THE UNITARY EXECUTIVE IN THE AGE OF AMERICAN AUTHORITARIANISM

Martin H. Redish[*] *& David M. Epstein*[**]

* Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern Pritzker School of Law. The authors thank Steven Calabresi for his helpful comments on an earlier draft. All views and mistakes are solely those of the authors.

** J.D., Northwestern Pritzker School of Law; B.A., University of Connecticut. The authors thank the editors of *Wake Forest Law Review* for their able assistance in preparing this piece for publication. Finally, the author thanks his wife for her unfailing support.

INTRODUCTION

Frustrated with the outcome of the 2020 presidential election, members of the Trump White House produced a draft executive order directing the Secretary of Defense to seize voting machines.[1] The draft order asserted the highly dubious claim that the machines contained evidence of widespread voter fraud.[2] President Trump had the authority to order the machines seized, according to the draft order, because of the power "vested" in him "pursuant to . . . Article 2 section 1 of the U.S. Constitution."[3] The drafters of the order invoked a sweeping vision of presidential power derived from the Vesting Clause of Article II. Such a vision entitled President Trump to take the unthinkable step of seizing voting machines. Thankfully, the draft order was never issued. In the future, we may not be so fortunate.

The legal theory on which the draft executive order relied is most closely associated with what we call "Strong Unitarianism." Proponents of this view of presidential power conclude that, pursuant to the Article II Vesting Clause, the president has the power to direct and remove subordinates. They also argue, however, that the president has the amorphous implied power to advance critical national interests, even without statutory authorization.

This theory of presidential power is dangerously flawed. It takes little prescience to see how the Strong Unitarian approach could be—and almost was—weaponized by a president seeking to exercise authoritarian power. Relying on her so-called inherent powers, a president could argue that Article II gives her boundless authority to

1. Luke Broadwater et al., *Jan. 6 Panel Examining Trump's Role in Proposals to Seize Voting Machines*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2022/02/01/us/jan-6-panel-trump-voting-machines.html.

2. *See* Betsy Woodruff Swan, *Read the Never-Issued Trump Order That Would Have Seized Voting Machines*, POLITICO (Jan. 25, 2022, 11:34 AM), https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572; *Presidential Findings to Preserve Collect and Analyze National Security Information Regarding the 2020 General Election*, POLITICO (Dec. 16, 2020), https://www.politico.com/f/?id=0000017e-920d-d65f-a77e-fbad182f0000 [hereinafter *Presidential Findings*].

3. *Presidential Findings*, supra note 2.

act in any manner she deems necessary to advance national interests. For example, she could suggest that she has the power to seize voting machines and postpone the certification of a duly elected challenger—or even far worse.

Standing in sharp contrast to Strong Unitarianism is a group of theories we refer to as "Anti-Unitarianism." Under this approach, Congress possesses authority, pursuant to the Necessary and Proper Clause contained in Article I, section 8, clause 18, to insulate executive branch administrators from presidential removal and direction. For example, Anti-Unitarians generally approve of legislation vesting in unelected administrators executive power over vital matters of policy, free from presidential oversight or removal. Anti-Unitarians often justify their view of limited presidential power on the basis of nakedly functionalist goals. These goals include ensuring that executive decision-making is done transparently, thereby fostering public discourse about important matters of policy and arriving at well-reasoned policy choices.

While perhaps less perilous than Strong Unitarianism, Anti-Unitarianism is equally troubling for a variety of reasons. The primary concern is that it undermines the text, structure, and values of the Constitution. The text of Article II explicitly confers executive power only upon the president. Therefore, the president must retain the power to direct and remove her subordinates. Similarly, the structure of the Constitution establishes a system of separation of powers. In so doing, it prohibits Congress from diminishing the power of the executive while aggrandizing its own power. Thus, as a constitutional matter, Congress cannot interfere with the president's ability to manage inferior executive branch officials. Finally, bestowing policymaking power upon unelected officials who are beyond the reach of the president undermines the American system of representative democracy. It does so because voters cannot reasonably hold elected officials accountable for the actions of politically-insulated executive administrators.

One searching for a constitutionally acceptable theory of presidential power is faced with a dilemma: Either, one accepts the Strong Unitarian view—a theory ripe for abuse by an authoritarian president, thereby threatening the very foundations of American democracy—or one opts for the Anti-Unitarian view at the expense of the Constitution's text, structure, and democratic values.

Unsatisfied with either of the existing theories of presidential power, we propose an alternative we deem far preferable to both—what we call "Limited Unitarianism." We develop this theory mindful of three goals. First, the theory must respect separation of powers. This goal is vital because separation of powers is appropriately viewed as a foundational prophylactic protection against tyranny, thus serving as an important roadblock to an authoritarian president. Separation of powers requires, among other things, a recognition that the Constitution creates three co-equal branches of government, each

possessing a limited and enumerated role in the federal scheme. Second, the unambiguous text of the Constitution must be read with fidelity. This requires the conclusion that each branch of government enjoys only those specific powers bestowed by the Constitution. Third, our theory of presidential power must recognize that American constitutional democracy dictates that the federal government is to be accountable to its citizens. As a result, voters must have a reasonable opportunity to hold policymakers accountable through the electoral process.

With these goals in mind, we here briefly describe our Limited Unitarian theory of presidential power. Beginning with the text of Article II, the Vesting Clause makes clear that executive power is conferred only upon "a President."[4] The remainder of Article II elucidates and limits the power granted to the president. For example, the Take Care Clause obliges the president to faithfully execute the law. In imposing this obligation, the Clause necessarily implies that the president has the power to execute the law. This is because the president could not be expected to fulfill her Take Care Clause obligation if she lacked the corresponding power to satisfy the obligation.

In addition to *granting* power, Article II limits the executive power to only those enumerated therein. Thus, the president may claim only powers explicit or necessarily implied from the powers explicitly granted to the president in the text of Article II. On this basis, the president may remove and direct administrators because such power is necessarily implied from the obligation imposed on the president by the Take Care Clause. The president may not, however, exercise so-called "inherent" powers; these are often considered to be powers of protection, emergency, and foreign affairs—powers nowhere explicitly granted to the president.

Article II specifies a list of relatively unremarkable powers, among them the president's power to receive ambassadors and solicit opinions from subordinates. It would make little sense for the Framers to expressly delineate such mundane powers if the president were also to possess the power to wield vast unspecified authority when faced with an emergency or foreign affairs crisis. The interpretive canon, *expressio unius*, *exclusio alterius* strongly counsels in favor of rejecting claims of inherent presidential authority which were neither expressly enumerated nor logically implied by those powers that were expressly granted. Indeed, Justice Robert Jackson made largely the same argument in his separate opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[5] where he rejected the view that the president enjoyed inherent powers. In his concurring opinion, Justice Jackson explained that the Framers "made no

4. U.S. CONST. art. II, § 1, cl. 1.

5. 343 U.S. 579, 640–41 (1952) (Jackson, J., concurring).

express provision for exercise of extraordinary authority because of a crisis."[6] That no mention of even the possibility of inherent powers is present in Article II is especially important, Justice Jackson explained, because Article II mentions even "trifling" powers.[7] Thus, the omission of inherent powers from Article II suggests that no inherent powers were conferred.

The textual structure of the Constitution establishes a system of separation of powers. This system is essential to the vitality of America's constitutional regime. In fact, James Madison described separation of powers as "a first principle of free government."[8] Pursuant to separation of powers, the executive, legislative, and judicial powers—unless the Constitution authorizes otherwise—are vested exclusively in a single branch of government. The Constitution is therefore structured to ensure no branch may aggrandize its power or diminish the power of another branch. Thus, Congress cannot insulate executive administrators from presidential control since doing so weakens the president and strengthens Congress in a manner not textually dictated. Similarly, the president cannot act without express authorization because that would mean the president is aggrandizing her power and minimizing Congress's power by acting as both a lawmaker and an executive.

The Constitution is of course grounded by foundational precepts of democratic political theory. We should recall that the Revolution was grounded in the principle of no taxation without representation. Thus, leaders charged with making significant policy choices must be periodically elected to ensure that citizens exercise a meaningful voice in their government. Thus, the president must be accountable for the decisions of her administration. One can rationally be held accountable for such policy choices only if one can meaningfully influence the choice made. Therefore, democratic political theory requires that the president must have the ability to finally determine policy by having the authority to remove and direct subordinates who shape or implement that policy. Otherwise, voters could not rationally hold the president accountable for the policy choices of her administration. Even worse, if the president cannot direct and remove subordinates then unelected and minimally accountable administrators would have significant control over executive power.

Democratic theory also dictates that the president may not exercise so-called inherent power. This is because inherent power lacks any meaningful referent within Article II; thus, only the president could determine whether the inherent power she is exercising is reasonable under the circumstances. Recognition of

6. *Id.* at 650.

7. *Id.* at 641.

8. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 152 (1969) (citation omitted).

such an awesome power in the president's hands virtually invites the onset of constitutionally authorized tyranny.

This Article proceeds in six parts. Part I explains why at this time in American history it is so desperately important to reexamine theories of executive power in light of the ominous growth of authoritarianism and authoritarian tendencies in the United States. Part II introduces and critiques various Anti-Unitarian views of executive power, ultimately rejecting all of them on grounds of textual defects or inconsistencies with foundational democratic theory, or both. Part III reviews and critiques the Strong Unitarian view of presidential power. This theory recognizes that Article II vests broad and undefined authority in the executive—the one branch of the federal government most susceptible to the exercise of tyrannical power. If for no other reason, this version of unitarianism must be soundly rejected. Part IV presents our Limited Unitarian theory of presidential power. This approach to unitarianism recognizes that Article II vests broad authority in the president, but at the same time imposes important textually grounded boundaries on that authority in order to prevent the onset of the very tyranny the Framers had sought to avoid in shaping the constitutional system of separation of powers. Part V addresses possible counterarguments to the Limited Unitarian theory. Finally, Part VI examines Supreme Court cases that address issues of executive power in order to determine whether our theory finds grounding in existing constitutional doctrine.

I. THE GROWTH OF AUTHORITARIANISM IN THE UNITED STATES

Since the Revolutionary War, the Framers had been acutely aware of the threat of authoritarianism. The Declaration of Independence proclaims the "right" and "duty" to rebel against a government whose "[o]bject evidences a design" of "absolute Despotism."[9] Early state constitutions featured "emasculat[ed]" governors as a result of the "awful fear in which magisterial authority was held."[10] After independence, the Articles of Confederation famously declined even to create an executive branch because the founding generation was so fearful that executive power would degenerate into tyranny.[11] During the Virginia Constitutional Convention, some objected to the content of Article II out of concern that "the president will degenerate into a tyrant."[12] Alexander Hamilton suggested during the Ratification debates that critics of the Constitution proposed an alternative vision of government that would

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

10. WOOD, *supra* note 8, at 149.

11. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 20 (2008) (explaining that the Articles of Confederation featured merely an executive committee).

12. Speech from James Madison to the Virginia Convention (June 5, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 133 (Gaillard Hunt ed., 1904).

lead down the "certain road to . . . despotism."[13] The Constitution, therefore, reflects the Framers' desire to establish a government that would frustrate any leader with despotic aims. Despite that goal, America has occasionally flirted with authoritarianism.

President Trump's behavior during the 2020 presidential election provides a recent and dangerous example of the threat of authoritarianism in America—though Presidents Franklin D. Roosevelt and Abraham Lincoln arguably also came close to acting as authoritarians at various points in their administrations.[14] During the night of the 2020 election, President Trump claimed, without any basis in fact, that the election was a "fraud on the American public."[15] He insisted that he "did win th[e] election" and called on states to stop

13. *See* THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

14. During the Civil War, President Lincoln suspended habeas corpus even though he most likely lacked the power to do so. *See* Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575, 577 (2010) ("The Chief Executive has never had the constitutional power to suspend the privilege of the writ of habeas corpus . . . [and] the question is not even a close one."). President Lincoln also suppressed political speech, even in states that were not in open rebellion. In one instance, Lincoln supported the arrest of a former Democratic Congressman who delivered remarks critical of Lincoln during a meeting in Ohio. Hon. Frank J. Williams, *Abraham Lincoln, Civil Liberties and the Corning Letter*, 5 ROGER WILLIAMS U.L. REV. 319, 328, 330, 333 (2000). President Roosevelt also took actions of an arguably authoritarian nature. For example, he established a military commission, which he oversaw, to try accused Nazi saboteurs—two of whom were American citizens. Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942); John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 256 (2018). The commission was a "striking departure" from the guarantees of the Sixth Amendment and it failed even to make "allowances for a right to legal counsel, a right to remain silent, or a right of appeal." *Id.* at 258. President Roosevelt also approved the mass surveillance of American citizens, even though doing so directly contravened an act of Congress. *See* Nardone v. United States, 302 U.S. 379, 380–81 (1937) (there, the Court interpreted the Communications Act of 1934 and concluded that it forbade *anyone* from intercepting wire communications without the sender's permission). Perhaps most notoriously, under President Roosevelt's "Executive Order 9066, the army removed more than 100,000 Japanese Americans from the Pacific Coast states during the spring of 1942." GREG ROBINSON, BY ORDER OF THE PRESIDENT 4, 105 (2001). The Japanese Americans were interned under suspicion that some might be enemy spies. *See* JOHN E. SCHMITZ, ENEMIES AMONG US: THE RELOCATION, INTERNMENT, AND REPATRIATION OF GERMAN, ITALIAN, AND JAPANESE AMERICANS DURING THE SECOND WORLD WAR 8–9 (2021); *see also* RICHARD REEVES, INFAMY xiii, xiv (2015) ("More than 120,000 American Japanese were forced from their homes and incarcerated in ten 'relocation centers' and several prisons during World War II.").

15. SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 9 (2022).

counting ballots.[16] Nearly a month after the election was over, President Trump claimed voting machines somehow played a role in the "fraud."[17] President Trump's claims of fraud lacked substantial evidence—to say the least. In fact, nearly every court that considered the issue of voter fraud during the 2020 presidential election dismissed the claims outright.[18]

Maintaining (without reliance on even the slightest bit of truthful concrete evidence) that widespread, outcome determinative election fraud had been committed, attorney Sydney Powell and Lt. Gen. Michael Flynn (ret.) met with President Trump to develop a plan to "gain access to voting machines in [s]tates where President Trump was claiming election fraud."[19] Around that time, President Trump's Chief of Staff Mark Meadows and advisor Rudy Giuliani considered directing the Department of Homeland Security to sequester voting machines.[20] Motivated by the dubious voting machine fraud theory, members of President Trump's team drafted an executive order directing the Secretary of Defense to commandeer voting machines.[21] The order relied on President Trump's authority "pursuant to . . . Article 2 section 1 of the U.S. Constitution."[22] The order was never issued, but it was thought a real possibility that President Trump might somehow employ the military to resist the peaceful transfer of power.[23] Prompted by concern that President Trump might enlist the military to investigate his claims of election fraud, all former living Secretaries of Defense issued a joint statement rebuking the plan.[24]

16. *Id.*

17. *Id.* at 219–20.

18. Rosalind S. Helderman & Elise Viebeck, '*The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020, 2:12 PM), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html.

19. SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, *supra* note 15, at 222.

20. *Id.*

21. Broadwater et al., *supra* note 1.

22. Swan, *supra* note 2; *Presidential Findings*, *supra* note 2.

23. *See* Jennifer Steinhauer & Helene Cooper, *At Pentagon, Fears Grow That Trump Will Pull Military into Election Unrest*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/us/politics/trump-military-election.html (explaining that President Trump's refusal "to commit to [the] peaceful transition of power" and the fear that he might enlist the military to quell protests prompted military officials to consider resigning).

24. *See* Ashton Carter et al., Opinion, *All 10 Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross into Dangerous Territory*, WASH. POST (Jan. 3, 2021, 5:00 PM), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html.

When his efforts to overturn the 2020 election failed, President Trump helped to unleash a large group of often violent insurrectionists on the U.S. Capitol while Congress was meeting to ratify President Biden's installation. President Trump implored his supporters to attend the January 6 "Stop the Steal" rally.[25] On the day of the event, he told the crowd that he would accompany them to the Capitol.[26] As rioters roved the halls of the Capitol, President Trump issued incendiary messages.[27] Eventually, President Trump asked rioters to leave the Capitol.[28] When he did so, the President explained that the rioters were "very special" people whom he "love[d]."[29] By the time the riot was over, approximately 140 police officers had been injured[30] and five people were dead.[31]

Donald Trump gave birth to a political movement comprised of followers who are committed to furthering their cause "by any means necessary."[32] One study suggests that over 20 million Americans believe "violence [is] justified to restore [President] Trump to the White House."[33] While former President Trump remains out of office as of this writing, his administration laid the groundwork for a future president with authoritarian inclinations to gain power simply by baselessly asserting the existence of widespread electoral fraud. Perhaps President Trump will win back the White House in a future election. Or maybe another candidate will take office with a base of supporters willing to overlook any constitutional violation for the sake of their cause.[34] The point is that one could fashion a strong

25. *See* SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, *supra* note 15, at 100, 294, 499.

26. *Id.* at 585.

27. *Id.* at 577–79.

28. *Id.* at 606.

29. *Id.*

30. Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capital Riot*, N.Y. TIMES (July 12, 2021), https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html.

31. Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html.

32. Barton Gellman, *January 6th Was Practice*, ATL., Jan./Feb. 2022, at 24, 26.

33. *Id.* at 31 (quoting a survey question).

34. Elsewhere, countries that seemed to be safely democratic are embracing anti-democratic policies; take Israel and Hungary as two examples. In Israel, the Minister of Justice proposed, and the Knesset passed sweeping judicial reforms that if implemented would reshape the workings of Israel's court system. Though the law was struck down by Israel's Supreme Court, the law would have significantly diminished the Court's ability to fulfill its checking function. Among the many proposed changes, one of the most troubling is the idea that the Knesset, by a simple majority, could overrule a decision of Israel's Supreme Court. Patrick Kingsley, *Netanyahu Surges Ahead With Judicial Overhaul,*

argument that America remains more vulnerable to authoritarianism today than at any other point in the nation's history.

America is thus confronted with the ominous and undeniable risk of presidential authoritarianism. In light of the existence of such a risk, we hope to identify a theory of presidential power that accomplishes two objectives. First, it must limit the risk of American authoritarianism by constraining presidential power while simultaneously preserving the existence of a meaningful level of democratically accountable executive power. Second, and equally important, the theory must find strong support from the text, structure, and values of the Constitution.

The argument might be made that if tyranny is to happen, nothing written on paper can stop that. To some extent, of course, this is true; a written constitution can never stop the onset of tyranny imposed by widespread violence. The Framers most certainly knew this. But what a written constitution *can* do is insert a type of speed bump to the widespread popular acceptance of tyranny. Tyranny rarely happens all at once. Like the frog placed in boiling water, the public in a democracy is likely to get used to smaller steps along the way to tyranny, until it discovers—much like the unfortunate frog—that it is too late. And the public is likely to be more receptive to particular presidential actions on the path to tyranny if that president can ground her behavior in validating Supreme Court decisions construing the Constitution to authorize those powers. On the other hand, presidential actions ignoring controlling Supreme

Prompting Fury in Israel, N.Y. TIMES (Jan. 12, 2023), https://www.nytimes.com/2023/01/12/world/middleeast/netanyahu-israel-judicial-reform.html. This effort to reform Israel's Supreme Court has been met with intense criticism, especially among jurists. According to former Chief Justice Esther Hayut, "[t]he significance of this plan is therefore to change the democratic identity of the country beyond recognition." Jeremy Sharon, *Hayut: Justice Minister Plans 'Fatal Blow' to Judicial Independence, Wants to Change Israeli Democracy 'Beyond Recognition'*, TIMES OF ISR. (Jan. 12, 2023, 8:12 PM), https://www.timesofisrael.com/liveblog_entry/hayut-justice-minister-trying-to-deliver-fatal-blow-to-judicial-independence. Former Chief Justice Aharon Barak claimed the reforms "will strangle Israeli democracy," and said that they mark a "war against democracy." *Ex-Chief Justice Barak: Government's Judicial Reform Plan 'Will Strangle Democracy'*, TIMES OF ISR. (Jan. 6, 2023, 5:15 PM), https://www.timesofisrael.com/former-chief-justice-judicial-reform-plan-a-chain-that-will-strangle-democracy. In Hungary, President Victor Orbán declared his intention to build an "illiberal state." Andrew Marantz, *Does Hungary Offer A Glimpse of Our Authoritarian Future?*, NEW YORKER (June 27, 2022), https://www.newyorker.com/magazine/2022/07/04/does-hungary-offer-a-glimpse-of-our-authoritarian-future. True to his word, President Orbán and his Fideaz party have stifled academic freedom by putting "many of the public universities . . . under the control of oligarchs and other [party] loyalists." *Id.* He has also created a secret police force with the authority to surveil virtually any Hungarian resident. *Id.*

Court interpretations of Article II, which deny the president the authority to take such actions, would raise the political stakes for a president wishing to act contrary to the Court's reading of the Constitution. Would this be enough to stop tyranny? Who knows? Hopefully we will never have to find out. But it is all we have—short of resort to responding violence—and we should most surely make full use of it in the fight against creeping presidential authoritarianism.

II. THE ANTI-UNITARIAN THEORY

Considering the almost unimaginable risks that an authoritarian president could pose to American democracy, it makes sense to begin by considering Anti-Unitarianism—a theory of executive power that concludes Congress may impose significant restraints on the president's control of the executive branch. If implemented, Anti-Unitarian theories might be thought to reduce the risk of authoritarianism by limiting the president's power to act unilaterally. At the same time, however, the theory threatens the core functions of presidential power.

Anti-Unitarians often invoke functionalist considerations to support their view of presidential power. Perhaps for this reason, Anti-Unitarian views of executive power are more diverse than unitarian theories. Two Anti-Unitarian views of executive power are discussed here.[35] The first Anti-Unitarian theory intends to promote accountability, while the second theory seeks to promote constitutional legitimacy.

35. We discuss two Anti–Unitarian views in the interest of concision. Professor David M. Driesen offers a third Anti–Unitarian perspective that he calls the Duty-Based Theory of executive power. David M. Driesen, *Toward a Duty–Based Theory of Executive Power*, 78 FORDHAM L. REV. 71 (2009). Under this view, "the Constitution denies the [p]resident complete control over the executive branch of government in order to assure fidelity to law." *Id.* at 73. Rather than accept a Strong Unitarian concept of executive power, the Duty-Based Theory holds that "[t]he Constitution envisions . . . a dialogue between somewhat independent officials and the [p]resident about appropriate exercises of discretion within a rule-of-law framework." *Id.* at 82. Thus, the president does not have complete authority to control subordinates; rather, both the president and her subordinates are obliged to uphold the rule of law as they see fit. *Id.* at 82, 93–94. Differences of opinion as to how the law should be upheld are acceptable and the president may not remove a subordinate merely for exercising his judgment in carrying out the law. *See id.* at 94 ("[the president's exercise of] executive power consists of a power to lead and cajole, not to exercise complete control.").

A. The Accountability Theory

Professor Heidi Kitrosser suggests that an important purpose of the Constitution is to establish an accountable government.[36] Accountability, according to Professor Kitrosser, requires more than holding regular elections.[37] Instead, three other forms of accountability must be considered.

She describes the first alternative form of accountability as "Presidential Accountability," which reflects the Framers' desire that the president be held accountable for acting in a manner that is competent, fair, and lawful.[38] The second form of accountability is "Legislative Accountability." It ensures that lawmakers operate in a sufficiently transparent and clear manner so that voters may hold officials accountable for their policy choices.[39] The third type of accountability is "Administrative Accountability," which itself is comprised of two components.[40] Component one is "Legislative and Presidential Accountability."[41] This component is designed to prevent both Congress and the president from using the administrative state to abuse their respective powers.[42] Professor Kitrosser suggests that the Supreme Court's decision in *Morrison v. Olson*,[43] which upheld the constitutionality of the independent counsel statute, should serve as a guide in this regard.[44] She approvingly quotes the *Morrison* Court's conclusion that Congress may not grant an administrator so much power that it would "'impede the [p]resident's ability to perform his constitutional duty . . . .'"[45] But, under this theory, Congress may sometimes insulate an administrator from presidential removal when doing so does not serve as a major impediment to the president in performing her constitutional duties.[46] An additional requirement of "Legislative and Presidential Accountability" is that in delegating authority to administrators, Congress must establish "regular and transparent procedures" for the administrator to follow.[47] Congress

36. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1751 (2009).

37. *Id.* at 1750, 1751 ("[T]he simple accountability [meaning periodic elections] assumed by unitarians does not comport with the Constitution's complex approach to accountability.").

38. *Id.* at 1751.

39. *Id.* at 1753–54.

40. *Id.* at 1754.

41. *Id.* at 1755.

42. *Id.*

43. 487 U.S. 654 (1988).

44. Kitrosser, *supra* note 36, at 1756.

45. *Id.* (quoting *Morrison*, 487 U.S. at 691).

46. *See id.*

47. *Id.* at 1758.

must also provide direction to the administrator in the form of setting an "intelligible principle."[48]

Professor Kitrosser adds a second component to "Administrative Accountability," which she calls "Bureaucratic Accountability."[49] This sort of accountability requires limits to be placed on the administrator so that "Congress, the [p]resident, and the judiciary can determine . . . if legislative directives are not faithfully or competently followed."[50] Presumably, Professor Kitrosser would count the Administrative Procedures Act and hybrid rulemaking as the sort of limits contemplated under Bureaucratic Accountability.

With this accountability framework in mind, Professor Kitrosser argues that Congress possesses wide latitude to engage in functional balancing the result of which may limit the president's power to direct and remove subordinates.[51] The limits on Congress's ability to constrain presidential power are established by a figurative floor and ceiling.[52] The floor is the requirement that Congress express an intelligible principle and establish measures for administrative transparency when delegating authority.[53] The ceiling is established by the Court's statement in *Morrison* that Congress may not "impede" the president's constitutional duties.[54] According to Professor Kitrosser, so long as Congress is acting within this floor and ceiling, it may constrain presidential power if doing so promotes accountability.[55] Under Professor Kitrosser's theory, constraining presidential power often promotes accountability. This is because it prohibits hidden interference with administrative agencies while ensuring that those agencies follow various accountability-promoting procedures set by Congress.[56] For example, Professor Kitrosser concludes that accountability is frequently disserved when the president asserts complete control over the administrative apparatus.[57] This is because such vast control "replaces multiple identifiable avenues for public input and information access with a single . . . opaque . . . formal decision maker."[58] Such decision-making, Professor Kitrosser laments, allows the president to "distance himself from unpopular decisions by pointing to actual or

48. *Id.* at 1756 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).
49. *Id.* at 1758.
50. Kitrosser, *supra* note 36, at 1758.
51. *Id.* at 1756, 1758–60.
52. *Id.* at 1758.
53. *See id.* at 1756, 1758.
54. *See id.* at 1756 (quoting Morrison v. Olson, 487 U.S. 654, 691 (1988)).
55. *Id.* at 1760 ("Congress enjoys substantial discretion, subject to functional balancing, to take accountability-enhancing measures beyond the requisite constitutional floor. These measures include degrees of insulation from presidential control.").
56. *See* Kitrosser, *supra* note 36, at 1759–60.
57. *Id.* at 1741–43.
58. *Id.* at 1743.

purported actions by inferiors within an opaque executive branch."[59] It would be better, according to Professor Kitrosser, to permit Congress to engage in a sort of accountability balancing.

Professor Kitrosser's conclusion that Congress may restrict the president's power to remove and direct subordinates is troubling. Our disagreement with Professor Kitrosser's theory is rooted in the text, structure, and democratic theory of the Constitution.

Article II vests the Executive Power in "a President"[60] and requires that the president "take care that the laws be faithfully executed."[61] The text of the Constitution is clear that the president has the power—and the obligation—to execute the law. To conclude, as Professor Kitrosser does, that Congress may limit the president's ability to remove or direct administrators undermines the Constitution's grant of Article II power. If the president is responsible for executing the law, she cannot effectively fulfill this obligation if she lacks the power to control who executes the law on her behalf. Relatedly, if the president cannot tell her administrators how the law should be enforced, the president cannot fulfill her Take Care obligation. Notably, neither Congress nor administrators of the executive branch are obliged to ensure the law's faithful execution. That responsibility is given exclusively to the president. As a result, the president must be able to direct her subordinates to enforce the law as she interprets it. To conclude otherwise is to read the Take Care Clause as conferring an obligation without also awarding the necessary power to satisfy the obligation. Such a reading is, we believe, illogical.

Professor Kitrosser's proposal violates separation of powers by permitting Congress to aggrandize its power and diminish the power of the president. Article I reflects the Framers' fear that the legislature, being "less susceptible to precise limits,"[62] might encroach upon the powers of the coordinate branches. To resist this encroachment, the Framers limited Congress's power to only those enumerated in Article I. Among the powers *not* enumerated in Article I is the power to control the day-to-day activities of members of the executive branch. Certainly, Congress has significant enumerated power, including the power under the Necessary and Proper Clause to facilitate the exercise of its expressly granted authority. But to rely on this clause or any other enumerated Article I power to conclude that Congress may limit the president's power is to ignore separation of powers. No branch, including Congress, may invoke an enumerated power to undermine the basic structure of the Constitution. A contrary conclusion would be to interpret the

59. *Id.*

60. U.S. Const. art. II, § 1, cl. 1.

61. U.S. Const. art. II, § 3.

62. THE FEDERALIST NO. 48, at 257 (James Madison) (George W. Carey & James McClellan eds., 2001).

Necessary and Proper Clause as containing a figurative constitutional self-destruct button. If Congress may entirely reallocate constitutionally-granted power pursuant to its Necessary and Proper power, then the notion of a limited, balanced, and enumerated federal government is sundered. A more sensible reading of the Necessary and Proper Clause is that in invoking that clause, portions of the Constitution, including those expressly allocating power to the president, must be deemed insulated from congressional control. Thus, assuming the Necessary and Proper Clause cannot justify Congress's diminishment of expressly granted presidential power, Professor Kitrosser's proposal violates constitutionally dictated separation of powers.

We agree with Professor Kitrosser that accountability is an important goal that the Constitution is designed to achieve; indeed, it is the foundational precept of democratic government. But the system that Professor Kitrosser envisions to achieve that accountability is counterproductive. Rather than create a more accountable government, Professor Kitrosser's theory would actually make the president and Congress *less* accountable to the People. By permitting Congress to insulate administrators from presidential removal and direction, Professor Kitrosser makes it more difficult for voters to reasonably hold the president accountable for actions of the executive branch.[63] If the president is unable to remove or direct her subordinates, it would be illogical for voters to express their displeasure with a policy decision made by an administrator insulated from electoral accountability. Similarly, if it appears to the voter that the administrator is the one making the policy decision, and not Congress, it would be illogical for voters to punish members of Congress by voting them out of office.

Professor Kitrosser's embrace of nonelective forms of accountability may stem from the reality that elections are an imperfect means of holding leaders to account. She may be correct that elections cannot always "foster meaningful accountability for

63. Professor Kitrosser argues that Congress can insulate administrators from presidential direction to prevent the president from interfering with the flow of information. Kitrosser, *supra* note 36, at 1759. If administrators can share information without it being screened by the White House, this enhances accountability, she claims. *Id.* To illustrate the importance of information flow, Professor Kitrosser describes the White House's attempt to modify testimony that a NASA scientist was planning to give to Congress. *Id.* at 1772. The scientist refused to endorse the testimony after it was modified by the White House. HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 182–83 (2015). Ironically, Professor Kitrosser's example suggests administrators have ample opportunity to alert the public of executive wrongdoing without giving Congress the power to insulate administrators from presidential direction and removal.

policymaking."[64] But the complex accountability scheme proposed by Professor Kitrosser puts vast decision-making authority in the hands of unelected—and therefore unaccountable—administrators. Such an outcome is fundamentally at odds with our system of representative democracy. It would be far wiser, for the purpose of accountability, to adhere to the structure defined by Article II. By giving the president the complete power to execute the law, and thus the power to direct and remove subordinates, Article II makes the President responsible for any policy changes made by her administration. Professor Kitrosser's suggestion that Congress can insulate administrators from presidential control creates "plurality in the executive."[65] Such a result, Hamilton explained, "tends to conceal faults, and destroy responsibility."[66]

B. The Legitimacy Theory

An alternative version of Anti-Unitarian theory, proposed by Professor Peter Shane, posits that Congress may limit the power of the president when doing so furthers "democratic constitutionalism."[67] This theory is founded on the seemingly uncontroversial premise that the chief object of the Constitution is to "establish [a] legitimate government."[68] Professor Shane argues that two elements are necessary for legitimate government. The first element is that citizens are treated equally under the law.[69] The second element, and the one worthy of elaboration here, is that there must be "opportunity for individual political engagement."[70] Voting is one obvious form of political engagement, but, according to Professor Shane, it is flawed.[71] Elections are naturally imperfect and are made more so through gerrymandering and the work of special interest groups.[72] Thus, a more expansive view of political engagement is necessary. He refers to this expansive view of engagement as "deliberation," which is defined by "genuine policy dialogue both within and outside government."[73] Promoting

64. Kitrosser, *supra* note 36, at 1749 (citing Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 199–200 (1995)).

65. THE FEDERALIST NO. 70, at 366 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

66. *Id.*

67. PETER M. SHANE, DEMOCRACY'S CHIEF EXECUTIVE 171, 174–75, 192–93 (2022).

68. *Id.* at 142.

69. *Id.*

70. *Id.* at 143.

71. *Id.*

72. *Id.* at 143–44.

73. SHANE, *supra* note 67, at 163.

deliberation is therefore an essential element of actualizing a key purpose of the Constitution: perpetuating a legitimate government.[74]

Professor Shane argues that Congress has the power to limit the president's power of removal and direction.[75] He arrives at this conclusion first by invoking early American practice and original public meaning to conclude that Article II does not establish a unitary executive.[76] Of course, if one categorically rejects originalist analysis as inherently impossible at best and disingenuous at worst, as we do, this is irrelevant. However, Professor Shane also maintains that as a functionalist matter, public deliberation is disserved by permitting the president to remove and direct administrators at will.[77] Professor Shane explains that conceiving the executive branch as "focused entirely on the policy predilections of a single individual" undermines the nature of public deliberation.[78] This is because subordinate officials and administrators will not think of themselves "as responsible actors in their own right."[79] In turn, Professor Shane contends that complete executive control will result in an "executive branch in which policy dialogue is stunted and relatively nontransparent."[80] It would be wiser, in Professor Shane's view, to foster a "pluralistic environment for executive-branch policy making."[81] This is because doing so will "support vigorous, open, and reasoned dialogue between government agencies" and the public.[82]

Professor Shane embraces the perceived functionalist benefits of plural executive decision-making. He concludes that "within extremely broad limits, it should be up to Congress to decide the scope of authority properly handed to administrative bodies to deal with regulatory issues."[83] Perhaps anticipating the rebuttal that unelected administrators may hinder rather than help public deliberation, Professor Shane insists that administrative agencies enjoy a strong "democratic pedigree."[84] Illustrative of this pedigree, Professor Shane says, is the requirement that administrators "must explain in transparent terms how they have . . . responded to the issues" raised by the public.[85] Professor Shane fails to explain, however, what happens if the public considers the administrative explanation insufficiently transparent or if it rejects the merits or wisdom of that

74. *See id.* at 142–43, 163–67.
75. *See id.* at 117–25, 167.
76. *Id.* at 117–25, 166.
77. *Id.* at 167.
78. *Id.*
79. SHANE, *supra* note 67, at 167.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 171.
84. *Id.*
85. SHANE, *supra* note 67, at 171.

explanation. These problems are caused by the administrators' *lack* of a democratic pedigree.

Professor Shane's argument is unconvincing because it fails to satisfactorily account for the text, structure, and democratic values of the Constitution. Starting with the text of Article II, little support can be found for Professor Shane's view that Congress has, "within extremely broad limits,"[86] the power to curtail the president's ability to direct and remove subordinates. As discussed above,[87] the necessarily logical implication of the Take Care Clause is that the president must possess unrestrained removal and direction powers. To conclude otherwise is to ignore the president's sole responsibility—indeed, obligation—to execute the laws faithfully. Thus, in order for the president to fulfill this responsibility, she must have the power to remove ineffective or recalcitrant members of the executive branch.

Article II includes no reference to the supremacy of other executive branch officials over any area of decision-making. Indeed, when subordinates are mentioned in that provision, they are used to illustrate the president's power over them. Consider the Opinions in Writings Clause as one example. There, the subordinate is required to share his or her opinion with the president.[88] The Clause makes no mention of the president having to respect, accept, or defer to the opinions of subordinates. Had the Framers envisioned a pluralistic executive, they presumably would have been more explicit about it in Article II.[89]

Professor Shane's theory discounts the critical nature of separation of powers protections in the name of fostering public participation in policymaking. Ironically, such a calculus would undermine the very constitutional legitimacy that Professor Shane hopes to promote.[90] Consider, for example, Professor Shane's conclusion that Congress may restrict the president's removal and direction powers.[91] Acceptance of this conclusion would effectively give Congress the ability to expand its power at will. Thus, when politically expedient, Congress could hamstring the president's oversight of administrators. Conversely, Congress could expand the power of the president to oversee subordinates when it deems doing

86. *Id.*

87. *Supra* Part II.A.

88. U.S. CONST. art. II, § 2, cl. 1.

89. One should expect explicit delegation of power to a subordinate of the president especially because the Framers so forcefully disdained plurality in the executive as a general matter. Consider Alexander Hamilton's writing as an example: "attaching ourselves purely to the dictates of reason and good sense, we shall discover much greater cause to reject, than to approve, the idea of plurality in the executive, under any modification whatever." THE FEDERALIST NO. 70, at 364 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

90. *See* SHANE, *supra* note 67, at 142–52.

91. *See id.* at 171–73.

so to be politically advantageous. The public, viewing such manipulation of our constitutional scheme, might understandably lose faith in the very structure of government established by the Constitution.

Far and away the most problematic element of Professor Shane's theory is that it relies so heavily on the supposed "democratic pedigree"[92] of the administrative state. The theory is facially inconsistent with the very nature of the administrative state. It may be true, as Professor Shane suggests,[93] that administrators must comply with a variety of transparency-fostering mechanisms. Certainly, the Administrative Procedures Act and a variety of judge-made administrative law doctrines force agencies to operate with some transparency.[94] But these safeguards are relatively transient. While today, transparency may be the watch-word for agency action—a proposition that is in any event surely debatable[95]—tomorrow Congress or the courts may grant agencies greater leeway in their decision-making. Thus, the agencies that Professor Shane trusts to foster public dialogue may be easily transformed into decision-makers that are opaque and unresponsive to public comment. In other words, it is too much of a risk to develop a theory of executive power premised on the expectation that the "democratic pedigree" of administrative agencies will remain peerless.

More importantly, the simple fact is that agency administrators are unelected decision-makers. America's constitutional system is designed to respond to the will of the voters. It is true that elections may be imperfect barometers for assessing the public will, but the essence of any representative system of government is that elected officials be the ones making governing decisions (at least those decisions not prohibited by the Constitution). It is not a coincidence that the only unelected branch—the judiciary—had its power limited to the adjudication of "Cases" and "Controversies."[96] The Constitution embraces a view of democratic political philosophy that requires elected officials to possess the power to decide the foremost issues of the day. Professor Shane's theory ignores this essential element of the Constitution, and thus must be rejected.

92. *Id.* at 171.

93. *Id.*

94. *See* Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1966–67 (2023).

95. *See, e.g.*, Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297 (2018) (detailing serious constitutional flaws in administrative procedure).

96. U.S. CONST. art III, § 2, cl. 1.

III. THE STRONG UNITARIAN THEORY

Unsatisfied with the Anti-Unitarianism theories discussed, we next consider the opposite extreme: what we call Strong Unitarianism. In contrast to Anti-Unitarianism, Strong Unitarianism embraces a robust—indeed, extreme—vision of executive power. Strong Unitarianism is especially relevant here because the draft executive order prepared by the Trump administration explicitly referenced that theory in justifying the president's power to seize voting machines.[97] This fact alone underscores the enormous danger of accepting Strong Unitarianism in an age of rapidly growing American authoritarianism. This is so, for the simple reason that Strong Unitarianism both enables and legitimizes executive usurpation of raw political power—the very result the Framers feared so greatly and the very reason they established the delicate balance of separation of powers that the Constitution was designed to embody.

Not surprisingly, the asserted rationales relied upon to support Strong Unitarianism are as logically flawed as the theory's results would be pragmatically disastrous. The first rationale is that the Article II Vesting Clause confers on the president *all* executive power, even when not specifically authorized. The second is that the president is imbued with inherent powers to act, even absent clear constitutional or statutory authorization, when the president determines that circumstances so warrant. We summarize and respond to each component of the Strong Unitarian theory in turn.

To a certain extent, Strong Unitarianism makes sense in its categorical rejection of the Anti-Unitarian view that if Congress so chooses, the president may be deprived of full authority over the policy choices vested in the executive branch either expressly or legitimately implied from those express powers in Article II. Both unambiguous constitutional text and foundational precepts of democratic theory dictate such a conclusion. But in most cases, Strong Unitarians go much further. In addition to granting the president authority vested in her explicitly or inferentially by Article II, most Strong Unitarians construe Article II to vest in the president a wide array of vague, unlisted "inherent" powers, the outer limits of which no one can safely determine. To justify this countertextual conclusion, Strong Unitarians draw on highly technical and misleading forms of linguistic gymnastics or wholly misguided understandings of foundational precepts of American political theory. Either way, the Strong Unitarians end up in the same place: Construing Article II, without any legitimate grounding in text, to provide the president with unstated and indeterminable powers either bordering on the tyrannical or constituting clear steps along the path to tyranny.

97. *See supra* text accompanying notes 2–3.

A. The Vesting Clause

Proponents of Strong Unitarianism begin with Article II's Vesting Clause, which provides that "the executive Power shall be vested in a President of the United States of America."[98] Interpreting this clause, Strong Unitarians conclude that all executive power must be placed in the hands of the president. This is because executive power is given to "*a* President" as opposed to "a president" *and* her subordinates.[99] The Vesting Clause leads Strong Unitarians to the conclusion that the president has "*all of* the executive power," not "*some of* the executive power."[100] Strong Unitarians claim that the Vesting Clause must mean that the president enjoys the power to direct and remove subordinates because only the president is granted executive power.[101] The president may permit subordinates to wield executive power as her agent; but at all times only the president is vested with executive power and thus the president may direct and remove subordinates acting on her behalf. To this point in their analysis, for reasons we discuss in the section that follows, we are in full agreement. However, their construction of the Vesting Clause quickly degenerates into a linguistic and textual morass.

This reading of Article II's Vesting Clause is bolstered, the Strong Unitarians claim, by comparing the text of Article II to that of Article III's Vesting Clause. Professor Steven Calabresi and Kevin Rhodes, both Strong Unitarians, note that both Article II and Article III begin by vesting power in the executive and courts respectively.[102] Just as the Article II Vesting Clause is a power grant, the Article III Vesting Clause "must be read as a grant of power" if the judiciary is to have any power at all.[103] This is so, they explain, because the Article III Vesting Clause is "the only explicit constitutional source of the federal judiciary's authority to act."[104]

One might logically assume that because Strong Unitarians believe that Article II's Vesting Clause implies unenumerated, inherent powers to the president, logically Article III's Vesting Clause should similarly be construed to vest unenumerated and inherent powers in the federal courts. Yet no one could seriously suggest such a conclusion in light of the well-established doctrine and history to the contrary; no court today would construe Article III to vest some

98. U.S. CONST. art. II § 1, cl. 1.

99. U.S. CONST. art. II § 1, cl. 1; *see* Morrison v. Olson, 487 U.S. 654, 698–99 (1988) (Scalia, J., dissenting) ("[T]he 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.").

100. *Id.* at 705 (emphasis in original).

101. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166–68 (1992).

102. *Id.* at 1176–81.

103. *Id.* at 1176, 1176–79, 1208.

104. *Id.* at 1176.

vague notion of unenumerated adjudicatory powers in the federal judiciary. But Calabresi and Rhodes attempt to distinguish the two situations. They explain that the Vesting Clause of Article II differs from the Vesting Clause of Article III in that only the Article III Vesting Clause includes the phrase "shall extend to."[105] This phrase is of vital importance to Calabresi and Rhodes because it signifies to them that the courts' powers are limited to only those enumerated in Article III.[106] The authors then note that the limiting phrase "shall extend to" is not included in the Article II Vesting Clause.[107] This omission, claim Calabresi and Rhodes, indicates that the president's power is not limited to only those powers enumerated in Article II.[108]

Applying similar reasoning, Calabresi and Rhodes compare the respective vesting clauses of Article I and Article II by noting that while the Article I Vesting Clause includes the limiting phrase "herein granted," no similar phrase is included in the Article II Vesting Clause.[109] Calabresi and Rhodes find that the Article II Vesting Clause does not limit the president to only those powers enumerated in Article II.[110] In summary, Calabresi and Rhodes think the Article II Vesting Clause is "sweeping indeed" because, unlike Articles I and III, Article II does not include a phrase that constrains the president to only those powers enumerated in the Constitution.[111]

105. U.S. CONST. art. III, § 2, cl. 1.; *Id.* at 1178 ("[T]he italicized language [*shall extend to*] does not appear in Article II. Because similar language was actually included in Articles I and III to limit the scope of the Vesting Clauses of those Articles, the omission of parallel language in the Vesting Clause of Article II is significant indeed.").

106. *Id.* at 1778, 1194 n.206.

107. U.S. CONST. art. III, § 2, cl. 1.; *id.* at 1178.

108. Calabresi & Rhodes, *supra* note 101, at 1178.

109. U.S. CONST. art. I, § 1; Calabresi & Rhodes, *supra* note 101, at 1186.

110. Calabresi & Rhodes, *supra* note 101, at 1196 ("[The provisions] of Article II, Section 2 all explain and substantially limit the [p]resident's executive power, *but unlike the nine jurisdictional heads of Article III, they are not offered to us as an exclusive list*.") (emphasis in original).

111. *Id.* at 1178, 1186. Elsewhere, Professor Calabresi argues that every president from George Washington to George W. Bush has asserted a largely unitarian conception of presidential power. CALABRESI & YOO, *supra* note 11, at 16. Among the examples Professor Calabresi invokes are President George Washington's declaration of neutrality amid growing tensions between Great Britain and France, *id.* at 49, 54–55; President Andrew Jackson's insistence that the Second Bank of the United States withdraw its treasury funds, *id.* at 106–09, 119; and President Ronald Reagan's use of the Office of Management and Budget to oversee administrative agencies, *id.* at 374, 380–82. We do not respond to this argument because it is not clear what version of unitarianism these examples support. Specifically, these examples may suggest a more moderate view of unitarianism than the one Professor Calabresi and Mr. Rhodes espouse.

B. Problems with the Strong Unitarian Vesting Clause Theory

The Strong Unitarian view of Article II's Vesting Clause is seriously flawed. First, it overemphasizes small stylistic differences between the first three articles of the Constitution to support the foundational and controversial proposition that of all three branches, the power granted to the executive is uniquely sweeping. In relying on the most technical of linguistic distinctions, the Strong Unitarians ignore the elephant in the room staring them in the face: Of all three branches, the one branch most likely to assume authoritarian power, thereby threatening both the values of federalism and individual liberty, is the one branch in command of the nation's military—the executive branch. Yet the consequence of their linguistic gymnastics is that the Constitution, framed through the use of enumerated powers and authorities, with the primary purpose of avoiding tyranny, must be construed to effectively impose no restrictions on the authority of the most dangerous branch. Surely, such a truly reckless undermining of the Constitution's foundational purpose must be rejected.

The linguistic niceties on which the Strong Unitarians rely are, in and of themselves, seriously flawed. They ignore the classic interpretive cannon, *expresio unius, exclusio alterius est:* The expression of one excludes others. In other words, there would be no point in enumerating specific grants of power in Article II unless that listing was intended to be exhaustive, absent some express qualification to the contrary. No such express qualification appears in Article II.

Far from signaling significant differences in the constitutional structure, the use of "herein granted" in Article I and "shall extend to" in Article III have simpler explanations. "[H]erein granted" was likely used to clarify that, unlike other legislative bodies, Congress is limited to exercising only those powers enumerated in the Constitution. Thus, "herein granted" makes clear that Congress may not assert that it had inherited the powers granted to the legislative branch which had been established by the Articles of Confederation.[112] Similarly, the words, "shall extend to" could reasonably be justified as a belt-and-suspenders measure to ease concerns that the unelected judiciary might attempt to aggrandize its power.[113] That no similar qualifying phrase was used in Article II may suggest simply that the Framers believed the powers enumerated therein were sufficiently clear that no express limiting phrase was necessary. Whatever the reason for the omission, it is far

112. *See* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1363 (1994) (making largely this argument).

113. *See* Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337 U.S. 582, 647 (1949) (Frankfurter, J. dissenting) (noting that the Framers were deeply concerned that the judiciary might seek to circumvent the Constitution).

from obvious that it indicates the president may wield power that is "sweeping indeed,"[114] in no way restricted by the specific enumeration designed to restrain the far less dangerous branches. If anything, the pervasive skepticism of a powerful national government suggests that Article II does not confer "sweeping" powers upon the president beyond those enumerated or reasonably implied therefrom.

In addition to the flaws of the Strong Unitarian approach already discussed, the theory undermines an additionally important premise of the Constitution's framework: the balance of power among the three branches. The Constitution establishes a federal government that is comprised of three co-equal branches. This structure is designed to ensure that each branch has adequate means to protect itself against encroachments from other branches. Such a structure is undermined if only one of the branches may assert sweeping inherent power while the other two remain limited to only those powers enumerated. In such a scenario, the branch with broader and less defined powers could gain the upper hand. Such an outcome was flatly rejected by the Framers.

C. An Assumption of Inherent Executive Powers

Relying on the twin deductions that Article II confers all power upon a president and illustrates but does not constrain the power conferred, Strong Unitarians conclude that the president enjoys inherent powers not enumerated in Article II. There is some disagreement among Strong Unitarians as to what powers are inherent—not a surprising result, given the vague and unlimited nature of the "inherent powers" concept. Those in one group think that the president may exercise some degree of "Protective Power" over the federal government and its instrumentalities. Those in a second group argue that the president has the inherent power to act in cases of emergency.

Before briefly reviewing these different views, we first note the difference between the concepts of inherent and implied powers. Professor Louis Fisher explains that implied powers are those that can be "drawn reasonably from express powers,"[115] much the way the Necessary and Proper Clause expands congressional authority. For example, one might reason that the president has the implied power to remove from office any subordinate pursuant to her express obligation to execute the laws. *Implied* powers are thus "anchored in the Constitution" because they are limited by the words and phrases from which the powers are implied.[116] In contrast, *inherent* powers are those deemed essential to, or bound up with, the office such that

114. Calabresi & Rhodes, *supra* note 101, at 1186.

115. Louis Fisher, *Holding the President Accountable to Constitutional Limits*, 2014 UTAH L. REV. 793, 797 (2014).

116. *Id.*

to name the office is automatically to bestow a power concomitant to it, regardless of which powers have or have not been expressly granted. For example, some scholars claim that the president has inherent foreign affairs powers because such powers are an elemental component of executive power.[117] In summary, implied powers are those that can fairly be gleaned from the powers enumerated by Article II because they facilitate implementation of the expressly granted powers. Inherent powers, by contrast, are powers that are considered so fundamental that to title the office of the president "the Executive" is to simultaneously grant certain unstated powers. Of course, who gets to determine the seemingly unlimited meaning of those words, which lack any real textual basis, remains to be determined. The following discussion explores how advocates of "inherent" executive powers have attempted to define executive powers.

1. The Protective Power

According to Professor Henry Monaghan, the president possesses the inherent power to protect the "government's personnel, property, and instrumentalities."[118] The fact that Article II explicitly vests in the president numerous powers but makes no mention of the one seemingly "discovered" by Monaghan seems to bother him little or not at all. Monaghan finds support for his claim in the president's Oath of Office, which requires the president to "preserve, protect and defend the Constitution."[119] Under this theory, the Oath obliges the president to take whatever actions are necessary—so long as they do not violate the law—to protect the government, its people, or its property.[120] But this argument is nonsense because it is inherently question-begging. The president's oath obligates her to protect and enforce the Constitution—which necessarily gets us back to the very question being debated, namely, what is it, exactly, that the Constitution dictates? If Article II dictates that the president possesses only those powers expressly granted (which is, in fact, our position), then the oath of course cannot be relied upon to expand executive power beyond what the Constitution vests in the president.

117. *Infra* part III.C.1–2.

118. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 66 (1993). Others similarly conclude that the president has the "inherent" power to protect. *See* Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on the Tempting of America*, 13 AVE MARIA L. REV. 47, 51 (2015) ("It is a plain stubborn fact of U.S. constitutional law that Article II's general grant of executive power to the [p]resident gives him some inherent and implied powers; such as . . . what Henry Monaghan labels the protective power. The [p]resident does not, however, have the power to act *contra legem* . . . .").

119. U.S. CONST. art. II, § 1, cl. 8.

120. Monaghan, *supra* note 118.

Further support for his dubious position, Monaghan claims, is provided by Alexander Hamilton's writings. Hamilton explained that the chief executive was expected to protect "against those irregular and highhanded combinations, which sometimes interrupt the ordinary course of justice."[121] Hamilton was inspired, Monaghan asserts, by eighteenth-century philosophers such as John Locke who proposed that it was the executive's obligation to protect citizens even without express legal authorization to do so.[122] But even if one were to concede Monaghan's interpretation of Hamilton's words, the fact remains that Hamilton spoke only for himself, and the text of the Constitution, not the views of one Framer, controls. James Madison—perhaps the most influential delegate at the Constitutional Convention—flatly rejected the notion that the Framers relied on Locke and Montesquieu in defining executive power. In a letter to Thomas Jefferson, Madison explained that one could not look to European jurists and theorists to interpret the meaning of Article II.[123] He wrote that the writings of "received jurists" were unhelpful in interpreting the Constitution because they "wrote . . . with their eyes too much on monarchical governments, where all powers are confounded in the sovereignty of the prince."[124] Enlightenment thinkers were similarly unhelpful in interpreting Article II. According to Madison:

> [w]riters, such as Locke, and Montesquieu . . . lie under the same disadvantage, of having written before these subjects were illuminated by the events and discussions which distinguished a very recent period. Both of them, too, are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry.[125]

The writings between Madison and Jefferson cast serious doubt on the assertion that Article II refers to the Enlightenment view of executive power.

Even if Madison's writing from 1793 were to be ignored, it is far from clear that the Framers understood executive power to include inherent foreign policy power.[126] Professor Julian Davis Mortenson

121. *Id.* (quoting THE FEDERALIST No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

122. *Id.* at 66 & n.319.

123. Letter from James Madison to Thomas Jefferson (Aug. 11, 1793), *in* 6 THE WRITINGS OF JAMES MADISON 1790–1802, 140, 144 (Gaillard Hunt ed., 1906).

124. *Id.*

125. *Id.*

126. The Constitutional Convention of 1787 lends further support for the conclusion that the Framers intended to confer only the law execution power, in addition to those other powers enumerated in Article II. During the Convention,

concludes that scholars who assert the president has an inherent foreign policy power err by "misread[ing] an idiosyncratic taxonomy adopted" by Enlightenment theorists such as Montesquieu.[127] The error of interpretation, according to Mortenson, stems from confusing "executive power" with "the executive." Whereas "executive power" includes only the power to execute the laws already enacted by the legislature, the "executive," according to some Enlightenment theorists, enjoyed a residuum of power beyond law execution.[128]

Finally, Professor Monaghan argues that his theory of inherent powers explains the Supreme Court's decision in *In re* Neagle. The case, which is discussed in detail below,[129] involved a Deputy United States Marshal who was appointed to protect a Supreme Court Justice from imminent harm.[130] The Supreme Court concluded that the executive had the inherent authority to order the Justice protected even without statutory authorization.[131] Monaghan explained that his theory was supported by *In re* Neagle because there the "Court insisted that the constitutional structure itself implied the Executive's right to protect federal officers in the discharge of their duties."[132] While this argument is critiqued in more detail in a subsequent Part, suffice it to say at this point that although naked reliance on a single Supreme Court decision might have been helpful were Monaghan writing a brief in court, it is not especially helpful in scholarly analysis, where mindless reliance on doctrine is usually frowned upon.

The inherent Protective Power is "no talisman," according to Monaghan.[133] Whatever the limits, they are "practical ones" that are based on "common understanding" as to the sort of action that is "appropriately 'executive' in our scheme of separation of powers."[134] Beyond our supposedly shared understanding, however, Professor

Charles Pinkney motioned to remove from the definition of "executive power" the phrase: "and to execute such other powers not legislative nor judiciary in their nature as may from time to time be delegated." Charles Pinkney's Statement at the Constitutional Convention (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 67, 67 (Max Farrand ed., 1911). This language was "unnecessary," Pinkney explained, because "the object of them being included in the 'power to carry into effect the national laws.'" *Id.* This suggests that the Framers understood the "executive power" to include *only* the power to execute the law. If it included something more, elaboration would have been appropriate. Even more important, Pinkney's motion was adopted. *Id.*

127. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1181–83, 1244 (2019).

128. *Id.* at 1245–49.

129. *Infra* Part V.

130. *In re* Neagle, 135 U.S. 1, 5–6, 52, 54 (1890).

131. *Id.* at 67, 81–85, 95–96.

132. Monaghan, *supra* note 118, at 63 (citing *In re* Neagle, 135 U.S. at 54–58).

133. *Id.* at 73.

134. *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

Monaghan does not explain what one should consider in order to define limits to the so-called "Protective Power."

Professors Steven Calabresi and Christopher Yoo suggest the president enjoys a limited "inherent power to protect the instrumentalities of government . . . ."[135] They agree with Professor Monaghan that the best example of this power is *In re* Neagle.[136] And while Calabresi and Yoo characterize this power as being "limited," they also explain that the "power expands with the nature of the exigency with which the president is confronted."[137] On this basis, they conclude that the "sweeping actions" taken by President Lincoln at the start of the Civil War were "arguably justifie[d]" under this theory of inherent presidential power.[138] Calabresi and Yoo, however, "disavow . . . very broad claims of implied, inherent power" asserted by Presidents Theodore Roosevelt, Truman, and Nixon.[139] Given the highly questionable violations of fundamental civil liberties engaged in by President Lincoln at the start of the Civil War, however, one should surely doubt the wisdom of Calabresi and Yoo's reliance on it as an illustration of their theory.

2. The Emergency Power

Professor John Yoo asserts that Article II gives the president inherent powers to tackle international emergencies but confers no special powers to address domestic emergencies.[140] Professor Yoo explains that the Framers "who drafted and ratified the Constitution would have understood [executive power] . . . to include an ability to respond to unforeseen events, crises, and emergencies."[141] Among the sources Professor Yoo marshals to support this proposition is the Lockean concept that the executive must occasionally act as a "guardian who exceeds his authority in the best interests of his ward."[142] But it is reliance on this quote that demonstrates Yoo's fundamental misunderstanding of the American democratic system.

135. CALABRESI & YOO, *supra* note 11, at 430.

136. *Id.* Note that pointing to a Supreme Court decision to illustrate how one's scholarly theory would work is not the same as relying on that decision to justify one's theory.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* John Yoo, *Emergency Powers During a Viral Pandemic*, 15 N.Y.U. J.L. & LIBERTY 822, 823, 844 (2022) (explaining that the executive lacks any special power to address domestic emergencies, such as the COVID-19 pandemic, but the president has expansive emergency powers to address foreign affairs crises).

141. *Id.* at 844.

142. John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 440 (2008) (citing 10 THE WORKS OF THOMAS JEFFERSON 7 n.l (Paul Leicester Ford ed., 1905) (reprinting a letter from Thomas Jefferson to John C. Breckinridge dated August 12, 1803))).

Contrary to the view expressed by both Locke and Yoo, American democracy does not presuppose the condescending, paternalistic relationship embodied in the guardian-ward arrangement. As Alexander Meiklejohn explained, in the American system the *real* "governors" are the people; the so-called governors are nothing more than their agents.[143] The view of democracy as a form of a paternalistic guardian-ward relationship, advocated by John Yoo, represents a pathological perversion of the *real* premises of American democracy, and in the end amounts to nothing more than an invitation to tyranny. After all, tyrants generally justify the morality of their tyranny by noting that the citizens cannot be trusted to make their own judgments, and that it is he who must make those judgments for them.

Most importantly, recognition of some vague form of unwritten, unlimited presidential emergency power is a frightening invitation to the very disaster most feared by the Framers: the onset of tyranny. One needs only recall Hitler's destruction of the Reichstag and reliance on that event as an "emergency" justification for the assumption of tyrannical power to grasp the frightening dangers associated with recognition of some vague, unwritten, and unconfined emergency presidential power.

D. The Flaws in the Inherent Powers Theory: A Summary

Inherent powers, regardless of how expedient they may prove in a crisis, were staunchly resisted by the Framers. This is in keeping with the principle of separation of powers and the whole idea of a written constitution. To conclude that Article II grants the president any sort of inherent power is to open the door to the kind of tyrannical executive that the Framers feared. This is because a president who claims to enjoy inherent powers is not easily checked by the Constitution. Neither Congress nor the courts can point to the text of Article II to identify a limiting principle when inherent powers are invoked. Indeed, the theories of executive power discussed above fail to identify a limiting principle. Inherent powers advocates seem to conclude that emergency powers expand and contract depending on the sort of crises the president faces.[144] But, in practice, presidents who have invoked inherent powers have struggled to articulate the limits of such authority. President Truman, for example, told the press that he had emergency powers to seize steel mills.[145] When he was asked to describe the limits of the emergency powers he invoked,

143. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 12 (1965).

144. *Supra* Part III.C.1 and 2.

145. President Harry S. Truman, Press Conference (Apr. 24, 1952) (transcript available at The American Presidency Project, https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-531).

President Truman incoherently said that when a president "meet[s] an emergency in an emergency, [he] ha[s] to meet it."[146] To President Truman, therefore, inherent powers were checked only by the needs of the moment—presumably as determined solely by him. This is not the sort of separation of powers principle that our Constitution establishes. Instead, the federal government is one of limited and enumerated powers. During the Pennsylvania Ratifying Convention, James Wilson highlighted this principle when he noted that those powers not "expressly delegated to the general government were reserved in the people's hands."[147] Wilson, like the other Framers, would be surprised to learn that unbeknownst to them, the Constitution somehow delegated to the federal government not only enumerated powers and authority necessarily implied by those powers but also sweeping ill-defined inherent powers.

IV. PROPOSING THE LIMITED UNITARIAN THEORY

A. Understanding the Unitarian Dilemma

Thus far, it appears that one who is concerned about the recent rise of American authoritarianism is faced with a dilemma. On the one hand, one could accept a version of Anti-Unitarianism to prevent a would-be authoritarian president from exercising the powers of a dictator. True, such a view of executive power may limit the risk of authoritarianism in the sense that a weakened president is less able to deploy her powers for tyrannical purposes. As discussed earlier, however, Anti-Unitarian theories pose their own grave risks.[148] For example, there is the risk that Congress may itself become tyrannical if the president is weakened. There is also the danger that the president may be hamstrung in attempting to satisfy her constitutional duties, thus making the executive totally ineffectual. Moreover, by withholding from the elected president the discretionary authority to remove unaccountable administrators, Anti-Unitarianism undermines the foundational democratic values of

146. *Id.*

147. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 540 (1998); *see also* James Wilson Speaking to the Pennsylvania Ratification Convention, 248, 252–253 (Nov. 28, 1787), *in* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788 (John Bach McMaster and Frederick D. Stone eds., 1888) ("But it was not only unnecessary, but on this occasion it was found impracticable–for who will be bold enough to undertake to enumerate all the rights of the people?–and when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted. So it must be with a bill of rights, and an omission in stating the powers granted to the government, is not so dangerous as an omission in recapitulating the rights reserved by the people.").

148. *Supra* Part II.

representation and accountability. Finally, every Anti-Unitarian theory discussed lacks adequate textual foundation.

For different reasons, Strong Unitarians offer an equally flawed concept of executive power. By insisting that the president possesses some indeterminate degree of vague and textually-unstated powers, Strong Unitarians increase the risk of presidential authoritarianism because they remove even the slightest textual restriction on presidential power. While parts of their theory may derive support from the text and structure of the Constitution—for example, their conclusion that only the president is vested with executive power—the primary elements of their theory lack even modest textual or structural support.[149] Even more troubling, Strong Unitarianism gives rise to an existential threat to constitutional democracy by inviting the president to wield virtually uncheckable power.

Unsatisfied with the rationales and effects of both Anti-Unitarianism and Strong Unitarianism, one must shape another theory to explain and limit executive power. It is from this dilemma that we propose what we call the theory of Limited Unitarianism. This theory of executive power finds support from three sources: the text of Article II, the structure of the Constitution, and the constitutional imperative that elected officials be politically accountable to their citizens.

B. Shaping the Limited Unitarian Theory: The Text of Article II

The first clause of Article II explains that the "executive Power" is vested in "a President."[150] The remainder of Article II clarifies and delimits the specific powers to which the Vesting Clause refers. It grants the president ten specific powers. Those are the powers to command the military;[151] require principal offers to submit their written opinions;[152] issue pardons;[153] make treaties with the advice and consent of the Senate;[154] nominate ambassadors and Supreme Court Justices;[155] fill vacancies when Congress is in recess;[156] convene Congress;[157] adjourn Congress;[158] receive ambassadors;[159] and the obligation to faithfully execute the law.[160] Article II grants power to no other member of the executive branch. In fact, it does not even

149. *Supra* Part III.
150. U.S. CONST. art. II, § 1, cl. 1.
151. U.S. CONST. art. II, § 2, cl. 1.
152. *Id.*
153. *Id.*
154. U.S. CONST. art. II, § 2, cl. 2.
155. *Id.*
156. U.S. CONST. art. II, § 2, cl. 3.
157. U.S. CONST. art. II, § 3.
158. *Id.*
159. *Id.*
160. *Id.*

necessarily require anyone else (aside from the vice president) to serve in the executive branch. Thus, the idea that others possess the power of final executive decision-making is not only atextual, it is countertextual.

Of the authorities granted, perhaps the most consequential is the president's obligation to execute the laws. This obligation is necessarily conferred by the Take Care Clause because it obligates the executive to "take Care that the Laws be faithfully executed."[161] But this obligation necessarily implies a corresponding power to execute those laws. Thus, the Take Care Clause must demonstrate that the president is vested with the power to execute the law.[162] The president's law execution power brings with it two concomitant powers—removal and direction. This is because the president could not faithfully execute the law if she were stuck with insubordinate administrators unwilling or unable to abide by the president's lawful directions.

C. Shaping the Limited Unitarian Theory: Constitutional Structure

The Constitution creates a federal government of enumerated powers comprised of three coequal branches of government. Bound up in the structure of the Constitution is separation of powers, a prophylactic protection against tyranny. The powers of the coordinate branches are well-defined and kept separate because "power is of an encroaching nature" and must be "effectually restrained from passing the limits assigned to it."[163] The branches were given sufficient means to resist power grabs initiated by members of other branches.[164] Each branch, however, was not given so much power as to have an "overruling influence over the other[] [branches] in the administration of their respective powers."[165] The

161. *Id.*

162. James Madison agreed. He explained,

> [T]he [p]resident is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end.

Speech from James Madison in the First Congress—First Session (June 17, 1789), *in* 5 THE WRITINGS OF WRITINGS OF JAMES MADISON, 1787–1790, 339, 398 (Gaillard Hunt ed., 1904).

163. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001).

164. *See* THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001) ("Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place.").

165. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001).

Framers were wary of the prospect of an authoritarian president. They understood that a president with "numerous and extensive prerogatives" was a "source of danger" to be "watched with all the jealously which a zeal for liberty ought to inspire."[166] Thus, to avoid the threat of a tyrannical president, Article II bestows executive power that is "restrained within a narrower compass."[167]

We thus interpret Article II through the lens of separation of powers. Doing so leads to the conclusion that Article II bestows upon the president only the powers enumerated therein and any powers necessarily implied by those powers. Some of these powers, such as the law execution power, are potentially far-reaching. But in order to act, the president possess authorization granted in the constitutional text. In addition, the president may also need a statutory basis to act. For example, the president must base her law execution efforts on an existing act of Congress. This conclusion is required by a faithful application of separation of powers.

Separation of powers, of course, also restrains the other branches of government. Therefore, the structure of the Constitution forbids Congress from diminishing the power of the president because doing so would comparatively aggrandize its own power.[168] Recall that the Framers designed the Constitution to provide each branch with the necessary tools to defend itself against encroachments from other branches. If Congress acts to diminish the power of the president, it necessarily magnifies its own relative power by making it more difficult for a coordinate branch to fight back.

D. Shaping the Limited Unitarian Theory: Democratic Political Theory

The Constitution provides that only the president and vice president are nationally elected. It is no surprise, therefore, that only the president is vested with executive power. While Article II contemplates there being other members of the executive branch, none is vested with any power. This is because all other members of the executive branch, aside from the vice president, are unelected and therefore unaccountable to the people. Article II, therefore, embodies an essential element of democratic political theory—accountability.[169]

166. *Id.* at 257.

167. *Id.*

168. James Madison shared this interpretation of the Constitution. During the first Congress, Madison explained, "If the Constitution has invested all Executive power in the [p]resident, I venture to assert that the Legislature has no right to diminish or modify his Executive authority." Speech from James Madison in the First Congress—First Session (June 16, 1789), *in* 5 THE WRITINGS OF JAMES MADISON, 1787–1790, 339, 394 (Gaillard Hunt ed., 1904).

169. The founding generation discussed this notion of accountability. James Madison, for example, predicted that the president would not dare to improperly remove a qualified member of his cabinet. Doing so, Madison predicted, "will

The president is accountable to all of the nation's voters for her actions, and in return, the president is granted significant power.

It is essential, for the sake of accountability, that the president maintains the authority to direct her subordinates. When Congress insulates members of the executive branch from presidential direction, it establishes a democratically pathological governmental structure that vests policymaking authority in officials insulated from any meaningful form of accountability. Insulation of this sort threatens the principle of accountability necessary to America's democratic system. Voters cannot reasonably hold a president responsible for the actions of a subordinate whose administrators are insulated from her control.

Knowing this, the president could covertly effectuate politically untenable policies by partnering with the insulated subordinate. In so doing, the president's goals might be achieved while avoiding any political consequences. Alternatively, Congress could avoid political accountability by establishing an insulated executive administrator whose role it is to develop politically unpopular policies. In either scenario, the principle of accountability is gravely undermined.

E. Shaping the Limits of Executive Power

As already noted, the age of American authoritarianism presents a dilemma. Considering the serious threat an authoritarian president may pose to America's constitutional democratic scheme, it is not sufficient to articulate only what the president may do; such a theory invites an unscrupulous president to take liberties with her executive powers. It is also necessary, therefore, to set out clear limits on executive power.

There are two principles that significantly limit the power of the president. The first is that the president may exercise only those powers expressly provided for in Article II or necessarily implied from those powers. Thus, the president lacks inherent powers, including any power not falling within the categories just described. For both

amount to an impeachment before the community, who will have the power of punishment, by refusing to re-elect him." Speech from James Madison in the First Congress—First Session (June 17, 1789), *in* 5 THE WRITINGS OF WRITINGS OF JAMES MADISON, 1787–1790, 339, 398 (Gaillard Hunt ed., 1904). Earlier, Madison wrote that should Congress defy the limits placed on it by the Constitution, "a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers." THE FEDERALIST NO. 44, at 235 (James Madison) (George W. Carey & James McClellan eds., 2001). Alexander Hamilton explained that "in a republic . . . every magistrate ought to be personally responsible for his behavior in office . . . ." THE FEDERALIST NO. 70, at 368 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). To ensure that the president was personally responsible, it was necessary to avoid "plurality in the executive" because it "tends to conceal faults, and destroy responsibility." *Id.* at 366.

textual and pragmatic reasons, the Limited Unitarianism theory categorically rejects the proposition that the president possesses constitutional powers not derived directly from the explicit powers specifically enumerated in Article II. We explain both the textual and pragmatic reasons for rejecting the notion of inherent powers in the discussion that follows. But to briefly summarize: First, as a matter of textual interpretation, the specific enumeration of express powers would have been pointless if the Vesting Clause of Article II had been designed to convey to the president some vague list of undefined and unstated powers. Second, as a pragmatic matter, it is completely inconceivable that the Framers, obsessed with the dangers posed by the onset of tyranny, would have chosen to only vest textually unconfined and unrestrained powers in the one branch in full charge of the military and the branch most likely to accumulate dangerous—indeed, disastrous—tyrannical power.

The second principle is that the president may not wield legislative power unconstitutionally delegated to her by Congress. As a result, Congress may not aggrandize the power of the president by giving the executive branch the power to issue what is properly understood as legislation.

1. Express, Implied, and Inherent Executive Powers

Under the Limited Unitarianism theory, the president lacks inherent powers of any kind, including over foreign affairs. This conclusion is supported by the text, structure, and values of the Constitution. The Constitution establishes a federal government of limited powers. This is because "power is of an encroaching nature," Madison explained.[170] When "extensive prerogatives" are given to the executive, that department is to be "justly regarded as the source of danger."[171] To counteract a natural inclination to amass and misuse power, the Framers sought to carefully balance the powers of each department. The executive department was viewed as a natural source of tyranny, especially upon the arrival of "some favourable emergency."[172] Therefore, the Framers bestowed upon the executive only those powers expressly enumerated or reasonably implied from those enumerated powers.

The text of Article II reflects the Framers' skepticism of ill-defined executive power. Rather than granting sweeping powers, Article II provides a laundry list of powers and responsibilities.[173] Some of the enumerated powers are relatively mundane, such as the power to receive ambassadors or solicit the opinions of subordinates. Nowhere in this long list of powers does Article II mention the

170. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001).

171. *Id.* at 257.

172. *Id.*

173. *See* U.S. CONST. art. II, § 1–3.

existence of any residual power. That there is no obvious mention of this sort of inherent power necessarily dictates that no such power was conferred. Justice Jackson arrived at a similar conclusion in the *Steel Seizure Case*, writing "I cannot accept the view that . . . [the Vesting Clause] is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."[174] What we are left with, therefore, is a concept of presidential power that is both cautious and circumspect, in sharp contrast to views that would bestow upon the president inherent power which would be susceptible to abuse. Under Limited Unitarianism, the president may not act without a lawful basis for doing so. Thus, at all times—even during a so-called emergency—the president must rely on authority granted by an enumerated power or constitutionally permissible legislation which vests that authority in the president. The president may not constitutionally rely on some sort of amorphous inherent power whose phantom existence cannot be totally challenged.

The structure of the Constitution provides additional support for the conclusion that the president may not wield inherent powers. The concept of inherent power is contrary to the principle of separation of powers. For if the president may rely on a textually undefined notion of inherent power, neither Congress nor the Court can hold her in check. Such a result is contrary to the prophylactic protection established by separation of powers. The entire point of forming a government of enumerated powers is to ensure that no branch grows dominant. Thus, by giving each branch only those powers that are plausibly grounded in textual referents, the Framers ensured that no branch could exploit an expeditious emergency to expand its own authority under the constitutional scheme. It is necessary, therefore, to preserve the vitality of separation of powers by rejecting the notion that the president may invoke an undefined inherent authority to act.

Moreover, the concept of inherent executive power potentially violates core notions of constitutional federalism. One of the main reasons the branches of the federal government were given only limited powers was to preserve state power. Yet to extend the president unlimited power would seriously undermine state power.

Lastly, the principle of democratic accountability requires the rejection of inherent presidential power. A president who enjoys inherent powers is a president who is less accountable to the voters. Because the text of the Constitution of course fails to define inherent powers, the president could claim that she enjoys these powers or lacks these powers whenever doing so is politically expedient. The American people would have no way to determine when a claim of inherent power is correct, having no textual referent to examine.

174. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640–41 (1952) (Jackson, J., concurring).

Instead, the People would have to take the president at her word. This result would be contrary to the principle of democratic accountability on which our Constitution is based.

The People, who are the Constitution's "only legitimate fountain of power,"[175] cannot be expected to hold the president to account if they must rely solely on the president's interpretation of an unwritten source of authority with no textual basis other than the phrase "executive power." The brilliance of the Constitution is that it is written and thus provides citizens with an accessible guide from which they may understand and assess their leaders' behavior. The notion that the Framers inserted into Article II inherent and ill-defined executive powers is at odds with the political theory embodied in the Constitution.

2. The President and the Nondelegation Doctrine

The Limited Unitarian theory of presidential power embraces a second limiting principle: vigorous enforcement of the nondelegation doctrine. Rooted in separation of powers and democratic political theory, the nondelegation doctrine ensures that elected officials remain accountable to the public.[176]

To be sure, this has not been accepted practice for many years. Since the 1940s, the Supreme Court has all but abandoned the imposition of any strict limitations on congressional delegations of authority to the executive branch. But for the Limited Unitarian model to achieve its goal of preventing the onset of tyranny, it is important that the doctrine be reinvigorated.

It is of course by no means easy to separate unconstitutional delegations of legislative power from constitutionally valid legislative directives that are to be implemented by the executive branch. But several factors may be considered in drawing that all-important distinction. Initially, in order for a congressional act to constitute proper legislation, Congress must make an affirmative political commitment so that voters may assess the "socio-political wisdom of their elected representatives."[177] When Congress passes legislation that provides no substantive policy direction, such action violates the nondelegation doctrine, because in so doing Congress will have failed to perform its intended function in our democratic structure. In close cases, a reviewing court can also properly take into account pragmatic considerations. For example, would the choices vested in the executive branch by Congress require in-the-moment decisions? We must recall that the Framers chose to create an executive, despite the

175. THE FEDERALIST NO. 49, at 261 (James Madison) (George W. Carey & James McClellan eds., 2001).

176. *See* Martin H. Redish, *Pragmatic Formalism*, *Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L.J. 363, 386–87 (2019).

177. *Id.* at 371.

fears of those who drafted the Articles of Confederation that creation of an executive could lead to tyranny, for the simple pragmatic reason that absent an executive branch, it would be impractical for Congress to make on-the-spot choices.[178]

Examination of several nondelegation cases should illustrate how the Pragmatic Formalist model of the doctrine works in practice. Consider *Mistretta v. United States*,[179] where the Court was asked whether Congress violated the nondelegation doctrine by establishing a sentencing commission comprised of federal judges to establish sentencing guidelines.[180] The Court concluded that the nondelegation doctrine had not been violated because Congress expressed a variety of purposes and factors that the commission should take into account when setting sentences.[181] Perhaps most importantly to the Court, it noted that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[182]

Unlike the *Mistretta* Court, the Pragmatic Formalist view dictates that Congress violated separation of powers when it tasked a sentencing commission with establishing, as opposed to merely suggesting, sentencing guidelines. This is because Congress essentially outsourced the job of making difficult policy choices to a committee of unelected judges. It would have been permissible for Congress to establish an advisory committee to suggest sentencing reforms. But it was constitutionally impermissible for Congress to delegate to another body the job of legislating absent an emergency that prevents Congress from acting.

J.W. Hampton, Jr., & Co. v. United States[183] offers another scenario illustrating our view of the nondelegation doctrine. There, Congress delegated authority to the president to set tariff rates so long as the president found that doing so would "equalize . . . the differences in costs of production" between the United States and other countries.[184] Put differently, Congress permitted the president to act if the president determined certain factual preconditions were satisfied. The Court concluded that Congress did not delegate legislative authority to the president. Instead, the Court reasoned that Congress merely tasked the president with executing the law by making certain factual determinations and responding to such findings as directed.

Under the approach to the nondelegation doctrine advocated here, Congress did not violate the nondelegation doctrine given the

178. For a more detailed examination of the theory of the nondelegation doctrine, see generally Redish, *supra* note 176.

179. 488 U.S. 361 (1989).

180. *Id.* at 362, 370–79, 397.

181. *Id.* at 374–79.

182. *Id.* at 372.

183. 276 U.S. 394 (1928).

184. *Id.* at 401–02.

facts at issue in *J.W. Hampton*. Instead, Congress simply "allow[ed] the president to execute a preexisting legislative policy decision."[185] In such circumstances, the president acts precisely as Article II envisions—she is applying certain facts to certain laws as part of her executive function. In addition, Congress could not have been expected to set tariff rates itself, because doing so would be practically impossible given the need for fast action. Because Congress would have been unable to set the tariffs itself under such circumstances, Pragmatic Formalism permits the president to act pursuant to a constitutional conferral of legislative authority.

As a final example, consider the National Emergencies Act. The Act permits the president to exercise a variety of otherwise unavailable powers when she declares a national emergency, provided the president follows certain procedures.[186] Problematically, the Act "fails to identify, even in broad terms, the specific types of events that must occur in order to trigger availability" of emergency powers.[187] If a president were to invoke the National Emergencies Act absent a scenario that prevented Congress from legislating, Pragmatic Formalism would require the invalidation of any action taken by the president on the basis of the Act. For example, Pragmatic Formalism would require a court to nullify President Trump's invocation of the National Emergencies Act as part of a scheme to build a wall along the United States-Mexico border.[188] This is because it is doubtful a true emergency existed when President Trump invoked the Act; and further, there was no evidence that Congress was somehow unable to fulfill its legislative function. In contrast, in the face of an emergency that prevents Congress from legislating, Pragmatic Formalism would find the president's invocation of the Act permissible.

V. EXAMINING SUPREME COURT DECISIONS ON EXECUTIVE POWER

The Supreme Court has not articulated a singular view of presidential power. Rather, its decisions suggest that the debate surrounding the extent of the president's power is ongoing. This Part is comprised of three Subparts. In the first Subpart, we discuss Supreme Court decisions defining the scope of the president's removal power. These decisions can be thought of as expressions of the Court's view of the extent to which Article II requires the president to exercise unitary control over the executive branch. As we explain, the Court has not consistently held a view that is readily categorized as Strong

185. Redish, *supra* note 176, at 403.

186. *See* 50 U.S.C. § 1621(a)–(b).

187. Redish, *supra* note 176, at 413.

188. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html.

Unitarian, Limited Unitarian, or Anti-Unitarian. In the second Subpart, we review the Court's decisions on inherent powers. Many of the Court's decisions in the late nineteenth and early twentieth centuries, find that the president enjoys inherent executive powers. Later decisions, however, suggest that the president lacks inherent power—especially if exercising such power puts individual liberties in jeopardy. In the third Subpart, we briefly explain our conclusion that the Court has declined to endorse a singular view of executive power.

A. The President's Removal Power

In a series of opinions totaling nearly two-hundred-and-fifty pages, *Myers v. United States*[189] considered whether President Harding had the power to remove a postmaster appointed by Congress to serve a four-year term.[190] Chief Justice Taft, writing for the Court, concluded that the text of Article II and the long-standing practice of recognizing presidential power to remove subordinates meant President Harding had the power to remove the postmaster.[191] The Court noted that the First Congress expressly permitted the President to remove the Secretary of Foreign Affairs.[192] From this decision, known as The Decision of 1789, the Court emphasized that between 1789 and 1863, no legislation or Supreme Court opinion cast doubt upon the president's removal authority.[193] In other words, historical practice featured significantly in the Court's conclusion that the president had the power to remove a subordinate.

According to Chief Justice Taft, the text of Article II further supported the notion that the president enjoyed the power of removal. Noting that the president is vested with the "executive power" and is bound to faithfully execute the law per the Take Care Clause, the Court reasoned that the president must have the power to "select those who . . . [are] to act for him under his direction in the execution of the laws."[194] The Court's decision in *Myers*, therefore, articulates a notion of executive power that is squarely unitarian in nature.

The Court expressed an Anti-Unitarian view of presidential power in *Humphrey's Executor v. United States*.[195] The Court was asked to decide whether President Roosevelt had the power pursuant to Article II to remove a commissioner of the Federal Trade Commission ("FTC") prior to the expiration of the commissioner's term.[196] The Court concluded that *Myers* was not controlling because

189. 272 U.S. 52 (1926).
190. *Id.* at 106.
191. *Id.* at 163–64, 176–77.
192. *Id.* at 113–14.
193. *Id.* at 163.
194. *Id.* at 117.
195. 295 U.S. 602, 631–32 (1935).
196. *Id.* at 618, 621, 626–27.

that case involved a purely executive administrator—a postmaster general.[197] In *Humphrey's*, by contrast, the Court concluded that FTC commissioners serve a "quasi-legislative and quasi-judicial" function.[198] And in order to fulfill this function, Congress thought it necessary to ensure the commissioners were independent of presidential removal.[199] Thus, the Court concluded it would violate separation of powers to permit President Roosevelt to remove Humphrey prior to the expiration of his term; because premature removal would interfere with Congress's legislative scheme.[200] *Humphrey's* represents a view of presidential power that is defined by functionalist considerations. Namely, the president's removal power may be limited when Congress creates administrative offices that do not wield purely executive power, even though they may be located in the executive branch.[201]

In *Morrison v. Olson*, the Court appeared to jettison the quasi-legislative/quasi-judicial distinction adopted in *Humphrey's* and found that the president could be prohibited by Congress from removing a subordinate performing an executive function.[202] The Court did not rely on the quasi-legislative, quasi-judicial, and pure executive distinction adopted in *Humphrey's*; instead, the Court in *Morrison* asked whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[203] The Court concluded that legislation providing for the appointment of an Independent Counsel was constitutional.[204] This was so despite the legislation's provision that the Independent Counsel could be removed only by the attorney general and only for good cause.[205] Otherwise, the Independent Counsel was permitted to make prosecutorial decisions and conduct investigations so long as the matter related to her initial appointment by the attorney general.[206]

The Court explained that the legislative scheme was constitutional because the removal provision did not "interfere impermissibly with . . . [the president's] constitutional obligation to ensure the faithful execution of the laws."[207] The Court concluded that various legislative provisions narrowing the scope of the Independent Counsel's authority were sufficient to guarantee that

197. *Id.* at 626–28.
198. *Id.* at 628.
199. *Id.* at 629–30.
200. *Humphrey's Executor*, 295 U.S. at 629–30, 631–32.
201. *See id.* at 628–29.
202. *Id.* at 689–93.
203. *Id.* at 691.
204. *Id.* at 659–60, 696–97.
205. *Id.* at 660, 685; 28 U.S.C § 596 (a)(1).
206. *Morrison*, 487 U.S. at 662–64, 667; 28 U.S.C § 594(a).
207. *Morrison*, 487 U.S. at 693.

the Counsel would not unduly burden the president's executive power.[208] As in *Humphrey's*, therefore, the Court embraced a sort of functionalism to uphold a legislative scheme.[209] Unlike in *Humphrey's*, the basis of the Court's reasoning relied not on categorical differences between various officials; instead, it relied on a series of factors that permitted the president to exercise a modicum of control.[210] For example, the *Morrison* Court noted that the Independent Counsel could be removed for "good cause."[211] It also noted that the Counsel was to follow Department of Justice rules "[when] possible."[212] And, finally, the Court observed that the Independent Counsel was appointed only at the attorney general's request.[213]

More recently, the Court has—at least to some degree—walked back its embrace of "good cause" removal provisions. In *Seila Law LLC v. Consumer Financial Protection Bureau*,[214] the Court concluded that the head of the Consumer Financial Protection Bureau could not be insulated from presidential removal.[215] The Court explained that such a provision impermissibly interfered with the president's Article II power to supervise subordinates.[216] In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[217] the Court held that a dual for-cause removal limitation was unconstitutional;[218] reasoning that such protection impermissibly interfered with the president's constitutional power to control the executive branch.[219] While these cases do not necessarily suggest a

208. *Id.* at 695–96.

209. *See id.* at 691 ("[The Court asks] whether the removal restrictions are of such a nature that they impede the [p]resident's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.").

210. *Id.* at 689–90, 696.

211. *Id.* at 696.

212. *Id.*

213. *Id.*

214. 140 S. Ct. 2183 (2020).

215. *Id.* at 2197. The following term, the Court relied on *Seila Law* in deciding *Collins v. Yellen*, 141 S. Ct. 1761 (2021). In *Collins*, the Court concluded that the structure of the Federal Housing Finance Agency, which was overseen by a director removable only "for cause," violated the Constitution. *Id.* at 1770 (quoting 12 U.S.C. § 4512(b)(2)). "As we explained last Term," the Court wrote, "the Constitution prohibits even 'modest restrictions' on the [p]resident's power to remove the head of an agency with a single top officer." *Id.* at 1787 (quoting *Seila Law*, 140 S. Ct. at 2205).

216. *See Seila Law*, 140 S. Ct. at 2203 ("The CFPB's single-Director structure contravenes [separation of powers] . . . by vesting significant governmental power in the hands of a single individual accountable to no one.").

217. 561 U.S. 477 (2010).

218. *Id.* at 492.

219. *Id.* at 496 ("A second level of tenure protection changes the nature of the [p]resident's review. Now the Commission cannot remove a Board member at

return to *Myers* and an embrace of Strong Unitarianism, they do suggest that the Court has abandoned a purely Anti-Unitarian view of presidential removal power—at least for the present.

B. The President's Inherent Power

1. Cases Supporting Inherent Executive Power

The Court considered whether the executive branch had the inherent authority to provide protection for a Supreme Court justice facing imminent harm in *In re* Neagle.[220] The case involved David Neagle, who was hired as a Deputy United States Marshal to protect Supreme Court Justice Stephen Field.[221] Though no law clearly authorized the U.S. Marshals to provide personal protection for Supreme Court justices, Neagle's assignment was thought necessary because Justice Field had been threatened by former litigants before his court.[222] Sarah and David Terry lost a case tried before Justice Field while he was riding circuit in California.[223] The Terrys vowed to avenge their loss by harming Justice Field. [224]

Somehow, the Terrys ended up on the same train as Justice Field and Deputy Neagle.[225] David Terry, seizing upon the opportunity to exact his revenge, assaulted Justice Field.[226] Deputy Neagle shot and killed Terry in response.[227] Concluding that Deputy Neagle had killed Mr. Terry without legal authorization, California state authorities charged Neagle with murder.[228] Deputy Neagle petitioned for habeas corpus relief, and the case was resolved by the Supreme Court.[229]

The Court granted Neagle's petition, explaining that absent a statute "[w]e do not believe that the . . . Constitution and laws have left the high officers of the government . . . [defenseless] and unprotected."[230] Instead, the Court reasoned the president (and therefore the president's subordinates) must have some degree of inherent power to act when an emergency requires. The Court asked rhetorically,

> [i]s [the Take Care Clause] duty limited to the enforcement of acts of Congress . . . according to their *express terms*, or

will. The [p]resident therefore cannot hold the Commission fully accountable for the Board's conduct . . . .").

220. 135 U.S. 1 (1890).
221. *Id.* at 5–6, 44–46, 52, 54.
222. *Id.* at 44–46, 51–52.
223. *Id.* at 45–46.
224. *Id.* at 46.
225. *Id.* at 52.
226. *In re* Neagle, 135 U.S. at 52–53.
227. *Id.* at 5, 53.
228. *Id.* at 3–6.
229. *Id.* at 58.
230. *Id.* at 59.

> does it include the rights, duties and obligations growing out of the Constitution itself . . . and all the protection implied by the nature of the government under the Constitution?[231]

The Court found that the president may take necessary measures to protect the judiciary from harm; the Department of Justice, therefore, had the authority to ensure Justice Field's protection.[232] *In re* Neagle suggests that the Court views the Constitution as bestowing at least some form of inherent power upon the president.

Five years after *In re* Neagle, the Court again found the executive enjoyed a degree of inherent power in *In re* Debs.[233] There, the United States sought to enjoin a railroad workers' strike organized by Eugene V. Debs and three other co-defendants.[234] Defying the injunction, the strike continued and the defendants were imprisoned.[235] Debs and the other co-defendants sought habeas corpus relief and alleged that the government lacked the statutory authority to seek the injunction.[236]

Finding no statutory authorization to seek an injunction against the strike, the Supreme Court nonetheless concluded that the executive had the inherent authority to prevent a planned interference with interstate commerce.[237] The Court reasoned that "[t]he strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce . . . ."[238] Therefore, the Court explained, the president may use the "executive power of the nation . . . to forcibly remove" obstructions to commerce even without legislation so authorizing.[239]

The Court again found the president could exercise inherent authority in *United States v. Midwest Oil Co*.[240] The case involved an act of Congress that permitted mineral prospectors to develop legal claims to public land.[241] Realizing that prospectors were mining oil from public land and selling it back to the government, President Taft issued an executive order withdrawing some public land from Congress's scheme.[242] Months after the land had been withdrawn, Midwest Oil commenced drilling oil from land withdrawn by the executive order.[243] Discovering this, the United States brought an

231. *Id.* at 63–64.
232. *In re* Neagle, 135 U.S. at 67.
233. 158 U.S. 564 (1895).
234. *Id.* at 568, 570, 572.
235. *Id.* at 572–73.
236. *Id.* at 573, 575.
237. *Id.* at 581–82, 599.
238. *Id.* at 582.
239. *In re* Debs, 158 U.S. at 599.
240. 236 U.S. 459 (1915).
241. *Id.* at 466.
242. *Id.* at 466–67.
243. *Id.* at 467–68.

action against Midwest Oil seeking an accounting for the estimated 50,000 barrels of oil extracted.[244] Midwest countered that the executive order was unlawful because President Taft lacked the power to withdraw land already made available by Congress.[245]

The Court disagreed with Midwest. Justice Lamar, writing for the Court, reasoned that President Taft was acting as Congress's agent by aiding it in the sale of land.[246] Thus, when circumstances changed or emergencies arose, the president could "in the public interest, withhold the land from sale."[247] This power, the Court concluded, "need not necessarily be expressed in writing."[248] The Court found further support for its conclusion by noting Congress had long acquiesced to similar executive orders.[249] Taken together, the Court concluded that the president enjoyed some degree of inherent power bestowed by the Constitution.

Finally, in *United States v. Curtis-Wright Export Corp.*,[250] the Court explained that the president enjoyed especially broad inherent powers with regard to foreign affairs. At issue was a law that permitted the president to suspend the sale of arms to belligerents involved in the Chaco War if the president found that doing so might bring peace to the region.[251] Pursuant to the law, President Roosevelt issued an order suspending the sale of arms.[252] After the order was issued, Curtis-Wright was criminally prosecuted for violating the embargo.[253] Curtis-Wright challenged the prosecution arguing that Congress had unconstitutionally delegated lawmaking authority to the executive branch, but the Court rejected this argument.[254] It reasoned that the president had "plenary and exclusive power" "as the sole organ of the federal government in the field of international relations."[255] Thus, the president's power with regard to foreign affairs "does not require [] a basis for its exercise an act of Congress."[256] While the president enjoyed some degree of implied foreign affairs power, the Court explained that the president's domestic powers are more circumscribed.[257] Still, *Curtis-Wright* is perhaps the most sweeping statement of inherent presidential power expressed by the Supreme Court.

244. *Id.* at 468.
245. *Id.*
246. *Midwest Oil Co.*, 236 U.S. at 474.
247. *Id.*
248. *Id.*
249. *Id.* at 471–72.
250. 299 U.S. 304 (1936).
251. *Id.* at 312.
252. *Id.* at 311–13.
253. *Id.* at 311, 314.
254. *Id.* at 314, 319–20.
255. *Id.* at 320.
256. *Curtis-Wright Export Corp.*, 299 U.S. at 320.
257. *Id.* at 316–19.

Neagle, Midwest Oil and *Debs* seemed to establish a broad doctrinal commitment to recognition of inherent presidential powers, despite the serious flaws and dangers in such an approach. But while the *Curtis-Wright* decision's recognition of inherent executive power over foreign affairs appears not to have been seriously challenged in subsequent years, in one of its best-known decisions the court has backed off dramatically from its generic doctrinal commitment to inherent powers. It is to a discussion of that decision that we now turn.

2. Cases Questioning Inherent Executive Power

The Court famously questioned the existence of inherent executive powers in *Youngstown Sheet & Tube Co. v. Sawyer*.[258] The case arose after President Truman issued an executive order directing the Secretary of Commerce to seize and operate most of the nation's steel mills.[259] The mills were not operating at the time because of a labor strike.[260] President Truman, perhaps understanding that military personnel fighting in the Korean War would be ill-equipped due to the strike's impact on steel production,[261] concluded that the seizure was necessary to produce war materiel.[262] Justice Black, writing for the Court, reasoned that because Congress had not legislatively authorized the president to take such action, President Truman was acting as a lawmaker, and since only Congress had legislative authority, the executive order was unconstitutional because it fell within none of the powers granted to the president in Article II.[263]

Perhaps the most forceful critique of President Truman's order appeared in Justice Jackson's concurrence. Justice Jackson criticized the notion that Article II confers inherent powers by observing that if the president did enjoy such powers, "it is difficult to see why the forefathers bothered to add specific items, including some trifling ones."[264] In an accompanying footnote, Justice Jackson listed some of the president's insignificant enumerated powers and noted "[m]atters such as those would seem to be inherent in the Executive if anything is."[265] Thus, Justice Jackson analyzed the issue by noting that the

258. 343 U.S. 579 (1952).

259. *Id.* at 582.

260. *Id.* at 582–83.

261. *See* ADRIAN R. LEWIS, THE AMERICAN CULTURE OF WAR: THE HISTORY OF U.S. MILITARY FORCE FROM WORLD WAR II TO OPERATION ENDURING FREEDOM 82 (2d ed. 2012) (explaining that United States military personnel lacked the necessary equipment to fight in Korea).

262. *Youngstown*, 343 U.S. at 583.

263. *Id.* at 587–89.

264. *Id.* at 640–41 (Jackson, J., concurring).

265. *Id.* at 641 n.9 (Jackson, J., concurring).

canon of construction, *expressio unius*, suggests no inherent powers were granted by Article II.

While *Youngstown* includes reasoning that is critical of the notion of inherent presidential powers, it is at least conceivable that it could be construed to stand for the narrower proposition that the president lacks authority to act only when Congress has expressed disagreement with such action. For example, the majority noted that Congress rejected an amendment to a labor relations statute that would have given the government the authority to seize businesses when an emergency so required.[266] However, prior to noting that Congress had rejected an effort to delegate the seizure power to the president, Justice Black's majority opinion had expressly grounded its finding of unconstitutionality on the fact that neither congressional legislation nor the specific grants of power in Article II vested the president with the power to seize the steel mills. At this point in his opinion, Justice Black let nothing turn on the existence of an affirmative congressional rejection of such a power.

The Court again rejected an argument based on inherent presidential power in *New York Times Co. v. United States*.[267] The case arose when the government sought to enjoin the publication of a classified report, popularly known as the Pentagon Papers, that was critical of the Vietnam War.[268] Lacking statutory authority to seek an injunction, the government argued that the president had the inherent authority to protect the nation from the harm that would befall it if the report was published.[269] The Court concluded that an injunction was improper because it would violate freedom of the press as protected by the First Amendment.[270] The majority further explained that permitting the use of inherent presidential power in this manner would destroy "fundamental liberty."[271] The majority therefore rejected the government's argument premised on inherent presidential power.

C. Summarizing the Supreme Court's View of Executive Power

No single theory of presidential power has been embraced by the Supreme Court. In some instances, the Court has seemingly accepted a Strong Unitarian or Limited Unitarian view of presidential power. *Myers, Seila Law*, and *Free Enterprise Fund* suggest that the Court sometimes embraces a unitarian vision of the executive branch. On the other hand, the Court has not overruled *Humphrey's* and *Morrison*, suggesting also that the Court is willing to embrace an

266. *Id.* at 586.
267. 403 U.S. 713 (1971).
268. *Id.* at 714.
269. *Id.* at 718–19.
270. *Id.*
271. *Id.* at 719.

Anti-Unitarian vision when it finds subconstitutional policy goals important.

Similarly, the Court has not categorically accepted or rejected inherent presidential power. Instead, when the president seeks to protect an important government interest from harm, the Court may find the president has the inherent power to do so—*In re* Neagle, *In re* Debs, and *Midwest Oil* support this conclusion. When foreign affairs are implicated, the Court is most willing to grant the president broad inherent powers despite the absence of such a sweeping grant of authority in the text of Article II, as illustrated in *Curtis-Wright*. In other instances, the Court has rejected claims of inherent executive power, as illustrated by *Youngstown* and *New York Times*.

CONCLUSION

Our theory of presidential power attempts to thread the eye of a needle. On the one hand, we seek to establish a vision of presidential power that is faithful to the text and structure of the Constitution and that furthers the principle of democratic accountability. This inevitably leads us to conclude that the president—and only the president—is vested with the powers enumerated in Article II. To conclude that the powers of the president are to be shared with subordinates, or the other branches, free from presidential control is to permit functionalist policy preferences to overcome the fundamental precepts of America's founding document.

On the other hand, our reading of presidential power is far narrower than the view offered by Strong Unitarians. Where Strong Unitarians conclude that the president may rely on inherent authority to act, we conclude the opposite. Indeed, we find Strong Unitarianism to constitute a reckless invitation to the very tyranny that the Framers sought desperately to avoid. For if Article II were construed to invest in the president so-called "inherent" powers unwritten anywhere and in no way restrained by the Constitution's text, then the most dangerous branch—the executive, in full charge of the military—would be given free rein to become a tyrant. The next time anyone considers the wisdom or legitimacy of Strong Unitarianism, they should recall how close our former president came to seizing the voting machines after the 2020 presidential election, and to the ominous growth of authoritarianism in our nation in recent years. Is this what we want for our constitutional democracy? Is it likely what the Framers wanted? We believe the answer to both questions is a resounding "no." Yet a commitment to Strong Unitarianism and its adoption of inherent presidential power facilitates—indeed, invites—just such a result.

This all leads us to the conclusion that while some form of the unitary executive theory is called for, it must be in the form that is far more limited and disciplined than the reckless Strong Unitarian model. All powers granted in Article II belong exclusively to the

president. But those powers are confined solely to those enumerated in Article II, and those that may be reasonably inferred from those enumerated powers. It is only in this manner that we will be able to preserve the integrity of presidential power while simultaneously staving off the threat of American authoritarianism, which has stalked the nation in the recent past. At the same time, we will be fulfilling the purposes envisioned by the Constitution's structure, which anticipated, and sought to foil, the very kind of threat that our constitutional democracy now faces.