming) (manuscript at 43) (noting in the eighteenth century, "'neglect of duty' meant failing to perform one's duties in a way that caused specific harm to the entity . . . to which the duties were owed").

315 Act of May 8, 1792, ch. 38, §§ 6–7, 1 Stat. 281, 282–83 (making supplementary provisions regarding the debt of the United States); Act of Mar. 3, 1795, ch. 45, §§ 9–12, 1 Stat. 433, 435–37 (providing for public credit and the redemption of the public debt); Sylla & Wilson, *supra* note 213, at 211 (noting 1795 legislation).

enumerated sovereign powers.³¹⁶ Congress designed both agencies to possess substantial independence from the President and granted both the Sinking Fund Commission and the Open Market Committee responsibility for initiating open market purchases. President Washington had no power to initiate open market purchases unless a majority of the Sinking Fund Commission agreed to do so, just as the President today has no power to initiate an open market purchase unless a majority of the Open Market Committee agrees to do so.³¹⁷ As Alexander Hamilton noted in *The Federalist*, this type of structure departs from a unitary executive model by subjecting the President's power "in part to the control and cooperation of others."³¹⁸ Such limitations on the President's power conflict with unitary executive arguments that officers cannot "refuse[]" the President's order "to take an action within the officer's statutory authority."³¹⁹ They also undermine Hamilton's conception of an "energetic" executive characterized by "[d]ecision, activity, . . . and dispatch."³²⁰

For both the Sinking Fund Commission and Open Market Committee, Congress chose not to vest purchasing decisions in the Secretary of the Treasury or another single officer situated to implement a unified executive policy. Instead, Congress chose multimember bodies whose members were primed to cast opposing votes and express diverse opinions on open market purchases.³²¹ It is difficult to think of a reason why Congress would ever replace a single officer with a multimember committee if its goal were to implement a singular executive directive. Dissents issued by members of both the Sinking Fund Commission and Open Market Committee reveal that the multimember design served a different purpose. This structure allowed members of the Commission and Committee to check the President and one another rather than carrying out a single directive at the behest of the President. And for the Sinking Fund Commission, the independence created by a multimember structure trumped any unified control the President may have possessed over the Secretaries of State and Treasury and Attorney General.

Congress further sheltered the Sinking Fund Commission and Open Market Committee from presidential control through appointment and tenure provisions. With respect to the Sinking Fund Commission, the President had no power to appoint Commissioners who served by virtue of their existing offices. While three of the Commissioners (Secretary of the Treasury, Secretary of State, and Attorney General) had already been appointed as principal executive officers, the Vice President was never appointed by the President and was instead elected as runner-up in the presidential election.³²² The Chief Justice of the Supreme Court was appointed to a judicial

316 See *supra* note 188.

317 See *supra* discussion surrounding notes 261–63.

318 THE FEDERALIST NO. 70, *supra* note 12, at 424 (Alexander Hamilton).

319 Miller, *supra* note 2, at 44.

320 THE FEDERALIST NO. 70, *supra* note 12, at 423–24 (Alexander Hamilton).

321 See discussion *supra* notes 57, 292–304.

322 See *supra* note 231.

office and never received a separate appointment to an executive office. The President had no power to appoint replacements for or remove the Chief Justice or Vice President from office, even though their attendance at meetings and votes were sometimes needed to initiate open market purchases.³²³ The Act left the President no recourse over the Chief Justice and Vice President if these officers neglected their duties and refused to show up for the Commission's meetings, as was the case with John Jay in 1792.

Many aspects of the Sinking Fund Commission's ex officio appointments and related tenure provisions afforded substantially more independence than tenure and appointments provisions for the Federal Open Market Committee.³²⁴ Whereas the First Congress gave the President no say in appointing ex officio Sinking Fund Commissioners,³²⁵ the President currently has the power to appoint Governors (who then become ex officio members of the Open Market Committee) once every fourteen years. And while the President could not remove at least two members of the Sinking Fund Commission,³²⁶ even in cases of malfeasance or neglect of office, the President has some level of removal power over all members of the Open Market Committee. The President may remove the Governors who comprise a majority of the Committee "for cause."³²⁷ In turn, these Governors have the power to remove Federal Reserve bank presidents (who constitute a minority of the Committee) at will³²⁸—an arrangement that provides adequate "[p]residential oversight" and ostensibly affords the President the same level of control as he has over the Governors.³²⁹ This for-cause removal power would allow the President to force the Committee members to tend to official duties if they, like John Jay, were tempted to neglect important duties, such as the need to attend and vote at meetings held to transact Committee business.

The historical record also makes clear that the Sinking Fund Commission falls outside of a unitary executive framework. The Sinking Fund Commission's multimember structure plainly trumped the unified control that some claim the President possessed over Commissioners whom the President could remove from their primary offices at will.³³⁰ The Secretary of State, Secretary of the Treasury, and Attorney General failed to carry out a singular executive policy when deciding whether or not to proceed with crucial open market purchases. Instead, Secretary of the Treasury Alexander Hamilton and Secretary of State Thomas Jefferson cast different votes, Jefferson

323 See *supra* notes 232, 235.

324 MASHAW, *supra* note 6, at 43 (noting that the lack of power to appoint Sinking Fund Commissioners created an "independent commission[]" in an even stronger sense than those we recognize today").

325 See PRAKASH, *supra* note 6, at 279.

326 See *supra* discussion surrounding notes 230–31, 234–36.

327 12 U.S.C. § 242 (2018).

328 *Id.* § 248(f).

329 *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010).

330 *But see* CALABRESI & YOO, *supra* note 2, at 53 (noting removal power afforded executive control over the Sinking Fund Commission); Bamzai, *supra* note 6, at 1339.

penned public dissents, and Attorney General Edmund Randolph withheld his vote until after the Chief Justice was able to provide a legal opinion.³³¹ The lack of a unified executive policy was also anticipated by Congress, as Congress added an additional requirement of presidential approbation of purchases approved by the Commission. If the President's ability to remove these officers at will gave him complete control over the Commission's purchasing decisions, there would be no need for the President to approve purchases agreed to by these Commissioners.

Nor did an approbation power somehow allow the President to direct all of the Commission's purchasing decisions.³³² As noted above, approbation applied to only a limited subset of the Commission's decisions and provided no presidential role in cases where three or more members of the Commission opposed a purchase. The Sinking Fund Commission's ability to block purchases reflected an important power and checked the President's ability to execute the law. It is the same check that the Open Market Committee exercises, and that President Trump finds so vexing, today. The President may ask the Committee to make open market purchases or take other action to reduce interest rates to bolster the economy, but he has no power to bring about the desired purchases or rate reductions unless a majority of the Open Market Committee agrees to take such action.

The history of the Sinking Fund Commission provides an important qualification on the Decision of 1789. It reveals that the Founders never recognized a one-size-fits-all model of executive power under the Constitution. The structure ultimately adopted by the First Congress gave the Commission substantial independence. It cannot be squared with the unitary executive argument that Article II requires the President to possess "*all*" power over open market purchases.³³³ The structure passed into law afforded the President control over only some of the Sinking Fund Commission's decisions, and thus provides evidence that the Constitution allows Congress to limit the President's role in executing certain laws.

If anything, the level of independence that the First Congress chose for the Sinking Fund was modest in comparison to other alternatives considered at the time. According to his proposal, Alexander Hamilton would have staffed the Commission with a majority of independent officers who could be removed only by Congress, and he would have given the President no power to approve or reject their purchase decisions.³³⁴ Under Hamilton's proposal, it is doubtful the President could have forced a majority of the Commission to assemble and tend to its job of deciding whether to make an open market purchase, if a majority of the nonexecutive officers acted like John Jay and decided to put Commission work on the back burner.

The level of independence proposed by Hamilton may seem extreme in modern terms, but it reflects the more restrictive views of presidential

331 See *supra* notes 292–308.

332 *Contra* PRAKASH, *supra* note 6, at 279–80; Bamzai, *supra* note 6, at 1339–40.

333 See *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

334 See *supra* notes 225–29.

removal power considered in debates leading up to the Decision of 1789. In particular, Hamilton's openness to a commission controlled by a majority of nonremovable officers would be roughly equivalent to an executive officer who could be removed only by impeachment.³³⁵ With respect to the Sinking Fund Commission, Congress's alterations of Hamilton's proposal struck a balance in favor of a more (but not all-) powerful executive. Congress limited the Commissioners whom the President could not remove to the Chief Justice and President of the Senate/Vice President, and also allowed the President to approve purchases agreed to by the Commission. This structure retained the Commission's power to check purchases desired by the President, but it did not place the Commission's work entirely beyond the President's control. In this sense, the Commission's level of independence is entirely in line with the level of independence that the Open Market Committee possesses today. When taken together, the modest independence approved by Congress and the extreme independence suggested by Hamilton establish important limitations on the unitary executive theory and arguments that the President must have the power to remove all officers carrying out executive functions at will. The Sinking Fund Commission should also give pause to any judges who may feel emboldened to jettison existing legislation or precedent based on unitary executive arguments.³³⁶

The Sinking Fund Commission also provides a helpful precedent for a relaxed application of Appointments Clause requirements. Here, of course, the First Congress's decision to bestow *ex officio* positions upon five principal officers is distinct from appointments concerns raised by the Open Market Committee. As explained above, the primary Appointments Clause concerns for the Open Market Committee focus on the Federal Reserve bank presidents who cast Committee votes without being appointed as principal officers.

On closer scrutiny, however, the Sinking Fund Commission's *ex officio* provisions raise questions about whether all members of multimember agencies are subject to Appointments Clause requirements for executive officers. In addressing requirements for *ex officio* placement in a second office, courts have generally allowed Congress to bypass a second appointments process when the *ex officio* provision merely expands duties germane to an existing office. As recounted by Aditya Bamzai, a member of Congress offered a similar explanation in an 1806 debate on the constitutionality of dual officeholding.³³⁷ The Supreme Court has held that the use of an *ex officio* post to expand statutorily required duties does not require a second

335 Hamilton proposed a Commission in which the Chief Justice and Vice President could be removed only through impeachment, and the Speaker of the House could be expelled only by the House. *Cf.* U.S. CONST. art. I, § 5.

336 See Christine Chabot, *Alexander Hamilton's Independent Agency*, A.B.A. ADMIN. & REGUL. L. NEWS, Winter 2020, at 12 (discussing the Sinking Fund Commission as precedent supporting the independent structures of the Federal Trade Commission and Consumer Financial Protection Bureau).

337 Bamzai, *supra* note 6, at 1339.

appointment or run afoul of the rule that Congress cannot “appoint the officer.”³³⁸ With respect to the Commission, Congress’s decision to make the Secretaries of the Treasury and State and the Attorney General *ex officio* Commissioners may have been a permissible expansion of duties germane to existing executive offices. But the Chief Justice was a different matter.

The Chief Justice was first appointed to an Article III office *outside* of the executive branch and performed judicial duties that had nothing to do with paying the debt through open market purchases of U.S. securities. The new duties Congress assigned as Sinking Fund Commissioner were not germane to the Chief Justice’s judicial duties, as they were duties related to an office in the executive branch. It would seem that the Chief Justice served on the Commission without any appointment qualifying him to be an executive officer. The probable explanation is that he did not need to be appointed as an executive “Officer of the United States” in order to serve on the Commission.

The historical record supports a limited appointments process in situations where persons without appointments as principal officers share primary decision-making responsibility with other properly appointed principal officers. As regards the Federal Reserve bank presidents, the failure to appoint the Chief Justice as an executive officer therefore provides helpful precedent. Like the Chief Justice, the bank presidents share primary decision-making responsibility for Open Market Committee decisions with the Governors, who are properly appointed principal officers. Neither the Chief Justice nor the bank presidents can exercise significant authority of the United States and make purchasing decisions on their own. Appointments Clause requirements that were excused for some members of the Sinking Fund Commission should also be excused for similarly situated presidents of Federal Reserve banks.

CONCLUSION

Leading originalist accounts of executive power draw on the “Constitution’s elegant simplicity,”³³⁹ and an understanding so straightforward that it “resonates strongly with the very earliest lessons we learn about our constitutional system” in primary and secondary school.³⁴⁰ As gracefully explained by Justice Scalia, granting the President anything less than complete control over “*all*” of the executive power would violate Article II.³⁴¹ This understand-

338 *Weiss v. United States*, 510 U.S. 163, 176 (1994) (noting that a second appointment is not required where the role “of military judge is ‘germane’ to that of military officer”); *Shoemaker v. United States*, 147 U.S. 282, 300–01 (1893) (noting that a second appointment is not required where Congress devolved upon properly appointed officers “additional duties, germane to the offices already held”).

339 Calabresi & Prakash, *supra* note 6, at 664.

340 *Id.* at 544.

341 *Morrison v. Olson*, 487 U.S. 654, 705 (1987) (Scalia, J., dissenting).

ing “forecloses historical arguments” for independent agencies.³⁴² It admits of “no caveats” and “no exceptions.”³⁴³

Elegant though it may be, the unitary executive explanation does not hold up to granular analysis of empirical evidence reflecting original meaning and practice. Historical records reveal that the problems facing the Founding generation and the solutions adopted by the First Congress were not so simple. Given the complex panoply of concerns present at the Founding of our Republic, it should come as no surprise that Alexander Hamilton advocated a variety of approaches to executive power. Sometimes he argued in favor of an all-powerful executive.³⁴⁴ But sometimes he did not.³⁴⁵

Hamilton’s proposal for the Sinking Fund Commission provides a clear example of an instance in which he called for independent decisionmaking and limits on the President’s control over the execution of federal statutes.³⁴⁶ Hamilton was not alone in endorsing an independent body. His proposal for an independent, multimember Commission was also passed and signed into law by members of the First Congress and President George Washington.³⁴⁷ And the Sinking Fund Commission was ultimately run by Hamilton alongside John Adams, John Jay, Edmund Randolph, and Thomas Jefferson.³⁴⁸ Taken together, these actions belie any argument that Congress’s delegation of open market purchases to an independent, multimember commission violates the Constitution.

As Alexander Hamilton’s writings show, he proposed an independent Sinking Fund Commission in order to guarantee an “inviolable” commitment to disperse funds according to a statutory mandate.³⁴⁹ Without such independence, political actors such as the President could not resist the temptation to violate Congress’s statutory mandate and divert funds to more politically expedient uses. Today’s Open Market Committee enjoys a similar rationale for its independence from executive control. The Committee’s dual mandate will sometimes require it to take actions which are “politically unpopular . . . in the short term,”³⁵⁰ and to ignore the President’s demand to lower interest rates in an effort to heat up the economy before an election.³⁵¹

The Sinking Fund Commission provides a direct original precedent for Congress’s decision to shelter the Open Market Committee from immediate political influence. Critics can no longer dismiss the Committee’s indepen-

342 Calabresi & Prakash, *supra* note 6, at 663.

343 *Id.* at 664.

344 CALABRESI & YOO, *supra* note 2, at 54–55 (discussing Hamilton’s 1793 *Pacificus* letters).

345 *See supra* notes 139, 223–27 (discussing THE FEDERALIST No. 77 and the Sinking Fund proposal).

346 *See supra* notes 224–28.

347 *See supra* notes 259–62.

348 *See supra* text accompanying notes 280–81.

349 *See Report on a Plan for the Further Support of Public Credit, [16 January 1795], supra* note 249.

350 Barkow, *supra* note 20, at 29.

351 Ramirez, *supra* note 17, at 530–32.

dent structure as a concoction of twentieth-century legislators who had forgotten or ignored the original requirements of the Constitution. Instead, the Open Market Committee's multimember structure, protections from removal, and limited appointment opportunities can be traced all the way back to the Founding of our Republic. This history shows that the independent structure of the Federal Reserve's Federal Open Market Committee is consistent with the original meaning of the Constitution.