

# HISTORICIZING THE EXECUTIVE

By Bernadette Meyler\*

During the spring of 2005, my first year as a law professor, Yale Law School hosted a conference on the topic of “The Constitution in 2020.”<sup>1</sup> A breakout session I attended on the uses of history in constitutional interpretation, led by Bob Gordon and Willie Forbath, left a lasting impression on me and my scholarly interests. At that event, participants speculated about the possibilities for unseating some conservative originalist accounts of the Constitution from a historical vantage point. Some of those who spoke called into question the inevitability of a connection between originalism and the conservative movement and suggested the possibility of an alternative historically oriented constitutionalism. Since then, Jack Balkin has articulated his own account of “living originalism,”<sup>2</sup> scholars like Jonathan Gienapp have critiqued the historical assumptions of originalism,<sup>3</sup> and legal historians have filed briefs in innumerable cases furnishing historical accounts of the Founding that support liberal positions in areas from habeas corpus to the Second Amendment and beyond.<sup>4</sup> Until recently, however, progressive arguments for rethinking executive power have not addressed originalists’ historical arguments head on. This piece speculates on the reasons for the gap and urges that progressives build on the newer historical work that has begun to fill it.

Among the most significant recent scholarly interventions in historical constitutionalism has been the effort to unseat claims that the Founders embraced an expansive understanding of presidential power, claims often linked with the “unitary executive.”<sup>5</sup> As Christopher Yoo and Steven Calabresi gloss the idea of a unitary executive:

[T]he Constitution gives and ought to give all of the executive power to one, and only one, person: the President of the United States. According to this view, the Constitution creates a unitary executive to ensure energetic enforcement of the

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<sup>1</sup> *Constitution in 2020 Conference: Schedule of Events*, YALE L. SCH. (Oct. 8, 2008) [<https://web.archive.org/web/20081008133509/http://islandia.law.yale.edu/acs/conference/schedule/index.asp>].

<sup>2</sup> JACK BALKIN, *LIVING ORIGINALISM* (2011).

<sup>3</sup> JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018).

<sup>4</sup> See, e.g., Brief for English/Early American Historians as Amici Curiae in Support of Respondents, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521); Brief of Legal Historians as Amici Curiae in Support of Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

<sup>5</sup> This scholarship includes: Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3428737>; Jane Manners & Lev Menand, *Presidential Removal: Defining Inefficiency, Neglect Of Duty, And Malfeasance In Office*, COLUM. L. REV. (forthcoming), <https://ssrn.com/abstract=3520377>; Julian Davis Mortenson, *The Executive Power Clause*, 16 U. PA. L. REV. (forthcoming), <https://ssrn.com/abstract=3406350>; Bernadette Meyler, *The President As Officer Not Sovereign*, 133 HARV. L. REV. F. 89 (2020); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL’Y 463 (2019); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016).

law and to promote accountability by making it crystal clear who is to blame for maladministration.<sup>6</sup>

One of the implications of unitary executive theory is that the President should have broad control over all subordinate officers within the executive branch, including even those charged with quasi-legislative and quasi-judicial roles.<sup>7</sup> The generally originalist scholars who promote the theory of the unitary executive anchor their conceptions textually in the Vesting Clause and Take Care Clause of Article II.<sup>8</sup> The language of these clauses is, however, far from precise.<sup>9</sup> The Vesting Clause states only that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>10</sup> In similarly laconic terms, the Take Care Clause specifies that the President “shall take Care that the Laws be faithfully executed.”<sup>11</sup> Furthermore, the Constitution lacks any textual specification about the removal of executive-branch officials—a crucial component of unitary executive theory—apart from the mechanism of impeachment.<sup>12</sup>

Some textualists have insisted that the Vesting and Take Care Clauses mean that the President—and no one else—possesses the executive power.<sup>13</sup> For the currently dominant approach to originalism today—original public meaning originalism—text is not the end of the story, and evidence of what terms meant at the time of the Founding plays a significant role.<sup>14</sup> If constitutional interpreters devote attention to the original public meaning of the text, the background questions of what “executive power” or even “officer” would have meant to ratifiers at the time of the Founding should shape understanding of the meaning of these clauses.<sup>15</sup> There are analogies within other areas of constitutional law. For example, originalist approaches that advocate expanding states’ rights under the Tenth and Eleventh Amendments have relied on assumptions about the meaning of state sovereignty at the time of the Founding instead of constitutional text.<sup>16</sup> The background principles on which originalists rely draw from both the

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<sup>6</sup> STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008).

<sup>7</sup> See Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1232 (2014).

<sup>8</sup> See *infra* note 12 and accompanying text.

<sup>9</sup> See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2024, 2037 (2011) (noting the “surface indeterminacy of Article II’s vesting clause” but finding the “Take Care Clause” somewhat more precise).

<sup>10</sup> U.S. CONST., art. II, § 1, cl. 1.

<sup>11</sup> *Id.*, art. II, § 3.

<sup>12</sup> *Id.*, art. II; see also Manning, *supra* note 9, at 2024 n.420 and accompanying text.

<sup>13</sup> For a classic articulation of this position, see Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570–92 (1994).

<sup>14</sup> For an account of the relationship between text and extratextual sources in practicing original public meaning originalism, see Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935 (2013).

<sup>15</sup> For a discussion of the role of common law practice in interpreting constitutional text, see Bernadette Meyler, *Common Law Confrontations*, 37 L. & HIST. REV. 763 (2019); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006). In the context of executive power more specifically, Sai Prakash’s book *Imperial from the Beginning: The Constitution of the Original Executive* treats “English, colonial, state, and federal precursors to the president,” maintaining that “[t]hese antecedents help us better grasp the original executive’s powers, duties, and constraints.” SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTIONS OF THE ORIGINAL EXECUTIVE* 7 (2015). With regard to offices, historical context could lead us to rethink the nature of, and conditions placed upon, office holding. See, e.g., Manners & Menand, *supra* note 5; Meyler, *supra* note 5.

<sup>16</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 715–22 (1999) (interpreting the Eleventh Amendment in light of the notion that traditional conceptions of sovereignty that were imported into the constitutional scheme would have

legal and political history of particular clauses—attempting to flesh out the scope of the royal pardon power, for example, in order to understand the constitutional scope of presidential pardoning—and the more general political theories underlying the Constitution—such as the vision of democracy or the understanding of sovereignty. In these constitutional contexts, the relationship between the language of specific constitutional provisions and the background principles invoked to support claims of original meaning could lead to a tension between originalism and textualism.<sup>17</sup> In addition, as scholars approaching executive power from a historical vantage point have recently revealed, the background assumptions upon which unitary executive and similar theories rely—whether explicitly or implicitly—are often incorrect.

Progressive historical interpretations of executive power seem to be thriving today. Looking back at the volume *The Constitution in 2020*,<sup>18</sup> published a little more than ten years ago, I am struck, however, by the absence of any essays engaged in reconstructing a left or liberal vision of executive power. The closest that any of the pieces comes to this account is a few pages in Harold Koh’s piece, “America and the World, 2020,” treating the assertions of executive power by the George W. Bush Administration in the early 2000s.<sup>19</sup> What accounts for this absence?

Explaining an absence is virtually impossible, and the gap may be entirely due to the contingency of people and projects. But there are a few possible reasons why such an account might have seemed unnecessary to the contributors to *The Constitution in 2020*. First, the volume appeared in 2009, a year that marked the beginning of the Obama Administration. At a time when there were high hopes for the progressive deployment of executive power, perhaps it seemed as though constraints on executive authority would be inconsistent with the substantive goals that members of the American Constitution Society aimed to achieve. Several of the contributors to *The Constitution in 2020* even went on to serve in the Obama Administration.<sup>20</sup> This raises the broader question of whether progressives should be concerned about cabining executive power generally or only when the President espouses unpalatable policy agendas. Scholars have argued that presidents across the political spectrum have helped to consolidate greater power within their office, and the steps that Abraham Lincoln and Franklin Delano Roosevelt took as presidents surely expanded presidential power in ways that most liberals would endorse today.<sup>21</sup>

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protected sovereign bodies from being sued); *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (relying in the commandeering context on the notion that “[i]t is incontestable that the Constitution established a system of ‘dual sovereignty’”).

<sup>17</sup> Will Baude and Steve Sachs’s recent article illustrates this tension in the Eleventh Amendment context by insisting that the Eleventh Amendment means just what its text says. William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, U. PA L. REV. (forthcoming), <https://ssrn.com/abstract=3466298>. For a similar, earlier effort to point out the inconsistency between textualism and originalists’ approach to the Eleventh Amendment, see Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence*, 45 HOW. L.J. 77 (2001).

<sup>18</sup> THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009).

<sup>19</sup> Harold Hongju Koh, *America and the World, 2020*, in THE CONSTITUTION IN 2020, *supra* note 18, at 313, 315–17.

<sup>20</sup> For example, Harold Koh was the Legal Adviser of the Department of State from 2009 to 2013 and Cass Sunstein assumed the role of Administrator of the Office of Information and Regulatory Affairs from 2009 to 2012.

<sup>21</sup> See William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 510–11 (2008).

Under the Obama Administration itself, many lawyers and scholars supported broad executive power with respect to counterterrorism. For example, Aziz Huq rejected the necessity for structural constraints on the executive with regard to counterterrorism policy.<sup>22</sup> Applying a similar logic, President Obama’s Attorney General Eric Holder defended the targeted killing program as furnishing sufficient due process, notwithstanding the fact that the process afforded existed entirely within the executive branch. As Holder asserted in a 2012 speech, “[d]ue process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.”<sup>23</sup> The process due, many Administration officials seemed to believe, was furnished by meetings over the “nominations” process, through which “more than 100 members of the government’s sprawling national security apparatus gather[ed], by secure video teleconference, to pore over terrorist suspects’ biographies and recommend to the President who should be the next to die.”<sup>24</sup>

Second, progressives and conservatives may both support broad accounts of executive power, but focus on disparate components of it. Whereas enthusiasm about a unitary executive is generally characterized as a conservative position, progressives widely endorse administrative expertise and the administrative state. Whereas the former emphasizes the singular capacities of the President, the latter sometimes also eschews legislative or judicial limitations on the executive branch in favor of its internal deliberative processes.<sup>25</sup>

Finally, from the vantage point of 2009, originalism may have largely seemed a passing trend, a method more worth resisting wholesale by reinforcing other approaches to constitutional interpretation—whether living constitutionalism or democratic constitutionalism—than accommodating by addressing its historical arguments on their own terms.<sup>26</sup> Since then, judicial appointments have meant that at least a plurality of the Supreme Court and large swaths of the federal judiciary are committed originalists. As Will Baude has asked rhetorically, “[i]s originalism our law?”<sup>27</sup> Given originalism’s entrenchment, changing the terms of the debate seems less effective as a mechanism for revising constitutional interpretations and understandings than it did in 2009. Nor, as scholars have been demonstrating, is it necessary. Once one engages with the history of the Founding Era, it is possible to unseat many of conservative originalists’ conclusions, particularly with regard to executive power.

In 2020, a progressive constitutional vision of executive power seems not only necessary but overdue. It is not just that President Trump has vigorously asserted his ability to resist congressional inquiries and his capacity to pardon everyone including himself. The rise of populism around the world has also rendered an account of executive power within the United

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<sup>22</sup> Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 890 (2012).

<sup>23</sup> Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES (March 5, 2012), <https://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html> (quoting Attorney General Eric Holder).

<sup>24</sup> Jo Becker & Scott Shane, *Secret Kill List Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012) <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

<sup>25</sup> For an example of the latter approach, see Huq, *supra* note 22.

<sup>26</sup> In *The Constitution in 2020*, Jack Balkin did articulate his vision of text and principle, his particular variety of originalism. Jack M. Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020*, *supra* note 18, at 11. Reva Siegel and Robert Post instead focused on the alternative of “democratic constitutionalism.” Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, *supra* note 18, at 25. *See also* Pamela Karlan, et al., *KEEPING FAITH WITH THE CONSTITUTION* (2009).

<sup>27</sup> Will Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015).

States that would resist such trends increasingly urgent.<sup>28</sup> This progressive vision need not necessarily depart from what the Founders contemplated—as the context of their break from the British Empire makes evident, they too worried profoundly about aggrandizing an executive. Such an account of executive power consistent with the original meaning of the Constitution should articulate responses to the first-order questions of what particular constitutional provisions mean, and should also, on a second order, furnish an account of democracy that supports limitations on presidential power.

Recent scholarship has tackled the historical meanings of the Vesting and Take Care Clauses and concluded that historical evidence does not support a broad grant of nearly royal powers to the President. Julian Mortensen’s work has emphasized that, in his words, “‘The Executive Power’ was not another word for royal prerogative.”<sup>29</sup> Similarly, Jed Shugerman, Ethan Leib, and Andrew Kent have emphasized the “faithful execution” component of the Constitution’s injunction that the President “take Care that the Laws be faithfully executed” rather than the “take care” portion, contending that the history of faithful execution clauses suggests real constraints upon the President that render his role more that of a fiduciary than a sovereign.<sup>30</sup>

With respect to the presuppositions about the President’s broad power to remove executive-branch officers, Jane Manners and Lev Menand have illuminated the meaning of the traditional phrases “inefficiency, neglect of duty, and malfeasance in office,” used in the context of for-cause removal and generally viewed as limiting the President’s power to fire officeholders. They demonstrated that, historically, the function of these phrases was almost the opposite of what we currently imagine; rather than acting as a constraint on an otherwise broad presidential power of removal, these phrases permitted the President to engage in removal when he would otherwise have been prevented from doing so because an office was supposed to be held for a specified term of years.<sup>31</sup> The default against which these words operated hence was less rather than more presidential authority to remove. Daniel Birk has further demonstrated that even the British King lacked the scope of removal powers that proponents of the unitary executive contend the President should possess.<sup>32</sup>

A number of scholars have also suggested historically based limits upon the President’s power to pardon in light of Trump’s assertions of his constitutional capacity to pardon associates and even himself.<sup>33</sup> As I have argued elsewhere, the President’s power to pardon has also been interpreted more broadly by the Supreme Court than the historical distribution of powers within England—as well as in the American colonies and states—would suggest it should be. In particular, nineteenth-century cases following the Civil War erased an earlier distinction between amnesty and pardoning, through which granting amnesty was often considered a legislative, as

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<sup>28</sup> On Trump, see, for example, Bernadette Meyler, *Trump’s Theater of Pardoning*, 72 STAN. L. REV. ONLINE 92 (2020). For trenchant discussions of the worldwide rise of populism, see NADIA URBINATI, *ME THE PEOPLE: HOW POPULISM TRANSFORMS DEMOCRACY* (2019); JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016).

<sup>29</sup> Mortenson, *The Executive Power Clause*, *supra* note 5, at 78.

<sup>30</sup> Kent, et al, *supra* note 5, at 2178–81.

<sup>31</sup> Menand & Manners, *supra* note 5, at 53–70.

<sup>32</sup> Birk, *supra* note 5, at 6.

<sup>33</sup> For a review of the arguments, see Meyler, *supra* note 28.

opposed to an executive, function.<sup>34</sup>

Less attention has been devoted to the historical validity of the principal second-order argument given in favor of the unitary executive—that enhancing presidential control over the executive branch will ensure democratic accountability. This theme returns as a refrain throughout judicial opinions and scholarly commentary. Hence Justice Scalia, dissenting in *Morrison v. Olson*, the case upholding the constitutionality of the office and authority of the independent counsel created by the Ethics in Government Act, insisted that, “when [the Founders] established a single Chief Executive accountable to the people,” they envisioned creating a system in which “the blame can be assigned to someone who can be punished.”<sup>35</sup> Steven Calabresi similarly invoked Alexander Hamilton’s views on presidential accountability as part of his normative justification for the unitary executive. As he contended, Hamilton believed that “a unitary executive would . . . facilitate public accountability for and control over how [the executive’s] power and energy was exercised.”<sup>36</sup> Quite apart from the practical issues that might arise today over actually holding the President accountable for one or more actions that the public disapproves during his or her tenure in office, the reliance on a historically derived notion of democratic accountability raises questions about what kinds of accountability and constraints the Framers would have contemplated. How much would they have viewed the democratic process itself as a constraint as opposed to requirements like “faithful execution” or the oath of office? And how did their conceptions of republicanism and democracy shape their understandings of the scope of presidential accountability and to whom and in what manner the President should be accountable?

Progressives should applaud the wealth of historically oriented scholarship that has begun to inform our understanding of the executive power generally as well as specific constitutional grants of authority to the President and executive branch. At the same time, it is crucial that progressives formulate a constitutional vision for the executive branch that will remain consistent across administrations and that relies on a conception of democracy less susceptible to the specter of populism than those currently undergirding the idea of the unitary executive. To achieve that, we might first return to the insights of the Framers and take their thoughts about resisting tyranny as a starting point.

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<sup>34</sup> Bernadette Meyler, *Forgetting Oblivion: The Demise of the Legislative Pardon* (Stan. Pub. L. Working Paper No. 1800383, 2011).

<sup>35</sup> *Morrison v. Olson*, 487 U.S. 654, 731 (Scalia, J., dissenting) (1988).

<sup>36</sup> Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 44–45 (1994).